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Wills: Pouring Over Into Testamentary Trust of Another

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know the grantee. The attorney's standard of conduct would probably also require clarification, since in *Malone v. Gerth,* an action by a client against his attorney, a somewhat variable test was proposed:

> If an attorney is fairly capacitated to discharge the duties ordinarily incumbent upon one of his profession, and acts with a proper degree of attention and with reasonable care, and *to the best of his skill and knowledge,* he will not be responsible. [Emphasis added][27]

Once a court removes the requirement of privity for tort liability or adopts a liberal view of third-party beneficiary doctrine, only the case by case method of determining the limits of liability for attorneys, and other professions, will allow one to state the law with any amount of certainty. Lawyers may protest this increased imposition of liability, attorney liability insurance may increase both in rates and coverage, but the possible value to the profession, if attorneys are aware of this greater liability, is an advantage to the profession which should not be quickly dismissed.

At present it would be too speculative to predict whether the California attorney 1.) will exercise a greater degree of care or 2.) show restraint in adopting new methods[28] or 3.) continue to practice in the same manner as he did prior to *Lucas v. Hamm.*

ALLAN E. IDING

Wills—Pouring Over into Testamentary Trust of Another: A mother and her son planned and drafted together her last will dated May 2, 1946, and his will dated May 3, 1946. The draft of the latter will was in existence on the date the former will was executed. According to a trust provision in the mother's will, one-half of the trust assets were left "to my son's trust estate, which is willed to charities including those of my choosing."[1] She died testate on November 19, 1947. The son later revoked his will and made a subsequent will dated February 14, 1958, which omitted all charities. He died testate on January 4, 1959. On September 11, 1959, the executors of the son's will filed a petition to construe the final judgement in the mother's estate for the purpose of determining whether any assets in the mother's estate should be inventoried in the son's estate. *Held:* the will by which testatrix made a be-

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[27] 100 Wis. 166, 75 N.W. 972 (1898). This statement of the standard of care has been interpreted, however, as merely requiring ordinary skill and care as commonly possessed and exercised by attorneys in that jurisdiction. 45 A.L.R. 2d 12 (1956).

[28] It has been asserted that California physicians and surgeons have resorted to the use of expensive precautions unnecessary for treatment but rather as a legal precaution, have refrained from the use of new drugs, and have been reluctant to employ novel techniques because of the impact of malpractice litigation and high jury awards in that state. *The California Malpractice Controversy,* 9 STAN. L. REV. 731 (1956).

[1] Estate of Brandenburg, 13 Wis. 2d 217, 222, 108 N.W. 2d 374, 376 (1961).

quest to "my son's trust estate, which is willed to charities including those of my choosing,"[2] incorporated by reference the son's will dated May 3, 1946, and the gifts to charity were not defeated by the son's subsequent revocation of that will. *Estate of Brandenburg,* 13 Wis. 2d 217, 108 N.W. 2d 374 (1961).

The doctrine of incorporation by reference is recognized in the majority of jurisdictions in the United States.[3] Stated generally, the traditional doctrine as applied to wills is that:

> A will, duly executed and witnessed according to statutory requirements, may incorporate into itself by an appropriate reference a written paper or document which is in existence at the time of the execution of the will, irrespective of whether such document is one executed and attested as a will or whether it is in and of itself a valid instrument, provided the document referred to is identified by clear and satisfactory proof. So incorporated, the extrinsic paper takes effect as part of the will and is admitted to probate as such.[4]

The rule requiring that an extrinsic document be in existence at the time of execution of a will in order to be incorporated by reference is solely for the purpose of identifying the document, and it need not be executed prior to the will.[5] This general rule has been applied in the case of a will wherein a bequest was made in trust and the terms of the trust were indicated by reference to an extrinsic trust instrument.[6]

