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A.J. White Hutton

PROCEDURAL DETERMINATION OF TESTAMENTARY INTENT IN PENNSYLVANIA

By

A. J. WHITE HUTTON*

A will is defined by our courts as the legal declaration of one's intentions to be carried out after the declarant's death.[1] No wills statute in this commonwealth has either defined a will or prescribed any form for the same. Therefore, any person, of the required age, is enabled to draw his will or that of another and in any words, provided the instrument as written conforms to the above general definition.[2] With this legal looseness, it is not strange that our reports teem with cases, odd and unique as to fact and form, wherein the courts struggle to reach a just conclusion whether the particular paper constitutes, in the sonorous phrase of the law, "a testamentary disposition."

The *Kauffman* case[3] is probably the latest in which the determination of testamentary intent has come before the supreme court and wherein per curiam the decree of the Orphans' Court of York County was affirmed "on the comprehensive opinion of President Judge Gross."

A review of this case and discussion of other authorities pertinent may aid, it is hoped, those interested in the process of determining testamentary intent and just where "the two witness" rule fits into the exercise of the judicial function as a part of the determination. In the instant case the decedent, an unmarried woman, died May 22, 1949 at the age of eighty-seven years. Letters of administration were issued by the register on May 26, 1949, but on September 23, 1949, a son by a former marriage, presented his petition to the register for the probate of an undated instrument in writing as the decedent's will reading as follows:

"dear bill
i want you to have farm
Annie Kauffman."

The register refused to admit the paper to probate on the ground that it was not testamentary in character. From this decision the proponent appealed to the orphans' court. On petition of the proponent, a citation was issued and directed to be

*A.B., Gettysburg; A.M., Gettysburg; LL.B., Harvard; LL.D., Gettysburg; Professor of Law, Dickinson School of Law; former Member Pennsylvania House of Representatives; Author of HUTTON ON WILLS IN PENNSYLVANIA; Member of Pennsylvania and Franklin County Bar Associations; Member of Advisory Committee, Law of Decedents' Estates and Trusts, Joint State Government Commission of Commonwealth of Pennsylvania.

1 Re Kauffman's Estate, 365 Pa. 555, 76 A.2d 414 (1950); Lewis' Estate, 139 Pa. Super. 83, 11 A.2d 83 (1940); Reynolds v. Maust, 142 Pa. Super. 109, 15 A.2d 853 (1940).
2 Hutton, *Testamentary Character and Intent*, 48 DICK. L. REV. 22 (1943).
3 See note 1.

served upon all the heirs at law and next of kin of decedent. Eventually it was stipulated by all the parties in interest that the court decide whether an issue d.v.n. be awarded and if so that the court should also decide the issue without the aid of a jury.[4] The position of contestants was that the paper purported to be no more than a letter and did not show testamentary intent. An additional position was that extrinsic evidence to show testamentary intent is not admissible. Lastly, that if such evidence is admissible, the "two witness rule" is applicable. The learned court in an elaborate series of findings of fact and an application of the principles of law concluded the paper was of testamentary character legally proved and was entitled to probate and directed the register accordingly. It was observed that the problem involved was solely of probate and therefore no matters of distribution or construction of will were relevant.[5]

Legal Declaration Of Intentions

Adhering to the definition of a will, the question recurs what is the meaning of the particular combination of words and who is the arbiter of that meaning? Judge Gross answers the query succinctly:

> "In all cases of this kind where a paper is proposed for probate and its testamentary character is denied, it becomes the duty of the court in the first instance to examine the paper, its form and its language, and therefrom determine as a matter of law whether or not it shows testamentary intent with reasonable certainty. If testamentary intent is satisfactorily revealed from such examination by the court, the paper should be probated as a will."

A few cases will illustrate the operations of the judicial function as just outlined.

In *Sullivan's Estate*[6] a model of brevity, clarity and terseness, howbeit with little regard for book spelling, the testator directed:

> "March the 4 Will my properti to my wief my death
>
> John Sullivan."

