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Holographic Codicils Incorporating by Reference and Republishing Invalid Non-Holographic Documents

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And yet, the privilege in most of its aspects seems well worth preserving. It is best defended, not as an unchangeable principle of universal justice, but as a doctrine proved by experience to be expedient in most cases.[23]

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HOLOGRAPHIC CODICILS INCORPORATING BY REFERENCE AND REPUBLISHING INVALID NON-HOLOGRAPHIC DOCUMENTS

The result reached in a recent case in Oklahoma, *Johnson* v. *Johnson*,[1] suggests the need of re-examining the status of the law as to holographic codicilliary incorporation by reference and republication.

The case was briefly this: The testator typed numerous bequests and devises on a single sheet of paper. This typewritten portion was not dated, nor did the testator sign his name at the conclusion thereof, nor was it attested by two witnesses. At the end of the typewritten portion and on the same page the testator wrote the following in his handwriting: "To my brother James I give Ten Dollars only. This will shall be complete unless hereafter altered, changed or rewritten." He signed and dated the latter, but it was not attested.[2]

The Oklahoma Supreme Court[3] held that the written portion of the instrument constituted a valid holographic codicil which incorporated the typewritten portion by reference and republished and validated it as a valid will, as of the date of the codicil. The court, in upholding the entire sheet of paper as a valid will, relied on the general principle of law that a codicil which is validly executed will operate as a republication of an earlier will regardless of defects which may have existed in the execution of the earlier document.[4] In order to apply this doctrine to the case, the Oklahoma court concluded that the earlier typewritten portion was a will although not signed, that the written portion being

[23] See Twining v. New Jersey, 211 U.S. 78, 113 (1908).

[1] 279 P. 2d 928 (Okla. 1955).
[2] *Id.* at 929.
[3] Although the decision was styled as a Per Curiam decision, it was rendered by a 5-3 vote upholding the validity of the will.
[4] *Supra* note 1, at 931.

wholly in the handwriting of the testator was a valid holographic codicil, which under the general rule republishes the typewritten portion by incorporating it under the doctrine of incorporation by reference. Indeed, there is a general principle of law that a codicil has the effect of reviving and republishing the terms of an invalid will,[5] but in order to have that force the codicil, being an appendage to and construed as part of the original will, must refer to the will in such a way as to leave no doubt as to the identity of that instrument. The codicil must in no sense be dependent for its validity upon the will in conjunction with which it was intended by the testator to be operative.[6]

It is well settled that for the purpose of determining the testamentary intention, a will and its codicils are regarded as a single and entire instrument taking effect at the time of testator's death.[7] They are construed together as if they had been executed at the time of the making of the codicil.[8] Thus a duly executed codicil operates as a re-execution of the original defective will and makes it valid from the date of the codicil.[9] This principle rests upon the theory that a proper execution of the codicil extends to the prior will and since in theory the two instruments are incorporated as one, the subsequent execution makes both instruments valid.[10] While for purposes of construction a codicil and the will to which it relates are to be considered as a single instrument, such is not the case where the question relates to the formality of execution. Then both instruments are to be considered separately and the validity of execution in respect to one

[5] Twenty-two states and England so hold. For citation of cases see 21 A.L.R. 2d 823 (1952). That a properly executed codicil will give effect to a will which was not validly executed has been specifically held in Kentucky. See Beall v. Cunningham, 42 Ky. 390 (1843); Hurley v. Blankenship, 313 Ky. 49, 229 S.W. 2d 963 (1950).

[6] Slaughter's Adm'r. v. Wyman, 228 Ky. 226, 230, 14 S.W. 2d 777, 779 (1929). There is authority for the proposition that a codicil may be probated as an independent instrument when the will to which it refers has been rendered inoperative by law, as by subsequent marriage. But the codicil must be complete in itself as to be capable of execution and not dependent upon the will to which it attempts to refer. In re Pardy's Estate, 291 N.Y.S. 969, 976 (1936).

