Buffalo Law Review

Volume 16 | Number 2 Article 13

1-1-1967

Decedents' Estates and Trusts—Incorporation by Reference—Conditional Bequest Rendered Absolute by Inadmissibility of Contrary Directions

Paul E. Rudnicki

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

 Part of the Estates and Trusts Commons

Recommended Citation

Paul E. Rudnicki, *Decedents' Estates and Trusts—Incorporation by Reference—Conditional Bequest Rendered Absolute by Inadmissibility of Contrary Directions*, 16 Buff. L. Rev. 448 (1967).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol16/iss2/13

This Recent Case is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

any police interrogation. Footnote 35 guarantees the accused this advice by providing him with the right to counsel in such circumstances.

It should be noted that while New York already provides for this independent right to counsel, under the *Donovan* and *Gunner* decisions, the right is severely limited to only those defendants who have either retained or requested counsel. However there would seem to be little reason in a society like ours to require a man to request those rights guaranteed him by the Constitution.[71] Moreover, such a concept was expressly condemned in *Miranda* when the right to counsel is used as a protective device for the privilege against self-incrimination, on the grounds that the requirement of request discriminates against those defendants who are not aware of their constitutional rights.[72]

Miranda also provides no guidance in answering such questions as whether statements made by the accused were spontaneous or the product of interrogation, whether non-testimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, and also, what constitutes a significant deprivation of liberty so as to require the *Miranda* warnings. This last question is of special importance to New York in light of its "Stop and Frisk"[73] statute which expressly permits the police "to stop any person abroad in a public place . . . and . . . demand of him his name, address, and an explanation of his actions."[74] The state police have been officially advised that *Miranda* does not require them to warn suspects, detained under this statute, of their constitutional rights.[75] However this issue must ultimately be decided by the United States Supreme Court on the basis of whether a person so detained "has been deprived of his freedom of action in any significant way."

GARY M. COHEN

DECEDENTS' ESTATES AND TRUSTS—INCORPORATION BY REFERENCE—CONDITIONAL BEQUEST RENDERED ABSOLUTE BY INADMISSABILITY OF CONTRARY DIRECTIONS

Testator bequeathed his clothing, jewelry, the remainder of his paintings, and similar personal effects "to be distributed as I shall direct in a memorandum to be found with this will or in my safe deposit box now at the First National City Bank of New York . . . or in my office safe, or in the absence of such directions, to be distributed by my said wife or niece as she shall deem proper."[1]

71. Note, 15 Buffalo L. Rev. 719, 721 (1966).
72. Miranda v. Arizona, 384 U.S. 436, 470, 471 (1966). See also People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965). *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956).
73. N.Y. Code Crim. Proc. 180-a.
74. N.Y. Code Crim. Proc. 180-a(1).
75. McKane, *Comments on Miranda v. Arizona*, 1 Law Enforcement Executive (No. 2) p. 7 (1966).

1. Matter of Salmon, 24 A.D.2d 962, 265 N.Y.S.2d 373, 374 (1st Dep't 1965).

Of the two distributees, only the niece survived him. An unattested and undated letter was found in the testator's office safe. This letter was in the testator's handwriting and was addressed to the testator's niece. In this document, testator advised the niece that he would *like* to have certain property given to named persons. An action was brought for a determination of the validity, construction, and effect of this paper. The Surrogate's Court held that the niece was entitled to take absolutely only in the complete absence of directions. Finding that such directions did exist, although they could not be validly incorporated by reference into the will, the court ordered that the property pass through the residuary clause.[2] On appeal, *held*, order modified, two judges dissenting. The letter of directions could not be incorporated into the will. As a result, there is an absence of legal directions and the gift to the niece becomes absolute. *Matter of Salmon*, 24 A.D.2d 962, 265 N.Y.S.2d 373 (1st Dep't 1965).

