

January 1963

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Jacque W. Best

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Recommended Citation

Jacque W. Best, *Holographic Wills in Montana - Problems in Probate*, 24 Mont. L. Rev. (1962).

Available at: <https://scholarship.law.umt.edu/mlr/vol24/iss2/4>

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HOLOGRAPHIC WILLS IN MONTANA—PROBLEMS IN PROBATE*INTRODUCTION*

Holographic wills are those which are wholly in the testator's handwriting. In Montana they have historical significance because of the bucolic existence of Montanans. With a sparse and wide-spread populace it was difficult to have a formal will drafted, and many times there weren't enough people in the immediate vicinity to obtain the requisite witnesses. Lawyers were few, distances great, and transportation limited.

History

Though holographic wills were particularly adaptable to the west, they were not conceived in this country, but were borrowed from France via the Napoleonic Code and Louisiana statutes.¹

The Montana statute² allowing holographic wills was adopted verbatim from the California Civil Code³ in 1877. Since that date no changes have been made in the Montana provision.

Holographic wills are not recognized by common law, and only nineteen states have statutory provisions allowing them.⁴ The statutes are of two general classifications⁵: the Virginia type and the Louisiana type. The Virginia type is a "negative" statute which does not establish a new category of wills, but merely dispenses with the necessity of witnesses if the instrument is in the handwriting of the testator. Statutes like that of Virginia are found in nine states⁶ located largely in the Southeast.

The Montana statute is patterned after the Louisiana Code. A similar statute appears in ten Western states.⁷ It differs from the Virginia statute in that it creates a distinct type of will which need not be witnessed.

The two types of statutes amount to about the same thing. Because the Virginia statutes does not create a separate kind of will, all of the formal requirements other than attestation have to be met.

Although only a minority of states have recognized holographic wills, the Model Execution of Wills Act⁸ and the Model Probate Code⁹ contain provisions for such instruments.

Purpose of this Article

Holographic wills have been characterized by dual treatment in courts. On the one hand, the courts have been liberal in finding testamentary intent

¹53 CAL. JUR. 2d *Wills* § 451 (1960).

²Revised Codes of Montana, 1947, § 91-108. (Hereafter cited as R.C.M. 1947.)

³CAL. CIVIL CODE § 1277. The present California code section appearing in CAL. PROBATE CODE § 53 contains an additional sentence not found in the original code section. It has been suggested that this sentence does not change the original statute in any way. See Mechem, *The Integration of Holographic Wills*, 12 N.C.L. REV. 214 (1933-4).

⁴Hansen, *Holographic Wills*, 95 *Trusts & Estates* 875 (1956).

⁵Note, 45 VA. L. REV. 614 (1959).

⁶ATKINSON, *WILLS* § 75 (2d ed. 1953).

⁷*Ibid.*

⁸MODEL EXECUTION OF WILLS ACT, 9 U.L.A. (1951) 422, § 5.

⁹MODEL PROBATE CODE § 48 (Simes 1946).

in holographic wills. They recognize the underlying policy of liberality making possible the drafting of holographs by untrained lay persons to obtain secrecy or to avoid legal fees which accompany formal wills.

On the other hand, the courts have been strict in requiring compliance with the statutory formalities such as dating and the requirement that the will be *entirely* in the testator's handwriting.

This comment is directed to a consideration of this dual treatment and the insidious effect it has had on the law of holographic wills in Montana. The analysis presented lays the groundwork for the radical revision suggested in the conclusion to this article.

When is a Will Entirely Written by the Hand of the Testator?

Section 91-108 of the Revised Codes of Montana, 1947, states: "A holographic will is one that is *entirely* written, dated, and signed by the hand of the testator himself." (Emphasis supplied.)

