

Memorandum 82-12

Subject: Study L-603 - Probate Law (Reference to Matters Outside the Will)

Both California law and the UPC permit a testator to make reference to a document or event outside the will which may affect the disposition of the testator's property. Both validate the following:

(1) Incorporation into the will of the terms of another document, in existence when the will is executed, by express reference to it in the will.

(2) Disposition by will of property by reference to future acts or events outside the will, such as disposition of property to such persons as may be employed by the testator at death.

California law and the UPC are generally similar in these areas. In addition, the UPC (but not California law) recognizes a third category:

(3) Reference in the will to a written statement or list outside the will to dispose of certain items of tangible personal property, which may be prepared before or after the making of the will and may thereafter be amended.

These three areas are discussed below.

Incorporation of Extrinsic Document by Reference in the Will

California case law and the overwhelming majority of American jurisdictions recognize the doctrine of incorporation by reference which permits the will to incorporate another document into the will if the document is in existence at the time the will is executed. See 7 B. Witkin, Summary of California Law Wills and Probate § 143, at 5660 (8th ed. 1974); T. Atkinson, Handbook of the Law of Wills § 80 (2d ed. 1953). The incorporated document may be of any character, testamentary or nontestamentary, written by the testator or by someone else, and may be a formal instrument such as a deed or deed of trust, or an informal paper such as a list of property holdings or a book of account. 7 B. Witkin, supra.

The UPC codifies this doctrine in Section 2-510 which provides:

2-510. Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests

this intent and describes the writing sufficiently to permit its identification.

The only problem the staff has with this section is its requirement that "the language of the will" manifest the testator's intent to incorporate and describe the writing. This requirement may have the effect of eliminating the California rule which admits evidence of the surrounding circumstances when the will is ambiguous to show the testator's intent to incorporate and to permit identification of the writing. Such a change in California law would not be good policy.

The California rule permitting resort to surrounding circumstances in the context of the doctrine of incorporation by reference is consistent with the general constructional rule that, when a will is ambiguous, surrounding circumstances may be considered. See 7 B. Witkin, supra §§ 160-61, at 5676-78. Moreover, it has been said that no reference in the will, however explicit on its face, can identify a separate paper without the production of evidence to show that the particular paper offered does correspond to the descriptive particulars in the will. In re Estate of Plumel, 151 Cal. 77, 81-82, 90 P. 192 (1907). The California courts have looked to the surrounding circumstances to identify the document to be incorporated in the following cases:

(1) After making a defective holographic will, the testator made a valid holographic codicil on the back of the same sheet of paper, but the codicil made no reference to the underlying will. The court held that the fact that the addendum was entitled "Codicil" by the testator implied a reference to an already existing document which the testator regarded as his will. That reference was sufficient to permit evidence that the codicil was on the same sheet of paper as the defective will, supporting the conclusion that the will was the document to which the codicil impliedly referred. Thus the codicil incorporated the defective will by reference, thereby validating it. In re Estate of Plumel, supra.

(2) The testator's will, dated March 25, 1932, left \$6,000 to his executors to be paid by them "as shall be directed by me in a letter that will be found in my effects and which said letter will be addressed to Martin E. Simon and Arthur W. Green (the executors) and will be dated March 25, 1932." After the testator's death, his safe deposit box was

found to contain the will and a letter addressed to his executors. The letter described itself as being the one mentioned in the testator's will, but was dated July 3, 1933, not March 25, 1932. The court held that the letter was the one described in the will, even though it bore the wrong date. The court said that the discrepancy in the date was overcome by evidence of the surrounding circumstances: (1) The letter was found with the will; (2) the letter described itself as the one mentioned in the will; (3) the letter was addressed to the executors as the will stated it would be; (4) the letter was written by the testator; (5) the terms of the letter conformed to the letter described in the will; and (6) no other letter was found. *Simon v. Grayson*, 15 Cal.2d 531, 102 P.2d 1081 (1940). (The fact that the letter was dated after the will was not an issue, since there was yet a later codicil which republished the will.)

(3) The testator's will provided that his property should be distributed according to "the terms of the will left by my wife." After the testator's death, two wills of his wife were produced. Both bore the same date, and both were in existence when the testator had made his will. Parol evidence was admitted to show which will was the last and effective will of the testator's wife, and therefore which one was incorporated by the testator's will. *In re Estate of Martin*, 31 Cal. App.2d 501, 88 P.2d 234 (1939).