[7] Breckinridge v. Breckinridge's Ex'rs., 264 Ky. 82, 94 S.W. 2d 283 (1936).

[8] In New York a properly executed codicil validates a will originally invalid for want of testamentary capacity, undue influence, or revocation but does not validate a will defectively executed because of improper attestation. It will be noted, however, that Justice Cardozo in *Re Fowles*, 222 N.Y. 222, 118 N.E. 611, 612 (1918), stated that the rule was malleable and uncertain and should be abandoned.

[9] Hurley v. Blankenship, *Supra* note 5.

[10] See 57 AM. JUR. 429 (1948).

is not conclusive in respect to the other. The original will is not rendered invalid by reason of the failure to have a codicil properly executed. On the other hand, a codicil, if properly executed, can operate to validate a defective will by either re-executing the will, or by the doctrine of incorporation by reference. In either case it is a rule of imputed intention, and therefore all the circumstances must be consistent with an intention to validate the previously defective will,[11] or to re-execute a previously revoked will.[12]

The courts often speak in terms of revival and republication in such cases even in jurisdictions where publication is not essential to validate a will at its inception.[13] The term "revival" implies that the instrument revived once had testamentary life but before the execution of the codicil it had for some reason become void. "Republication" is the re-execution of a valid will or codicil, the effect of which is to give it added force and is a restatement of those valid and existing testamentary instruments to which the codicil applies.[14] Frequently these terms are used in the same sense and when courts refer to revival and republication they are actually referring to re-execution.

When a holographic will is not signed originally and the testator later writes his signature in a codicil appearing on the same sheet of paper, it would seem that a re-execution rather than an incorporation or republication results, and the instrument if wholly in the writing of the testator would be a valid holographic will.[15] If the will was not originally in the handwriting of the testator and was invalid, it may be incorporated into another valid instrument and become operative as a part of that instrument, but the subsequent instrument cannot revive or republish that which never had life. Therefore in the *Johnson* case[16] if the holographic writing could be said to validate the typewritten por-

[11] Fidelity & Columbia Trust Co. v. Vivian, 294 Ky. 390, 171 S.W. 2d 987 (1943).

[12] KY. REV. STAT. Sec. 394.100 provides that a revoked will can only be revived by a re-execution in same manner as a will is executed.

[13] Some jurisdictions require that the testator declare to the attesting witnesses that the instrument being executed is his will. See 14 IOWA L. REV. 1, 14 (1928). Kentucky has no statutory requirement as to publication and it has generally been held that the witnesses need not be familiar with the contents of the will. Singleton v. Singleton, 269 Ky. 330, 107 S.W. 2d 273 (1937).

[14] Evans, *Testamentary Republication,* 40 HARV. L. REV. 71, 72 (1926).

[15] Beall v. Cunningham, *Supra* note 5.

[16] *Supra* note 1.

tion appearing on the same page, it could properly speaking have validated it only by incorporating it into the valid written portion. Yet courts have often applied the doctrine that a valid codicil republishes and revives an instrument which was not an effective will because of incapacity or undue influence[17] or want of proper execution.[18] These decisions can be justified on the theory of incorporation by reference in that the subsequent codicil incorporates the invalid instrument and makes it speak as of the date of the valid codicil as a valid testamentary disposition.[19]

A document is said to be incorporated by reference into a will if all of the following requirements are met: (1) the will must refer to and identify the document with reasonable certainty, (2) the will must show the testator's intention to make the document part of the will, (3) the will must refer to the document as being in existence at the time of execution of the will and (4) the document must be shown to be the one referred to in the will.[20]

Incorporation by reference should be distinguished from republication as incorporation arises where instruments which have never had testamentary life are given testamentary effect through incorporation by proper reference in a subsequently executed valid will or codicil; whereas republication applies to incorporation and republishing of instruments which, either at the time of the codicil or at some other time, had been validly executed.[21] As most jurisdictions recognize this doctrine, the result of giving effect to the earlier instrument is therefore justified although the terminology may be faulty.[22]