The question most frequently arises when the testator uses a letter-head or form upon which to write his will, and by so doing includes within his will parts of the printed matter already on the paper. In such instances two theories have been adopted by the courts.¹⁰ The first is termed the "intent" or "intent to incorporate" theory, and the result depends upon whether the testator intended to make the printed matter a part of his will. If he so intended, the entire will is invalid, even though the non-holographic portion is not necessary to an understanding of the will. This view is apparently followed only in California¹¹ and Utah.¹² Professor Mechem suggests¹³ that recent decisions indicate that both states are gradually abandoning this theory.¹⁴ Commenting on this theory, Professor Mechem stated,¹⁵ "Experience shows it to be one apt to work harshly, difficult of application, and prolific of litigation; it is significant to note the tendency to modify it in the state which originally applied it most rigorously."¹⁶

The rival theory is called the "surplusage doctrine" and it operates by disregarding the non-holographic matter, provided enough remains in the testator's hand to satisfy the statutory requirements.¹⁷ The application of this theory has resulted in the probate of wills created by filling in the blanks on a printed form.¹⁸ The cases accepting this theory begin with the proposition that the testator intended to adopt the printed form, and conclude by disregarding the printing as surplusage. As stated by Professor Atkinson,¹⁹

The principal objections to this theory are that it makes hash of the statute, especially if it requires that the will be *entirely* in the

¹⁰Mechem, *supra* note 3 at 216.

¹¹Estate of Thorn, 183 Cal. 512, 192 Pac. 19 (1920).

¹²Estate of Wolcott, 54 Utah 165, 180 Pac. 169 (1919); Estate of Yowell, 75 Utah 312, 285 Pac. 285 (1930).

¹³Mechem, *supra* note 3 at 216.

¹⁴*Id.* at n. 18.

¹⁵Mechem, *supra* note 3 at 216.

¹⁶Mechem, *supra* note 3 at n. 18.

¹⁷ATKINSON, *supra* note 6 at n. 16.

¹⁸*Id.* at n. 17.

¹⁹*Id.* § 75.

handwriting of the testator, and that while the courts may carefully omit the non-holographic words on probate, they may be tempted to give them effect in the process of construction.

There are apparently no Montana cases wherein the court considers these divergent approaches and makes an unequivocal choice. Both Professors Mechem²⁰ and Turrentine²¹ cite the Montana case of *In Re Noyes' Estate*²² as authority for the proposition that Montana has adopted the "surplusage theory." However, a careful examination of this case will disclose no clear-cut holding on this point.

In the *Noyes* case the first three figures of the year (190..) were printed on the letterhead. The final figure was placed in the testator's handwriting. The question considered by the court was whether this complied with the statute²³ requiring the entire writing (including the date) to be in the testator's handwriting. The court intimated that if the final two figures (03) had been holographic, then it may have been sufficient. This was undoubtedly what the learned professors noted in citing the case as representing the "surplusage doctrine." It should be noted, however, that the will, as it actually existed, would have been insufficient under *either* of the theories. Even under the surplusage theory there must remain enough of the will in the testator's handwriting to meet the statutory requirements. If the court reasoned (as, in fact, it did) that "3" standing alone was not sufficient as the designation of a date, then the decision would have been the same regardless of the theory used.²⁴

If Professor Mechem is correct in stating that California has abandoned the intent theory,²⁵ then it would be fair to say that Montana should follow the surplusage theory and that it should profit from the parent state's experience. The surplusage theory is simple of application and predictable of result. In Professor Mechem's own words: "The disadvantages of the intent theory are a matter of actual experience; those of the surplusage theory may be said to be as yet latent."²⁶ It would seem logical for Montana to follow the California courts on this point, but such speculation must be tempered with caution.

Integration Problems of Holographic Wills

What writings of the testator are to be considered together as his will? Where attested wills are the subject of litigation this matter is simpler because the act of execution and attestation usually form a "finishing touch" which indicates what was meant to be included within the "will" of the testator. This is not true of holographic wills since they require no subscription²⁷ in many cases, and they never require attestation.

²⁰*Supra* note 3 at n. 25.

²¹TURRENTINE, *WILLS AND ADMINISTRATION*, 113, n. 10 (1954).

²²40 Mont. 190, 105 Pac. 1017 (1909).

²³R.C.M. 1947, § 91-108.