The writing is beyond doubt testamentary. The words "my death" could have been omitted. The significant word remaining is "Will," a technical expression with a meaning recognized as such in legal and lay parlance.[7] It was held this paper was properly admitted to probate. To show the evolution in the judicial process of ascertaining and determining the meaning of words in *Gaston's Estate*[8] the words used by the writer of the paper were, "It is my wish." The word "wish" in this sentence was pronounced as the equivalent of the word "will" and

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[4] That jury trial may be waived, see *Probate of Wills in Penna.*, 54 DICK. L. REV. at page 409 (1950).
[5] Re Rockett's Will, 348 Pa. 445, 35 A.2d 303 (1944).
[6] 130 Pa. 342, 18 A. 1120 (1889).
[7] See writer's discussion, *Testamentary Character and Intent*, 48 DICK. L. REV. at page 24 (1943).
[8] 188 Pa. 374, 41 A. 529 (1898).

therefore testamentary by judicial fiat.[9] In the oft cited *Knox's Estate*[10] Mitchell, J., a careful and exact reasoner, pronounced "clearly testamentary" a letter left by the decedent, written in lead pencil and signed "Harriet." The phrases emphasized by the learned justice were "A few things I would love to have done" coupled with the direction "Please have just my baptismal names on stones." Thus the words "would love to have done" taken with the latter directory sentence meant in the judicial mind, "I will to be done." In *Hengen's Estate*[11] a paper undated was offered for probate as a codicil to a formal will, the latter dated July 20, 1935, and testatrix dying January 24, 1938, the words were:

> "I want Mamie to have my House
> 544 George St.
>
> M. L. Hengen."

It was held the language was testamentary. Thus, as it appears by the aforegoing cases, the courts in a series of progressive steps have started with the word "will" and then proceeded to "wish" as the equivalent of "will" and then "want" as the same as "wish." Finally in the *Knox* case the phrase "I would love to have done" is interpreted as meaning "I will to be done."

In *Zell's Estate*[12] Linn, J. concluded:

> "If the instrument is a legal declaration of Zell's intention directed to be performed after his death, it is a will."

The learned justice further declared that the testamentary character of the instrument being apparent on its face, it was the duty of the court to give it effect.[13]

As was pointed out by Simpson, J., in *Kimmel's Estate*[14] the informal character of a paper is immaterial and by no means precludes the court from finding testamentary intent. Many cases were cited of deeds, mortgages, letters, powers of attorney, agreements, checks and notes in form but nevertheless held to be wills owing to certain words or phrases therein indicating testamentary character.

It may be that the language of the paper does not show testamentary intent and on this score Judge Gross in the *Kauffman* case observed:

> "On the other hand, if, from such examination (that is by the Court) the paper is shown not to be a testamentary disposition, but is shown to be a document of another type, then it is not to be probated as a will."

There are many cases in the reports illustrative of the court's action in declaring testamentary intent to be lacking. An early case is that of *Stein* v. *North*[15] where

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[9] *Cf.* Fosselman v. Elder, 98 Pa. 159 (1881), "My wish."
[10] 131 Pa. 220, 18 A. 1021 (1890).
[11] 339 Pa. 547, 12 A.2d 119 (1940).
[12] 329 Pa. 312, 198 A. 76 (1938), citing many cases.
[13] Re Tranor's Estate, 324 Pa. 263, 188 A. 292 (1936).
[14] 278 Pa. 435, 123 A. 405 (1924). Here a crudely drawn letter was held testamentary.
[15] 3 Yeates 324 (1802).

the facts were that an uncle in this country wrote to his nephew, living abroad, promising if the nephew would come over here and prove obedient and follow his directions the uncle would make the nephew heir of his whole estate. It was held that the language used was not precise enough to operate, either as a will or a contract. In *Shields* v. *Irwin*[16] one executed an instrument under seal declaring that he was justly indebted to a certain person for personal services and that his executors should pay to this person the sum of $1000.00. The instrument was held to be an obligation and not a testamentary disposition.[17]

In *McCunis' Estate*[18] the register admitted to probate a paper signed by the decedent and reading as follows:

> "I want you, E. A. Kerr, to look after my property and if I don't sell it, I will sign it over to you for taking care of me."

