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Decedents Estates And Trusts—Wills—Incorporation by Reference

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The Appellate Division allowed a reduced amount which it found reasonable,[6] and the Court of Appeals unanimously affirmed.

The Court held that the services rendered by Thomy were necessary to the estate and because of their nature and extent not within his duties as executor. From Thomy's prior service to testator, testator's reliance on Thomy just prior to his death, and the fact that the testator had nominated Thomy an executor, the Court found it was testator's intention that Thomy continue and be compensated for the involved accounting services which he was performing.

Cases which have allowed executors extra compensation for necessary services outside the executor's duties have done so on two grounds: the express or implied intention of the testator, or the consent of the beneficiaries of the estate. Intention sufficient to allow compensation has been inferred from testators' directions where testator directed the executors to choose one of his sons as a manager of his business and they chose a son who was an executor,[7] where an architect had served decedent for many years prior to his death,[8] and where the executor who was manager of decedent's business prior to his death was elected president of that business and testator had allowed his executors discretion as to which assets should be kept by the estate.[9]

The decision in this case makes no change in the rules governing the compensation of executors, but merely reinforces numerous lower court decisions which have allowed additional compensation where justly deserved. As the Court indicated, such allowances do raise danger of self-dealing by fiduciaries, but that danger is eliminated by proper judicial surveillance.

Wills—Incorporation by Reference

New York does not permit an unattested instrument to be incorporated into a will by reference.[11] However, this rule against incorporation by reference has not been carried to "a drily logical extreme"; and in *In re Rausch's Will*,[12] a disposition to a trust controlled by an unattested instrument was upheld. On the authority of the *Rausch* case, dispositions to trusts controlled by unattested instruments wherein the settlors reserved the power to amend have also been

6. 4 A.D.2d 310, 164 N.Y.S.2d 573 (4th Dep't 1957).
7. In re Davison, 173 Misc. 323, 17 N.Y.S.2d 790 (Surr.Ct. 1940).
8. Russel v. Hilton, 37 Misc. 642, 76 N.Y.Supp. 233 (Sup.Ct. 1902), *modified on other grounds* 80 App.Div. 178, 80 N.Y.Supp. 563 (1st Dep't 1903).
9. In re Beri, 130 Misc. 527, 224 N.Y.Supp. 466 (Surr.Ct. 1927).
11. Booth v. Baptist Church of Christ, 126 N.Y. 215, 28 N.E. 238 (1891).
12. 258 N.Y. 327, 179 N.E. 755 (1932).

upheld.[13] In the latter cases, the settlor's mere reservation of the power to amend or alter the trust instrument has not proven fatal to the validity of the disposition; and if the unattested document was in existence at the time of the execution of the will, if it is clearly identified and is such that it excludes the possibility of alteration, fraud, or mistake, incorporation of that document will be permitted.[14]

A prior case, *President and Director of Manhattan Co. v. Janowitz*,[15] held that where an amendment to the trust instrument changes the beneficiaries, the incorporation by reference will not be permitted. In that case, the testator, after the execution of his will, added two supplemental indentures to the trust agreement whereby he eliminated, in the first, certain beneficiaries and changed his wife's interest, and in the second, deleted one beneficiary and substituted another. The Court said that the disposition of the property was being made not by the will, but by the shifting provisions in the trust instrument; and to allow the incorporation of the trust indenture would allow the testator to circumvent section 21 of the Decedent Estate Law by an instrument not published and attested as required. The Court further stated that the testamentary disposition will fail altogether, since it would defeat the purpose and intention of the testator to have the property pass in accordance with the original terms of the inter vivos trust.

The *Janowitz* case has during the last term been tacitly distinguished by *In re Ivie's Will*.[16] In the Ivie case, the testator created a trust in 1932 and reserved the right to amend the trust; he exercised this retained power by changing the trustees twice, once in 1941 and once in 1949. In the final amendment, he relinquished all power to alter or amend the trust. The will, which was executed in 1941 after the first amendment, recited the creation, provisions, and first amendment of the trust. The Court, in upholding a bequest to the trust, held that since the trust remained unimpaired and substantially the same the amendments which concerned only the administrative provisions of the trust deed would not bring the unattested instrument within the purview of the rule against incorporation by reference.

If this retained power of the settler to amend or alter the trust instrument is exercised, the change effected will be determinative in applying the rule. Therefore, New York will generally permit the incorporation of unattested instruments even though they have been amended if the amendment reflects no

13. In re Bremer's Will, 156 Misc. 160, 281 N.Y.Supp. 264 (1935); In re Tiffany's Estate, 157 Misc. 873, 285 N.Y.Supp. 971 (1935); In re Andrus' Estate, 156 Misc. 268, 281 N.Y.Supp. 831 (1935); In re Snyder's Will, 125 N.Y.S.2d 459 (Surr.Ct. 1953).

14. See note 13, *supra*.

15. 260 App.Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940).

16. 4 N.Y.2d 178, 173 N.Y.S.2d 293 (1958).

change in the testamentary intention or volition and the elements of fraud or mistake are lacking. This relaxation of the rule against incorporation by reference will not lead to the evils the rule seeks to prevent, since the court in each instance will evaluate the substance of any amendments.

Wills—Power of Appointment

In many will cases involving the exercise of a power of appointment the property over which the person has a power may be in one state while the will in question was drawn in another. The construction of a will insofar as it involves exercise or non-exercise of a power of appointment when the donor of the power is domiciled in New York, and the situs of the property involved is New York, is governed by the law of New York.[17]

A governing statute in New York concerning the construction of a will states:

> Power to bequeath executed by general provisions in will. Personal property embraced in a power to bequeath, passes by a will or testament purporting to pass all the personal property of the testator; unless the intent, that the will or testament shall not operate as an execution of the power, appears therein either expressly or by necessary implication.[18]

The Court of Appeals in the case of *In re Deane's Will*[19] had to determine the law to be applied to and the construction to be placed on a general devise of personal property under a will drawn in Texas. The testatrix had been given a power of appointment over a trust fund amounting to some $800,000 by her former husband. The testatrix in a general bequest left all her personal property to her grandson. Since the donor of the trust was a resident of New York and created the trust in New York, the Court applied the law of New York in construing the will. The required intent (under section 18 of the Personal Property Law) not to exercise the power of appointment did not appear in her bequest of personal property under the will. Outside evidence as to statements made during the drafting of the will clearly indicated that the testatrix did not wish to exercise the power of appointment. However, the Court decided that under the express terms of section 18, outside evidence is of no effect unless the requisite intention not to exercise the power is found in the will.

The Court of Appeals in strictly adhering to the language of the statute also reaffirmed *In re Smith*[20] stating: that "direct statements of intention" are

17. In re Philbrick, 209 N.Y. 585, 103 N.E. 315 (1913); adopting the rule of Massachusetts in Sewall v. Wilmer, 132 Mass. 131 (1882).
18. N. Y. PERS. PROP. LAW §18.
19. 4 N.Y.2d 326, 175 N.Y.S.2d 21 (1958).
20. 254 N.Y. 283, 172 N.E. 499 (1930).