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Bettie Gilbert
University of Kentucky

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STUDENT NOTES

WILLS—THE NATURE OF NON-TESTAMENTARY ACTS

A non-testamentary act is an unattested act which determines or affects either the amount of a legacy or devise or the identity of the legatee or devisee, but whose primary purpose is other than affecting the will, that is, not testamentary.

The acts may be divided into those affecting legacies or devises and those affecting legatees or devisees, but if we are to arrive at the nature of the act it is more purposeful to divide them into those acts involving writing and those which do not. The validity of the latter is not as questionable as the validity of the former.

A numerous class is that involving a bequest to the person or persons who shall take care of the testator in his last days. There are many variations of this. Bequests to employees or servants are universally held good,[1] the only controversy being as to what persons are included by the terms of the will.[2] A bequest to a "business partner" was held good.[3] In all of these the doing of a certain act completes or gives effect to a testamentary provision but the act is not performed for that purpose. The testator hires a servant for the purpose of having that person serve him and not because he wants to benefit him by his will. In the same way one would not select a business partner for the sole purpose of allowing him to take under a will, but because he wants that person as a business partner. Each of these acts could be performed with testamentary intent in disregard of the immediate temporal effect, but it is so unlikely that the courts do not even discuss it. Could the testator with a provision in his will for servants employ a person with the sole intention that he might be benefited by the will without requiring any services? The writer thinks not. In the first place, it is almost inconceivable that a person would act in that way when it would be so much easier to change the will, and in the second place, the courts would probably recognize it as testamentary and not allow it. Most of the provisions require something besides mere

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[1] "No case has been found in which the validity of a devise or bequest has been questioned on the ground that it was to 'servants', 'employees', or the like instead of to named persons, but numerous cases have considered the question of who may take under such a provision." Note, 38 A. L. R. 779.

[2] Abbott v. Lewis, 77 N. H. 94, 88 A. 98 (1913); Metcalf v. Sweeney, 17 R. I. 215, 21 Atl. 364 (1891); Ginter's Executors v. Shelton, 102 Va. 185, 45 S. E. 892 (1903); Industrial Trust Co. v. Alves, 46 R. I. 16, 124 Atl. 260 (1924); Givens v. Whitney, 233 N. Y. 665 (1922); In re Mitchell's Estate, 114 Misc. 370, 186 N. Y. S. 666 (1921); In re Altman's Estate, 115 Misc. 476, 188 N. Y. S. 493 (1921); 1 Page on Wills 1518–19, Sec. 911.

[3] Stubbs v. Sargon, 3 M. & C. 507, 40 Eng. Rep. 1022 (1838).

employment, usually a certain length of time, so it would be, to say the least, a most uncertain opening for a non-testamentary act.

When the will provides that those who take care of the testator in his last days shall take part of the estate, usually there is no writing involved.[4] It takes the concurrence of the testator's and the beneficiary's acts to identify the beneficiary. Both could be performed with testamentary intent. The testator may arrange for a person to care for him principally with the intent of naming the beneficiary of his will. But it takes something besides the intent—the care must actually be given. If the person giving the care knows of the will provision, he may give that care with the principal intent of taking under a will, but caring for a person is of such a nature that the primary intent must be giving care and cannot be benefiting from a will. Since this is true, it was properly held that one who took care of the testatrix at her request with full knowledge of the will provision, took under the provision.[5] The provision in the will was that the care should be furnished at the request of the testatrix, and in the request to her granddaughter the testatrix even said that she wanted the granddaughter to have all her property. This case probably goes to the extreme. It is an illustration that an act may be partly testamentary and still valid as non-testamentary. In one case[6] the testatrix told her attorney that she intended for her stepdaughter to have her property under a provision that it should go to whomsoever should take care of her. This evidence was not admitted as it was clearly shown that a charitable organization and not her stepdaughter had really taken care of her. The act cannot be entirely testamentary. What little objection there has been to this type of provision in wills is not that it allows a later testamentary act to change the will, but because of uncertainty and the admission of parol evidence.[7] It makes no difference that the care is to be for someone other than the testator.[8]

The non-testamentary acts involving writing are more difficult to explain. One is that involving advancements, or satisfactions.[9] The testator provides that all advancements to the beneficiaries appearing

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[4] Lear v. Manser, 114 Me. 342, 96 Atl. 240 (1916); In re Reinheimer's Estate, 42 R. I. 408, 108 Atl. 419 (1919).

[5] Dennis v. Holsapple, 148 Ind. 297, 47 N. E. 631 (1897).

[6] In re Mangan's Will, 185 Wisc. 328, 200 N. W. 386 (1924).

[7] Bosserman v. Burton, 137 Va. 502, 120 S. E. 261 (1923) (Contention that the provision was void for uncertainty but it was held good); In re Farmer's Will, 163 N. Y. S. 1089 (1917); Summers v. Summers, 102 Va. 185, 73 S. E. 401 (1916).

