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Avoidance of the Disinterested Witness Rule by Codicilliary Republication or Incorporation: *In re Estate of Pye*, 325 F. Supp. 321 (D.D.C. 1971)

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Casenote

AVOIDANCE OF THE DISINTERESTED WITNESS RULE BY CODICILLIARY REPUBLICATION OR INCORPORATION: *In re Estate of Pye,* 325 F. Supp. 321 (D.D.C. 1971)

I. INTRODUCTION

The facts of a recent District of Columbia case raised various issues concerning who can properly be an attesting witness to testamentary instruments. The court in *In re Estate of Pye*[1] was presented with the question of the effect of two codicils upon the disposition of an estate. The first codicil was attested to by three witnesses, two of whom also received bequests under it; the second codicil was witnessed by the same three individuals, but only one of the three witnesses received a bequest from the second codicil. Although both instruments were attested by three witnesses, only two witnesses were required by the District of Columbia Code.[2] Like the law in almost every other American jurisdiction, District of Columbia law provides that an attesting witness to a will cannot receive a bequest from the attested instrument. This rule is often called the "disinterested witness" requirement.[3] In applying this rule, the court held that the two witness-legatees lost their gifts under the first codicil, but the bequest made in the second codicil was held to be valid.

Most of the opinion in *Pye* deals with the second codicil,[4] where only one of the three witnesses was "interested," *i.e.*, a legatee. The second codicil thus raised the issue of whether an interested witness can keep the bequest if there are a sufficient number of disinterested witnesses. Although the question was one of first impression in the District of Columbia, most jurisdictions have statutory provisions

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[1] 325 F. Supp. 321 (D.C.C. 1971).

[2] D.C. CODE ANN. § 18-103 (1967).

[3] D.C. CODE ANN. § 18-104 (1967), is the Statute of George II, 25 Geo. 2, c. 6, § 1 (1752): ". . . If any person shall attest the execution of any will or codicil . . . to whom any devise, legacy . . . shall be given, the will or codicil shall, so far only as concerns such persons attesting the execution of such will or codicil be utterly null and void and such person shall be admitted as a witness to the execution of such will or codicil."

[4] The first codicil represented a $300 bequest and the second codicil contained a $10,000 gift; thus, the first was hardly worth litigating.

to deal with this contingency. Almost every state[5] provides that an interested witness can keep the bequest if "there be two other competent subscribing witnesses,"[6] and the court in *Pye* did allow the bequest to the interested witness where there were two disinterested witnesses. The court reached this result without the benefit of such a statute.

There is no reference in *Pye* to any legal theory or argument that could have supported the first codicil's validity. However, there are theories that could have been used to uphold the first codicil. This casenote will discuss the closely related arguments that the second codicil either (1) "republished" or (2) "incorporated by reference" the earlier codicil and remedied its defects. The historical development of the disinterested witness rule will also be explored, and the wisdom of the rule requiring disinterested witnesses to testamentary instruments will be examined.

II. DEVELOPMENT OF THE DISINTERESTED WITNESS REQUIREMENT

The requirement of nonlegatee-witnesses to testamentary instruments is a relatively recent addition to Anglo-American law. Except by local custom in some areas of England,[7] a freehold estate could not be devised under early common law.[8] In the first Wills Act of 1540,[9] Parliament gave Englishmen not subject to similar local custom the power to devise; the only formality was that the will be in writing.[10] The Statute of Frauds[11] in 1678 introduced the requirement of three or four "credible" witnesses, and this formality was included in the Statute of Victoria[12] which replaced the earlier acts.

Common law rules of evidence were used to ascertain the meaning of "credible witnesses,"[13] the phrase used in the Statute of

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[5] The exceptions are Georgia, New Jersey, Maine, Rhode Island and South Carolina.

[6] NEB. REV. STAT. § 30-207 (Reissue 1964). *See also* CAL. PROB. CODE § 51 (West 1956).

[7] *See* 2 W. PAGE, WILLS § 19.2 (3d ed. 1960).

[8] G. THOMPSON, THE LAW OF WILLS 18 (3d ed. 1947).

[9] The Act of Wills, 32 Hen. 8, c. 1 (1540).

[10] 2 W. PAGE, *supra* note 7, § 19.2.