Incorporation by reference is recognized by the majority of American jurisdictions.[3] Through the use of this doctrine, an extrinsic writing is permitted to become part of the program of testamentary disposition. One major advantage of allowing incorporation by reference is that it permits a degree of relaxation in the rule prohibiting courts from looking beyond the four corners of the will.[4] This relaxation provides the court with needed flexibility where a restriction to the will would frustrate the intended testamentary disposition. However, the need for this flexibility does not extend to the point of admission of all extrinsic documents. Incorporation by reference is necessarily limited in use and application because the unlimited allowance of extrinsic writings to effectuate testamentary disposition conflicts with the policy of wills statutes. As a means of avoiding a potential tidal wave of extrinsic writings, courts have sought to restrict incorporation by reference by permitting its use only when specified conditions have been met. These conditions are: (1) the will itself must refer to such extrinsic document sought to be incorporated as being in existence at the time of the execution of the will;[5] (2) the document must be reasonably identified in the will;[6] (3) testator's intention to incorporate such instrument in his will and to make it a part of his will must be shown;[7] (4) the document must in fact be in existence at the time of the execution of the will;[8] and (5) the document must correspond to the description of it in the will and must be

2. Matter of Salmon, 46 Misc. 2d 541, 260 N.Y.S.2d 66 (Surr. Ct. 1965).

3. Thompson, Wills § 106 (3d ed. 1947).

4. Samuels, *Incorporation by Reference in New York Wills*, 19 N.Y.U.L.Q. Rev. 270 (1941).

5. Wagner v. Clauson, 399 Ill. 403, 78 N.E.2d 203 (1948); Matter of McNamara's Estate, 119 Cal. App. 2d 744, 260 P.2d 182 (Dist. Ct. App. 1953).

6. Matter of Protheroe, 77 S.D. 72, 85 N.W.2d 505 (1957).

7. Zimmerman v. Hafer, 81 Md. 347, 32 Atl. 316 (1895); Richardson v. Byrd, 166 S.C. 251, 164 S.E. 643 (1932).

8. Bircher v. Wasson, 133 Ind. App. 27, 180 N.E.2d 118 (1962); Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950); Kellom v. Beverstock, 100 N.H. 329, 126 A.2d 127 (1956).

shown to be the instrument referred to.[9] Substantial fulfillment of these requirements will not suffice; all conditions must be fully complied with or the attempted incorporation will fail.[10] This emphasis on these conditions as a prerequisite to incorporation by reference represents an attempt to strike a proper balance between desired flexibility and the requirements of formality in the execution of a will.

In New York, the doctrine of incorporation by reference has had a somewhat troubled career. Judicial concern with the possibility of fraud in attempted incorporations, *i.e.*, permitting the testator or someone else to alter testamentary disposition after execution of the will without compliance with the formalities of wills statutes, led to the erroneous conclusion that the doctrine of incorporation by reference was rejected in New York. This error has resulted in the New York courts formally denying application of incorporation by reference while permitting it in actuality where there is little possibility of fraud. Initially, incorporation by reference was accepted in New York until 1891,[11] when the Court of Appeals decided *Booth v. Baptist Church*.[12] There testator bequeathed stock which was to be selected from his securities and he stated that a memorandum of securities which he had selected would be found among his papers. An undated memorandum was denied effect, the Court saying, "It is unquestionably the law of this state that an unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument."[13] From then on, *Booth* was accepted as authority for the proposition that New York rejects incorporation by reference.[14] Many commentators have contended that the strong language found in the *Booth* opinion was dictum since the memorandum could have been held ineffective under the conditions ordinarily applied to permit incorporation by reference.[15] With the light of incorporation by reference now eclipsed by the *Booth* case, the New York courts were confronted with the prospect of either limiting testamentary distribution to the four corners of the will or allowing the use of extrinsic documents without overruling the language of the *Booth* case.

A reference to the leading cases in this area shows the compromise position which New York has adopted. Shortly before the decision in the *Booth* case, the Court of Appeals had decided *Matter of Piffard*.[16] In this case, the daughter pre-

9. Matter of Smith's Estate, 196 Cal. App. 2d 544, 16 Cal. Rptr. 681 (Dist. Ct. App. 1961).

10. 2 Page, Wills § 19.18 (Bowe-Parker rev. ed. 1960).

