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Wills—Holographic Wills and Testamentary Intent—Extrinsic Evidence Is Inadmissible to Prove Testamentary Intent for Holographic Wills Lacking Words of Disposition. *Edmundson v. Estate of Fountain*, No. 03-1459, 2004 WL 1475423 (Ark. July 1, 2004)

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WILLS—HOLOGRAPHIC WILLS AND TESTAMENTARY INTENT—EXTRINSIC EVIDENCE IS INADMISSIBLE TO PROVE TESTAMENTARY INTENT FOR HOLOGRAPHIC WILLS LACKING WORDS OF DISPOSITION. *Edmundson v. Estate of Fountain*, No. 03-1459, 2004 WL 1475423 (Ark. July 1, 2004).

I. INTRODUCTION

Few civil matters are as controversial as will disputes. These cases often pit family member against family member for recognition of their claim to the estate of a deceased loved one. Unlike formal wills in which ceremonial formalities prove the intention of the testator,¹ when confronted with a holographic will² the survivors of the deceased may question the intent of the document. One commentator observed that the majority of holographic wills were forgeries.³ Due to these concerns, holographic wills have great potential to incite disputes over the deceased's estate. Notwithstanding the potential for controversy, the holographic will survives as an inexpensive means for citizens to avoid intestacy. In fact, provisions for holographic wills are in both the Uniform Probate Code and the Restatement (Third) of Property.⁴

This note will explore the controversy over testamentary intent in holographic wills brought about by the recent Arkansas Supreme Court decision *Edmundson v. Estate of Fountain*.⁵ Section II of this note will provide both the background facts of the case and the reasoning of the Arkansas Court of Appeals.⁶ After that, Section III will explore the historical background of the law of holographic wills,⁷ the early law in Arkansas and the development of the testamentary intent requirement,⁸ and the development of Arkansas law regarding the proof of testamentary intent.⁹ Next, Section IV will trace the reasoning of the Arkansas Supreme Court's majority¹⁰ and

1. See generally Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 455–56 (2002).

2. A holographic will is an informal will written in the handwriting of the deceased. 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 1.3 (3d ed. 1960).

3. John J. Harris, *Genuine or Forged?*, 32 CAL. ST. B.J. 658, 660 (1957).

4. See U.P.C. § 2-502(b) (1990) (amended 1993); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 (1998).

5. No. 03-1459, 2004 WL 1475423 (Ark. July 1, 2004).

6. See *infra* Sections II and II.A.

7. See *infra* Section III.A.

8. See *infra* Section III.B.

9. See *infra* Sections III.C.1–3.

10. See *infra* Section IV.A.

dissenting opinions in *Edmundson*.¹¹ Finally, Section V will comment on the state of the law regarding both admission of extrinsic evidence to prove testamentary intent¹² and the substantive facial requirements for a valid holographic will.¹³

II. FACTS

Oral W. Fountain was the widowed mother of Kay Edmonston,¹⁴ Wayne Fountain, Shirley Washington, E.W. Fountain, and Nell Harris.¹⁵ Mrs. Fountain lived alone on a 160-acre cattle farm in Izard County, Arkansas.¹⁶ She raised five children on her farm and continued to keep cattle.¹⁷ Most of Mrs. Fountain's children lived elsewhere, but the youngest daughter, Kay Edmonston, lived next door to Mrs. Fountain.¹⁸ On April 23, 1998, Mrs. Fountain died.¹⁹ Mrs. Fountain's children initially probated the estate as intestate.²⁰ Three of the Fountain siblings filed to administer the estate.²¹ Kay Edmonston objected to this.²² Two months after Mrs. Fountain's death, the administrator-siblings filed a petition to sell Mrs. Fountain's personal property, and Kay Edmonston again objected.²³

Sometime between April and May of 1999, approximately one year after Mrs. Fountain's death and soon after the probate judge's final order to sell Mrs. Fountain's personal property, Mr. Roger Hall called upon the Edmonston household.²⁴ While visiting, Mr. Hall acquired a large roll of upholstery that belonged to Chick Edmonston, the husband of Kay Edmon-

11. See *infra* Sections IV.B and IV.C.

12. See *infra* Section V.A.

13. See *infra* Section V.B.

14. There is a considerable amount of confusion on the spelling of Mrs. Edmonston's name. The Arkansas Court of Appeals misspelled her name as "Edmondston," and the Arkansas Supreme Court spelled her name "Edmundson." The correct spelling of her name is "Edmonston" as it is on the holographic will written by her mother. See *Edmondston v. Estate of Fountain*, 84 Ark. App. 231, 240, 137 S.W.3d 415, 420 (2003) for a reproduction of the will.

15. Appellant's Abstract and Brief at 8, *Edmondston v. Estate of Fountain*, 84 Ark. App. 231, 137 S.W.3d 415 (2003) (No. CA 02-842).

16. *Id.*

17. *Id.*

18. *Id.*

19. Appellee's Supplemental Abstract and Brief at 7, *Edmondston v. Estate of Fountain*, 84 Ark. App. 231, 137 S.W.3d 415 (2003) (No. CA 02-842).

20. *Edmondson v. Estate of Fountain*, No. 03-1459, 2004 WL 1475423, at *1 (Ark. July 1, 2004).

21. Appellee's Supplemental Abstract and Brief at 5, *Edmondston* (No. CA 02-842).

22. *Id.*

23. *Id.*

24. *Id.*

ston.²⁵ A few weeks later, Mr. Hall unrolled the upholstery to use as a stair cover and discovered an envelope inside of the roll.²⁶ The envelope contained what seemed to be a handwritten will signed by Oral W. Fountain.²⁷

Mr. Hall informed Mrs. Edmonston about the contents of the envelope.²⁸ Mrs. Edmonston arranged to meet Mr. Hall at a liquor store on the Izard county line to receive the envelope and contents.²⁹ The purported will found inside of the envelope read:

Last Will Jan. 1 1997
 Kay Edmonston
 160 acre farm & contents remaining
 37 head of cattle at this time
 1972 truck
 Wayne Fountain
 Cattle on Wayne's Farm & Fiddle
 Shirley Washington
 200.00
 E.W. Fountain
 200.00
 Nell Harris
 200.00
 [Signed] Oral W. Fountain
 Witness
 [Signed] Ricky Smithson
 [Signed] Justin McAlister³⁰

Kay Edmonston was the beneficiary of nearly all of Mrs. Fountain's estate.³¹ Kay submitted the document to the probate court as a holographic will.³² The other Fountain siblings vehemently objected to the will because they thought the will was not in Mrs. Fountain's handwriting.³³ The matter went to trial in circuit court.³⁴

At the trial handwriting experts testified about the authenticity of the will.³⁵ The trial court also heard testimony from Mrs. Verlin Harris, Mrs.

25. *Id.* at 4.

26. *Id.*

27. Appellee's Supplemental Abstract and Brief at 4, *Edmondston* (No. CA 02-842).

28. *Id.*

29. *Id.*

30. Appellant's Abstract and Brief at 15, *Edmondston* (No. CA 02-842).

31. *See id.*

32. Appellee's Supplemental Abstract and Brief at 5, *Edmondston* (No. CA 02-842).

33. Appellant's Abstract and Brief at 8, *Edmondston* (No. CA 02-842).

34. *Id.*

35. *Id.* The court examined literally "hundreds" of writing samples from the late Mrs. Fountain. *Id.*

Fountain's 85-year-old sister.³⁶ Mrs. Harris testified that she spoke frequently with Mrs. Fountain and that in a conversation during the month of Mrs. Fountain's death, they spoke about wills.³⁷ Twice in that conversation, Mrs. Fountain stated she had a will.³⁸ Mrs. Harris exhorted Mrs. Fountain to have two attesting witnesses sign the will, but Mrs. Fountain responded that she already had two witnesses.³⁹

The two attesting witnesses for Mrs. Fountain's will were Mr. Ricki Smithson and Mr. Justin McAlister.⁴⁰ Smithson was a long-time acquaintance of Mrs. Fountain's.⁴¹ McAlister was not acquainted with Mrs. Fountain but happened to accompany Smithson on the day Mrs. Fountain asked them to sign the instrument.⁴² On that day, Smithson and McAlister were in search of Brad Edmonston.⁴³ The two men saw Mrs. Fountain on her front porch and stopped to ask if Mrs. Fountain knew where to find Brad.⁴⁴ After some conversation, Mrs. Fountain asked the men to do her a favor.⁴⁵ She went into her house and returned with the purported holographic instrument.⁴⁶ Mrs. Fountain asked the men to witness the paper.⁴⁷ Smithson and McAlister signed the document for Mrs. Fountain.⁴⁸ In their depositions, both Smithson and McAlister stated that they thought the instrument was a will.⁴⁹

After hearing the evidence, the trial court ruled that the instrument was both written and signed by Mrs. Fountain.⁵⁰ Following that determination, the trial court considered whether the instrument was a will.⁵¹ In its analysis of whether the instrument was a will, the only issue the trial court considered was if the instrument had "language . . . sufficient in testamentary

36. *Id.* at 5.