A more difficult question is whether an holographic will should be allowed to incorporate by reference non-holographic documents and validate the entire disposition as a valid will. Although this situation can only arise in the jurisdictions which allow the probate of holographic wills[23] there is a conflict as to the applica-

[17] Farmers Bank and Trust Company v. Harding, 209 Ky. 3, 272 S.W. 3 (1925). But if the undue influence continues to exist at the time the subsequent instrument is executed it will not validate the will.

[18] Hurley v. Blankenship, *supra* note 5, at 52.

[19] Evans, *op. cit., supra* note 14, at 73.

[20] Daniel v. Tyler's Estate, 296 Ky. 808, 178 S.W. 2d 411 (1943). See also ATKINSON, WILLS 387 (1953).

[21] Evans, *op. cit., supra* note 14, at 72.

[22] ATKINSON, *op. cit, supra* note 20, at 392.

[23] There are nineteen states that allow holographic instruments to be probated as wills. Nine of these treat these wills as "an exceptional kind of written will

tion of the doctrine of incorporation to the holographic will statutes.

The California courts have consistently allowed an holographic will or codicil to incorporate by reference documents not wholly written by the testator, even though its statutes provide that an holographic will must be wholly in the handwriting of the testator to be valid. In the leading case of *In Re Soher's Estate*,[24] the testator executed an invalid attested will, later adding an holographic codicil. The California court allowed the will to be probated and said that the extrinsic document did not as a matter of physical fact become part of the holographic will. The fiction of regarding such a document as part of the will is to aid in its construction and should not be extended to reach unjust consequences.

In *Hewes* v. *Hewes*[25] the Mississippi court took the opposite position. In that case the testatrix executed two invalid formal wills, later writing a letter wholly in her handwriting mentioning both invalid wills. The court held that since the letter was unattested it could not incorporate anything not wholly in the testator's handwriting. The court concluded that to allow incorporation by reference in this type of situation would contravene the statute, as the extrinsic document becomes part of the will and would be valid only if wholly in the handwriting of the testator.

Since *Sharp* v. *Wallace*[26] was decided in 1886, the accepted rule in Kentucky has been that an unattested codicil, although wholly in the handwriting of the testator, cannot bring into operation as a will a paper which is neither in the handwriting of the testator nor attested, as required by statute. The position of the Kentucky court has been based on the theory that since the nonholographic instrument is not attested nor in the handwriting of the testator and since that portion and the codicil together make

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rather than in a class by themselves". In the other ten states, including Kentucky, holographic wills are a distinct type of will. All nineteen states require the holographic will to be wholly in the handwriting of the testator. 14 IOWA L. REV. 1, 25 (1928).

[24] 78 Cal. 477, 21 Pac. 8 (1889).

[25] 110 Miss. 826, 71 So. 4 (1916).

[26] 83 Ky. 584 (1886). See also, Blankenship v. Blankenship, 276 Ky. 707, 124 S.W. 2d 1060 (1939); Adams Ex'r. v. Beaumont, 226 Ky. 311, 10 S.W. 2d 1106 (1928).

up one will, it must be wholly in the handwriting of the testator to satisfy the statutory requirement.[27]

In the recent case of *Scott* v. *Gastright*[28] the Kentucky court reaffirmed this position. In that case the testatrix wrote and signed a memorandum which stated, "The will I dictated to H. Schear Atty, but did not sign is my last will and as I wish it." The court denying probate of both instruments stated: "Neither of the two instruments which are sought to be probated as a will in this case was acknowledged before, or signed by subscribing witnesses. On the other hand, the two instruments were not *wholly* written by Mrs. Gastright. Such being the case, these instruments taken together do not fulfill the requirements of the statute. . . ."[29] Although the Kentucky court has followed a strict rule in this type case, it does allow an attested instrument to incorporate a non-holographic document by reference and become a part of the testamentary disposition.[30]