[11] An Act for Prevention of Fraud and Perjuries, 29 Cor. 2, c. 3, § 5 (1678).

[12] An Act for the Amendment of the Laws with respect to Wills, 7 Wm. 4 & 1 Vict., c. 26 (1837).

[13] A "credible witness" was one who was "competent" to testify in court as to the facts to which he attested by signing the will. Holdfast v. Dowsing, 93 Eng. Rep. 1164 (K.B. 1746).

Frauds. It was subsequently held that a legatee could not witness a will because of an interest in the outcome of possible litigation involving the will;[14] thus a testamentary instrument witnessed by a legatee was, in the words of the Statute of Frauds, "utterly void and of none effect."[15]

In order to save a will attested to by legatees, English courts allowed a witness to release his legacy and thus render himself competent to testify. In 1746 this subterfuge was condemned in *Holdfast v. Dowsing*,[16] but six years later the Statute of George II[17] in effect made mandatory the old practice. The new act provided that a legatee was a competent witness to a will, but that the legatee's bequest was automatically forfeited.

In most states the statutes requiring disinterested witnesses to testamentary instruments are similar to the early English statutes.[18] Only one state allows a legatee to witness a will or codicil and keep his bequest.[19] Most states provide statutes similar to that of George II, making legatees "competent" witnesses by voiding the bequest[20] to them. The majority of states have statutes allowing a legatee-witness to take a bequest up to the amount of his intestate share;[21] the District of Columbia reached this result by case law in *Manoukian v. Tomasian*,[22] as noted in *Pye*.

The application of the disinterested witness rule can have inequitable results; a good example of this is when a will is prepared without the assistance of an attorney, and the testator turns to his family for witnesses.[23] The history of the rule is one of avoidance

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14 *Id.*

15 *Supra* note 11.

16 93 Eng. Rep. 1164 (K.B. 1746).

17 25 Geo. 2, c. 6, § 1 (1752).

18 *See Rees, American Wills Statutes*, 46 VA. L. REV. 613, 633 (1960).

19 PA. STAT. tit. 20 (1950).

20 For example, N.Y. DECED. EST. LAW § 27 (McKinney 1949), provides: "If any person shall be a subscribing witness to the execution of any will . . . any bequest . . . shall be void, so far as concerns such witness . . . and such person shall be a competent witness. . . ."

21 *See, e.g.*, NEB. REV. STAT. § 30-208 (Reissue 1964): "If [any interested witness] would have been entitled to any share of the estate of the testator, in case the will was not established, then so much of the share that would have descended or have been distributed to such witness, as will not exceed the devise or bequest made to him in the will, shall be saved to him . . . in proportion to and out of the parts devised or bequeathed to them."

22 237 F.2d 211 (D.C. Cir. 1956).

23 *Infra* pp. 179-81.

and mitigation of the resulting forfeiture of bequests. Various theories were thus readily available for the court in *Pye* to avoid the rule and to hold the first codicil valid.

III. VALIDATION OF THE FIRST CODICIL BY THE SECOND CODICIL

The court in *Pye* raised issues it did not discuss when it held the bequests in the first codicil invalid. Two closely related (and often confused) theories can be used to argue that the defects in the first codicil were remedied by the second codicil. The first theory is "republication"; the second concept is termed "incorporation by reference."

A. Republication

The general rule is that a valid codicil "republishes" an earlier will, and that the two instruments speak from the date of the codicil and the codicil draws the will to its own date.[24] In *Newsome v. Carpenter*[25] it was held that the words "last will and testament" were sufficient notice of the probate of both a will and a codicil. The court said: "[T]he law is well settled that a properly executed codicil has the effect of validating and republishing the prior will so that the will and codicil will then be considered as one instrument speaking from the date of the codicil."[26] There is no question that the second codicil in *Pye* republished the original will.

The rationale for the rule that a codicil republishes an earlier will is well stated in *Taft v. Stearns*.[27] There the court reasoned that the execution of a codicil "imports in the mind of the person executing the codicil the existence of a will which can be supplemented and modified."[28] In other words, the execution of a codicil is an implied restatement or rewriting of the earlier testamentary instrument.