11. Caulfield v. Sullivan, 85 N.Y. 153 (1881); Tonnele v. Hall, 4 N.Y. 140 (1850).

12. 126 N.Y. 215, 28 N.E. 238 (1891).

13. *Id.* at 247-48, 28 N.E. at 242.

14. See Matter of Ivie, 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958); Matter of Rausch, 258 N.Y. 327, 179 N.E. 755 (1932); Matter of Fowles, 222 N.Y. 222, 118 N.E. 611 (1918); Matter of Fowles, 176 App. Div. 637, 642, 163 N.Y. Supp. 873, 876 (1st Dep't 1917), all of which refer to a rule against incorporation by reference.

15. 2 Page, *op. cit. supra* note 10, at § 19.22; Samuels, *supra* note 4, at 278-79; Chaplin, *Incorporation by Reference*, 2 Colum. L. Rev. 148, 150 (1902); Comment, 29 Fordham L. Rev. 143, 144 (1960).

16. 111 N.Y. 410, 18 N.E. 718 (1888).

deceased the testator and her will directed division of the amount she would take under her father's will. The daughter's will was given effect not as a power of appointment, but as defining those persons and proportions to whom the daughter's share should pass. This decision has been explained as a holding that when the will of another party is involved, a special type of incorporation by reference is present.[17] Comments on the case place great emphasis on the fact that such a will is not totally dependent on testator's will but has an independent existence of its own. Further, the formality attached to the execution of a will tends to minimize the possibility of fraud. This special mode of incorporation exhibited continued vitality in *Matter of Fowles*.[18] In this case, testator left property in trust for life with a part of the remainder interest to be distributed pursuant to the wife's will. Testator also provided that if both he and his wife died under circumstances in which it could not be determined which party predeceased the other, it was to be presumed that the testator had predeceased the wife. Both the testator and his wife were lost on the Lusitania and it could not be determined which party was the survivor. In an opinion per Cardozo, J., the Court held that there was a gift by implication to the legatees named in the wife's will because the survivorship clause of the testator's will was held effective in avoiding a lapse of the wife's power. The Court relied directly on *Piffard* as authority for its decision. Addressing itself to the subject of incorporation by reference, the Court noted, "It is plain, therefore, that we are not to press the rule against incorporation to a 'drily logical extreme. . . .' "[19] It has been suggested that this decision rests upon the idea that the wife's will was an independent act and was not dependent on the will of the testator for its vitality.[20] As in the *Piffard* case, the attempted incorporation involved an extrinsic document which had been executed with formalities tending to negate the possibility of fraud. The receptiveness of the New York courts to a limited degree of incorporation was seemingly apparent again in *Matter of Rausch*.[21] In his will, testator gave one-fifth of his residuary estate to a trust company in trust for his daughter under terms of an agreement dated 1922, "which agreement is hereby made part of this my will, as if fully set forth herein."[22] One highly relevant factor in this case was that the trust was an inter vivos trust already in existence, and the will sought only to add further property to the corpus of the trust. The bequest to the trust was upheld, the Court reiterating that the doctrine against incorporation need not be carried to a drily logical extreme.

It is difficult to determine from the language of the Court whether the *Rausch* case was based on incorporation by reference or independent legal significance.

17. Comment, 10 Fordham L. Rev. 82, 88-89 (1941).
18. 222 N.Y. 222, 118 N.E. 611 (1918).
19. *Id.* at 233, 118 N.E. at 613.
20. See Samuels, *supra* note 4, at 283; Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act*, 25 Colum. L. Rev. 879, 900 (1925); 27 Yale L.J. 673, 676 (1917-18); *contra*, Scott, *Trusts and the Statute of Wills*, 43 Harv. L. Rev. 521, 552 (1930).
21. 258 N.Y. 327, 179 N.E. 755 (1932).
22. *Id.* at 330, 179 N.E. at 756.