37. *Id.* The two sisters spoke for about an hour almost every night. *Id.*

38. *Id.*

39. Appellant's Abstract and Brief at 5, *Edmonston* (No. CA 02-842).

40. *Id.* at 5-7.

41. *Id.* at 6. Mrs. Fountain was probably a babysitter for Mr. Smithson at some point in his youth, evidenced by Smithson's referral to Fountain as "Granny," his statement that he knew her since he was four or five, and his statement that Fountain "used to spank [his] hind end." *Id.*

42. *See id.* at 7.

43. *Id.* at 6. Brad's parents were Chick and Kay Edmonston. *Id.*

44. *Id.* at 6. There were two houses on Mrs. Fountain's farm. *Id.* Mrs. Fountain lived in one, and the Edmonstons lived in the other. *Id.*

45. Appellant's Abstract and Brief at 6, *Edmonston* (No. CA 02-842).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 6-7.

50. *Id.* at 6.

51. Appellant's Abstract and Brief at 16, *Edmonston* (No. CA 02-842).

character.”⁵² The trial court stated that the determination of the language’s character was a question of law for the court to decide from the face of the writing.⁵³

The trial court applied its rule by comparing Mrs. Fountain’s purported will to the will in *Estate of O’Donnell*.⁵⁴ Both the Fountain will and the will in *O’Donnell* were similar because they were lists of names and property with the caption “Last Will.”⁵⁵ The trial court did not expound on the reasoning of *O’Donnell*.⁵⁶ Instead, the trial court seized on the holding in *O’Donnell* that the *O’Donnell* will had no testamentary character.⁵⁷ Because the two wills were similar in both form and substance, the trial court reasoned that the Fountain will also lacked testamentary language.⁵⁸

Even though there was extrinsic evidence from Mrs. Harris, Mr. McAlister, and Mr. Smithson, the trial court did not consider the extrinsic evidence because Mrs. Fountain’s writing lacked the “intent to make a will” due to lack of testamentary language and, therefore, “extrinsic evidence [was] not admissible to prove the necessary intent.”⁵⁹ The trial court refused to probate Mrs. Fountain’s alleged will and dismissed the proceeding.⁶⁰

A. The Arkansas Court of Appeals’s Decision

Kay Edmonston appealed the trial court’s decision to the Arkansas Court of Appeals.⁶¹ On appeal, Mrs. Edmonston argued that her mother unequivocally intended the handwritten instrument as a will and that the words contained within the four corners of the will were not the deciding factor for whether her mother intended the document as a will.⁶² The administrator-siblings defended their contention that the law required “words of a testamentary nature” for a holographic will to be valid and that Mrs. Fountain’s purported will contained no such words.⁶³

Seizing upon Mrs. Edmonston’s argument, the court stated that the law in Arkansas was that “the intent of the maker is the primary consideration in determining the validity of a will.”⁶⁴ The court acknowledged that a valid

52. *Id.* (quoting *Ardent v. Ardent*, 80 Ark. 204, 96 S.W. 982 (1906)).

53. *Id.* at 17 (citing *Cartwright v. Cartwright*, 158 Ark. 278, 250 S.W. 11 (1923)).

54. 304 Ark. 460, 803 S.W.2d 530 (1991).

55. See Appellant’s Abstract and Brief at 17, *Edmondston* (No. CA 02-842).

56. *Id.* at 17.

57. See *id.*

58. See *id.*

59. *Id.* at 18 (quoting *McDonald v. Petty*, 262 Ark. 517, 559 S.W.2d 1 (1977)).

60. *Id.*

61. *Edmondston*, 84 Ark. App. at 232, 137 S.W.3d at 415 (2003).

62. *Id.* at 234, 137 S.W.3d at 416.

63. *Id.* at 235, 137 S.W.3d at 417.

64. *Id.* at 234, 137 S.W.3d at 416.

holographic will must disclose the intention of the maker,⁶⁵ but it refused, however, to recognize any limits on the form of a will or on how decedents choose to express testamentary intention.⁶⁶ The court also noted that extrinsic evidence was "customarily" admitted by Arkansas courts to prove testamentary intent.⁶⁷

In the court's opinion, the only issue to decide was "whether words of a testamentary nature are absolutely required . . . for the instrument to be admitted for probate."⁶⁸ Mrs. Edmonston contended that the trial court's authorities were factually distinguishable, and that the trial court's authorities did not stand for the proposition that the words on the face of the will were of greater importance than the intent of the decedent "as evidenced by the instrument itself and the admitted extrinsic evidence."⁶⁹

Agreeing with Mrs. Edmonston, the court set about its distinction of the trial court's authorities.⁷⁰ First, the court considered *Dunn v. Means*⁷¹ as precedent for the administrator-siblings argument.⁷² According to the court, the holding of *Dunn* was not that the instrument in *Dunn* was totally devoid of testamentary words, but instead was that the instrument's words did not evidence testamentary intent.⁷³ The court noted that two full sentences in the *Dunn* will were a possible directive for the disposition of property after death.⁷⁴

Continuing its distinction, the court struck farther into the heart of *Dunn* by distinguishing *McDonald v. Petty* [hereinafter *McDonald II*],⁷⁵ the keystone authority in *Dunn*.⁷⁶ In *McDonald II*, the Arkansas Supreme Court stated that the will in that case had "no words of a dispositive nature" and

65. *Id.*, 137 S.W.3d at 417. The court stated that "[t]estamentary intent is necessary to the validity of a holographic will." *Id.*, 137 S.W.3d at 417 (citing *Chambers v. Younes*, 240 Ark. 428, 430, 399 S.W.2d 655, 657 (1966)).

66. *See id.*, 137 S.W.3d at 417. The court declared "that a valid will may take many forms" and that when evaluating testamentary language "[n]o particular words . . . are necessary." *Id.*, 137 S.W.3d at 417 (citing *Chambers*, 240 Ark. at 430-32, 399 S.W.2d at 657).

67. *Edmondston*, 84 Ark. App. at 234, 137 S.W.3d at 417 (citing *Chambers*, 240 Ark. at 430-31, 399 S.W.2d at 657).

68. *Id.* at 235, 137 S.W.3d at 417.

69. *Id.*, 137 S.W.3d at 417.

70. *Id.*, 137 S.W.3d at 417.

71. 304 Ark. 473, 803 S.W.2d 521 (1991).

72. *Edmondston*, 84 Ark. App. at 235-36, 137 S.W.3d at 417-18.

73. *See id.* at 236, 137 S.W.3d at 418 (discussing *Dunn*, 304 Ark. 473, 803 S.W.2d 542 (1991)).

74. *Id.*, 137 S.W.3d at 418 (discussing *Dunn*, 304 Ark. 473, 803 S.W.2d 521 (1991)). The two sentences the court referred to were "Judee Dunn-Claude & I give you full power to do & take care of all our Business & do as you wish with, with it, [sic] with no problems from anyone." *Id.*, 137 S.W.3d at 417 (quoting *Dunn*, 304 Ark. at 474, 803 S.W.2d at 542).

75. 262 Ark. 517, 559 S.W.2d 1 (1977) [hereinafter *McDonald II*].

76. *Edmondston*, 84 Ark. App. at 236, 137 S.W.3d at 418.

was “defective on its face because it lacked the required . . . intent to make a will.”⁷⁷ Because the document failed to show testamentary intent, the *McDonald II* court barred the admission of extrinsic evidence to prove the document was a will.⁷⁸ To distinguish *McDonald II*, the appeals court cited the unintelligible nature of the will in *McDonald II*.⁷⁹ The appeals court noted that with regard to the *McDonald II* instrument, the Arkansas Supreme Court observed that the instrument was “merely a sketch or drawing on the back of an envelope with names in individual squares” and that there was “absolutely nothing” in the instrument evidencing an intent dispose of property after death.⁸⁰ The appeals court contrasted Mrs. Fountain’s will with the *McDonald II* will and concluded that Mrs. Fountain’s will was completely different from the *McDonald II* will because of the apparent degree of care taken by Mrs. Fountain to prepare the will and because of the caption “Last Will” at the top the Fountain will.⁸¹

Next, the appeals court distinguished *O’Donnell*, the second authority used by the trial court.⁸² Like the trial court, the appeals court recognized the similarities between the *O’Donnell* will and the Fountain will.⁸³ Unlike the trial court, the appeals court articulated the reasoning process in *O’Donnell* that considered the language on the face of the holographic instrument in conjunction with extrinsic evidence.⁸⁴ The appeals court concluded that *O’Donnell* did not stand for lack of testamentary language as being “fatal to a holographic will on the issue of testamentary intent.”⁸⁵

Because the court felt that the two authorities used by the trial court were not a sufficient basis to keep Mrs. Fountain’s will out of probate or exclude extrinsic evidence to prove Mrs. Fountain’s intent, the court reversed the decision of the trial court and remanded with instructions to admit the will to probate.⁸⁶

III. BACKGROUND

While there are formal will statutes in every state, the holographic will persists by statute in about one half of the states as an alternative to a formal

77. *Id.* at 236, 137 S.W.3d at 418 (quoting *McDonald II*, 262 Ark. at 518, 559 S.W.2d at 1).