Wisconsin case law on the subject of incorporating by reference an unexecuted document has been sparse. The Wisconsin Supreme Court previously held in *Polak v. Polak* that the making of mutual wills by husband and wife, referring to a postnuptial agreement which was never in fact executed, did not establish evidence of such an agreement so as to deprive a divorce court of authority to divest the wife of realty conveyed to her by her husband shortly after their marriage.[7] The facts in that case, however, revealed that there was no evidence of an existing agreement between the parties prior to the execution of the will. In the *Brandenburg* case the court semed to settle the issue that a document need not be in existence in final form before it may be incorporated into a will by reference.[8]

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[2] *Ibid.*

[3] 3 A.L.R. 2d 683 (1949); Skinner v. American Bible Society 92 Wis. 209, 65 N.W. 1037 (1896); Estate of Wells 184 Wis. 242, 199 N.W. 52 (1924).

[4] 57 AM. JUR. WILLS §233, at 193 (1948).

[5] Allday v. Cage, 148 S.W. 838 (1912).

[6] Bemis v. Fletcher, 251 Mass. 178, 146. N.E. 277 (1925); *Re* Willey, 128 Cal. 1, 60 Pac. 471 (1900); Industrial Trust Co. v. Colt, 45 R.I. 334, 121 A. 426 (1923).

[7] Polak v. Polak, 248 Wis. 425, 430, 22 N.W. 2d 153, 155 (1946).

[8] *Supra* note 1, at 226, 108 N.W. 2d at 379. The Wisconsin court quotes from 2 BOWL-PARKER: PAGE ON WILLS §19.27 (1960):

> "If a trust document to be incorporated into a will was in existence at the time the will was executed, the fact that it was not signed or that

The second problem the court had to decide was whether the son's will of May 3, 1946, which included *trust* provisions for named charities could be incorporated by reference into the mother's will, even though the son's later will in 1958 omitted the charitable *trust* provisions. In jurisdictions which permit both the making of an amendable revocable trust and the incorporation of its terms into a will by reference, the *mere possibility* of an amendment or revocation of the trust does not make the will void when the trust is thus incorporated, but the assets passing under the will are administered according to the trust terms.[9] In a Massachusetts case, *Bemis v. Fletcher*,[10] where there was a bequest by the testatrix to those persons who should be appointed residuary trustees under her husband's will, the court held that the husband's will was incorporated into the will of the testatrix but stated that it need not consider what construction would be given to her will if her husband had made another will, as this event did not happen.[11] Thus the theory of incorporation by reference would allow incorporation of a revocable and amendable trust document only as it existed at the time of execution of the will. This theory has forced attorneys to execute a codicil referring to the trust as amended after each amendment. If the trust were revoked, it appears that the incorporation by reference doctrine would not be effective, for there would be a bequest to a trust no longer in existence. The mother in the *Brandenburg* case would not have made a valid bequest if the son revoked his trust containing charities unless on the basis of a constructive trust.

Even though the Wisconsin Supreme Court could not sustain the charitable bequests made by the mother by an application of the incorporation by reference doctrine, the court refused to allow them to fail by reason of the son's revocation of his charitable trust. It impressed the mother's property with a constructive trust for the benefit of the residuary charitable beneficiaries named in her son's will of May 3, 1946. The court stated that where a person knowing that a testator by giving him a devise or bequest intends it to be applied for the benefit of another, and either expressly provides, or by his action at the time implies that he will effectuate the testator's intention and the property is left to him in the belief that such promise will be kept, the promisor will be held as a trustee ex maleficio.[12] It was held in *Brook v. Chappel* that such a trust "owes its validity not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which

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the trust had not been created by the transfer of property to the trustee should not prevent the incorporation of the trust document into the will."

[9] 57 AM. JUR. WILLS §241 (1948); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E. 2d 381 (1944).

[10] Bemis v. Fletcher, 251 Mass. 178, 146 N.E. 277 (1925).

[11] *Id.* 146 N.E. at 279.

