When Incorporating By Reference ---- Be Careful

We frequently enter an order and refer in the order to another document which is not part of the court file. For example, when entering an order for the sale of real estate, the order will require the sale but will not cite the particulars. These details, such as: the listing pricing, reduction of the price over time, and conditions under which an offer must be accepted, are not for the public to see and are kept out of the court file. Typically, the details are contained in a private letter agreement between the parties.

The intent here is to keep the terms of the letter agreement private while, at the same time, retaining the ability to enforce the letter agreement as an order of court. Thus, the letter agreement is incorporated by reference in the order. The language that we use is something like "the letter agreement is hereby incorporated herein by reference as if set forth verbatim herein".

Is this sufficient? Does the letter agreement now become part of the court's order? Well, it may depend on what part of the order contains this language.

An order consists of two parts: the introductory language or recitals, and the ordering part or the decretal portion. The recitals don't really count for much and do not constitute the court's order. The decretal portion is the important part and is the court's order.

So, if your language incorporating the letter agreement appears in the recitals only, chances are that the letter agreement will not have the force of an order of court and cannot be enforced as such. On the other hand, if the language is in the decretal portion, then the letter agreement has become part of the court's order and is capable of judicial enforcement.

There are a string of cases going all the way back to the early 20s establishing this principle. Kempa v. Murphy, 260 Ill.App.3d 701, 632 N.E.2d 1111 (2nd Dist. 1994); Stewart v. Stewart, 35 Ill.App.3d 236, 341 N.E.2d 136 (1st Dist. 1975); Green v. Green, 21 Ill.App.3d 396, 315 N.E.2d 324 (5th Dist. 1974); Chechik v. Koletsky, 305 Ill. 518, 137 N.E. 419 (1922).

All of this might sound overly technical, maybe even elevating form over substance, but don't get caught short.

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