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WILLS—INCORPORATING BY REFERENCE AN UNATTESTED
NON-HOLOGRAPHIC INSTRUMENT INTO A HOLOGRAPHIC CODICIL

Hinson v. Hinson, 280 S.W.2d 731 (Tex. 1955)

Decedent typed and signed his own will, but failed to have it attested and subscribed as required by statute.¹ Subsequently, decedent executed a holograph² which was intended to serve as a supplement to the typewritten instrument. Respondent sought to probate both documents as the will of the decedent. The Texas Supreme Court held that the holograph could not be probated together with the typewritten instrument, because incorporation of the unattested non-holographic instrument into the subsequently executed holographic document would result in non-fulfillment of the statutory requirement that a holograph be entirely in the handwriting of the testator.³

As a general rule, an invalid will can be validated by a subsequent document executed with all the required testamentary formalities, provided there is a clear reference in the subsequent instrument to the prior one.⁴ This is known as the doctrine of incorporation by reference.⁵ The problem facing the Texas court in the principal case was whether this doctrine could be applied to the situation where the subsequent instrument is holographic and the prior unattested instrument is non-holographic. In this area, the courts in those states which have statutes⁶ validating holographic instruments are in disagreement.

A majority of those courts which recognize the holograph as a valid

1. TEX. REV. CIV. STAT. ANN. art. 8283 (1925) provides that a will: Shall, if not wholly written by the testator, be attested by two or more credible witnesses above the age of fourteen years, subscribing their names thereto in the presence of the testator.

A typewritten document is not considered to be a holograph. *In re Dreyfus' Estate*, 175 Cal. 417, 165 Pac. 941 (1917).

2. A will entirely in the handwriting of the testator is termed a holograph. No witnesses are required. 1 PAGE, WILLS § 333 (3d ed. 1941). The term is occasionally applied to wills entirely in the handwriting of the testator but which are required by statute to be executed with all the testamentary formalities. See, e.g., WASH. REV. CODE § 11.12.020 (1951). For the purpose of this comment the former meaning will be adopted.

3. *Hinson v. Hinson*, 280 S.W.2d 731 (Tex. 1955).

4. *Beall v. Cunningham*, 42 Ky. 390 (1843); *Harvy v. Chouteau*, 14 Mo. 587 (1851); *In re Kelly's Estate*, 236 Pa. 54, 84 Atl. 593 (1912).

5. *Allen v. Maddock*, 11 Moo. P.C. 427, 14 Eng. Rep. 757 (P.C. 1858). The document to be incorporated is not restricted to prior invalid wills, but applies also to deeds, contracts, notes, and informal instruments specifically designated. ATKINSON, WILLS 392 (2d ed. 1953). The doctrine of republication is nothing more than incorporation by reference of a will rather than some other type of document. RITCHIE, ALFORD & EFFLAND, DECEDENT'S ESTATES AND TRUSTS 183 (1955). The differences between the two doctrines may be traced to the history of their development. 2 PAGE, WILLS § 542 (3d ed. 1941); RITCHIE, ALFORD & EFFLAND, *op cit. supra* at 183 n.22. The New York courts, however, apparently distinguish the two doctrines. See, e.g., *In re Emmons' Will*, 110 App. Div. 701, 96 N.Y. Supp. 506 (Sup. Ct. 1906).

6. See, e.g., ARIZ. CODE ANN. § 41-102 (1939); CAL. PROB. CODE ANNOTATIONS § 53 (1931); LA. CIV. CODE ANN. arts. 1574, 1588 (West 1952).

form of testamentary disposition take the position that incorporation of an invalid, unattested, non-holographic instrument into a holographic document creates, in effect, a single instrument and, because this *one instrument* is not wholly in the handwriting of the testator as required by statute,⁷ the instrument fails as a valid testamentary disposition. Furthermore, these courts feel that validating the unattested document would create greater opportunities for fraud,⁸ make it possible for the testator to create a will without knowing its exact provisions,¹⁰ and in the extreme case would allow circumvention of the statutory handwriting requirement by merely writing "The above document is my last will."¹¹ Because the statutory provision permitting the use of a holographic will is a sharp departure from the ordinary formality requirements of attestation and subscription, these courts seem to view the holograph with a certain amount of suspicion and require absolute compliance with the provision that the document be wholly in the handwriting of the testator.¹²

A few courts, however, make use of the doctrine of incorporation by

7. See, e.g., ARK. STAT. ANN. § 60-404 (Supp. 1953) ("entire body" in handwriting of the testator); IDAHO CODE ANN. §§ 14-303, 14-304 (1947) ("entirely written"); KY. REV. STAT. § 394.040 (1953) ("wholly written").

8. *Hewes v. Hewes*, 110 Miss. 826, 71 So. 4 (1916); 1 PAGE, WILLS § 387, 2 PAGE, WILLS § 545 (3d ed. 1941).