[12] Brook v. Chappell, 34 Wis. *405 (1874).

the trust arises ex maleficio and in which equity turns the fraudulent procurer of the legal title into a trustee to get at him."[13] New York has held that "if the devisee does not mean to act in accord with the declared expectation which underlies and induces the devise, he is bound to say so, or his silent acquesience is otherwise a fraud."[14] The rule is founded on the principle that the devise would not have been given unless the promise had been made, and hence the person is bound in equity to keep it, as to violate it would be fraud."[15] This doctrine appears to apply only when the revocation or fraud comes after the death of the testator. Case law gives no clear determination as to whether the doctrine will apply if the revocation comes before the testator's death. If in a *Brandenburg* fact situation the son revoked his will before the mother's death, the mother would probably be held to have knowledge of the revocation.

Although it appears that Wisconsin can sustain a bequest to charities named in a testamentary trust created by another person, by invoking the incorporation by reference and constructive trust doctrines, an analysis of Section 231.205[16] indicates that Wisconsin will not incorporate

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[13] *Id.* at 415.

[14] *Re* O'Hara, 95 N.Y. 403 (1884), as cited in 66 A.L.R. 156, 162 (1930).

[15] Amhurst College v. Ritch, 151 N.Y. 282, 45 N.E. 876, 887 (1897).

[16] WIS. STAT. §231.205 (1959): *Life use by settlor of trusts; eligibility for bequests and devises; powers.*

(1) Any instrument declaring or creating a trust, when otherwise valid, shall not be held an invalid trust, or an attempted testamentary disposition, because it contains any of the following powers, whether exerciseable by the settler or another or both:
   (a) To revoke, alter, amend or modify any or all provisions of the trust.
   (b) To exercise any power or option over any property transferred to or held in the trust.
   (c) To add to or withdraw from the trust all or any part thereof at one time or at different times.
   (d) To direct during the lifetime of the settlor or another, the persons and organizations to whom or on behalf of whom the income shall be paid or principal distributed.

(2) A trust otherwise valid, created by a written instrument, whether or not it contains any or all of the powers specified in sub. (1), shall have existence independent of any will and be eligible to receive property bequeathed, devised or appointed by the settlor and others, whatever the size or character of its corpus or the terms of the instrument, unless the instrument specifically states otherwise. No reference to any such trust in any will shall cause the trust assets to be included in the property administered as part of the testators estate.

(3) Any or all of the powers listed in sub. (1) may be exercised without affecting the validity of the trust, its nontestamentary character and its independent existence and eligibility for the receipt of property bequeathed, devised and appointed to it, and the exercise of a power, under sub. (1) (a) to amend, alter or modify the provisions of the instrument shall be effective to change such provisions as to property devised, bequeathed or appointed by will to the trust even though the settlor's will is not re-executed or republished after the exercise of such power.

(4) Nothing in this section shall be construed as altering or changing in any way the existing law or rules of law relating to the rights of widows, the taxation of transfers of property in trust, or trusts and wills other than those specified in this section.

by reference the terms of a prior *living* revocable amendable trust into a will which adds to that trust by what is commonly called a pour-over clause.[17] By statutory provision the inter vivos trust shall have existence independent of any will and the courts will not incorporate into wills the dispositive provisions of the living trust and thus make them dispositive parts of the will.[18]

The remaining question to be answered is whether Section 231.47, enacted subsequent to the *Brandenburg* case may be applied to a comparable fact situation. Under the new statute the charitable bequest by Arabelle S. Brandenburg would not be invalid because made to a trust created or to be created under the will of another person. It would seemingly appear that Section 231.47(1) has a wider application than the incorporation by reference doctrine as no document at all need to be in existence showing her son's bequest to charities at the time that Arabelle S. Brandenburg executed her will. However, under the new statute her son's will must have been executed (or was last modified with respect to the terms and conditions of his charitable trust) prior to his mother's death. The son's will in the principal case was executed before his mother's death and was later revoked after his mother's death. However, the son's will could not be admitted to probate prior to, or within two years after his mother's death as required by Section 231.47(1), as he did not die until 12 years after the mother's death.