[8] Harriman v. Harriman, 59 N. H. 135 (1879).

[9] Langdon v. Astor's Executors, 16 N. Y. 9 (1857); King v. Lynch, 74 N. C. 364 (1876); In re Twombly, 24 Misc. 51, 53 N. Y. S. 385 (1898); In re Moore, 61 N. J. Eq. 616, 47 Atl. 731 (1900); Robert v. Corning, 89 N. Y. 225 (1882); Lawrence v. Lindsay, 68 N. Y. 108 (1877); Shaw v. Grimes, 187 Ky. 250, 218 S. W. 447 (1919). Evans, *Incorporation by Reference, Integration, and Non Testamentary Act*, 25 Col. L. R. 879, 893 (1925). Advancement is incorrect technically but it is the most convenient term as it is used in the will provisions themselves.

on his account book shall be charged against their legacies. The writing of the amount in the account is done expressly to affect the size of the legacy. It seems at first glance that we are allowing the testator to change his will by a subsequent unattested writing, but it is held to be non-testamentary. Advancements do not change the gift in the will but are only the paying of part of it before the death of the testator. The testator may make gifts without regard to his will.[10] It is quite proper for him to make known which gift he wants to be considered part of the gift in the will. This he does by writing it in his account book. The writing is considered part of the non-testamentary advancement and so is itself non-testamentary.[11] If it were only evidence of the advancement, the only controlling feature would be the intention of the testator. It has been held that a writing which amounts only to the striking of a balance and is not made until some time after the advancement is actually made is admissable to show the testator's purpose to treat the gifts as advancements if they were in fact made.[12] It would seem more desirable to only allow the admission of a writing which is made at the time of the advancement and so is an integral part of it. A writing made some time later would only be valid if the testator at the time of making the gift actually had the intention to treat it as an advancement. Of course, it would be practically impossible to discover the actual intent of the testator at the time, but a writing made at the time would be better evidence than one made later. It is submitted that it should be the only evidence since it is actually a part of the advancement. It is consistently held that the writing is not conclusive and there must be advancements in fact.[13] This problem is very closely related to incorporation by reference and

[10] Webster v. Gray, 7 N. Y. S. 266, 268 (1889) (T, who stated in will that amount charged in books should be treated as advancements, may enter memorandum in the account of settlement in full. Power to dispose of property in his lifetime not limited by any previously indicated testamentary provision.)

[11] "In my judgment, the paper which contained the charge is not to be regarded as testamentary in character." In re Moore, 61 N. J. Eq. 616, 47 Atl. 731, 732 (1900).

[12] McClintock's Appeal, 58 Mich. 152, 24 N. W. 549 (1885).

[13] "It cannot be presumed that the testator intended that an entry should pay a legacy, unless it expressed the fact. Besides if the testator so intended, it is doubtful whether such a provision would be valid." Lawrence v. Lindsay, 68 N. Y. 108, 114 (1877); "We do not here hold that the mere act of charging a sum as an advancement done by the testator after the making of a will is of effect." In re Harris' Estate, 82 Vt. 199, 72 Atl. 912, 915 (1909); "Hence the charge in the book goes for nothing if it be shown to be untrue; or that the subject matter of it had not been actually given or advanced to the party charged with it." Hoak v. Hoak, 5 Watts 80, 82 (Pa. 1837); but see Musselman's Estate, 5 Watts 9, 13 Pa. 1837), "He might, doubtless, have peremptorily directed the book, in whatever condition found at his death to be taken for conclusive proof of the state of the accounts"; In re Weil's Will 151 Misc. 841, 272 N. Y. S. 477 (1934) (Testator provided that charges should be conclusive evidence of the fact of indebtedness and of the account but no comment was made upon this provision by the court).

it would be well to note one important distinction. When the statement of accounts is spoken of as already existing and so incorporated by reference, the amounts stated are conclusive.[14] An important reason for distinguishing between the two is that some states which do not allow incorporation by reference do recognize the efficacy of non-testamentary acts.[15]

Suppose that the testator should provide that those assuming certain positions after the execution of his will whose names he should write down, would take under his will, for example, those who should take care of him and whose names he should write in a particular place should be beneficiaries. It has been rightly held that a testator cannot provide that such of his already existing creditors whose names he shall later write down may take under his will.[16] But could he provide that such of his after-acquired creditors whose names he should write down should take? Such a provision would be good if these cases are analogous to the cases of advancements. The assumption of the position is non-testamentary and if the act of writing the names is a part of that, it is also non-testamentary. The act of writing down the amount is more a natural part of an advancement than writing down a name is of having a person occupy a certain position. In the leading case of *Langdon* v. *Astor's Executors*[17] the writing down was said to have been made in the course of business. If this is the rationale behind the advancement cases it could not apply to our hypothetical cases and the provisions would not be good. It is a method of selecting which under certain non-testimentary acts shall benefit from a will, and since the selection is entirely for the purpose of designating legatees, it is testamentary and void.

