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Holographic Wills Animus Testandi - Incorporation by Reference

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the released party be held not liable to any extent, that can be achieved only by a release of that party's pro rata share of the claim. The general effect is that no tortfeasor may be made liable for more than his share of the claim asserted. The injured party (creditor) is prevented from throwing the loss at his caprice to one or the other of the parties. We should note the effect of the act upon the concluding statement of the Montana court in the Lisoski case.[45]

> "It may be noted here additionally that under the facts as pleaded the Glasgow Motors, Inc., would get no benefit from its voluntary payment to this plaintiff if she may maintain her suit against these defendants, as from the allegations it appears that these defendants might in a second suit recover from it whatever amount the plaintiff might recover from them in this suit."

Under the uniform act, that result would not be reached since the amount paid by the released party would be charged against its share of the liability. No contribution could be obtained from it unless its pro rata share exceeded the amount paid.

In the writer's opinion the Montana legislature would do well to consider the Uniform Contributions Act from its effect on the broad field of contribution. It is thought advisable that the act be given serious consideration with a view toward certainty and uniformity in our law. And it is believed that after examining these and other closely related problems, the legislature will find that the adoption of the act will be a further step in the direction of a modern liberal code.

Cecil N. Brown.

[45] *Supra* note 39.

HOLOGRAPHIC WILLS
ANIMUS TESTANDI—INCORPORATION BY REFERENCE

In *In re Watts' Estate,*[1] a widower wrote a letter in lead pencil to his sister, Ida, some seven years before his death. In this letter, he discussed the condition of his health, conditions of weather and crops, and advised that if anything should happen to him, "you Will all Find By Bisnes Fix and in the Citszen Bank Still looks like Rain made ida over every thing." Upon learning of her brother's death, Ida went to the bank's attorney who obtained from decedent's safety deposit box an undelivered warranty deed to a farm and an undelivered bill of

[1] (1945) ....Mont....., 160 P. (2d) 492.

sale of certain personal property possessed by decedent at the time of his death. The sister offered the letter as a valid holographic will claiming the undelivered deed and bill of sale to have been incorporated in the will by reference. In deciding the case, the Montana Supreme Court found that the undelivered deed and bill of sale were not incorporated into the letter written by Watts so as to render the letter valid as a holographic will, where the letter purported to be wholly in the handwriting of deceased while no part of the deed or bill of sale was in his handwriting other than his signature. A dissenting opinion expressed belief that the circumstances showed testamentary intent, that the deed and bill of sale were sufficiently identified to be incorporated by reference, and that they should be so incorporated even though not entirely written by deceased.[3]

In the law of wills, it is elementary that there was no common law recognition of wills as we now understand them. The courts are, therefore, bound to a strict application of the laws governing testamentary disposition as defined by legislative bodies. The essential statutory elements are mandatory, and compliance with the statutes must be shown, otherwise validity of the will cannot be established. The strict construction of statutes applies with particular force to the admission of holographic wills to probate.[3] The recognition of holographic wills is a particular extension of rights to make disposition of property in that its requirements for validity are so few and informal. However unskilled in grammar, spelling, literary form or punctuation; whether written in ink or pencil;[4] on paper, reportedly on a bed post[5] or eggshell,[6] none of these things will operate as a bar to testator's ability to dispose by holograph. The single personal skill required is the ability to write. Yet with all the apparent latitude permitted, the basic requirements prescribed must be proven to meet the requisites before a court of probate can raise the instrument to the dignity of a valid will. Our

[2]In re Noyes' Estate (1909) 40 Mont. 231, 106 P. 355, 357; Barney v. Hayes (1891), 11 Mont. 99, 27 P. 384.

[3]If a part of the date is printed, a filling in of the month and day and completion of the year is insufficient, and the entire will is invalid. In re Noyes' Estate (1909) 40 Mont. 190, 105 P. 1017, 26 L. R. A. (N. S.) 1145.

[4]Meyers v. Vanderbelt (1877) 84 Pa. 510, 24 Am. Rep. 277 "Yet inasmuch as the statute is silent on the question, we cannot say the mere fact that it is written or signed in pencil, thereby makes it invalid. It is nevertheless a writing, known and acknowledged as such by the authorities, and fulfills the requirement of the statute."

[5]12 MICH. LAW REV. at page 468.

[6]Hodson v. Barnes (1926) 43 T. L. R. 71.

Montana statute[7] specifically provides for this special type of will, and gives it the same efficacy as a formal witnessed will. Holographic wills differ only in the manner and form of execution.

Writings frequently offered for probate are contained in personal letters in which the deceased has in the course of social correspondence expressed wishes, made promises, restated facts or disposed of his property to take effect after his death. Letters often do meet the requirements of a holographic will, but the case under discussion is an illustration of the inability of the proponent to prove a letter in probate which clearly expressed the deceased's wishes, yet lacked essential testamentary character.

The material portion of the letter presented in *In re Watts' Estate* is quoted:

> "Well ida if any thing Happen To me you will all Find My bisnes fix and in the citszen Bank Still looks like Rain made ida over every thing."