78. *Id.* at 236, 137 S.W.3d at 418 (discussing *McDonald II*, 262 Ark. at 518, 559 S.W.2d at 1).

79. *See id.*, 137 S.W.3d at 418.

80. *Id.*, 137 S.W.3d at 418 (quoting *McDonald II*, 262 Ark. at 519, 559 S.W.2d at 2).

81. *Id.*, 137 S.W.3d at 418.

82. *Id.* at 236–38, 137 S.W.3d at 418–19.

83. *Edmondston*, 84 Ark. App. at 236, 137 S.W.3d at 418.

84. *Id.* at 236–38, 137 S.W.3d at 418–19.

85. *Id.* at 238, 137 S.W.3d at 419.

86. *Id.*, 137 S.W.3d at 419.

will.⁸⁷ Two major rationales for recognizing such an informal vehicle of inheritance are to decrease intestacy⁸⁸ and to support the individual's testamentary freedom.⁸⁹ This section will trace the historical roots of this practice,⁹⁰ lay the foundation of Arkansas law regarding holographic wills and testamentary intent,⁹¹ and then examine the Arkansas court's positions on proof of testamentary intent.⁹²

A. Historical Development of Holographic Wills

Unfortunately, the exact origins of the holographic will are unclear.⁹³ The Romans, however, were the first to codify holographic wills in the western world.⁹⁴ Near the end of the Roman Empire, the provincial Germanic kings of Italy, France, and Spain adopted compilations of laws for their Roman subjects.⁹⁵ One such compilation was *Lex Visigothorum*, a set of laws written by the Visigoths in the seventh century.⁹⁶ The *Lex Visigothorum* had a provision for holographic wills that allowed one to will away property with a handwritten instrument that included the date and one's signature.⁹⁷ In the twelfth century, the nobility phased out the codes of the Germanic kings, and replaced the codes with the code of Justinian.⁹⁸ Holographic wills disappeared from the law during this period, but later reappeared in the municipal laws of France in the fifteenth century.⁹⁹ In the sixteenth century, the holographic will appeared in the ecclesiastical courts of England¹⁰⁰ and remained effective until abolished by statute.¹⁰¹

87. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 cmt. a (1998).

88. Lawrence H. Averill Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Probate Code*, 17 U. ARK. LITTLE ROCK L.J. 631, 661-62 (1995).

89. Gail Boreman Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 610 (1981).

90. See *infra* Section III.A.

91. See *infra* Section III.B.

92. See *infra* Sections III.C.1, III.C.2, and III.C.3.

93. R.H. Helmholz, *The Origin of Holographic Wills in English Law*, 15 J. LEGAL HISTORY 97, 97 (1994).

94. Reginald Parker, *History of the Holograph Testament in Civil Law*, 3 JURIST 1, 2 (1943). The Romans allowed "privileged testaments" in times of plague, for peasants, for soldiers, and from father to his heirs. *Id.*

95. *Id.* at 6.

96. *Id.* at 7.

97. *Id.* at 7-8.

98. *Id.* at 10.

99. See *id.* at 10-18. Professor Parker argues the re-introduction of the holographic will into the laws of France was not from the Roman or Visigoth laws but from the customs of the local peoples. *Id.* at 15.

100. See Helmholz, *supra* note 93, at 98-99. Professor Helmholz demonstrates the holo-

In America, the first codification of holographic wills appeared in Louisiana and Virginia.¹⁰² During the first legislative session after statehood in 1838, Arkansas adopted the holographic will.¹⁰³ The present Arkansas code still allows holographic wills into probate when the will is in the handwriting of the testator, and in the event no witnesses sign the will, at least three “credible disinterested witnesses” verify the handwriting of the deceased.¹⁰⁴

B. Early Arkansas Case Law and the Development of the Testamentary Intent Requirement

The informal nature of the holographic will allows most any handwritten instrument in which the testator describes the disposition of property after death to qualify as a holographic will.¹⁰⁵ For example, a widow successfully submitted the suicide note of her late husband as a holographic will in *Ardent v. Ardent*.¹⁰⁶ The note, written entirely in the hand of the husband on the day of his death and found on his dresser, read in part: “Dear Wife: You will find everything all right, I hope. Whatever I have in worldly goods, it is my wish that you should possess them.”¹⁰⁷ The court had little concern for the irregular form and informal language of the will and cited several cases from other jurisdictions where the courts held that personal correspondence qualified as a valid holographic will.¹⁰⁸

graphic will in England was an innovation of the English Church that arose from the privileged will available to soldiers under Roman law.

101. *Id.* at 99. In 1667, the Statute of Frauds invalidated the use of holographic instruments to transfer real property. *Id.* at 97. Parliament banned the use of holographic instruments with regard to personal property in 1837. *Id.*

102. Bird, *supra* note 89, at 606. Louisiana recognized the holographic will in 1808, Virginia in 1819. *Id.*

103. 157 REV. STAT. ARK. § 4 (Weeks, Jordan & Co 1838). The original Arkansas holographic will provision reads: “[W]here the entire body of the will and the signature thereto, shall be written in the proper handwriting of the testator or testatrix, notwithstanding there may be no attesting witnesses to such will.” *Id.*

104. ARK. CODE ANN. § 28-25-104 (LEXIS Repl. 2004).

105. Stanley R. Langley, Note, *Proof of Testamentary Intent in Holographic Codicils*, 25 ARK. L. REV. 376, 376 (1971).

106. 80 Ark. 204, 96 S.W. 982 (1906). The court did not elaborate on the circumstances of Mr. Ardent’s suicide only that it was “for what seems a trifling cause.” *Id.* at 208, 96 S.W. at 983.

107. *Id.* at 204, 96 S.W. at 982.

108. *Id.* at 207–08, 96 S.W. at 982–83. The court discussed two cases from North Carolina and a case from California. *Id.*, 96 S.W. at 982–83; see also *Clarke v. Ransom*, 50 Cal. 595, (1875) (handwritten note from dying woman to friend was valid holographic will); *Outlaw v. Hurdle*, 46 N.C. 150 (1853) (short handwritten statement by ill man stating he wanted his property to go to his friend was a holographic will); *Alston v. Davis*, 24 S.E. 15 (N.C. 1896) (letter from man missing and presumed dead held to be valid holographic will).

Because it is possible that any handwritten personal correspondence that mentions the disposition of property after death is a holographic will, the Arkansas courts ascertain whether the decedent intended the document to be a will.¹⁰⁹ *The intention to make a document a will is animus testandi*, or testamentary intent.¹¹⁰ In *Ardent*, the court held that the late Mr. Ardent wrote his suicide note with the requisite intent because Mr. Ardent was "sincerely attached to his wife" and "the language of his letter to her, written under the shadow of impending death, shows . . . that it was testamentary in character."¹¹¹

In *Cartwright v. Cartwright*,¹¹² the court evaluated a love letter from an Arkansan serving in France during World War I to his wife as a holographic testament.¹¹³ The court sifted through the soldier's descriptions of life overseas and endearments to his wife and considered whether the following language was testamentary:

I think I can get an allotment made soon. You will get \$15 of my pay and \$15 from the government made soon. You will get \$15 of my pay and \$15 from the government, then I will get \$4.75 per mo. We both will draw \$45 a mo. then I have to pay insurance & Liberty bonds out of my part, then you will get the \$5,000 when I die, so you should not want for anything except me. (Signed) "Lus."¹¹⁴

In addition to the purported testamentary language, the court observed that the soldier also contemplated his mortality in the letter.¹¹⁵ The court addressed the question of the testamentary character of the letter as "one of law for the court to determine from the face of the offered instrument."¹¹⁶ The court elaborated that an instrument which "purports to bequeath or devise any property, either in general or particular terms, to an individual or class of individuals . . . is of testamentary character."¹¹⁷ The court upheld the letter as a will because the soldier manifested intent to leave the \$5,000 life insurance policy to his wife upon his death.¹¹⁸

Seventeen years later, the Arkansas Supreme Court again confronted the question of whether or not an informal writing expressed testamentary

109. *Stark v. Stark*, 201 Ark. 133, 138, 143 S.W.2d 875, 877-78 (1940). Testamentary intent is "the intention to make a will." *Id.*, 143 S.W.2d 875, 877-78.

110. *Id.*, 143 S.W.2d 875, 877-78.

111. *Ardent*, 80 Ark. 204, 96 S.W. 982 (1906).

112. 158 Ark. 278, 250 S.W. 11 (1923).

113. *Id.*

114. *Id.* at 281, 250 S.W. at 12.

115. *Id.*, 250 S.W. at 12.

116. *Id.* at 223-83, 250 S.W. at 13.

117. *Id.* at 284, 250 S.W. at 13.