²⁴A further discussion of this case appears under the subsection "Dating of Holographic Wills" herein.

²⁵See *Supra* notes 13 and 14.

²⁶Mechem, *supra* note 3 at 218.

²⁷ATKINSON, *supra* note 6 at § 75.

Holographic wills need not be completed in a single day.²⁸ Yet, a few cases²⁹ among them California decisions, impose a time test. Without setting an arbitrary time limitation, these cases generally require that the questionable matter be "a part of one continuous instrument."³⁰ In neither Louisiana nor California (both of which have applied a time test) does a will ever appear to have been rejected for this reason; the rule seems merely to encourage contests.³¹ Mechem suggests that if the papers are all holographic and there is a dating and signing among them, it is immaterial when or where the dating and signing were done, so long as it may be shown that the testator meant all the papers together to constitute his will.³² This test, he states, will yield the same results as the cases have reached, and will also void unnecessary litigation.³³

The only Montana case discussing this matter is *Estate of French*.³⁴ This case involved five purported testamentary writings which were found in the strong box of the testatrix: 1) an incomplete holographic will (which had only a year for a date) stating it would be made in a different form in the future; 2) a fully attested formal will; 3) a letter to the sole beneficiary directing the burial details and also containing certain testamentary dispositions; 4) two holographic scraps of paper, one of which was dated and signed and both of which related to testamentary wishes of the testatrix; and 5) a further undated holograph directing the executor to pay the funeral expenses out of certain insurance proceeds. These writings were kept together by the testatrix during her lifetime, and were so found at her death.

The majority of the court by-passed the question of integration. They rejected an argument as to the validity of the first holographic will on the grounds that it did not have a sufficient date (it bore only a year date). The majority also considered the formal will and on this point they remanded with the suggestion that additional evidence be admitted and that it be considered for probate. No reference was made to the other three documents which were found in testatrix's strong box.

Justices Adair and Bottomly (in a 91 page dissent) agreed that the five writings constituted testatrix's will *in toto*. Although the facts are not clear, it appears that none of the instruments were conflicting or contradictory. These two justices further suggested (consistent with Professor Mechem's position) that the original holographic will could adopt the date of later writings and was therefore complete within the Montana code section defining holographic wills. In reaching this conclusion the dissenters relied on R.C.M. 1947, section 91-204 which says that several testamentary instruments should be construed together in determining what was the testator's will.

Justice Angstman concurred specially with the majority and properly noted that the reason the majority did not consider the probate of the five

²⁸*Id.* at § 79 n. 18.

²⁹*Lagrange v. Merle*, 5 La. Ann. 278, 52 Am. Dec. 589 (1850). *Cf.*, *Will of Miller*, 194 N.Y. Supp. 843 (1922).

³⁰Mechem, *supra* note 3 at 223.

³¹*Id.* at 224.

³²*Id.* at 221.

³³*Id.* at 221.

³⁴137 Mont. 228, 351 P.2d 548 (1960).

instruments together was that no such claim had been made in the lower court. Because of this procedural oversight the case can not be said to represent a holding favorable to either position on the question of integration. This question, like so many others in the field of holographic wills, remains unanswered in Montana. One can only guess that the numerous California decisions⁵³ would be of great influence on the court.

Incorporation by Reference

Incorporation by reference means that papers which are not a part of the will proper, and which need not be present when the will is probated, can be considered as a part thereof for some purposes.⁵⁴ A successful incorporation by reference requires: 1) the will must refer to the writing to be incorporated; 2) there must be a sufficient description of the writing; 3) the writing must be described as presently existing, not in terms of futurity; and 4) there must be an intent to incorporate the writing.