It was argued that the circumstances showed a testamentary intent, that the letter was written, dated and signed by the testator as required to make it a valid holographic will, and that the deed and bill of sale are a part of the will under the doctrine of incorporation by reference.

Proof that the deceased possessed animus testandi at the time the letter was written, that is, that the act and intent concur is particularly important in most holographic wills since there are no witnesses to testify to its existence. Proving the necessary testamentary intent must rest on the words of the testator, reading his manifestations in the light of surrounding circumstances. Although enlightened by circumstances, the writing itself must indicate a desire to dispose. As said in *Page* on *Wills* (2d Ed.) Vol. 1, §47:

> "In order that an instrument may amount to a will, it must show testator's intention to make a testamentary gift by that instrument as distinguished from a gift to be made, or spoken of as already made, by some other instrument."

The principle requiring a showing that the testator intended to dispose by *that instrument* is pointedly illustrated by the Kentucky court in Nelson v. Nelson:[8]

[7] R. C. M. 1935 §6981: "A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

[8] (1930) 235 Ky. 189, 30 S. W. (2d) 893.

"The animus testandi must exist contemporaneously with the execution of the instrument, and the intent that the instrument shall be a will must apply to the particular instrument offered as a will. If the paper shows no more than an intention that the person intended to make a disposition of his property in the future as indicated in the paper, it is not sufficient. It must appear that the paper itself was the instrument which he intended to be his will."

Thus if it shall appear under the circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, if it can be done consistently with the language of the instrument.[9] Present intent may be found even though within the instrument itself the testator indicates he will make a later will, or that the present writing is designed to be effective only until a formal witnessed will is executed.[10] However clearly deceased may have expressed his desires and intentions for the disposition of his property, probate can give no effect to this intent until the testator himself declares or indicates that it is by this instrument that he wishes his intent to be known and carried out. Written statements of deceased's present intent to make a certain disposition in the future[11] have been repeatedly held not testamentary in character. With equal uniformity, courts have refused probabe of writings reciting provisions and attempted dispositions purporting to have been done in the past.[12]

There is no definite fixed rule for determining testamentary intent. Yet, the language employed in the light of circumstances[13] must manifest the existence of a present intent to make known his last wishes which are to take effect after his death. The testator need not describe the writing as a will nor even himself consider it to be a will,[14] nor does the existence of matters other than the disposition of property in the written instru-

[9]Clark v. Ransam (1875) 50 Cal. 595.

[10]Instrument offered as last will and testament purported to be executed by testator about a year before his death, and recited that "Until I can have my will written, the following are my wishes in regard to my estate." Following this quotation, the instrument proceded to dispose of testator's entire estate. The writing was found to have been executed animus testandi. Nelson v. Nelson (1930) 235 Ky. 189, 30 S. W. (2d) 893.

[11]In re Kelleher's Estate (1927) 202 Cal. 124, 259 P. 437, 54 A. L. R. 913; In re Major's Estate (1928) 89 Cal. App. 238, 264 P. 542.

[12]In re Richardson's Estate (1892) 94 Cal. 63, 29 P. 484, 15 L. R. A. 635.

[13]In re Spitzer's Estate (1925) 196 Cal. 301, 237 P. 739; White v. Deering (1918) 38 Cal. App. 433, 177 P. 516, (education and knowledge of writer considered).

[14]Barnes v. Horne (1921) Tex. Civ. App.) 233 S. W. 859; Rice v. Freeland (1921) 131 Va. 298, 109 S. E. 186; Langfitt v. Langfitt (1930) 108 W. Va. 466, 151 S. E. 715.

ment nullify the effect as a will. Can it be said that the words "you will all find my bisnes fix made ida over every thing" indicate a present intention to dispose of his property to take effect after death? This writing conveys the thought that disposition had already been made and the writer wished to inform his reader of that fact. Reading the words in the light of the circumstances of Watts' previously having signed the deed and bill of sale to a sister of whom he was fond, it is possible to confuse decedent's ineffectual acts with testamentary intent. It is fair to say that deceased believed he had effectually disposed of his real and personal property covered by the deed and bill of sale at the time he signed his name to them. Believing he had made effective disposition, he later undertook to inform his sister of the action he had taken when he wrote the letter in controversy. This casual, informative writing lacks the character to make it effective as an instrument written with animus testandi. It is purely a statement of mistaken belief that an undelivered deed and bill of sale would operate to vest title in the sister after his death. No one will deny that Watts anticipated that his sister would become owner of this property, yet probate courts cannot undertake to give testamentary effect to a writing not so intended.

