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Decedent Estates—Publication of a Will

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VII Decedent Estates

Publication of a Will

In asking the subscribing witnesses to sign his last will and testament, the testator "shall declare the instrument so subscribed, to be his last will and testament."[1] This declaration need not be made in any set pattern, but the testator must, in some way, make known to them either by acts or conduct,[2] if not by words, that it is intended and understood by him to be his will.[3]

There are two important reasons for demanding that publication be made. One is that the testator be fully aware of what he is doing, and secondly that the witnesses will be impressed with the signing so that they will know "what occurred at its execution and be ready to vouch for its validity in court."[4] Since it is less likely that the testator does not know what he intends an instrument to be, in the matter of holographic wills the courts will be more lenient as to proof of publication,[5] although there still must be compliance with the statute.[6] The atmosphere of a testamentary instrument wholly in the handwriting of the testator is such as naturally to dispose to the judicial mind that the dangers of fraud and the imposition of undue influence against which the statute was designed as a safeguard, are greatly diminished, and that it is unnecessary to criticize as closely the terms and manner of publication.[7]

This question of publication was brought up anew in the case of In re *Pulvermacher's Will.*[8] The testator while in the safety deposit room of his bank, asked two guards to sign an instrument telling them that he was going away on a trip, but he made no mention that it was testamentary in character. One witness testified, "He did say he wanted something taken care of in case anything happened to him," and, "that with all the accidents which you have today you never know what will happen." The instrument was so folded so that only the last paragraph was visible. One of the witnesses then requested the testator to sign his name again so that he might witness the signing. The dis-

1. Decedent Estate Law § 21 (3).
2. *Torry v. Bowen,* 15 Barb. 304 (N. Y. 1853).
3. *Lane v. Lane,* 95 N. Y. 494 (1884).
4. *Matter of Moore's Will,* 109 App. Div. 762, 96 N. Y. Supp. 729 (4th Dep't), *aff'd,* 187 N. Y. 573, 80 N. E. 1114 (1907).
5. *Matter of Will of Hunt,* 110 N. Y. 278, 18 N. E. 106 (1888).
6. See note 4 *supra.*
7. *Matter of Turell's Will,* 166 N. Y. 330, 59 N. E. 910 (1901); see also In re *Levengston's Will,* 158 App. Div. 69, 142 N. Y. Supp. 829 (3rd Dep't 1913); In re *Wallace's Will,* 148 Misc. 867, 265 N. Y. Supp. 898 (4th Dep't 1933).
8. 305 N. Y. 378, 113 N. E. 2d 525 (1953).

position of the Surrogate's Court, New York County[9] was to deny probate for the instrument; the Appellate Division reversed[10] and the Court of the Appeals reinstated the judgment of the surrogate stating that there had been no publication.

The Court of Appeals in denying the probate bases its finding upon the fact that the testator had not shown unequivocably to the witnesses that this instrument was testamentary in character. The court held that the witnesses had not been told in absolute terms that the instrument was testamentary and that the acts were not sufficient to convey the same idea. Acts in themselves may constitute publication.[11] The words and acts used by the testator ("something taken care of in case anything happened to him") could be taken to mean that he was making an inter vivos gift or even that he was granting of a power of attorney. This contention was outweighed by the Appellate Division in its opinion[12] which cited a case where practically the same words were used by the testator.[13]

It is the opinion of the writer that the decision of the Appellate Division was more sound in its interpretation of the testimony of the witnesses than that of the Court of Appeals. The fact that the instrument is holographic and that the two witnesses must have understood that they were witnessing a paper of some importance, in that it did require witnesses, would seem to satisfy the requirement of publication.

Surrogate Court Act § 269

In time of national emergency, the Federal Government is empowered to enacted legislation under its war power which in time of peace would be unconstitutional. Such is the Trading with the Enemy Act.[14] Under this act the President of the United States is authorized to "regulate . . . or prohibit, any acquisition, holding, withholding, use, transfer . . . importation or exportation of . . . any property in which any foreign country or national thereof has any interest," except, "upon such terms and conditions as (he) may prescribe."[15] The President so ordered, in respect to Hungary, in April of 1940, and he issued Executive Order No. 8389, and by § 3 of this order the effective date as respect to

9. In re *Pulvermacher's Will*, 111 N. Y. S. 2d 474 (Surr. Ct. 1952).
10. In re *Pulvermacher's Will*, 280 App. Div. 575, 116 N. Y. S. 2d 110 (1st Dep't 1952).
11. See note 7 *supra*.
12. See note 10 *supra*.
13. *In Matter of Palmer's Will*, 42 Misc. 469, 87 N. Y. Supp. 249 (Surr. Ct. 1904).
14. 50 U. S. C. A. Appendix.
15. *Ibid.* § 5 (b).