118. *Id.*, 250 S.W. at 13.

intent in *Stark v. Stark*.¹¹⁹ After Mr. Stark's sudden death in 1933, his son¹²⁰ and widow discovered Mr. Stark's will in a rolltop desk at the Stark family home.¹²¹ The will, executed in 1922 prior to Mr. Stark's second marriage, left the entire estate to the son.¹²² On the front of the will, however, Mr. Stark wrote in his own handwriting "cancelled" along with the date and his signature.¹²³ Mr. Stark also cut away the signature at the bottom of the will, and on the back of the will, he wrote out the following:

Apr. 1, 1930

At this time I have no Will believing My Wife—Will of my personal Estate give my Son such as he may choose of the same—there is barely sufficient to maintain her with no other beneficiary. Should my son Wm. P. Stark meet with reverses I feel the relation between Hazel and him are such as would justify each others Confidence.

(Signed) Wm. A. Stark.¹²⁴

After they sought the advice of an attorney, the widow and son entered into a settlement agreement the same year.¹²⁵ In 1939, Mrs. Stark probated the writing from the back of the mutilated formal will as a separate holographic will.¹²⁶ The court noted that the writing began with "At this time I have no will," and that Mr. Stark needed to only copy the testamentary language from the front of the will to make a new will on the back of the document.¹²⁷ The court cited *Ardent* with approval and stated that only documents executed with testamentary intent were valid wills.¹²⁸ The court declared the boundary of testamentary intent to exist "not as a matter of inference, but . . . expressed so that no mistake be made" about the existence of the intent.¹²⁹ After it expressed concern for the writing's failure to devise Stark's real estate, the court refused to overturn the denial of probate for the writing.¹³⁰

119. 201 Ark. 133, 143 S.W.2d 875 (1940).

120. Mr. Stark's son, William P. Stark, was a child from a prior marriage and not the son of Hazel A. Stark, the widow in this case. *Id.* at 134, 143 S.W.2d at 876.

121. *Id.* at 135, 143 S.W.2d at 876.

122. *Id.*, 143 S.W.2d at 876.

123. *Id.*, 143 S.W.2d at 876.

124. *Id.*, 143 S.W.2d at 876.

125. *Stark*, 201 Ark. at 135–36, 143 S.W.2d at 876–77.

126. *Id.* at 136, 143 S.W.2d at 876. The court noted that Mrs. Stark probated the will after "the son's wife filed a foreclosure suit against the widow growing out of another entirely different transaction." *Id.*, 143 S.W.2d at 876.

127. *Id.*, 143 S.W.2d at 876.

128. *Id.* at 138, 143 S.W.2d at 877–78.

129. *Id.*, 143 S.W.2d at 877–78.

130. *Id.*, 143 S.W.2d at 877–78.

These early Arkansas cases recognized the informal nature of the holographic will, but the courts in these cases also set limits on what constituted an acceptable holographic will. In addition to meeting the statutory minimums, the courts also required the maker of the document to execute it with testamentary intent. One important issue unresolved by the early case law is how the proponent of a holographic will can prove testamentary intent. Section III.C below explains the law regarding proof of testamentary intent in holographic wills.

C. Proof of Testamentary Intent

With the basic foundation of Arkansas's law concerning testamentary intent in holographic instruments set out above, the focus of this subsection is on proving that a holographic instrument was executed with testamentary intent. The Arkansas Supreme Court has two positions on the matter. The first is that it is appropriate to prove testamentary intent with extrinsic evidence regardless of the language of the document.¹³¹ The second position is that extrinsic evidence is not admissible to prove testamentary intent unless the document has dispositive language expressing that intent.¹³² The latter of these positions seems to be the present law, but the Arkansas Supreme Court left ambiguity in the law as to whether the former position is no longer a permissible legal framework.¹³³

1. *Extrinsic Evidence Admitted to Prove Testamentary Intent*

In 1966 the Arkansas Supreme Court allowed extrinsic evidence to prove testamentary intent in a holographic will proceeding.¹³⁴ Mr. Boyd Ruff died after suffering from a serious coronary condition.¹³⁵ His widow, Mrs. Modene Ruff, discovered a blank check in Mr. Ruff's wallet.¹³⁶ On the back of the check, Mr. Ruff wrote and signed the following message: "I Boyd Ruff request that all I own in the way of personal or real estate property to be [sic] my wife Modene."¹³⁷ Mr. Ruff's sister, Lois Chambers, challenged the will but lost at the trial level because the trial court allowed extrinsic evidence to prove testamentary intent.¹³⁸

131. See *infra* Section III.C.1.

132. See *infra* Section III.C.2.

133. See *infra* Section III.C.3.

134. *Chambers v. Younes*, 240 Ark. 428, 399 S.W.2d 655 (1966).

135. *Id.* at 432, 399 S.W.2d at 657.

136. *Id.* at 428, 399 S.W.2d at 656.

137. *Id.* at 429, 399 S.W.2d at 656.

138. *Id.* at 428-29, 399 S.W.2d at 656.

On review the Arkansas Supreme Court upheld the admission of extrinsic evidence.¹³⁹ Specifically, the court endorsed “inquiry . . . into all relevant circumstances where the existence of testamentary intent is in doubt.”¹⁴⁰ The court also ruled that because the law permitted the use of extrinsic evidence when testamentary intent was in doubt, there was no requirement for testamentary language on the face of a purported holographic will.¹⁴¹ Given the extrinsic evidence that Mr. Ruff had a serious coronary condition, suffered a heart attack shortly before he executed the will, and shared a close relationship with his wife, the court upheld the validity of the will.¹⁴²

2. *A “Petty” Dispute Leads to an Important Rule: Extrinsic Evidence Allowed Only if the Will Contains Dispositive Words*

Confronted with a document that consisted of a “drawing on the back of a used envelope with names in individual squares, directions indicated, and the decedent’s signature and date,” the Arkansas Supreme Court refused to probate the document as a holographic will because the will lacked words of disposition.¹⁴³ This case, however, did not begin as a dispute over a holographic will. The original controversy began when Mr. Frank Petty and his five siblings each acquired a one sixth interest in their father’s ninety-five-acre farm.¹⁴⁴ One of the siblings, Ray Petty, commenced an action against his siblings to partition the farm.¹⁴⁵ The county court subsequently declared it impossible to satisfactorily partition the land and ordered a public sale.¹⁴⁶ In the time leading up to the sale, Frank Petty allegedly threatened his siblings with violence if they did not convey their interests in the farm to him.¹⁴⁷ Frank attained each of his siblings’ interests in the farm for a consideration of \$3,000 and a promise to convey the farm back to his siblings in his will.¹⁴⁸ On the day of the partition sale, two of Frank’s siblings success-

139. *Id.* at 430, 399 S.W.2d at 657.

140. *Chambers*, 240 Ark. at 430, 399 S.W.2d at 657 (quoting the former 94 C.J.S. *Wills* § 203 emphasis added by the court, now 95 C.J.S *Wills* § 203 (2001)).

141. *Id.* at 432, 399 S.W.2d at 658.

142. *Id.*, 399 S.W.2d at 658.

143. *McDonald II*, 262 Ark. 517, 519 559 S.W.2d 1, 2 (1977).

144. *McDonald v. Petty*, 254 Ark. 705, 496 S.W.2d 365 (1973) [hereinafter *McDonald I*].

145. *Id.* at 707, 496 S.W.2d at 366.

146. *Id.*, 496 S.W.2d at 366.

147. *Id.* at 706–07, 496 S.W.2d at 366. The Petty siblings accused their brother of threatening to kill them or anyone else who attempted to bid on the property at the public sale. *Id.*, 496 S.W.2d at 366. Ray Petty alleged that Frank personally threatened him with a pistol. *Id.*, 496 S.W.2d at 366.

148. *Id.* at 706, 496 S.W.2d at 366.

fully petitioned the county court to stop the sale because Frank had complete interest in the property.¹⁴⁹

Eight years later, Frank died intestate whereupon the surviving siblings instituted an action to enforce their claim that Frank made an oral contract to will the property back to them.¹⁵⁰ After losing in the court below, the estate of Frank's widow, Mrs. Hazel Petty, appealed to the Arkansas Supreme Court.¹⁵¹ The court refused to recognize the oral contract to make a will for a myriad of reasons.¹⁵² First, the total consideration paid by Frank was more than the market value of the property.¹⁵³ Second, no disinterested witness testified that Frank either threatened any of his siblings or had a propensity for violence.¹⁵⁴ Finally, there was no evidence that the siblings were upset or in disagreement about the disposition of the property.¹⁵⁵

During the proceedings over the oral contract to make a will, one of the Petty siblings discovered a document that was seemingly Frank Petty's will.¹⁵⁶ The Petty siblings submitted the document to probate in a separate proceeding and won in part because the court allowed extrinsic evidence to prove testamentary intent.¹⁵⁷ The document, written on the back of a used envelope, entailed a series of squares with "directions indicated,"¹⁵⁸ Frank Petty's signature, and the date.¹⁵⁹ In a short opinion, the court disallowed the document as a holographic will because the document had "no words of a dispositive nature" and therefore lacked testamentary intent.¹⁶⁰ The court reasoned that because there was no testamentary intent on the face of the document, extrinsic evidence was not admissible to prove testamentary intent.¹⁶¹ The court distinguished *Chambers* by stating that the review of cases

149. *Id.* at 708, 496 S.W.2d at 367.