The lower court dismissed an appeal from the register's action in admitting to probate this paper but the supreme court reversed the decree and held the paper non-testamentary.

Extrinsic Evidence

In *Kauffman's Estate,* Judge Gross admitted extrinsic evidence to show the circumstances and conditions attendant upon the signing of the paper by the decedent, however the learned court made this pertinent observation:

> "Under the authority of In *Re Hengen's Estate, supra,*[19] which we will discuss later, we might have been warranted in holding that, upon proper proof of its execution by the decedent, the disputed paper was prima facie the will of the decedent and thus have placed the burden of proving the absence of testamentary intent upon the contestants. The proponent, however, chose to assume the burden of proving testamentary intent."[20]

The aforegoing statement is sound in law and excellent in pointing out the proponent.[21]

It was in *Kisecker's Estate*[22] that Judge Stewart, then of the O. C. of Franklin County, delivered a classic opinion on testamentary intent, extrinsic evidence and the—"two witness" rule. It has been our guide for over half a century. The contested paper signed at the end thereof was as follows:

> "I this day, the 18th of December, 1888, give all my property real and personal to Ruthy D. Long and Vesta A. Long, but I am to have the use of all so long as I live, and I to pay all the taxes and keep up repairs

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16 3 Yeates 389 (1802).
17 *Cf.* Frew v. Clarke, 80 Pa. 170 (1875). See also Patterson v. English, 71 Pa. 454 (1872); Tyson's Estate, 336 Pa. 497, 9 A.2d 733 (1939).
18 263 Pa. 523, 109 A. 156 (1920), per Stewart, J.
19 See Note 11.
20 HUTTON ON WILLS, pp. 132, 178.
21 *Cf.* Keen's Estate, 299 Pa. 430, 149 A. 737 (1930).
22 190 Pa. 476, 42 A. 886 (1899); 48 DICK. L. REV. 36 (1943).

and after my death Ruthy D. Long and Vesta A. Long is to have full and free use of all my property, for value received."

Said the learned court:

> "Judged by the language alone, that is, allowing the paper to speak for itself, either a present conveyance or a posthumous disposition may have been intended. The paper is no more inconsistent with the one than the other, while the terms used are ordinarily employed in conveyances of present interest, yet considered connectedly and as a whole they seem to disclose a purpose that the instrument is not to take effect until after the death of the maker. *Were we shut off from all considerations other than those to be found in the paper itself, we would allow this latter view to prevail as the expressed intention of the maker. What little extrinsic evidence there is is only confirmatory of this conclusion, and there is no reason whatever why it may not be considered.*" (Emphasis supplied by the present writer.)

In affirming the decree ordering the register to admit the paper to probate, and dismissing the appeal the supreme court said per curiam:

> "The paper in controversy was undoubtedly testamentary. It was to take effect after the death of the testator. It was in writing signed at the end thereof by the deceased. The opinion of the learned court below covers every contention of the appellant so fully and so entirely to our satisfaction, that we affirm the decree for the reasons there stated."[23]

The *Kisecker* and *Kauffman* cases have general points of similarity as to fact and reasoning. Furthermore, both are affirmations per curiam and sustain the principle of judicial determination of the problem of what is a will. In *Re Yentz' Estate*[24] it was said by Maxey, J. concerning the admission of extrinsic evidence:

> "As to the proof of attendant or extrinsic circumstances when there is a question of the nature of a paper, offered as testamentary, see Page on Wills, 34d. Ed. Vol. 1, sec. 59, p. 137, and In Re Sunday's Estate, 167 Pa. 30, 31 A. 363. See also Fellbush v. Fellbush, 216 Pa. 141, 65 A. 28."[25]

In *Kisecker's Estate*[26] as already pointed out, it was held that extrinsic collateral evidence is always competent to show that a paper was written and executed with testamentary intent. In referring to such evidence Judge Stewart made these pertinent observations:

> "Nothing short of a positive and unequivocal expression from the maker herself could more strongly negative the idea of an intention to convey presently than the facts and circumstances disclosed in the evidence. This paper was written and executed by the maker ten years before her death. It was never delivered to any one, but remained to the end in her exclusive possession, not that it had been forgotten and was overlooked, for, until four or five days before her death, she had kept

23 Mitchell, J. was at this time on the Supreme Bench; *cf.* his opinion in the same tenor in Knox's Estate, 131 Pa. 220, 18 A. 1021 (1890).
24 345 Pa. 393, 29 A.2d 13 (1942).
25 For discussion of Pa. cases—HUTTON ON WILLS, 174
26 See Note 22.