The leading writers in the field of Wills are also in conflict as to whether an holographic instrument should incorporate a non-holographic instrument. Professor Atkinson[31] states that the doctrine of incorporation is as applicable to holographic as to ordinary wills. It is his opinion that the sounder view is that even if the extrinsic document sought to be incorporated is not written by the testator it can nevertheless be incorporated by a holographic will. Professor Mechem[32] in discussing the rule of the *Sharp* case concluded that it was sound from the standpoint of analysis as well as from the standpoint of providing a tolerable and working rule. In Page on Wills[33] the rule is stated as follows:

> The holographic will is an apparent, though not a real, exception to the general rule that a codicil, if properly executed, revives a prior will. Since a holographic will must be entirely in the handwriting of the testator, a holo-

[27] KY. REV. STAT. Sec. 394.040 provides that no will shall be valid unless it is in writing with the name of the testator subscribed thereto by himself. If the will is not wholly written by the testator, the subscription shall be made on the will acknowledged by him in the presence of at least two credible witnesses.

[28] 305 Ky. 340, 204 S.W. 2d 367 (1947).

[29] *Id.* at 342.

[30] Daniel v. Tyler's Estate, *supra* note 20.

[31] Atkinson, *op. cit., supra* note 20, at 392.

[32] Mechem, *The Integration of Holographic Wills*, 12 N. CAR. L. REV. 213, 229, 230 (1934).

[33] 2 PAGE, WILLS 14 (1941).

> graphic codicil, which is not attested, does not republish a prior will which is not entirely in the handwriting of the testator. . . .

It has been argued that, by analogy to the doctrine of incorporation by reference of unattested documents into attested codicils, it follows logically that the doctrine should apply to holographic codicils.[34] Further, since there is no statutory authorization for incorporation by reference either in attested wills or holographic wills then there should be no bar to allow either to incorporate.[35] It has also been urged that a testator should be able to do by holographic will whatever he could do by an attested will in a jurisdiction where holographic wills are validated generally by statutes.[36]

Although the present state of the law is in conflict on this matter, it is submitted that the rule followed by the courts in Kentucky and Mississippi represents the better view. Although an attested document can incorporate an unattested instrument, it does not necessarily follow that an unattested written instrument can incorporate another document that has not been written by the testator. In the former instance, the testator by having the incorporating document attested has declared that the extrinsic papers are his will, or at least his act. Thus, he has removed any doubt as to his intention to incorporate an extrinsic document and any doubts of fraud. On the other hand, where the testator merely writes a codicil in his own handwriting and it attempts to incorporate an instrument that he did not write or any purported will invalid for want of proper execution, there is even less assurance that he prepared the extrinsic instrument attempted to be probated, assented to its contents, or that he did it under his own free will. If the extrinsic document is in the handwriting of the testator, the authenticity of the testator's intention is manifested by his own handwriting. To hold otherwise, will permit a writing which is not entirely in the handwriting of the testator to be admitted to probate without any attestation.

The statute prescribing the manner of executing a will was designed not only to lessen the opportunity for imposition and

[34] 16 TENN. L. REV. 741, 745 (1941). See also 57 AM. JUR. 434 (1948).
[35] *Supra* note 23. See also 1 RUSSELL AND MERRITT, KENTUCKY PROBATE PRACTICE 333 (1955).
[36] *Supra* note 10, at 434.

fraud but also to insure that a testator would be clearly cognizant of the testamentary dispositions he was then making. The requirement that a will be wholly written by the testator makes certain that he was expressing what he intended. On the other hand, the requirement of attesting witnesses attaches to the testamentary act a certain formality which insures that the testator had read and understood the writing prepared by another as being his last will and testament.

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