Because a codicil is a restatement of prior testamentary intent, it has been well settled that an improperly executed will is validated

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[24] Kenfield v. Dudek, 135 Neb. 574, 283 N.W. 209 (1939); In re Appeal of Rogers, 126 Me. 267, 138 A. 59 (1927); First Mech. Nat. Bank v. Norris, 134 N.J. Eq. 229, 34 A.2d 749 (1943); White v. Conference Claimants Endowment Comm'n, 81 Idaho 17, 336 P.2d 674 (1959).

[25] 382 S.W.2d 350 (Tex. Civ. App. 1964).

[26] *Id.* at 355.

[27] 234 Mass. 273, 125 N.E. 570 (1920).

[28] *Id.* at 276, 125 N.E. at 571.

by a properly executed codicil.[29] In *Johnson v. Johnson*[30] the court stated that "[A] codicil validly executed operates as a republication of the will no matter what defects may have existed in the execution of the earlier document,"[31] and that an improperly signed, dated, and witnessed will is validated by a codicil. An early Iowa case, *In re Will of Murfield*,[32] held that a codicil validated a will which had a beneficiary as one of the two subscribing witnesses. And the Supreme Court of Nebraska in *In re Estate of Kaiser*[33] noted that a properly executed codicil republishes a will and "remedies all the defects in its execution."[34]

As demonstrated by the above, there is ample authority to hold that the second codicil in *Pye* remedied any possible defects in the *will*. However, the defect in question was in an earlier *codicil*. There is very little authority on the question of whether a codicil republishes an earlier codicil. It would seem that if a testator had an earlier will in mind when he made a codicil he would also have in mind earlier codicils, so that the reasoning behind a codicil validating a will by republication would apply equally to the validation of earlier codicils by republication. The few American cases that have ruled upon this issue have held that a codicil does republish and validate a previous codicil.

In *Camp v. Shaw*[35] the testator attached to his will a paper marked "sheet B," but it was not acknowledged or attested. The court said:

> We think that if, after the execution of the original will, the deceased wrote sheet B and attached it to the will, intending it to operate as a codicil . . . the [latter] codicil operated as a publication and due execution of the sheet B and the will, all speaking from the date of the codicil.[36]

This opinion was later affirmed,[37] but it is not clear if the higher court considered the sheet B a codicil or an alteration of the will.

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[29] Hinson v. Hinson, 154 Tex. 561, 280 S.W.2d 731 (1955); Robinson v. Harmon, 107 Ohio App. 206, 157 N.E.2d 749 (1958); Foster v. Tanner, 221 Ga. 402, 144 S.E.2d 775 (1965).

[30] 279 P.2d 928 (Okla. 1954).

[31] *Id.* at 931.

[32] 74 Iowa 479, 38 N.W. 170 (1888).

[33] 150 Neb. 295, 34 N.W.2d 366 (1948).

[34] *Id.* at 305, 34 N.W.2d at 373.

[35] 52 Ill. App. 241 (1893).

[36] *Id.* at 250.

[37] Shaw v. Camp, 163 Ill. 144, 45 N.E. 211 (1896).

In *Gordan v. Lord Reay*,[38] an English case, it was held that an unattested codicil was republished by a later codicil, and the defective codicil was remedied.[39] However, twelve years later in *de Zichy Ferraris v. Marquis of Hertford*[40] the English courts rejected the theory that a codicil republishes prior codicils, and instead adopted the "incorporation by reference" doctrine.

Other courts have stated as dicta that a codicil republishes and validates a defectively executed prior codicil. A good example of this type of opinion is *Hurley v. Blankenship*,[41] where the testator executed only one codicil. The court said that "[a] codicil duly executed will operate as a republication of an earlier will or codicil, although the latter is inoperative or imperfectly executed or attested."[42]

A Pennsylvania decision which applied New Jersey law, *In re Butler's Estate*,[43] seems to hold that a second codicil "republishes [an earlier] codicil, incapable of passing New Jersey real estate, because without subscribing witnesses, and makes effective a devise . . . therein."[44] Although in the syllabus and in the opinion the court used the term republication, the English cases dealing with incorporation by reference of prior codicils were reviewed. In fact, at one point the court stated that: "[T]he real question is whether it [the later codicil] refers not only to the will, but also to the first codicil with a certainty sufficient to republish the later also."[45] *Butler* is an excellent example of the way two similar theories, codicilliary republication and incorporation by reference, are often confused.[46]

B. Incorporation by Reference

The doctrine of incorporation by reference is distinct from the theory of republication. If a properly executed testamentary instrument refers with sufficient clarity to a distinctly extraneous document, the extraneous document becomes incorporated into the testamentary instrument and becomes a part of the testamentary instru-

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[38] 58 Eng. Rep. 339 (Ch. 1832).