> it where she must frequently have seen it, and in the very place of all others where one in her situation would be most likely to keep a will, and least likely to keep a deed,—in her Bible. A very few days before her death, she directed an attendant to read it aloud in her hearing, and then to place it carefully away in some other place. To no one did she speak of it as her will, yet having it read over to her within a few days of her death, and then directing that it be put away in some safe place, such circumstances point unmistakably to the conclusion that she herself regarded it as a posthumous disposition of her property."

In *Kauffman's Estate*[27] Judge Gross as he stated would have been legally justified in ordering the probate of the disputed paper without extrinsic evidence but in admitting the same so fully as appears, any lingering doubt as to intent was dispelled. This result is in accord with the reasoning of the *Kisecker* case over fifty years before.

Two Witness Rule

It was urged in the *Kauffman* case that the "two witness rule" as to wills was applicable. This rule was stated by Gibson, J. over one hundred and twenty years ago[28] and was epitomized in *Orlady* v. *Orlady*[29] as follows:

> "Proof of execution must be made by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence, so that no link in it may depend on the credibility of but one."

On the matter of the "two witness rule" Judge Stewart in the *Kisecker* case observed:

> "It is true that there are cases which recognize the doctrine that testamentary intent is an essential link in the chain of evidence necessary to establish a will, and like any other essential fact must be established by two witnesses. The cases of *Scott's Est., supra,* and *Sunday's Est.,* 167 Pa. 30, may be instanced. But an examination of these cases and all others to like effect will show that this rule obtains only where no testamentary intent is derivable from the instrument itself, indeed, only in cases where the nature and form of the instrument are inconsistent with such intent. Under such circumstances, where extrinsic evidence is relied upon exclusively to show that the instrument was intended to operate as a will, it is not difficult to understand why the statutory requirements are held applicable. But where the form and language used are entirely inconsistent with such intent, under judicial construction, or the intent is fairly derivable from a consideration of the entire instrument, the necessity for two witnesses relates only to the formal execution of the paper. Where an instrument is by its terms a disposition of property to take effect after the maker's death, no evidence of publication or acknowledgment on his part that it is a last will is required. If legal proof be furnished of its execution, the law will presume that the maker signed it understandingly, and that he intended it to be his will."[30]

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27 See Note 1.
28 Hock v. Hock, 6 S. & R. 47 (1830).
29 336 Pa. 369, 9 A.2d 539 (1939).
30 *Cf.* 11 Pa. Super. 293 (1899).

At another place[31] the writer has discussed the cases concerning this rule and its proper application,[32] giving a summary of the matter as follows:

> "The rule, therefore, deduced from the cases, concerning the two witness requirement, is that it only applies when issues are granted by the court to determine questions of testamentary intent upon facts presented to the jury. If the writing is doubtful and the extrinsic facts do not clear this doubt to the satisfaction of the judge, the result may be either that the chancellor could not conscionably support a verdict for the writing as showing testamentary intent and therefore holding against probate, or that a substantial dispute having arisen, a verdict either way could be supported, in which case the issue would be granted. However, if as pointed out in *Sunday's Estate, supra,* the act is distictly non testamentary and couched with strict technical propriety in the words of contract, deed, note or other non-testamentary form, there is no place for extrinsic evidence and to admit any is to violate the terms of the Wills Act, specifying that 'every will shall be in writing.' On the other hand if the doubt is dispelled by any extrinsic evidence to the satisfaction of the court, the prayer for an issue will be denied and the paper ordered admitted to probate."