(5) This section shall be applicable to trusts created and wills executed both before and after May 14, 1955 by persons who are living on or after May 14, 1955.

(6) Any amendment, alteration or modification of a trust subject to this section shall be effective to change the provisions thereof as to property devised, bequeathed or appointed by will to the trust even though the will is not re-executed or republished after the effective date of the amendment, alteration, or modification, if the settlor or testator is alive on or after July 26, 1957.

[17] Estate of Steck, 275 Wis. 290, 81 N.W. 2d 729 (1957). The court sustained a living trust against the contention of the widow that the trust was testamentary in part because it was tied in with the will by a pour-over clause which bequeathed the residue of the estate of the trustee.

[18] *Supra* note 16, at §231.205(2).

[19] LAWS OF WIS., ch. 403 (1961), WIS. STAT. §231.47: *Devises and Bequests to Testamentary Trusts:* (1) A devise or bequest otherwise valid shall not be held invalid because made to a trust created or to be created under the will of another person, if the will of such other person was executed (or was last modified with respect to the terms and conditions of such trust) prior to the death of the person making the devise or bequest and such other person's will is admitted to probate prior to, or within 2 years after, the death of the person making the devise or bequest. All such devises and bequests, when accepted, shall be added to the trust to which they were devised or bequeathed and be administered as part thereof. (2) If such a devise or bequest is not accepted or if no will of such other person which meets the conditions specified in sub. (1) is admitted to probate within the period therein limited, and if the will containing such devise or bequest makes no alternate disposition of the property so devised or bequeathed, the will containing such devise or bequest shall be construed to create a trust upon the terms and conditions contained in the document or documents constituing the will of such other person as of the date of death of the person making the devise or bequest.

So under the statute the mother's bequest could not be added to the son's trust and be administered as part of that trust even if it were in existence when he died. But under Section 231.47(2) even though the mother's bequest is not accepted, or the son's will is not admitted to probate within the period limited in Section 231.47(1) and the mother's will contained no alternate disposition of the property, her will shall be construed to create a trust upon the terms and conditions contained in the will of her son as of the date of her own death. As the son's will containing charitable bequests was not revoked as of the time of the mother's death, the mother's testamentary bequest would be valid under Section 231.47(2). Had the son revoked his will before his mother's death, the bequest by the mother would not have been valid under the statute because there would be no will of the son in existence at the time of the mother's death from which a trust could be construed.

A final analysis of Section 231.47 leads to the conclusions that this section controls devises and bequests to testamentary trusts and does away with the common law doctrine of incorporation by reference. Under the facts of the *Brandenburg* case a constructive trust will be invoked to sustain the mother's bequest only if the son has not revoked his will including charitable provisions before the mother's death; and if the son revokes his will before the mother's death, the mother's bequest will fall outside the protection of the statute.

DENNIS LINDNER

Constitutional Law—Freedom of Silence—Admission to the Bar: On May 6, 1957, the United States Supreme Court decided the first *Konigsberg v. State Bar of California* case.[1] Prior to that time Raphael Konigsberg, having successfully passed the California bar examination, had applied for certification for bar membership. Under California law the California Supreme Court may admit to the practice of law any applicant whose qualifications have been certified to it by the California Committee of Bar Examiners.[2] The Committee declined to certify Konigsberg on the ground that at the Committee hearings Konigsberg refused to answer questions relating to his membership in the Communist Party.[3] At the hearings he had stated unequivocally his disbelief in violent overthrow of government and had stated that he had never knowingly been a member of any organization which advocated such action. He further submitted witnesses to substantiate his good character. He would not, however, answer questions regarding his present or

[1] 353 U.S. 252 (1957).
[2] Cal. Bus. & Prof. Code 6064.
[3] No person may be certified "who advocates the overthrow of the Government of the United States or of this state by force, violence or other unconstitutional means." Cal. Bus. & Prof. Code 6064.1.