[39] The second codicil confirmed only the provisions of the will, so the doctrine of incorporation by reference had no effect on the decision.

[40] 163 Eng. Rep. 794 (P. & D. 1844), *aff'd sub. nom.* Croker v. Marquis of Hertford, 13 Eng. Rep. 334 (P.C. 1844).

[41] 313 Ky. 49, 229 S.W.2d 963 (1950).

[42] *Id.* at 52, 229 S.W.2d at 965.

[43] 29 Pa. Dist. 683 (1917).

[44] Syllabus of Court, *Id.*

[45] *Id.* at 686.

[46] Evans, *Testamentary Republication*, 40 Harv. L. Rev. 71 (1926).

ment.[47] To be incorporated, the extrinsic material must be in existance when the will or codicil is executed.[48]

A number of cases have dealt with the question of whether a codicil incorporated by reference a prior codicil. In the case of *In re Walton's Estate*[49] the court said:

> One of the subscribing witnesses did not attest [the first codicil] in the presence of the testator. But there was a subsequent codicil, properly executed and attested, and that codicil contained an express republication of both the will and the first codicil, and the latter instrument was thereby validated.[50]

It should be noted that the court referred to an "express republication" of the first codicil, which is another confusion of republication and incorporation by reference. The court apparently meant "express reference" since it applied the incorporation by reference doctrine to validate the first codicil.

As mentioned previously, in *de Zichy Ferraris v. Marquis of Hertford*[51] the English courts rejected the theory of republication in favor of incorporation by reference. In *Hertford* the court said: "In order to incorporate the [unattested] codicil . . . there must not only be a plain identification, but a sufficient certainty."[52] The necessity for a specific reference to a prior codicil, under the theory of codicilliary incorporation by reference, was later emphasized in *Burton v. Newberry*.[53]

In *Pye* the second codicil may have contained a specific reference to the first codicil, thus incorporating it by reference, but the facts of the case do not cite the exact wording of the second codicil. It is quite possible that the second codicil in *Pye* contained a sufficient reference to the first codicil under the criteria of some decisions. For example, if the second codicil in *Pye* had recited that it was a "further codicil,"[54] or a "further codicil to my last will and codicils,"[55] it would probably be a sufficient reference to incorporate

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[47] Clark v. Citizens Nat. Bank of Collingswood, 38 N.J. Super. 69, 118 A.2d 108 (1955); Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950); In re Gregory's Estate, 70 So. 2d 903 (Fla. 1954).

[48] Lawless v. Lawless, 187 Va. 511, 47 S.E.2d 431 (1948).

[49] 194 Pa. 528, 45 A. 426 (1900).

[50] *Id.* at 428.

[51] 163 Eng. Rep. 794 (P. & D. 1844).

[52] Croker v. Hertford, 13 Eng. Rep. 334, 339 (P.C. 1844).

[53] L.R. 1 Ch.D. 234 (1875).

[54] Radburn v. Jervis, 49 Eng. Rep. 77 (Ch. 1841).

[55] Manship v. Stewart, 181 Ind. 299, 104 N.E. 505 (1914).

the first codicil. A reference to the previous codicil by date would also have incorporated it.[56]

In summary, the court in *Pye* should have examined the second codicil for a reference to the first codicil. The second codicil may have incorporated by reference the prior codicil, which would have enabled the court to validate the bequests made in the first codicil. However, even if the second codicil did not incorporate the first codicil by reference the doctrine of codicilliary republication could have been used to validate the first codicil. Republication can be used to remedy the defective execution of a prior codicil without the later instrument specifically referring to the earlier one so that codicilliary reublication has wider application than incorporation by reference.