Turning to the question of incorporation of an extrinsic document in a will, three essentials are generally required to permit its incorporation. These essentials[15] may be briefly stated as follows: "(1) The will itself must refer to the document in such way as to identify it with reasonable certainty and as a writing already in existence and also show testator's intention to incorporate it. (2) Proof must be made that the document thus referred to was actually in existence before the will was written. (3) Proof must be made that the document thus sought to be incorporated is the identical one referred to in the will." If the instrument to be incorporated in the holographic will is in the handwriting of the testator, and all the requisites exist, then there is no difficulty about the incorporation of the instrument. But when as in the case under discussion, the instrument sought to be incorporated is not wholly in the handwriting of the testator, there exists a split of authority.[16] This split of authority is due in part to a refusal on the part of the courts to notice one important difference between incorporation by reference

[15]Newton v. Seaman's Friend Society (1881) 130 Mass. 91, 39 Am. Rep. 433.

[16]Incorporation permitted: Estate of Plumel (1907) 151 Cal. 77, 90 P. 192; Gooch, (1922) 134 Va. 21, 113 S. E. 873; Rogers v. Agricola (1928) 176 Ark. 287, 3 S. W. (2d) 26.

and integration. An integrated paper must be present at the time of execution and becomes a part of the will in the fullest sense, including admission to probate, while the incorporated document need not be present nor need it be probated with the will.[17] In line with the doctrine of incorporation, therefore, it is believed that the decisions allowing the incorporaton into a holographic will of material not in testator's handwriting represents the correct view on principle.

The majority holding in our Montana court took an opposite view, which is supported by Hewes v. Hewes,[18] a Mississippi decision:

> "When an extrinsic document is incorporated into a will by a reference thereto in the will, it becomes a part and parcel thereof; and since a will not attested by witnesses must be 'wholly written' by the testator himself, it necessarily follows that for an extrinsic document to be incorporated into and thereby become a part and parcel of a will valid only if 'wholly written' by the testator himself, such document must be so written; for should it not be, the whole will not be in the handwriting of the testator."

A report of this case shows the sole authority cited for this proposition is Gibson v. Gibson.[19]

A dissenting opinion on this question expresses belief that a holographic will may incorporate a paper not wholly in the handwriting of the testator. A pursuasive discussion of this view is contained in In re Soher's Estate,[20] a California decision, from which the following is quoted:

> ".....The only difference between an olographic and an attested will is in the form of execution. The statute has prescribed two forms in which written wills may be executed. In each case the instrument must be signed by the testator. But the formality of witnesses is dispensed with if the instrument is all in the handwriting of the testator

[17]In re Willey's Estate (1900) 128 Cal. 1, 60 P. 471; Tuttle v. Berryman 1893) 94 Ky. 553, 23 S. W. 345. COSTIGAN, CASES ON WILLS, (2d Ed., 1929) 267 note: "Integrated papers can constitute a holographic will only if all the papers are holographic, but courts may well permit a holographic paper to incorporate by reference a paper not in testator's handwriting, and may permit a will not in his handwriting to be brought down to the date of a holographic codicil by such codicil. If a will may incorporate other writings and may republish and revive prior wills, it may well be held that it is because it is a valid will, regardless of whether it is holographic or attested, that it has all these effects."

[18](1916) 110 Miss. 826, 71 So. 4.

[19](1877) Va. 28 Gratt 44.

[20](1889) 78 Cal. 477, 21 P. 8, 9.

himself. One form is the precise equivalent of the other. Whatever would be good as an attested will or codicil is good as an olographic one, if written, dated, and signed by the hand of the testator. And whatever may be done in or by the one may be done in or by the other. Therefore, if the formalities of attestation are not required in a document referred to by an attested will or codicil, the corresponding formalities are not required in a document referred to in an olographic will or codicil. ..... And we think that the rule is a sound and salutary one. If testators are to be encouraged by a statute like ours to draw their own wills, the courts should not adopt upon purely technical reasoning a construction which would result in invalidating such wills in half the cases."

In accord with the above quotation, it is submitted that since holographic wills are by our statute, apparently accorded equal rank with formal witnessed wills, what may be done by one type of will may also be done by the other. Assuming the presence of the three essentials for incorporation by reference in order to guard against fraud or mistake, it is believed that the court ought to permit incorporation of an extrinsic document not entirely in the handwriting of the testator in a holographic will.

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RECOVERY UNDER THE WORKMEN'S COMPENSATION ACT FOR THE DEATH OF A MINOR

A considerable variance exists in the Workmen's Compensation Laws of the several states with respect to the inclusion of "minors" in the definition of "employees" under the Act.

The statutes of four states, in defining employee, restrict persons coming under the Act to those lawfully employed.[1] In these states illegally employed minors are denied recovery under the Workmen's Compensation Act.[2]

Twenty-nine states have statutes making no mention whether the employment must be lawful or whether it may be unlawful.[3] In these jurisdictions there is a conflict as to

[1]Minnesota, Nebraska, Utah and West Virginia.
[2]Westerlund v. Kettle River Co. (1917) 137 Minn. 24, 162 N. W. 680; Allen v. Trester (1924) 112 Neb. 515, 199 N. W. 841; Jackson v. Monitor Coal and Coke Co. (1925) 98 W. Va. 121, 126 S. E. 492.
[3]Alabama, Connecticut, Delaware, Idaho, Illinois, Iowa, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington and Wisconsin.