The trust agreement complied with all the requirements for a valid incorporation by reference[23] and it also had independent legal significance.[24] As a result of this silence, some commentators have read the case as allowing incorporation by reference[25] and others contend that independent legal significance was the rationale.[26] One substantial argument in favor of the rationale of independent legal significance in *Rausch* rests upon the statement of the Court that, "Here the extrinsic fact, identifying and explaining the gift already made, is as impersonal and enduring as the inscription on a monument."[27] This emphasis on the impersonality of the document and its durability indicate that the independent existence of the trust agreement was of the greatest importance. It can be further noted that these qualities minimize the possibility of fraud.

Following the *Rausch* case, the New York lower courts upheld the use of incorporation in cases involving inter vivos trusts where the settlor retained a measure of control over the trust.[28] Limitations upon the practice of using the amendable or revocable inter vivos trust as a part of testamentary disposition were presented in *President & Directors of Manhattan Co. v. Janowitz.*[29] Testator reserved the power under the trust indenture to modify, amend, alter or revoke the trust, in whole or in part.[30] Not only was this power expressly reserved, but testator had exercised it on four occasions; twice before execution of the will; once immediately after execution of the will; and once two months after execution of the will. While the lower court restricted the controlling terms of the trust instrument to the first three amendments, the Appellate Division invalidated the article of the will which contained the attempted incorporation of the trust agreement. The court reasoned that permitting the trust to stand after its final amendment would permit the testator to substantially alter his will by use of an instrument which does not comply with the statutory standards.[31] As to the contention that the trust had independent significance, it was held that "the reservation of power to amend the trust indenture and its repeated exercise eliminated all independent significance that might be attached

23. Comment, *supra* note 15, at 146.

24. See 1 Scott, Trusts § 54.3 (2d ed. 1956).

25. Note, 17 Minn. L. Rev. 527, 535 (1933); Note, 50 Yale L.J. 342, 343-44 (1940); Note, 9 N.Y.U.L.Q. Rev. 507, 508 (1932).

26. Note, 21 Cornell L.Q. 492, 494 (1935); Note, 6 U. Cinc. L. Rev. 295, 303-04 (1932).

27. Matter of Rausch, 258 N.Y. 327, 332, 179 N.E. 755, 756 (1932).

28. See Matter of Tiffany, 157 Misc. 873, 285 N.Y. Supp. 971 (Surr. Ct. 1935) (where testator reserved certain powers to himself but never exercised them); Matter of Bremer, 156 Misc. 160, 281 N.Y. Supp. 264 (Surr. Ct. 1935), *aff'd on reargument*, 157 Misc. 221, 283 N.Y. Supp. 159 (Surr. Ct. 1935) (where testatrix retained power to amend and did amend prior to execution of the will).

29. 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940).

30. *Id.* at 175, 21 N.Y.S.2d at 233.

31. N.Y. Deced. Est. Law § 21. Were the post-execution amendments allowed to take effect in the *Janowitz* case, it would have presented a departure from the prior cases. With the possibility of fraud always under consideration, the mere possibility alone may have been sufficient to defeat the subsequent amendments. Further, the Appellate Division refused to allow the trust to take effect by its terms prior to execution of the will on the theory that this would frustrate the testator's intent.

to the trust indenture."[32] It should be noted that the opinion speaks of both the power to amend and its exercise as defeating independent significance. A later lower court opinion suggested that reservation of the power to amend an inter vivos trust without actual exercise of that power may allow use of the independent significance rationale.[33] Another decision held that reservation and an exercise of a reserved power over an extrinsic document prior to execution of the will does not invalidate a reference to the trust.[34]