For some time academicians and practitioners have questioned whether non-holographic materials can be incorporated into a holographic will. Cases and authorities have not agreed. California, in particular, has an array of cases which reflects the inconsistency of treatment in that court.⁵⁵ Leading authorities have struck an impasse on the question; Professor Atkinson favors liberal incorporation⁵⁶ and Professor Mechem contends that such a stand is inconsistent with the requirement that the entire instrument be handwritten.⁵⁷

Again, no Montana case seems squarely in point. In the dissenting opinion of *In Re Watts' Estate*,⁵⁸ Justice Angstman made the following statement:⁵⁹

I think a holographic will may, by reference, incorporate another instrument which is not entirely in the handwriting of the testator. This court, in line with the overwhelming weight of authority elsewhere, has held that a holographic will may by appropriate reference incorporate a paper not of a testamentary character and not wholly in the handwriting of testator so as to make it a part of the holographic will. (Citing *In Re Noyes' Estate*.)

Unfortunately, the remainder of the court preferred to treat the case as one of testamentary intent. Because of this, the weight of Justice Angstman's statement is a matter of speculation.

On principal, Mechem's view seems more easily defensible than does Atkinson's. Atkinson would be forced to agree that a single typewritten word in a holographic will can destroy its testamentary validity. Yet he would argue that an entire page of typewritten material which was incorporated by reference does not affect its validity. Certainly nothing akin to logic would suggest this result. The theory underlying the validity of holographic wills is that they are protected from forgery and misrepre-

⁵³53 CAL. JUR. 2d *Wills* § 472 (1960).

⁵⁴ATKINSON, *supra* note 6 at § 80.

⁵⁵53 CAL. JUR. 2d § 455 (1960).

⁵⁶ATKINSON, *supra* note 6 at § 80.

⁵⁷Mechem, *supra* note 3 at 225.

⁵⁸117 Mont. 505, 160 P.2d 432 (1945).

⁵⁹R.C.M. 1947, § 91-108.

sentation because they are in the testator's handwriting. The same could not be said of typewritten matter incorporated by reference into a holographic will. Carried to its logical conclusion, however, this argument would also apply to incorporation by reference in formal wills. The proponents of the Atkinson view argue that if a non-executed, non-attested instrument can be incorporated into a formal will by reference, why should not a non-holographic writing be acceptable in a holographic will? Are not both processes merely safeguards against forgery and misrepresentation? Why, then, should one be allowed and not the other? It is submitted that the lack of formality surrounding holographic wills makes it more vital that non-holographic matter be excluded than that non-executed matters be excluded from formal wills.

Dating of Holographic Wills

Determining what constitutes a valid dating is the single most litigated point of holographic wills in Montana. This perplexing question does not arise in formal wills as no dating is necessary to the validity of such wills. In holographic testaments the statutory requirements⁴² specifically state that the writing must include a date in the testator's handwriting.

The first case involving dating requirements of holographic wills was *In Re Noyes' Estate*.⁴³ It will be recalled that the testator in the *Noyes* case used a letterhead for three of the necessary four figures of the year date. This was held inadequate even though the extrinsic evidence showed conclusively that the date had to be 1903. The testator had not known the legatee until 1899, and he had died in 1909. Therefore the conclusion was inescapable that the handwritten "3" could refer only to 1903. Still the date was held insufficient, the court basing its decision largely on the fact that the statute is mandatory and that the right to make a will is subject to any requirements the legislature chooses to impose.⁴⁴ Because of the extrinsic evidence this case seems especially harsh although it is apparently in line with the holdings in other jurisdictions.⁴⁵

The case of *In re Irvine's Estate*⁴⁶ was thought by many to answer the question as to what was required as a sufficient date.⁴⁷ In that case the holographic will was dated "this day of May, 1938." The court split 2-1-2 on the question. The majority relied on a "common sense" interpretation of the statutory requirements and stated that a month and year were sufficient without more. Justice Morris concurred solely on the grounds that no other instruments had been presented for probate which might require a finding of a more exact date, and further that there was no question of mental capacity at a certain day which might have imposed the need for more specificity in the date. The dissenters relied on the historical definition of "dated" and on its common meaning in arriving at the decision that a date *requires* all three factors, *i.e.*, day, month, and year.

⁴²*Supra* note 3.

⁴³No attempt will be made in this article to differentiate "rights" from "privileges."