150. *McDonald I*, 254 Ark. at 705, 496 S.W.2d at 365.

151. *Id.* at 706, 496 S.W.2d at 365. Hazel suffered from cancer during the trial, and about a year afterwards, she died. *Id.* at 709, 496 S.W.2d at 367.

152. *See id.* at 708-10, 496 S.W.2d at 367-68.

153. A professional appraiser valued the property at \$17,862.00, but Frank paid his siblings a total \$20,125.93, which included Frank's interest, the \$3,000.00 interest of each of his siblings, the attorney's fees of \$450.00 from Ray's partition action, and the assumption of a loan against the land totaling \$1,675.93 by Frank. *Id.* at 708-09, 496 S.W.2d at 367.

154. *Id.* at 709, 496 S.W.2d at 367-68.

155. *Id.* at 709, 496 S.W.2d at 367.

156. *McDonald II*, 262 Ark. at 517, 559 S.W.2d at 1.

157. *Id.* at 518, 559 S.W.2d at 1.

158. The court did not articulate what it meant by "directions indicated," but if one examines the original holographic instrument, the logical impression is that the court meant that each square on the holographic instrument had the name of a Petty sibling in it. *See id.* at 519, 559 S.W.2d at 2.

159. *Id.* at 519, 559 S.W.2d at 2.

160. *Id.* at 518, 559 S.W.2d at 1.

161. *Id.*, 559 S.W.2d at 1.

in *Chambers*¹⁶² “recognized that the words in a holographic instrument must indicate a testamentary intent.”¹⁶³

3. *A Return to Extrinsic Evidence Without Dispositive Words?*

The bar to extrinsic evidence for wills without “dispositive” words remained in full effect for over a decade.¹⁶⁴ The Arkansas Supreme Court, however, appeared to revert to the use of extrinsic evidence without considering the language on the face of the document in the 1991 case of *Estate of O'Donnell*.¹⁶⁵ The family¹⁶⁶ of Harold O'Donnell attempted to probate a holographic instrument that O'Donnell wrote in 1988.¹⁶⁷ Evidence showed that O'Donnell prepared the instrument at the direction of his attorney in order to “tide him [O'Donnell] over” while the attorney prepared a formal will.¹⁶⁸ When O'Donnell completed his holographic will, he delivered it to his attorney's office, handed it to his attorney, and said “here it is.”¹⁶⁹ The will consisted of a list of O'Donnell's beneficiaries and the portion of the estate for each, the words “last will and test,” and O'Donnell's signature.¹⁷⁰ In its determination that the writing was not a valid holographic will, the probate court did not merely look at the face of the document but instead used a factors test that included both evidence from the face of the document and extrinsic evidence.¹⁷¹ In a memorandum opinion, the probate court listed seven factors¹⁷² as favoring the instrument as a will, and eleven fac-

162. The court did not provide a pinpoint cite to identify the review of cases to which the court refers. See *McDonald II*, 262 Ark. at 519, 559 S.W.2d at 2.

163. *Id.*, 559 S.W.2d at 2.

164. See David Terrell Faith Prophet Ministries v. Estate of Varnum, 284 Ark. 108, 112, 681 S.W.2d 310, 312 (1984) (citing *McDonald II* for the use of extrinsic evidence only when the document expresses testamentary intent); see also Faith v. Singleton, 286 Ark. 403, 405, 692 S.W.2d 239, 242 (1985) (citing *McDonald II* to mean that courts look to the “four corners of the instrument” for testamentary intent).

165. 304 Ark. 460, 803 S.W.2d 530 (1991).

166. Harold O'Donnell's family in this case was his two brothers and his mother. *Id.* at 461, 803 S.W.2d at 530. Harold's widow, Patricia O'Donnell, opposed the instrument. *Id.*, 803 S.W.2d at 530.

167. *Id.* at 461, 803 S.W.2d at 530. While not successful in their bid to probate the handwritten will, O'Donnell's family successfully overturned the probate court's award of debt-free dower to Patricia with their argument that Harold's typewritten formal will of 1979 was still in effect. *Id.* at 465–66, 803 S.W.2d at 532–33. Harold ordered his attorney to tear the will in half, but the attorney did not do so in Harold's presence as per the formal statutory requirements. *Id.*, 803 S.W.2d at 532–33.

168. *Id.* at 464, 803 S.W.2d at 532.

169. *Id.*, 803 S.W.2d at 532.

170. *Id.* at 467, 803 S.W.2d at 533.

171. *O'Donnell*, 304 Ark. at 462–64, 803 S.W.2d at 531–32.

172. The probate court considered the following factors to favor the instrument as a will: decedent's delivery of the instrument to attorney and statement to attorney “here it is,” the

tors¹⁷³ disfavoring the instrument as a will.¹⁷⁴ The Arkansas Supreme Court reviewed the probate court's opinion and concluded that the probate court's approach was "within the framework of the applicable law."¹⁷⁵

Only one week after issuing the *O'Donnell* opinion, the Arkansas Supreme Court appeared to revert to disallowing extrinsic evidence to prove testamentary intent in *Dunn v. Means*.¹⁷⁶ The deceased in *Dunn* was Mr. Claude Rogers, a man who lived with his female traveling companion, Ms. Maxine Robertson.¹⁷⁷ The two owned a house together, but were not married.¹⁷⁸ Ms. Robertson and Mr. Rogers invited Ms. Robertson's only daughter, the daughter's husband, and a close mutual friend to dinner one evening before Robertson and Rogers were to take an extended vacation.¹⁷⁹

While all were present that evening, Ms. Robertson drafted a three-page holographic will and signed her name at the end.¹⁸⁰ After her signature, Ms. Robertson added a second, independent writing from her original will: "Judee Dunn Claude & I give you full power to do & take care of all our Business & do as you wish with it, with it, [sic] with no problems from anyone. You can sell or dispose of all property & monies."¹⁸¹ This writing was not in Mr. Rogers' handwriting, but Mr. Rogers and Ms. Robertson signed below the end of the writing.¹⁸² Both Ms. Robertson's son-in-law and the mutual friend witnessed the second writing.¹⁸³

Mr. Claude Rogers died two months later, and his brother Virgil Rogers, who thought Claude died intestate, petitioned for Mr. Henry Means

decedent's taciturn personality, the instrument being both signed and dated, the "Last Will and Testament" caption at the top of the instrument, the widow not knowing about a prior will, the widow not knowing about the revocation of the prior will, and the decedent's not telling his wife their house was in only his name. *Id.* at 463, 803 S.W.2d at 531.

173. The probate court's factors disfavoring the instrument as a will were brevity of the document, the use of both pen and pencil on scratch paper, strikeovers made by decedent, the lack of urgency to have a will, failure of document to dispose of all property, decedent's attorney called the document a list, decedent wanted his attorney to make a formal will, decedent showed draft of formal will to wife and did not tell her about the handwritten will, decedent went over the draft of the formal will with his wife, handwritten will had no words of a dispositive nature, and the handwritten will did not mention the wife. *Id.*, 803 S.W.2d at 532.

174. *Id.* at 462-64, 803 S.W.2d at 531-32.

175. *Id.* at 465, 803 S.W.2d at 532.

176. 304 Ark. 473, 803 S.W.2d 542 (1991).

177. *Id.* at 474, 803 S.W.2d at 542.

178. *Id.*, 803 S.W.2d at 542.

179. *Id.*, 803 S.W.2d at 542.

180. *Id.*, 803 S.W.2d at 542. It is unclear from the *Dunn* opinion as to what Ms. Robertson wrote on the first three pages of the will. *See id.*

181. *Id.*, 803 S.W.2d at 542-43.

182. *Dunn*, 304 Ark. at 474, 803 S.W.2d at 542-43.

183. *Id.*, 803 S.W.2d at 542-43.

III to be the administrator of Claude Rogers's estate.¹⁸⁴ About eight weeks later, Judge Dunn filed the second writing with the probate court as the will of Claude Rogers.¹⁸⁵ After the probate court refused to probate the writing, Judge Dunn appealed to the Arkansas Supreme Court.¹⁸⁶

On appeal, Mrs. Dunn argued that the probate court erred by not considering extrinsic evidence to prove Mr. Rogers's testamentary intent.¹⁸⁷ The court cited *McDonald II* with approval, stating that a holographic will needs "words of a dispositive nature" on its face in order to be a will executed with testamentary intent.¹⁸⁸ With regard to Mr. Rogers, the court found "no testamentary intent whatsoever" in the testamentary clause of the will.¹⁸⁹

By taking opposite approaches in two cases within a week of one another, the Arkansas Supreme Court left an ambiguity in the law for proof of testamentary intent. This ambiguity was whether courts were to follow the extrinsic evidence approach of *Chambers v. Younes*¹⁹⁰ or the "four corners" test of *McDonald II*.¹⁹¹ The *O'Donnell* case seemed to be a manifestation of the *Chambers* approach, while *Dunn* was a substantiation of *McDonald II*. In Kay Edmonston's attempt to probate her mother's alleged holographic will, the Arkansas Court of Appeals agreed with the reasoning set forth in *Chambers* and *O'Donnell*, but the issue of which approach was the law ultimately went to the Arkansas Supreme Court for resolution.¹⁹²

IV. REASONING

On appeal to the Arkansas Supreme Court, the court, in concluding the purported holographic will was properly denied probate, reversed the decision of the Arkansas Court of Appeals and held that holographic wills require words of disposition and that extrinsic evidence was not admissible to

184. *Id.* at 474, 803 S.W.2d at 543.