Nevertheless, it was not until 1958 that the New York Court of Appeals shed additional light on the cloudy status of incorporation by reference and independent legal significance. This was done in *Matter of Ivie*[35] where testator and his wife created the inter vivos trust in 1932 and reserved a power to amend the trust. In 1941, prior to execution of the will, testator and his wife amended the trust in such a way as to provide for a change of trustees in the future. After the execution of the testator's will, the trust was again amended so that the prior amendment was eliminated. A third and final amendment provided for the relinquishment of all power which the settlors had over the trust. Although the last two amendments to the trust were made after the execution of the will, a bequest from the testator to the trust was upheld. On the position of the rule against incorporation by reference, it was stated, "where the trust itself remains unimpaired and substantially the same as it was at the time of the execution of the will, and certainly where the amendments are concerned solely with the administrative provisions of the trust deed, it cannot be said to come within the purview of the rule against incorporation by reference."[36] It was further commented, "we believe that as long as adequate safeguards[37] are employed, the rule against incorporation by reference should not be carried to 'a drily logical extreme.' "[38] While the amendments were admittedly made for administrative purposes, the Court appeared to indicate that the reference to the amended trust might have been upheld even if the amendments were of a substantive nature. This is seen in the statements that, "not every attempt to dispose of property by testamentary reference to another instrument will be thwarted," and, "a will provision is not necessarily defeated although events may occur and documents may

32. President & Directors of Manhattan Co. v. Janowitz, 260 App. Div. 174, 179, 21 N.Y.S.2d 232, 237.

33. Matter of Tillman, 53 N.Y.S.2d 664 (Surr. Ct. 1945).

34. Matter of Snyder, 125 N.Y.S.2d 459 (Surr. Ct. 1953). The *Janowitz* case received a barrage of criticism from many commentators. See, *e.g.*, Niles, *Trusts and Administration*, 32 N.Y.U.L. Rev. 433, 436 (1957); McClanahan, *Bequests to an Existing Trust–Problems and Suggested Remedies*, 47 Calif. L. Rev. 267, 284 (1959); Scott, *op. cit. supra* note 24; Note, 50 Yale L.J., *supra* note 25, at 348.

35. 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958). For the same case at the lower court levels, see Matter of Ivie, 155 N.Y.S.2d 544 (Surr. Ct. 1956), *aff'd* 3 A.D.2d 914, 163 N.Y.S.2d 380 (2d Dep't 1957).

36. *Id.* at 182, 149 N.E.2d at 726, 173 N.Y.S.2d at 295.

37. This reference to adequate safeguards clearly shows that the major concern of the Court is the possibility of fraud where there is a reference to an extrinsic document. As in the prior cases, the negation of the possibility of fraud is emphasized. [Author's footnote].

38. Matter of Ivie, 4 N.Y.2d 178, 182, 149 N.E.2d 725, 726, 173 N.Y.S.2d 293, 295 (1958).

be altered after the execution of the will determining either the identity of a beneficiary or the amount of a bequest. . . ."[39] As the extrinsic document had been altered after the execution of the will, it is unlikely that the decision was based on incorporation by reference. The better reasoning suggests that the reference to the amended trust was upheld on the basis of the trust having an independent significance outside of the will.[40]

This progression of cases leads to the conclusion that New York actually follows two rules regarding incorporation by reference. Where the extrinsic document has independent legal significance, incorporation will be permitted on the basis of that independent significance. Where the factor of independent significance is not present, New York allows use of incorporation by reference but limits such incorporation to situations where the possibility of fraud is minimal. "While the New York courts have occasionally used language which seemed hostile to the rule against incorporation, the actual adjudications are what we would find in a state which recognized the rule."[41] It is unfortunate that the holding of the *Booth* case was interpreted by subsequent decisions to state that New York does not allow incorporation by reference. Rather than engage in this tortured approach to incorporation, there should be an express acceptance of the doctrine of incorporation and its application limited to situations where the possibility of fraud is minimal.