⁴⁴*Mechem, supra* note 3 at n. 26.

⁴⁵114 *Mont.* 577, 139 P.2d 489 (1943).

⁴⁶Comment, 5 *Mont. L. Rev.* 82 (1944). This article recognized that the question was not answered.

It is apparent that by technical legalism the *Irvine* case did not settle the question of dating requirements since there was no clear-cut majority holdings as to what will be required as a date in every case.

The most recent decision by the Montana Court considering this question is *Estate of French*.⁴⁷ In that case the holographic will offered for probate had only designated the year, not the day or month. The court again split 2-1-2, but on the question of date the holding was 3-2 that it was not sufficient. The only trouble with the holding is that it fails to answer the dilemma. The court seems to follow both the concurring opinion of Justice Morris and the majority opinion of the *Irvine* case. It states:⁴⁸

The statutory requirement of dating a holographic will is based primarily on two grounds: (1) In order that the courts may determine whether the testator had the requisite testamentary capacity when he executed the will; and (2) if there are two or more wills, containing incompatible provisions, in order to determine which is the later will. (This is exactly the position of Justice Morris in his concurring opinion in the *Irvine* case.) * * * It is possible that if the month is given this is a sufficient delimitation to enable the courts to determine the above questions should they arise. (This is the majority opinion in *Irvine*.)

Is the question yet to be answered? Not if we accept Justice Castles' statement in the *French* case. The court is obviously adopting the concurring opinion of Justice Morris in the *Irvine* case as the rule of this case. It makes reference to the designation of month only as it fits within this framework. But for the apparently clear holding of the *Noyes* case (which stated that the year alone was insufficient) this might lead one to the question: "Upon this reasoning, however, could not the entire date be omitted?"⁴⁹

Can any conclusions be drawn as to the present law on dating holographic wills?

First, we know that a date which shows the year only is insufficient. (*In Re Noyes' Estate*). Second, we know that the purpose of the statute is to determine capacity and to establish implied revocation. (*In Re French's Estate*). Third, we know that the month and year (without a day being specified) can be sufficient for this purpose in certain cases. (*In Re Irvine, In Re French's Estate*).

Some doubt is thrown on the second statement above by the holding in *Barney v. Hayes*.⁵⁰ In that case the will was dated 1880 rather than 1890, the year in which it was written. The court held (and later affirmed the holding in *In Re Noyes' Estate*) that an erroneous date was sufficient. How can this be so in light of the avowed purpose of the dating requirement? Suppose a case in which the will bears a full and complete date which is obviously incorrect (for example, December 12, 1962, the testator having died in 1960). Assume further that no extrinsic evidence

⁴⁷137 Mont. 228, 351 P.2d 548 (1960).

⁴⁸*Id.* at 231.

⁴⁹5 MONT. L. REV. 82, 92 (1944). This same question was posed by Stimson in this article.

⁵⁰11 Mont. 571, 29 Pac. 282 (1892).

exists as to the proper date and that no question of capacity or a later will were presented. Quite probably the will would be upheld. Assume the same circumstances and a legitimate question of capacity in 1960 or prior thereto. What then? The will should be invalid. This would give effect to the holding of the *French* case and to the concurring opinion of the *Irvine* case. Such a holding would also offer no substantial conflict with the apparent liberality which prompted the passage of statutes allowing holographic wills initially. Unless such a holding would lead to trumped-up challenges on capacity, there seems no substantial objection.

The Requirement of Signing

There is general agreement that subscription is not necessary⁵¹ except in those states which require it by statute.⁵²

There is also general agreement that the testator need not sign his legal or true name.⁵³ Thus, few problems are encountered in this area which have not been covered in the discussion of integration and incorporation by reference.⁵⁴

Testamentary Intent in Holographic Wills

The question of determining testamentary intent in holographic wills is much more difficult than in formal will cases. This is due to the inherently casual nature of holographic instruments and the lack of any "ritualistic" practice such as execution. The reports abound with cases in which the only question for the court is whether a letter is of testamentary or merely social import.

