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WILLS-LETTERS AS HOLOGRAPHIC WILLS-TESTAMENTARY INTENT

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WILLS—LETTERS AS HOLOGRAPHIC WILLS—TESTAMENTARY INTENT—A church trustee offered for probate as decedent's will a letter wholly written, dated, and signed in the handwriting of decedent. The letter was addressed to proponent, and read: "I am sending you a cashier's check for the $5000.00 I wrote you about last week. Now as to my heirs—I have three nieces, and a husband who has had enough. I'm not interested in any of them. If I leave $5.00 or $5,000.00 I want the church to have it." Probate was denied, and proponent appealed. *Held*, the letter was entitled to probate. *De Lapp v. Anderson*, (Ky. 1947) 203 S.W. (2d) 388.[1]

[1] For decisions on appeal in an action brought to enforce proponent's promissory

A number of American jurisdictions give statutory validity to unattested holographic wills,[2] presumably because such wholly handwritten wills are considered to be less susceptible to forgery.[3] In jurisdictions which recognize that type of will, litigation in a number of cases has been concerned principally with statutory construction of requirements of form,[4] but the most difficult problem is that of testamentary intent, which involves a construction of the holographic instrument.[5] The problem is particularly acute in informal writings such as letters, and unless such an instrument is specifically labeled "will," [6] or unless recognized words of bequest or devise are used, the intention of the testator may often be discernible only by construction of vague and precatory expressions,[7] although extrinsic evidence of intent may be admissible where the instrument is ambiguous on its face.[8] It is generally agreed in principle that a letter cannot operate as a will unless the writer intended that identical instrument to have testamentary effect.[9] The testator need not know that he is performing a testamentary act,[10] but his intention with reference to the instrument must be such that the court will say that a final disposition of property was meant to be effectuated.[11] As a correlative principle, it seems clear that a letter cannot operate as a will where the writer merely intended to give information,[12] or to make a request [13] or casual statement.[14] It would seem to be equally clear that there is no testamentary intent where the instrument states only a desire [15] or

note, given decedent in a transaction apparently involving the check referred to in the propounded letter, see Anderson's Admr. v. De Lapp, 300 Ky. 785, 190 S.W. (2d) 471 (1945); and De Lapp v. Anderson's Admr., (Ky. 1947) 203 S.W. (2d) 389.

[2] Bordwell, "The Statute Law of Wills," 14 IOWA L. REV. 1 (1928), lists nineteen states.

[3] ATKINSON, WILLS, § 134 (1937). Cf. Gulliver and Tilson, "Classification of Gratuitous Transfers," 51 YALE L. J. 1 (1941), citing the absence of "ritual value" as a reason for the rather limited recognition of holographic wills.

[4] For example, date, signature. See the cases referred to in 1 PAGE, WILLS, 3d ed., §§ 388-94 (1941).

[5] 1 PAGE, WILLS, 3d ed., § 91 (1941).

[6] As in Sneed v. Reynolds, 166 Ark. 581, 266 S.W. 686 (1924).

[7] But see N.C. Gen. Stat. (Michie, 1943) § 31-3, affording a statutory safeguard.

[8] Estate of Spitzer, 196 Cal. 301, 237 P. 739 (1925); 1 PAGE, WILLS, 3d ed., § 59 (1941).

[9] "A paper is not to be established as a man's will merely by proving that he intended to make a disposition of his property similar to or even identically the same with that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will." McBride v. McBride, 26 Gratt. (67 Va.) 476 at 481 (1875). Cf. Reeves v. Duke, 192 Okla. 519, 137 P. (2d) 897 (1943), holding that a holographic instrument nominating an executor but not disposing of any property was entitled to probate.

[10] Langfitt v. Langfitt, 108 W.Va. 466, 151 S.E. 715 (1930).

[11] 1 SCHOULER, WILLS, 6th ed., § 336 (1923); and cases collected in 54 A. L. R. 917 (1928), concerning letters as wills.

[12] In re Young, 95 Okla. 205, 219 P. 100 (1923).

[13] Estate of Meade, 118 Cal. 428, 50 P. 541 (1897).

[14] Ellison v. Smoot's Admr., 286 Ky. 768, 151 S.W. (2d) 1017 (1941).

[15] Spencer v. Spencer, 163 N.C. 67, 83, 79 S.E. 291 (1913).

intended future action,[16] but cases involving these features shade off into almost imperceptible distinctions. In cases involving letters of soldiers and sailors, the courts are inclined to relax the rules of construction and find testamentary intent where the instrument expresses only a desired disposition of property without an actual intention that the letter itself operates as a dispositive instrument.[17] A similar tendency is found in other cases. Thus, a letter to an attorney stating, "What I want is for you to change my will so that she will be entitled to all that belongs to her as my wife. . . . I don't know what the laws are in Montana. I don't know what ought to be done, but you do" was held testamentary.[18] In such holographic writings there is a considerable degree of freedom in construing equivocal language to mean that the instrument was written with testamentary intent. There are probably no presumptions in favor of such a construction,[19] and each case must to a certain extent stand on its own facts.[20] The principal case did not directly present the question of testamentary intent,[21] but since the court held that the letter filled every requirement of a valid will it must have regarded it as testamentary on its face. No evidence of surrounding circumstances was considered.[22] Although it might have surprised the testator to learn that he had made a will there may nevertheless be an element of justice in finding testamentary intent in such instances, and the principal case is at least consistent with other cases involving similar facts.

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[16] In re Johnson, 181 N.C. 303, 106 S.E. 841 (1921).

[17] Rice v. Freeland, 131 Va. 298, 109 S.E. 186 (1921); Cartwright v. Cartwright, 158 Ark. 278, 250 S.W. 11 (1923). Cf. Johnson v. White, 172 Ark. 922, 290 S.W. 932 (1927); Sullivan v. Jones, 130 Miss. 101, 93 S. 353 (1922).

[18] Barney v. Hayes, 11 Mont. 571, 29 P. 282 (1892). See also Milam v. Stanley, 33 Ky. L. Rep. 783, 111 S.W. 296 (1908); May v. May, 18 T.L.R. 184 (1901). But compare In re Johnson's Will, 181 N.C. 303, 106 N.E. 841 (1921), where this language was held non-testamentary: "I want you to write my will for me. . . . And I want to give [certain property to certain persons]."

[19] There may be a presumption to the contrary. 1 REDFIELD, WILLS, 4th ed., § 17 (1876). To the effect that the presumption against intestacy does not apply, see Estate of Kelleher, 202 Cal. 124, 259 P. 437 (1927), annotated in 54 A. L. R. 917 (1928); cf. Estate of Spitzer, 196 Cal. 301, 237 P. 739 (1925).

[20] Estate of Spitzer, 196 Cal. 301, 237 P. 739 (1925).

[21] Contestant apparently urged only that the instrument was irrevocable. Principal case at 389.

[22] But the court's remarks in the companion case, De Lapp v. Anderson's Admr., (Ky. 1947) 203 S.W. (2d) 389, indicate a knowledge of extrinsic circumstances.