The instant case serves to perpetuate the existing confusion over the status of incorporation by reference in New York when the element of independent legal significance is not present. Citing the *Booth* case, the Appellate Division held that the undated and unattested letter could not be incorporated.[42] The result could have been reached merely by application of the general requirements for a valid incorporation to the extrinsic document in the case. Had this been done, the document would have been excluded on the basis of failure to comply with the requirements. No reference was made to the letter's existence at the time of execution of the will.[43] The opinion gives no indication that the letter was in existence at the time of execution.[44] The document did not correspond to the description in the will as it was not found where testator declared

39. *Id.* at 181-82, 149 N.E.2d at 726, 173 N.Y.S.2d at 294-95.

40. See Scott, *op. cit. supra* note 24, at § 54.3. *But see* Atkinson, *Succession*, 34 N.Y.U.L. Rev. 490, 500 (1959), which suggests that the decision in *Ivie* was based on incorporation by reference. A lower court decision apparently reading *Matter of Ivie* in terms of incorporation by reference is Matter of Furst, 27 Misc. 2d 589, 213 N.Y.S.2d 266 (Surr. Ct. 1961). New York has recently taken a major step in sanctioning the use of the trust in conjunction with the will by enactment of Deced. Est. Law § 47-g. The statute explicitly refers to trusts which are amendable or revocable. Especially noteworthy is § 47-g(d) which provides that a devise, bequest, or appointment shall be valid even though the trust instrument was not executed in the manner required by Deced. Est. Law § 21.

41. 2 Page, *op. cit. supra* note 10, at § 19.22.

42. Matter of Salmon, 24 A.D.2d 962, 265 N.Y.S.2d 373, 374 (1st Dep't 1965).

43. Wagner v. Clauson, 399 Ill. 403, 78 N.E.2d 203 (1948); Matter of McNamara's Estate, 119 Cal. App. 2d 744, 260 P.2d 182 (Dist. Ct. App. 1953).

44. Bircher v. Wasson, 133 Ind. App. 27, 180 N.E.2d 118 (1962); Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1960); Kellom v. Beverstock, 100 N.H. 329, 126 A.2d 127 (1956).

it would be found.[45] These infirmities would result in the denial of incorporation in virtually all jurisdictions. By its failure to note the true status of incorporation by reference in New York, the decision in the instant case allows this formal rule against incorporation by reference, born in dictum and perpetuated in exceptions, to continue its unneeded existence in New York law.

As the attempted incorporation in the instant case failed, the remaining question was whether the property mentioned in the article should pass to the niece under the theory of a failure of directions or pass through the residuary clause. In its opinion, the Surrogate's Court held that the niece was entitled to take the property for herself only in the absence of any directions whatsoever. Purporting to effectuate the testator's intent, the court reasoned that since the testator left directions, he did not intend that the property should pass to the niece absolutely. However, the Appellate Division held that the letter of directions cannot be given effect. There being a *legal* failure of directions, the niece took absolutely under the provision of the article covering failure of directions.

It is submitted that the distinction between physical absence and legal absence of directions should not have been of paramount importance in the case. Rather, emphasis should have been placed on what the testator intended by the entire clause of the will. While it is probable that testator never envisioned the directions being denied effect because of legal infirmities, this does not prevent ascertainment of his intent. At the time of the execution of the will, testator was uncertain if any parties outside of the niece should be left certain articles. Despite his indecision as to these other parties, it is clear that testator desired to have the niece take absolutely if no other parties were later designated. Permitting the articles to pass to the niece does not frustrate testator's intent since he was aware of this possibility and even provided that the niece should take absolutely if there were no other takers. The language of the will reveals that testator was establishing his preference that those who might be named in the letter of directions should be his first choice to take and then designating his niece as his second choice. The parties designated in the letter cannot take due to the infirmities in the document which prevent its incorporation. Testator's first preference thus eliminated, his intent can best be effectuated by allowing the property to pass to his next-designated choice. In reading the clause in this manner, a result is reached which is consistent both with testator's intent and with the language of the will.

PAUL E. RUDNICKI

45. Matter of Smith's Estate, 196 Cal. App. 2d 544, 16 Cal. Rptr. 681 (Dist. Ct. App. 1961).