Probably one of the most dubious decisions ever rendered by the Montana Supreme Court is that of *Barney v. Hayes*.⁵⁵ In that case the unmarried testator had effectuated a valid formal will in 1889. Later he had married, and, apparently aware that this revoked his previous will⁵⁶ he wrote a letter to his attorney explaining his recent marriage. The letter contained the following statements:⁵⁷

" . . . So much explanatory; will enlighten you further on the subject, if you wish, when I see you. Now, 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 am in very poor health, and would like this attended to as soon as convenient. I don't know what the laws are in Montana. I suppose Babcock and Rowley will have to witness the change or codicil. I don't know what ought to be done, but you do. . . . Let me hear from you soon on this subject, as soon as you can make it convenient. . . ."

On these facts the lower court refused to probate the will because it lacked testamentary intent, even though the jury had found that the let-

⁵¹ATKINSON, *supra* note 17. In *Re Watt's Estate*, 117 Mont. 505, 160 P.2d 432 (1945).

⁵²4 ALA. L. REV. 140, 145 (1951-52).

⁵³53 CAL. JUR. 2d § 456 (1960). In *Re Noyes' Estate*, 40 Mont. 190, 105 Pac. 1017 (1909).

⁵⁴See comment, 7 MONT. L. REV. 76 (1944) for a more detailed discussion of this point.

⁵⁵*Supra* note 50.

⁵⁶See R.C.M. 1947, § 91-128.

⁵⁷11 Mont. 99, 104, 27 Pac. 384, 385 (1891).

ter was a valid codicil. The Supreme Court reversed, saying, "The whole gist of the case, therefore, is whether said letter was a codicil; that is, whether it was testamentary in character."¹¹ The court went on to reason that since the letter expressed (though indirectly) a testamentary wish, it was a valid codicil and therefore had the effect of republishing the former will. This was so, the court reasoned, even though the deceased had requested that the will be changed formally, and that change had never been made.

It is submitted that this case was clearly wrong. Atkinson states that "a letter of instructions to one's attorney regarding the drafting of a will, . . . or information as to how the writer has decided to leave his property, have been held to show no testamentary intent, and hence result in denial of probate of the instrument as a will."¹²

In chronological sequence the next case was that of *In Re Augestad's Estate*.¹³ In that case the deceased had written a long letter to his brother in which he discussed his financial condition, his property holdings, and his unfriendly attitude toward his children. He continued:¹⁴

I had thought to set up a testament, and temporarily anyhow. So that you and Finn (a son of the deceased) could get a half part each! but make Finns part so, that he gets something such as \$10 a month, for if he gets all, it will go all at once, he ought really not to have anything, but I thought anyhow temporarily, *you shall get your share*, if there is oil here then it could be much. (Emphasis supplied.)

This time the court correctly refused probate of the instrument, making this observation:¹⁵

However, without that assumption we cannot find in the letter the essential feature of any will, holographic or otherwise, namely, the *animus testandi*. At most this letter expresses an intention, at some time in the future, to make a will and that his intention had been that when such will was made one-half of his property should go to the contestant, Finn Augestad, under some sort of a trust arrangement, and the other half should go to the brother Arndt.

Is this letter any less explicit than that in the *Barney* case? If anything it would seem more explicit. The *Barney* case was clearly erroneous, and the *Augestad* case correct.

Next in line was the case of *In Re Watts' Estate*.¹⁶ The letter in that case discussed health, crops, weather, and other family matters, and advised that if any thing happened to the deceased the reader ". . . Will all find my Bisnes Fix and in the Citizen Bank Still looks like Rain made ida over everything."¹⁷ When the author died, Ida found an undelivered warranty deed to his real property and a bill of sale to his personalty in a safe deposit box.

¹¹11 Mont. 571, 574, 29 Pac. 282, 283 (1892).

¹²ATKINSON, *supra* note 6 at § 47.

¹³111 Mont. 138, 106 P.2d 1087 (1940).

¹⁴*Id.* at 140.

¹⁵*Id.* at 141.