185. *Id.* at 475, 803 S.W.2d at 543. The *Dunn* opinion does not elaborate on whether Ms. Dunn probated the writing as a formal or holographic will with regard to Mr. Rodgers. *See id.* It appears that Ms. Dunn attempted to probate the writing as a holographic will because of the informal nature of the instrument and the court's use of authority interpreting the law of testamentary intent in holographic wills. *See id.* If this was the case, it is strange that the court did not choose to invalidate the writing because the supposed testamentary language was not in Mr. Rogers's handwriting—a necessity for a holographic will. *See id.*

186. *Id.*, 803 S.W.2d at 543.

187. *Id.*, 803 S.W.2d at 543.

188. *Dunn*, 304 Ark. at 475, 803 S.W.2d at 543.

189. *Id.*, 803 S.W.2d at 543.

190. 240 Ark. 428, 399 S.W.2d 655 (1966).

191. 262 Ark. 517, 559 S.W.2d 1 (1977).

192. *Edmundson v. Estate of Fountain*, No. 03-1459, 2004 WL 1475423 (Ark. July 1, 2004).

prove testamentary intent unless a will contains words of disposition.¹⁹³ While the Arkansas Supreme Court's ruling clarified the rules for probating a holographic will, the ruling was also met with opposition for both substantive and public policy reasons.¹⁹⁴ Section IV.A traces the reasoning of the Arkansas Supreme Court majority.¹⁹⁵ Following this are sections IV.B and IV.C, which discuss the dissents of Chief Justice Dickey and Justice Brown, respectively.¹⁹⁶

A. The Arkansas Supreme Court Majority's Reasoning

The majority ruled upon the issue of whether the law requires a holographic will "to contain words that express a testamentary intent."¹⁹⁷ The court began with a review of the law on testamentary intent.¹⁹⁸

First, the court defined a will as "disposition of property to take effect upon the death of the maker of the instrument."¹⁹⁹ Second, the court recognized the necessity of testamentary intent to make a document a will.²⁰⁰ Next, the court limited the determination of testamentary intent to remain within the "four corners" of the offered instrument.²⁰¹ Finally, the court declared that the existence of testamentary intent within the document was a question of law for the court to determine.²⁰²

After laying this foundation, the court gave its interpretations of the authorities relied upon or distinguished by the courts below.²⁰³ The court started with an examination *McDonald v. Petty*,²⁰⁴ an authority relied on by the trial court and distinguished by the appeals court.²⁰⁵ The court emphasized that the rule in *McDonald II* was that the maker of a will must express testamentary intent so that a reviewing court without inference cannot mistake the maker's intention.²⁰⁶ In a reiteration of the *McDonald II* holding, the court stated that all instruments without dispositive words were without testamentary intent and therefore facially invalid.²⁰⁷ The court approved the

193. *Id.*

194. *Id.*

195. *See infra* Section IV.A.

196. *See infra* Sections IV.B and IV.C, respectively.

197. *Edmundson*, 2004 WL 1475423.

198. *See id.*

199. *Id.* (citing *Faith v. Singleton*, 286 Ark. 403, 692 S.W.2d 239 (1985); *Clark v. Rutherford*, 227 Ark. 270, 298 S.W.2d 327 (1957)).

200. *Id.* (citing *Smith v. Nelson*, 227 Ark. 512, 299 S.W.2d 645 (1957)).

201. *Id.* (citing *McDonald v. Petty*, 262 Ark. 517, 559 S.W.2d 1(1977)).

202. *Id.* (citing *Stark v. Stark*, 201 Ark. 133, 143 S.W.2d 875 (1940)).

203. *Edmundson*, 2004 WL 1475423.

204. *McDonald II*, 262 Ark. 517, 559 S.W.2d 1 (1977).

205. *Edmundson*, 2004 WL 1475423.

206. *Id.* (discussing *McDonald II*, 262 Ark. at 519, 559 S.W.2d at 2).

207. *Id.*

ruling in *McDonald II* that disallowed extrinsic evidence to prove testamentary intent for a facially insufficient instrument.²⁰⁸

Following its examination of *McDonald II*, the court scrutinized the lower court's use of *Chambers v. Younes*.²⁰⁹ Instead of viewing *Chambers* as disregarding testamentary language for holographic wills, the court interpreted *Chambers* to require some testamentary words but no certain words.²¹⁰ The court extended this interpretation of *Chambers* to limit the use of extrinsic evidence to prove testamentary intent only when the language of the document itself expresses testamentary intent.²¹¹ In other words, the court ruled that the use of extrinsic evidence to prove testamentary intent in the absence of "words of disposition" was inappropriate because "the existence of testamentary intent is not a matter of inference."²¹²

The court next assailed use of *Estate of O'Donnell*²¹³ to allow extrinsic evidence to prove testamentary intent.²¹⁴ The court recognized that the *O'Donnell* court used extrinsic evidence to prove testamentary intent but also noted that the *O'Donnell* court did not determine if the purported will had some testamentary words on its face.²¹⁵ Also, the court criticized *O'Donnell* for an incomplete citation to *David Terrell Faith Prophet Ministries v. Estate of Varnum*.²¹⁶ The court stated that the *O'Donnell* court's citation of *Varnum* did not include the language restricting the use of extrinsic evidence to cases where "the instrument uses words expressing testamentary intent."²¹⁷ The court also noted that *O'Donnell* did not mention the requirement from both *McDonald II* and *Varnum* that a purported will must contain some dispositive words.²¹⁸ Because *O'Donnell* seemed to allow the use of extrinsic evidence to prove testamentary intent without considering the face of the document, the court overruled *O'Donnell*.²¹⁹

208. *Id.* (quoting *McDonald II*, 262 Ark. at 519–20, 559 S.W.2d at 2). Curiously, the court followed this discussion of *McDonald II* with a summary of the facts and holding of *Dunn v. Means*, 304 Ark. 473, 803 S.W.2d 542 (1991), but the court did not elaborate on the significance of *Dunn* in its discussion. *See id.*

209. 240 Ark. 428, 399 S.W.2d 655 (1966).

210. *Edmundson*, 2004 WL 1475423 ("[T]his court recognized that while it is not necessary for a testator to use specific terms such as 'bequeath' or 'devise,' there must be *some* words indicating an intent on the part of the testator to dispose of property." (emphasis in original)).

211. *Id.*

212. *Id.*

213. 304 Ark. 460, 803 S.W.2d 530 (1991).

214. *Edmundson*, 2004 WL 1475423.

215. *Id.*

216. *Id.* (citing *David Terrell Faith Prophet Ministries v. Estate of Varnum*, 284 Ark. 108, 681 S.W.2d 310 (1984)).

217. *Id.*

218. *Id.*

219. *Id.*

After giving its interpretation of *O'Donnell*, the court criticized the dissenters' use of the Restatement (Third) of Property's position that extrinsic evidence is admissible to prove testamentary intent when there is no testamentary intent on the face of the will.²²⁰ The court remarked that the Restatement was in direct conflict with the court's prior holdings and the holding of the case at bar.²²¹ In one final criticism of the dissent, the court remarked that the caption "Last Will" at the top of the Fountain will was insufficient to "cure the defective nature of [the] document" because there was no other language in the document that indicated Mrs. Fountain "intended to give or leave certain property to each of her children."²²²

Finally, the court applied its interpretation of the law to the facts of the case.²²³ First, the court noted there was no language in Mrs. Fountain's will that purported to leave property to Fountain's children.²²⁴ Second, the court ruled that the lack of dispositive language made Mrs. Fountain's will facially defective.²²⁵ Third, because Mrs. Fountain's will lacked testamentary intent on its face, extrinsic evidence was not admissible to prove testamentary intent.²²⁶ Finally, because the "document's expressions are not so clearly stated that, without inference, no mistake can be made that [Mrs.] Fountain possessed the requisite testamentary intent" at the time Mrs. Fountain made the will, the trial court did not commit an error for failure to admit Mrs. Fountain's will to probate.²²⁷ The court concluded that the document was merely a list of Fountain's children with property under each child's name.²²⁸

B. The Dickey Dissent

Chief Justice Dickey dissented on the grounds that the majority's interpretation of case law was inaccurate.²²⁹ She first set out to distinguish the majority's use of *Varnum*, by making a more complete citation to *Varnum* that included a statement that wills with no facial intent were tantamount to

220. *Edmundson*, 2004 WL 1475423. See also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 cmt. c (1998).