(4) After the testator's death, his holographic will was found in his pocketbook. The will itself contained no dispositive provisions, but another writing which purported to dispose of the testator's property was folded inside the will. The will referred to the other writing merely by saying, "There is another paper in my pocketbook which will explain." The court looked to the surrounding circumstances to identify the document to be incorporated in the will, and held that the document was sufficiently identified because it was found in the testator's pocketbook where the will said it would be, and because it was the only other document found there. *In re Estate of Miller*, 128 Cal. App.176, 17 P.2d 181 (1932).

Although no California case has looked to the surrounding circumstances to establish the testator's intent to incorporate, one case said in dictum that "the testator's intent to incorporate other documents

into a will should be reasonably apparent either from direct reference thereto in the will or from some rather unequivocal surrounding circumstances clearly indicating the same intent." Estate of Selditch, 91 Cal. App.2d 62, 66, 204 P.2d 364 (1949).

The staff is of the view that the court should have the latitude to look to surrounding circumstances to explain an ambiguous will in the context of incorporation by reference, and that by doing so the California courts have carried out the testator's intent and have achieved just results. Accordingly, the staff recommends the adoption of UPC Section 2-510 modified as follows:

2-510. Any writing in existence when a will is executed may be incorporated by reference if the ~~language of the will~~ manifests this intent and describes the writing sufficiently to permit its identification.

The Law Revision Comment would note that the UPC language has been revised to assure that the California courts may continue to look to surrounding circumstances to explain an ambiguous will when applying the doctrine of incorporation by reference.

Acts and Events of Independent Significance

Under the common law rule, if an act or event outside the will has significance other than to pass property at death, such an act or event may be resorted to in order to determine who takes or what property passes under the will--this is the doctrine of "events of independent significance." L. Averill, Uniform Probate Code in a Nutshell § 9.07, at 91 (1978). Under this doctrine, the testator may make a valid testamentary disposition to such persons as may be employed by the testator at death, to the person the testator may marry, or to the residuary beneficiaries under a third person's will. 7 B. Witkin, supra § 147, at 5663.

The UPC codifies this doctrine as follows:

2-512. A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the testator's death. The execution or revocation of a will of another person is such an event.

Although there is little authority in California on this doctrine, it appears to have been accepted as the rule in this state. French &

Fletcher, supra at 359 n.84. Indeed, it has been said that the proposition that language has meaning only when applied is "self-evident" (id. at 359), and that the doctrine of events of independent significance is "absolutely essential" to the proper functioning of wills law (L. Averill, supra).

It seems useful to have a clear statement of the doctrine as under the UPC. Accordingly, the staff proposes to include UPC Section 2-512.

Separate Writing Identifying Bequest of Tangible Personal Property

Under limited circumstances and with explicit restrictions, the UPC permits a writing separate from the will to dispose of certain tangible personal property, notwithstanding that the writing does not satisfy the requirements for execution of an attested or holographic will and does not come within the doctrine of incorporation by reference or the doctrine of events of independent significance. The UPC provision is Section 2-513, which provides:

2-513. Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

UPC COMMENT

As part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution, this section permits a testator to refer in his will to a separate document disposing of certain tangible personalty. The separate document may be prepared after execution of the will, so would not come within Section 2-510 on incorporation by reference. It may even be altered from time to time. It need only be either in the testator's handwriting or signed by him. The typical case would be a list of personal effects and the persons whom the testator desired to take specified items.

California has no such provision, although California analogously permits additions to a previously executed holographic will without a

new signature. French & Fletcher, supra at 361.

The UPC provision has been supported as follows:

Considering the limitation placed upon the type and extent of property which may be disposed of in this manner, problems of fraud, duress and undue influence are not serious considerations. One of the most beneficial aspects of this provision is to provide a convenient and simple device for the person who would otherwise desire to change his will frequently due to changing desires with respect to testamentary gifts of tangible personal property and effects. This new device appears to be popular both with laymen and with practicing attorneys.

L. Averill, supra § 9.08, at 93-94. In its 1973 critique of the Uniform Probate Code, the State Bar appeared to have no objection to this provision. See State Bar of California, The Uniform Probate Code: Analysis and Critique 43, 45 (1973). Accordingly, the staff recommends the inclusion of UPC Section 2-513.

Respectfully submitted,

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