¹⁶117 Mont. 505, 160 P.2d 432 (1945).

¹⁷*Id.* at 508.

The court, in its decision, discusses approvingly the "this very paper doctrine."⁶⁵ By this line of authority the very paper in question must evidence testamentary intent, no matter how clearly the deceased may show his intentions by future acts or writings. It is submitted that this is the only correct test, and that it should have been applied in the *Barney* case. By correctly applying the law in the *Watts'* case the court had no trouble finding a lack of testamentary intent.

Another relevant decision by the Supreme Court was *In Re Hansen's Estate*.⁶⁶ In that case the deceased had prepared a formal, executed will naming his wife as executrix. About five years later he wrote a letter to his son in which he stated: "I would like for you to be administrator."⁶⁷ The letter then continued by stating in general terms, and with seeming absence of dispositive intent, the wishes of the deceased for the disposition of his property. Approximately nine months after this letter was written the deceased stopped in his attorney's office and again read the formal will he had prepared. When asked about any changes in the will, the deceased replied, "Just the way I want it, put it back where it was and keep it."⁶⁸ The court correctly decided that the letter was not a testamentary writing, although the decision was based largely on the fact that the statements in the letter did not definitely and peremptorily revoke the former will. Regardless of this, the decision was correct as to intent.

Just as the Supreme Court was beginning to correct the erroneous holding of the *Barney* case, two new decisions were handed down. One was clearly incorrect, and the other a debatable, but less damaging opinion.

The clearly erroneous decision was that of *Van Voast's Estate*.⁶⁹ The important parts of the letter with which that case dealt are three:⁷⁰

1) "Well, I suppose you may be wondering why I am taking up your valuable time with all this. Well I'll tell you it is just because I want someone to know that old age is creeping up and if I am not in as good condition as I should be I want someone to know about it and maybe give me some advice about what to do.

2) There is something else I want you, George, and the family to know and that is that should I pass out, (which I surely will some time) well whenever that happens if I leave any worldly goods worth possessing I should want it divided equally among you five children. . . . I do not know whether or not I should make a will or just how to make it as things now stand.

3) I am expecting with reasonable confidence to be here for at least a few more years, but one can never tell. You know just what is coming up, and I see no reason for putting everything off for someone else to attend to at the last minute. I have also had a marker for myself placed in the Walton lot in the

⁶⁵TURRENTINE, *WILLS AND ADMINISTRATION*, p. 117, n. 1 (1954).

⁶⁶126 Mont. 552, 254 P.2d 1073 (1953).

⁶⁷*Id.* at 524.

⁶⁸*Id.* at 526.

⁶⁹127 Mont. 450, 266 P.2d 377 (1954).

⁷⁰*Id.* at 451.

cemetery here, beside my sister, who was my mother for twenty-nine years.

The court erroneously rejected the "this very paper test" relied upon in the *Watt's* case and said:⁷¹

. . . the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest.

The court held that the writing constituted a valid testamentary instrument. But can it be fairly said that the deceased wanted to make even a revocable disposition of her property in this case? If so, why did she ask advice and ponder over whether a will should be made? It is submitted that even though "this very paper test" is abandoned (and it should not be), still the case is incorrect. In the words of the dissent:⁷²

Testamentary intent, we take it, means that the writing offered for probate must have been executed by the testator with the intent that such writing take effect as his last will. . . . *To construe such letters as testamentary would be to make social correspondence a risky pastime.* (Emphasis supplied by the court.)

This last statement seems clearly meritorious. Why should a mere statement of a future intention suddenly be brought into court as a completed will? Human beings are too apt to reveal their magnanimous intentions as a matter of human nature with no real intention of carrying them out. Surely something more than a casual statement should be required even in a holographic will.

In *Estate of Coleman*,⁷³ the second questionable case, the instrument read: ". . . should anything happen to me in my travels, I leave . . ."⁷⁴ The question considered was whether the will was to take effect only upon the occurrence of a condition precedent (failure to return from the trip), or did the clause merely state an inducement to the making of the will? The court held that the will was not conditional and affirmed a lower court holding to that effect.