In the *Kauffman* case Judge Gross declared:

> "If, however, after considering the extrinsic evidence in connection with the propounded paper itself, the ambiguity has not been dispelled and the Court is still in doubt that the language of the propounded paper is susceptible of but one meaning and that a verdict of a jury would be sustained either in favor of or against the paper as a will, an issue d.v.n. should be granted, unless waived and the final decision lodged in the lap of the Court, as the parties have done, by stipulation, in the instant case."[33]

Conclusion

Under the probate procedure in Pennsylvania the first point of contact is with the register of wills.[34] It is the register before whom all wills must be probated. A will is not admissible in evidence until it has been probated.[35] The register, in passing upon a paper offered for probate, acts as a judge and as such exercises judicial functions within his orbit as prescribed by statute. Every wills act in this commonwealth has specified that wills be proved by the oaths or affirmations of two or more competent witnesses. The Wills Act of 1947 provides:

> "Section 4. Witnesses. No will shall be valid unless proved by the oaths or affirmations of two competent witnesses."[36]

Section 4 above quoted is a repetition of the earlier statute. When the statute states that the will is to be proved, the assumption is that the instrument

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31 48 DICK. L. REV. 34 et. seq. (1943).
32 See Gibson's Est., 128 Pa. Super. 44, 193 A. 302 (1937).
33 Citing Hutton on Wills, page 178.
34 *Death As a Jurisdictional Fact Before the Register of Wills* etc., 53 DICK. L. REV. 108 (1949).
35 Wilson v. VanLeer, 103 Pa. 600 (1883); *cf.* Wilson v. VanLeer, 127 Pa. 371, 17 A. 1097 (1889).

propounded is a will in form and substance. This determination as already pointed out in the discussion is a matter of law for the court. Therefore, in point of time the legal determination as to whether the paper propounded is a will must first be determined. Then follow the proofs of execution, by the testimony of two witnesses.[87]

In all cases the function of the register is to come to a determination as to whether the paper propounded is in law a will in the light of the decided cases. In *Kauffman's Estate* it does not appear from the record available just how much study the register actually made, but the opinion of Judge Gross in reversing the register is an excellent exposition of the law on this subject. At another place[88] the present writer has in the discussion of this general subject deduced certain propositions and the same are herewith repeated for the benefit of any reader who does not have access to the original paper:

1. A will may be written with any material and upon any material but the nature of the materials and the position of the testator at the time of execution will throw considerable light on the testamentary intent.
2. A will may be in any form of language provided testamentary intent can be construed therefrom.
3. The ascertainment of testamentary intent is a matter of interpretation of language and a question of law for the Court.
4. Where the language is not clear the Court may be aided in the interpretation by extrinsic evidence, in which case the two witnesses requirement is not applicable and circumstances disclosed may resolve any doubt existing as to the nature of the instrument.
5. If the Court determines as a matter of law that the evidence for the contestant or proponent would not support a verdict for either as the case might be, there are no grounds for the granting of an issue *d.v.n.*
6. If the Court determines that an issue should be granted or that the facts presented to the Court as the trier of the same raise a doubt, this doubt must be dispelled by the two witness requirement.
7. If the language of the paper propounded is susceptible of but one meaning, there is no question of interpretation and extrinsic evidence is inadmissible.
8. Where the language of the paper is clear, the subscriber is bound by the legal intent deduced therefrom except in cases of fraud, accident or mistake.[89]

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86 Report of Commission, page 38.
87 See *Execution of Wills*—47 DICK. L. REV. 65 et seq. (1943).
88 Testamentary Character and Intent, 48 DICK. L. REV. 22 (1943).
89 A will containing no intelligent bequest or devise is void for uncertainty and parol evidence is not admissible to explain what the testator meant by such an instrument, Kelley v. Kelley, 25 Pa. 460 (1854); Carlin's Est., 36 D. & C. 704 (1939); Douglas' Est., 303 Pa. 227, 154 A. 376 (1931); Brennan's Est., 324 Pa. 410, 188 A. 160 (1936).