221. *Edmundson*, 2004 WL 1475423, at n.3.

222. *Id.*

223. See *id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Edmundson*, 2004 WL 1475423.

228. *Id.*

229. See *id.* (Dickey, C.J., dissenting) ("[T]he case law cited by the majority leads one to believe that the document in question contains testamentary language sufficient to allow the trial court to consider extrinsic evidence . . .").

the type of will in *McDonald II*.²³⁰ Next, Justice Dickey made a public policy criticism of the majority for overruling *O'Donnell* because doing so jeopardized the ability of citizens to draft a long-term instrument with the expectation that courts will honor the instrument.²³¹

Returning to her substantive law criticism of the majority, Justice Dickey recounted the facts and reasoning of the *O'Donnell* case.²³² After this, Justice Dickey drew comparisons and contrasts between the *O'Donnell* instrument and the Fountain will.²³³ She recognized that both the Fountain and *O'Donnell* wills were dated and signed lists with the caption "Last Will" and that both wills had the names of beneficiaries and specific property or cash amounts next to each name.²³⁴ A salient distinction between the *O'Donnell* will and Fountain will to Justice Dickey was that the *O'Donnell* will had alterations of amounts to some beneficiaries.²³⁵ Another distinction between the two wills articulated by Justice Dickey was that the Fountain will had two attesting witnesses.²³⁶ Because of the distinctions between the Fountain and *O'Donnell* wills, Justice Dickey believed the case for the Fountain will was "stronger than that in *O'Donnell*."²³⁷ Another criticism leveled at the majority's logic by Justice Dickey was that if the *O'Donnell* court used extrinsic evidence, then the purported will had enough testamentary language.²³⁸ Extending that reasoning, Justice Dickey could not reconcile the majority's determination that the Fountain will lacked testamentary language when there was so much similarity between the Fountain will and the instrument in *O'Donnell*.²³⁹

To further her argument that the majority misinterpreted the law on the admission of extrinsic evidence to prove testamentary intent, Justice Dickey quoted the Restatement (Third) of Property's section on the probate of holographic wills.²⁴⁰ Justice Dickey noted the strong similarities between the Restatement's example of a holographic will eligible for proof with ex-

230. *Id.* (Dickey, C.J., dissenting). The language Justice Dickey emphasized from *Varnum* to illustrate this argument was "use of extrinsic evidence is appropriate only when the instrument expresses an intent, it is inappropriate when the instrument expresses not intent as in *McDonald* . . ." *Id.* (quoting *Varnum*, 284 Ark. at 112, 681 S.W.2d at 312).

231. *Id.* (Dickey, C.J., dissenting). ("[B]oth the bar and the general public rely on our established precedent in advising clients in the drafting of long term instruments like holographic wills. There is no reason for this court to depart from our well reasoned holding in *Estate* [sic] *O'Donnell* . . .").

232. *Id.* (Dickey, C.J., dissenting).

233. *Edmundson*, 2004 WL 1475423 (Dickey, C.J., dissenting).

234. *Id.* (Dickey, C.J., dissenting).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Edmundson*, 2004 WL 1475423 (Dickey, C.J., dissenting).

240. *Id.*

trinsic evidence and the Fountain will.²⁴¹ After that, Justice Dickey quoted the language in *Chambers* that appeared to allow extrinsic evidence to prove testamentary intent.²⁴² Justice Dickey then distinguished the will in *McDonald II* from the Fountain will by contrasting the two.²⁴³ Specifically, Justice Dickey noted that the *McDonald II* will was “nothing more than a sketch on the back of a used envelope with names in individual squares” with “absolutely nothing” showing an intent to dispose of property after death while the Fountain will listed Mrs. Fountain’s children with “various property or amounts of money after each child’s name.”²⁴⁴ Finally, Justice Dickey examined the semantics of “dispositive words” as it related to testamentary language.²⁴⁵ Taking “dispositive” to mean “decisive factor,”²⁴⁶ Justice Dickey concluded that the caption “Last Will” and the arrangement of the heirs’ names and the property of the estate were “dispositive words.”²⁴⁷

241. *Id.* The Restatement’s example was:

After G’s death, a document was found in her desk. The document, written in G’s handwriting, appears as follows:

To A, 1/4

To B, 1/4

To C, 1/4

To D, 1/8

To E, 1/8

/s/G

3/12/98

Two of G’s friends testified that G told them that she made a will, and that it could be found in her desk after her death. The testimony of G’s friends may be considered in determining whether G’s document was executed with testamentary intent [T]he fact that the transfers add up to all of G’s estate raises an inference of testamentary intent.

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 cmt. c (1998).

242. *Edmundson*, 2004 WL 1475423 (Dickey, C.J., dissenting). The most relevant part of Justice Dickey’s quotation of *Chambers* was “Review of our cases clearly indicates that our courts have customarily admitted extrinsic testimony to establish testamentary intent” *Id.* (quoting *Chambers v. Younes*, 240 Ark.428, 428, 399 S.W.2d 655, 655 (1966)).

243. *Id.* (Dickey, C.J., dissenting).

244. *Id.*

245. *Id.* (Dickey, C.J., dissenting) .

246. The meaning of “dispositive” as Justice Dickey used it is “[b]eing a deciding factor; (of a fact or factor) bringing about a final determination,” but the alternate meaning is “[o]f, relating to, or reflecting the disposition of property by will or deed.” BLACK’S LAW DICTIONARY 505 (8th ed. 2004).

247. *Edmundson*, 2004 WL 1475423 (Dickey, C.J., dissenting). (“Because I believe the caption ‘Last Will’ meets the requirement of dispositive or testamentary language on the facts of this case, I disagree with the majority’s affirmance of the trial court.”).

C. The Brown Dissent

Justice Brown dissented from the majority on the grounds that Mrs. Fountain's will did contain evidence of testamentary intent.²⁴⁸ Justice Brown's dissent criticized the majority's requirement that holographic wills have dispositive words because holographic wills require no technical or "magic" words.²⁴⁹ To Justice Brown, the majority's reasoning construed the law so that the face of the will has to show absolute proof of testamentary intent rather than merely raising enough testamentary intent to allow extrinsic evidence.²⁵⁰ Justice Brown also made a public policy argument against the majority's "strict requirements" on holographic wills because such restrictions militate against allowing those without access to legal services to avoid intestacy.²⁵¹ Like Justice Dickey, Justice Brown also argued that *Chambers* allowed extrinsic evidence to prove testamentary intent.²⁵² As a final criticism, Justice Brown speculated that the majority's in restricting the availability of extrinsic evidence was to shut "the door to multiple family squabbles in court over testamentary intent when a handwritten instrument is found after a person's death."²⁵³

V. SIGNIFICANCE

Before the *Edmundson* decision, Arkansas had two positions on the admission of extrinsic evidence to prove testamentary intent in holographic wills. The first position, embodied by both *Chambers v. Younes*²⁵⁴ and *Estate of O'Donnell*,²⁵⁵ had courts use all facts and circumstances to prove testamentary intent.²⁵⁶ The second position, created in *McDonald v. Petty*,²⁵⁷ was for courts to consider extrinsic evidence to prove testamentary intent only if the offered document was facially sufficient to the degree that one could not mistake that the maker of the document executed the document

248. *Id.* (Brown, J., dissenting) ("To conclude, as the majority does, that evidence of testamentary intent is not raised by this writing dismisses the obvious").

249. *Id.*

250. *See id.* (Brown, J., dissenting).

251. *Id.* (Brown, J., dissenting).

252. *Id.* Justice Brown used the same language from *Chambers* as Justice Dickey: "[O]ur courts have customarily admitted extrinsic evidence to establish testamentary intent . . ." *Id.* (quoting *Chambers v. Younes*, 240 Ark. 428, 428, 399 S.W.2d 655, 655 (1966)).

253. *Edmundson*, 2004 WL 1475423 (Brown, J. dissenting).

254. 240 Ark. 428, 399 S.W.2d 655 (1966).

255. 304 Ark. 460, 803 S.W.2d 530 (1991).

256. *See* discussions of *Chambers*, *supra* Section III.C.1, and *O'Donnell*, *supra* Section III.C.3.