In the absence of statute the decision of the *Coleman* case would be unquestionably correct. However, the question is complicated in Montana⁷⁵ and in five other states⁷⁶ because of statutory provisions that a will which is conditional by its own terms shall be granted or denied probate in conformity with the condition. In Montana or in one of the other five states having such a statute, the effect is to treat the will as valid only if something does *in fact* happen to the testator in his travels. If he returns safely, the will ceases to have effect. The case thus reached an erroneous decision on the applicable law.

In the absence of a statute such as that in Montana the courts have generally attempted to construe the conditional language as merely an in-

⁷¹*Id.* at 454.

⁷²*Id.* at 470.

⁷³139 Mont. 58, 359 P.2d 502 (1961).

⁷⁴*Id.* at 502.

⁷⁵See R.C.M. 1947, § 91-112.

⁷⁶Cal., N.D., Okla., S.D., and Utah.

ducement, thereby making the will valid for all purposes." By this treatment the happening or failure of occurrence of the event would not be of any significance (except perhaps to convince the court that the inducement was correct if the testator did, in fact, fail to return).

The most important point to be recognized for present purposes is that the question of whether conditional language is a mere inducement or something else arises most frequently in connection with holographic wills. While there is no reason that a formal will could not be conditional, the mere expediency of the holographic will seems to lend it to frequent use as a conditional instrument. This is further fortified by the fact that a lay person would be unlikely to recognize the problem which may arise from the use of such conditional terms.

Conclusion

The foregoing discussion suggests the problems encountered in holographic wills. It would be difficult to determine exactly what proportion of Montana will litigation involves holographic wills, but it appears that such litigations are disproportionately large when compared with those involving formal wills. This should not come as too great a surprise when it is remembered that most holographic wills are drafted by untrained lay persons who are not acquainted with the complexity of testamentary disposition. In addition, holographic wills are often written under conditions which place serious doubt on the writer's dispositive intentions.

There is a great danger involved in construing simple friendly correspondence as a will. The *Van Voast* case is particularly suggestive of this danger.

In construing the dating requirement the courts have reached the opposite extreme and have required a rather technical adherence to the statutory requirement.

The law of holographic wills is thus characterized by a dual treatment. On the one hand, it is strict as to technical requirements. On the other, it is liberal as to testamentary intent.

Less than half the states in the union have found holographic wills a necessity. They may once have been a necessity in Montana in the days when horse and buggy transportation made a trip to town an infrequent occasion. These conditions no longer exist, and neither does the need for holographic wills.

The five, ten, or even twenty-five dollars which the testator may save by drafting his own will does not balance the uncertainty and litigation likely to arise from a "home-made" will.

Even the most remote ranches in Montana are now accessible by mail in a relatively short period. Why should we continue to invite testamentary disaster by condoning the use of a once-valuable instrument which has outlived its usefulness?

⁷ATKINSON, *supra* note 6 at § 83.

The practical difficulty of such a change is admitted. Any bill offered in the Montana legislature to effect such a change would be branded a "lawyer's relief bill." The proposed change would probably cost attorneys some very sizeable fees which arise from litigating holographic wills, but this would be overlooked.

The argument would be made that such legislation deprives a man of some historic "right" to make his own will. The suggestion would inevitably be made that the government should leave the whole matter alone and the concept of hardy western individualism would be thrown in for good measure.

These arguments should be balanced against the probable gains of such legislation. In the first place, the formally drawn instrument would be more likely to accomplish the actual wishes of the testator. The abolition of the holographic wills statute would eliminate the possibility of a friendly letter being construed as a dispositive instrument. It should serve to force living persons to consider more carefully the ultimate disposition of their property. Over the long run it would save the decedent's money by avoiding costly litigation which so often arises from home-spun legal draftsmanship.

A man wouldn't remove his own appendix to save a \$300 doctor and medical bill. Why should he save \$25 by drawing his own will and chancing the loss of his personal fortunes?

JACQUE W. BEST