See also *Sharp v. Wallace*, 83 Ky. 584 (1886), and *Gibson v. Gibson*, 69 Va. (28 Gratt.) 44 (1877), in which the courts use language that would be equally applicable to a situation where the court has before it a single physical instrument not wholly in the handwriting of the testator. In the *Gibson* case the problem seems to have been one of integration rather than incorporation. See Malone, *Incorporation, by Reference, of an Extrinsic Document into a Holographic Will*, 16 VA. L. REV. 571, 580 (1930); Mechem, *The Integration of Holographic Wills*, 12 N.C.L. REV. 213, 229 (1934). Integration of a will is a process whereby several papers which are present at the time of execution and are intended to be part of the will are probated together. ATKINSON, WILLS § 79 (2d ed. 1953). In the case of incorporation by reference, the document need not be present at the time of execution since it is metaphorically made a part of the will. Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act*, 25 COLUM. L. REV. 879, 888 (1925). The *Sharp* case might also more realistically be viewed as an integration problem. Malone, *supra* at 580. If what is presented is integration, then certainly both instruments are to be viewed as a single physical instrument. In such a case some courts have given effect only to those parts in the handwriting of the testator, viewing the rest as surplusage, unless that part not in the testator's handwriting is the key provision of the will. *In re Morrison's Estate*, 55 Ariz. 504, 108 P.2d 669 (1940); *In re De Caccia's Estate*, 205 Cal. 719, 273 Pac. 552 (1928); *In re Will of Goodman*, 229 N.C. 444, 50 S.E.2d 34 (1948); *In re Love's Estate*, 75 Utah 342, 285 Pac. 299 (1930); *In re Yowell's Estate*, 75 Utah 312, 285 Pac. 285 (1930). Other courts reject this "surplus" theory and state that if the testator intended the non-holographic part to be in the will (as was undoubtedly the situation in the *Sharp* and *Gibson* cases, since without the presence of such intention the court, obviously, could not have considered the doctrines of incorporation or republication), then that part cannot be overlooked. See generally, Mechem, *supra* at 213.

9. *Scott v. Gastright*, 305 Ky. 340, 343, 204 S.W.2d 367, 368 (1947).

10. *Scott v. Gastright*, *supra* note 9.

11. *Ibid.*; *Sharp v. Wallace*, 83 Ky. 584 (1886).

12. See, e.g., *Scott v. Gastright*, 305 Ky. 340, 343, 204 S.W.2d 367, 368 (1947). *But cf.* *Harvy v. Chouteau*, 14 Mo. 587 (1851).

reference to validate a prior unattested non-holographic instrument.¹³ The Arkansas and Oklahoma courts accept the one instrument theory,¹⁴ but fail to recognize the fact that this results in non-compliance with the statutory requirement that the will be entirely in the handwriting of the testator.¹⁵ The California courts, on the other hand, view the one instrument doctrine as a fiction which will not be permitted to result in absurd or inequitable consequences.¹⁶

Jurisdictions that accept the doctrine of incorporation by reference do so on the ground that substance must prevail over form—that the intent of the testator must be effectuated at the expense of rigid compliance with formal technicalities.¹⁷ This reasoning may be applied to incorporate an invalid non-holographic will into a holographic instrument.¹⁸ It may be conceded that incorporation in this situation will not result in strict compliance with the statutory requirement that the holograph be entirely in the testator's handwriting. But whenever an unattested document is incorporated into a valid testamentary instrument, the statutory formality of attestation is being circumvented. Having accepted the doctrine of incorporation by reference for the purpose of effectuating the testator's intent, even at the expense of non-compliance with certain statutory requirements, it is not unreasonable to utilize the same doctrine to incorporate an invalid non-holograph into a valid holograph.

Clearly, the desire to effectuate the intent of the testator is the determining factor in arriving at the general rule that an invalid will can be validated by a subsequent document executed with all the required testamentary formalities. In those states in which holographic instruments are validated by statute, should the factor that the subsequent document is a holograph make such a difference as to prevent use of the doctrine of incorporation by reference to carry into effect the testator's obvious intent? Underlying the reasoning of those courts that have recognized a distinction is a fear of fraud where the prior instrument is not merely unattested, but also is not in the testator's handwriting. Of course, the factor of fraud is important, but is it so ominous that, where there is nothing to remotely suggest the presence of fraud, as in the instant case, the intent of the testator should not be given precedence over the formal statutory requirement? A danger of fraud also exists whenever the doctrine of incorporation

13. *Rogers v. Agricola*, 176 Ark. 287, 3 S.W.2d 26 (1928); *In the Matter of Soher's Estate*, 78 Cal. 477, 21 Pac. 8 (1889); *Johnson v. Johnson*, 279 P.2d 928 (Okla. 1954).

14. *Rogers v. Agricola*, *supra* note 13; *Johnson v. Johnson*, *supra* note 13.

15. See Note, 44 Ky. L.J. 130, 136-37 (1955).

16. *In the Matter of Soher's Estate*, 78 Cal. 477, 21 Pac. 8 (1889); *In the Matter of Atkinson's Estate*, 110 Cal. App. 499, 294 Pac. 425 (1930).

17. See, e.g., *Harvy v. Chouteau*, 14 Mo. 587 (1851).

18. *Johnson v. Johnson*, 279 P.2d 928 (Okla. 1954).

by reference is applied. If the holograph is to be accepted as a form of testamentary disposition and the jurisdiction also accepts the doctrine of incorporation by reference, it seems logically sound to permit incorporation of an invalid non-holographic instrument into a holographic codicil.