257. 262 Ark. 517, 559 S.W.2d 1 (1977).

with testamentary intent.²⁵⁸ Mrs. Edmonston's case was an opportunity for the Arkansas Supreme Court to validate the approach in *Chambers* and *O'Donnell* or to extinguish their analytical framework altogether. The result was both a continued limitation on the use of extrinsic evidence to prove testamentary intent²⁵⁹ and a great uncertainty as to the semantic requirements to make a valid disposition of property with a holographic will.²⁶⁰

A. The Use of Extrinsic Evidence to Prove Testamentary Intent

While *Edmundson* unambiguously overruled *O'Donnell* for considering extrinsic evidence without dispositive words, *Edmundson* stopped short of overruling *Chambers*.²⁶¹ Instead, *Edmundson* relied on *McDonald II* for authority to distinguish *Chambers*.²⁶² The holding in *McDonald II* also did not overrule *Chambers*, but instead *McDonald II* distinguished *Chambers* with an oblique reference to a "review of the cases [in *Chambers* that] recognized that the words in a holographic instrument must indicate a testamentary intent."²⁶³

This assertion by *McDonald II* is suspect because *McDonald II* failed to explain why the review of the cases in *Chambers* recognized a requirement for words that express a testamentary intent and because *McDonald II* gave no pinpoint to the review of cases to which it referred.²⁶⁴ There were, in fact, two reviews of law in *Chambers*.²⁶⁵ The first review of law in the *Chambers* opinion was a quotation of 94 C.J.S *Wills* section 203 in which the authors of C.J.S cite Arkansas cases in a broader discussion about testamentary intent in holographic wills.²⁶⁶ The *McDonald II* court's reference

258. See discussion of *McDonald II*, *supra* Section III.C.2.

259. See *infra* Section V.A.

260. See *infra* Section V.B.

261. See *Edmundson*, 2004 WL 1475423.

262. *Id.*

263. *McDonald II*, 262 Ark. at 519, 555 S.W.2d at 2.

264. See *id.*, 555 S.W.2d at 2.

265. See *Chambers*, 240 Ark. 428, 430-31, 399 S.W.2d 655, 657 (1966).

266. *Id.* at 430, 399 S.W.2d at 657 (quoting 94 C.J.S. *Wills* § 203, now 95 C.J.S. *Wills* 203 (2001)). The quotation reads as follows:

Testamentary intent is necessary to the validity of a holographic will. [Smith v. Nelson, 227 Ark. 512, 299 S. W. 2d 645; Barnard v. Methodist Church of Mena, Arkansas, 226 Ark. 144, 288 S. W. 2d 595.] No particular words are necessary to manifest the *animus testandi*; thus, the paper need not refer to itself as a will ... The fact that the holographic instrument concerns itself with matters other than the disposition of property will not nullify its effect as a will, but it may be considered in determining the intent of the writer [Cartwright v. Cartwright, 158 Ark. 278, 250 S. W. 11] *Inquiry may be made into all relevant circumstances where the existence of testamentary intent is in doubt.*' [Emphasis added]

Id., 399 S.W.2d at 657.

to *Chambers* is possibly the “no particular words” language in the C.J.S. quotation. The presence of the adjective “particular” implies a limitation on the court’s willingness to consider a document without testamentary words or with insufficient testamentary words. The second review of law in *Chambers* was a cursory discussion of two cases where the courts in those cases considered whether a decedent’s personal correspondence was a valid holographic will.²⁶⁷ In this review, the *Chambers* court stated that in those cases extrinsic evidence “was necessary to fortify the finding of existence of testamentary intent.”²⁶⁸ It is possible that this was the language to which *McDonald II* referred because the infinitive phrase “to fortify” makes a strong implication that the personal correspondence in those cases already had some testamentary language.

Regardless of the review of law to which *McDonald II* referred, neither review directly states the proposition for which *McDonald II* cites *Chambers*. In fact, the ruling in *Chambers* was irreconcilable with that of *McDonald II* because *Chambers* disposed of the very argument adopted by *McDonald II*.²⁶⁹ The *Edmundson* court, relying on *McDonald II* as authority, distinguished *Chambers* with reasoning similar to *McDonald II*.²⁷⁰ Even though *Chambers* rejected the bar to extrinsic evidence and despite the *McDonald II* court’s dubious reference to *Chambers*, the interpretation of *Chambers* proffered by *McDonald II* is now unequivocally, by way of *Edmundson*, the law in Arkansas law governing the admission of extrinsic evidence to prove testamentary intent for holographic wills.

267. The pertinent part of review reads:

Review of our cases clearly indicates that our courts have customarily admitted extrinsic testimony to establish testamentary intent, without considering whether the statute on proof of a holographic will (§ 62-2117, *supra*) expressly permits such testimony. Perusal of *Arendt v. Arendt*, 80 Ark. 204, 96 S.W. 982, and *Weems v. Smith*, 218 Ark. 554, 237 S.W.2d 880, and the letters therein held to be valid holographic wills, it is apparent that extrinsic testimony was necessary to fortify the finding of existence of testamentary intent. We think this is proper.

Id. at 430–31, 399 S.W.2d at 657.

268. *Id.*, 399 S.W.2d at 657.

269. The court in *Chambers* considered an argument offered by the opponent of the will in that case that a holographic will must show testamentary character and testamentary language on its face. *Id.* at 432, 399 S.W.2d at 658. The court disposed of the argument because “inquiry may be made into all relevant circumstances where the existence of testamentary intent is in doubt.” *Id.*, 399 S.W.2d at 658.

270. *Edmundson*, 2004 WL 1475423.

B. Words to Die by: What Language Must the Writer of a Holographic Will Use to Make a Valid Disposition of Property?

The *Edmundson* court reaffirmed the requirement from *McDonald II* that holographic wills have dispositive words.²⁷¹ Nevertheless, the court provided little guidance on the substantive nature this requirement. By discussing the composition of the *McDonald II* will, the court seemingly drew the border for dispositive words in a holographic instrument.²⁷² The *McDonald II* will was literally a sketch on the back of an envelope with some names, property, the decedent's signature, and the date.²⁷³ After *Edmundson*, it is almost certain that any holographic will communicated in a visual manner will fail for lack of testamentary language.

This is the only certainty offered by the *Edmundson* court with regard to the testamentary language issue. The court appeared to expand the territory of documents without words of disposition beyond visual depictions by discussing *Dunn v. Means*.²⁷⁴ The alleged testamentary language in the *Dunn* would read: "Judee Dunn—Claude & I give you full power to do & take care of all our Business & do as you wish with it, with it, [sic] with no problems from anyone."²⁷⁵ In *Dunn*, the court declared that the language of the will "showed no testamentary intent whatsoever."²⁷⁶ The *Edmundson* court did not elaborate on the significance of the *Dunn* case, but the possible legal implication is that even if a document contains verbs such as "give" that purport to make a transfer, the court may not consider the document as testamentary.²⁷⁷ If this implication proves correct in future cases, even documents past courts considered facially sufficient could fail for lack of testamentary intent.

For example, the will in *Chambers* was a simple writing that requested the decedent's property "be" to his wife.²⁷⁸ The verb "be" has far less testamentary strength than the word "give." The word "give" implies a permanent detachment from the property while the word "be" is a generic verb with no connotation. The decedent also omitted the preposition "to" before

271. In upholding the trial court's initial determination, the *Edmundson* court stated that Mrs. Fountain's will "lacked any dispositive language." *Id.*

272. *Id.* (discussing *McDonald II*, 262 Ark. at 519–20, 559 S.W.2d at 2).

273. See *McDonald II*, 262 Ark. at 519–20, 559 S.W.2d at 2.

274. 304 Ark. 473, 803 S.W.2d 842 (1991).

275. *Id.* at 474, 803 S.W.2d at 542.

276. *Id.* at 475, 803 S.W.2d at 543.

277. The *Edmundson* court made a brief summary of the facts and law in *Dunn* after discussing *McDonald II*, but did not elaborate on the significance of *Dunn*. See *Edmundson*, 2004 WL 1475423.

278. *Chambers*, 240 Ark. 428, 429, 399 S.W.2d 655, 656 (1966). The instrument from *Chambers* read "I Body Ruff request that all I own in the way of personal or real estate property to be [sic] my wife Modene." *Id.*, 399 S.W.2d at 656.

“be” in his will.²⁷⁹ Surely if a post-*Edmundson* court considered only the words on the face of the will in *Chambers* and nothing else, the will’s lack of strong words of disposition would fall into the no man’s land of documents without testamentary intent.

The will of Oral Fountain seemed to fit somewhere between the *McDonald II* will and the *Dunn* will. The Fountain will was not devoid of words, yet there were no complete sentences with words like “bequeath” or “devise.”²⁸⁰ The court recognized the “Last Will” at the top of the document, but this was not enough to show the writer’s intent that the list of property and beneficiaries below the caption “Last Will” was a final disposition of Mrs. Fountain’s estate.²⁸¹

In the wake of the *Edmundson* decision, a drafter of a holographic will cannot be certain how much testamentary language or what “magic words” the courts will require to validate a holographic will. Even though the court recognized that holographic wills “need not have a specific title or be couched in technically appropriate language,”²⁸² the court’s emphasis on dispositive words created a de facto requirement for very strong testamentary language to prove that the maker of a holographic will intended the document as a will. Merely making a list of property with some visual depiction of which person gets what property is not enough, yet writing out complete sentences with verbs such as “give” may also fail for lack of testamentary intent. The implications for equity are great because a will’s proponent, in possession of a surfeit of evidence favoring the holographic instrument as a will, cannot depend on that evidence unless the purported will is tantamount to a formal writing with strong words of disposition.

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279. *Id.*, 399 S.W.2d at 656.

280. See *Edmondston v. Estate of Fountain*, 84 Ark. App. 231, 239, 137 S.W.3d 415, 420 (2203), for a reproduction of the original will.

281. *Edmundson*, 2004 WL 1475423.

282. *Id.*

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