IV. EXAMINATION OF THE POLICY OF REQUIRING DISINTERESTED WITNESSES

As demonstrated by the above, the court in *Pye* could have allowed bequests to interested witnesses. *Pye* thus presents the question of whether the disinterested witness rule is actually necessary in modern American law. The primary reason for requiring non-legatee witnesses that is generally given is to protect the testator from undue influence and to prevent a group of conspiring witnesses from presenting a fraudulent will for the testator's signature.[57] This rationale for the disinterested witness rule was first stated in 1788 by Lord Camden, who feared the fraud:

> [S]o commonly practiced upon dying men, whose hands have survived their heads; who still have strength enough to write a name, or make a mark, though the capacity of disposing is dead. What is the condition of such an object, in the power of a few, who are suffered to attend him, wheedled, or teized, into submission, for the sake of a little ease; put to the laborious task of recollecting the full state of all his affairs, and to weigh the just merits, and demerits, of those, who belong to him, by remembering all, and forgetting none![58]

It should be noted that sickbed wills are often holographic, and a number of states further protect the testator by requiring all the formalities of execution required for non-holographic wills.[59]

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[56] Aaron v. Aaron, 64 Eng. Rep. 568 (Ch. 1849).

[57] *See also Mechem, Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 506 (1948).

[58] Cornwall v. Isham, 1 Day 35, 36 (Conn. 1802), *citing* Doe dem. Hindson v. Kersey, 4 Burn. Ecc. Law (5th ed. 1778) 88, 92 (1760).

[59] *See, e.g.*, NEB. REV. STAT. § 30-204 (Reissue 1964), which requires the formalities of execution for all wills except nuncupative instruments.

It is suggested by this writer that Lord Camden's image of a group of conspirators converging on a dying testator like a flock of vultures is an overly pessimistic view and should be examined in light of modern social conditions and experience. One of the more recent examinations of the disinterested witness rule was made by the authors of the Uniform Probate Code. The authors responded to criticism[60] of the rule and dispensed with the requirement of non-legatee witnesses.[61] The official comment to the section that omits the rule notes that attorneys will still use disinterested witnesses, but:

> [T]he rare and innocent use of a member of the testator's family on a home-drawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as a witness but to use disinterested witnesses.[62]

The authors of the Code are not alone in their beliefs that interested witnesses usually attest home-drawn wills and the rule does not prevent fraud.[63]

One author has argued that it is a "medieval point of view" to assume that an interested witness will lie.[64] As noted previously, the original English statutes required "credible witnesses"[65] to testamentary instruments, and common law rules of evidence were used to interpret "credible" to exclude parties who had an interest in possible litigation concerning the will. The common law rule forbidding parties to a suit to testify in their own behalf has long since been abrogated.[66]

In summary, modern conditions and experience have weakened the policy arguments that have supported the rule requiring dis-

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[60] Mechem, *supra* note 57; Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 11 (1941).

[61] UNIFORM PROBATE CODE 2-505 (6), provides: "A will or any provision thereof is not invalid because the will is signed by an interested witness."

[62] *Supra* note 60, at 49.

[63] Gulliver & Tilson, *supra* note 61, at 12.

[64] Mechem, *supra* note 57.

[65] *Supra* note 11.

[66] Evans, *Common Law Rules of Testifying Applied to Wills*, 25 MICH. L. REV. 238 (1927).

interested witnesses to wills and codicils. The authors of the Uniform Probate Code and other commentators have recommended the complete abolition of the rule. When a court is faced with the issues of whether to abolish the rule, it must decide if the rule prevents fraud often enough to risk frustrating honest testamentary efforts by those unaware of the rule.

V. CONCLUSION

When a court is faced with the question of the validity of a codicil attested to by interested witnesses, if there is a second, validly executed codicil to the same will, the court can usually find reasonable grounds for holding that the second codicil validated the first. In deciding whether to hold the first codicil valid, the court must also face the question of the value of the disinterested witness rule. In deciding this question the court should consider the view that the disinterested witness requirement has been ineffective in preventing fraud, and instead has no doubt on many occasions frustrated honest testamentary attempts. The issue to be decided is thus whether fraud is prevented often enough to justify the possibility of invalidating wills drawn by those unaware of the rule.

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