Another type of non-testamentary act involving writing is the designation of the beneficiary thru another person's will.[18] In one case[19] the testator left some property to his daughter and in case of her death in his lifetime to her executors. The provision was held good. This case was the basis for the decision in the much discussed *In re Fowles' Will*,[20] in which the testator provided that in case he and his wife died under such circumstances that it was impossible to tell which one predeceased the other, it should be deemed that he predeceased his wife. The effect of this was that his estate should go according to his wife's will, and it was held good. These wills are testamentary as to the writer's property but not as the property of the testator, who refers to them as means of identifying his beneficiaries, and so properly

[14] In re Well's Estate, 184 Wisc. 242, 199 N. W. 52 (1924).

[15] The state of New York is a notable example.

[16] Hartwell v. Martin, 71 N. J. Eq. 157, 63 Atl. 754 (1906).

[17] 16 N. Y. 9 (1857).

[18] Evans, *op. cit. supra* note 9, 898.

[19] In re Piffard's Estate, 111 N. Y. 410, 18 N. E. 718 (1888).

[20] 222 N. Y. 222, 118 N. E. 611 (1918). For discussions of the case see 27 Y. L. J. 673 (1918); 3 Corn L. Q. 320 (1918); Evans, *op. cit. supra* note 9, 899, 900.

fall under the heading of non-testamentary acts. If the will is already in existence at the time and referred to as such, it is incorporated by reference.[21] That this is possible is obvious, but it does not follow that if the writing can be incorporated by reference, it must be, and so if incorporation by reference is not recognized, the provision is not allowed to stand under the doctrine of non-testamentary acts. In other words if the non-testamentary act has already been performed at the time the will is made, it is not good.[22] Thus it would appear that the non-testamentary act must be performed after the will is made even tho it may be non-testamentary before that time. In *Condit* v. *DeHart*[23] the testator left property to the person whom his son might designate by his will as the one to whom it might go. The son died first, designating his wife. It was held that the property passed to the wife but under the father's will. It is submitted that this is wrong when looked upon as a non-testamentary act, because the whole purpose of the son's designating his wife as the person to have the estate was for the sole purpose that she might take the father's estate and no other. In the other cases discussed the beneficiaries were not named for that one purpose but that they might be beneficiaries of the will in which they were named.

The cases involving trusts are very similar to the will cases. The trust deed is written and its purpose is the disposition of property. In one case[24] the testator left property to a trust fund over which he had the power to change the beneficiaries after the will was made. The amount already in the fund was much larger than that to be added to it by the will. It was held that the bequest was void because of the testator's power over the trust. This decision seems to be wrong because any act of the testator altering the trust would be primarily for the purpose of affecting the property already in the trust. In the words of the dissenting opinion it would be "of business nature" and have "reason for its existence apart from any disposition of the property under the will".[25] When there can be no incorporation by reference, a bequest to the trustee of a trust fund is valid even tho there must be a reference to the trust agreement[26] and a bequest to a specified person under the same terms as a certain trust agreement is also valid.[27] The trust is distinct and definite and capable of identification. The establishment of the trust is a non-testamentary act.

[21] Bemis v. Fletcher, 251 Mass. 178, 146 N. E. 277 (1925).

[22] Keil v. Hoehn, 72 Misc. 255, 131 N. Y. S. 89 (1911). But see In re Barlow's Will, 144 Misc. 210, 258 N. Y. S. 451 (1932). Here the New York court uses language indicating a tendency to adopt incorporation by reference when the holding of the case is perfectly correct under the doctrine of non-testamentary acts.

[23] 62 N. J. L. 200, 40 Atl. 776 (1898).

[24] Atwood v. R. I. Hospital Trust Co., 275 Fed. 513 (1921).

[25] Atwood v. R. I. Hospital Trust Co. 275, Fed. 513, 538 (1921).

[26] Swetland v. Swetland, 100 N. J. Eq. 196, 134 Atl. 822 (1926).

[27] In re Rausch's Will, 179 N. E. 755, 258 N. Y. 327, 80 A. L. R. 98 (1932).

A border line case is *In re Gibbon's Estate*[28] in which the testator provided that any checks outstanding at his death should be treated as valid claims against his estate and paid by his executor. The provision was held to be invalid. Writing checks is disposing of property, but it is not disposing of property after death. The fact that they are outstanding is not deliberate, but purely a matter of chance. The reasoning of the court was that they were testamentary since neither names nor amounts were mentioned in the will. But if there can be a valid gift without one, there might just as well be a valid gift without both. In the cases involving wills neither the beneficiary nor the amount is given. The method of identification is just as proper when applied to both as to one.

In conclusion, provision for subsequent acts whose only reason for existence is the disposition of property after death is not valid because the acts are testamentary and unattested and so invalid.[29] The identification as the result of the acts must be reasonably certain.[30] It is not necessary that the act be absolutely devoid of testamentary intent, but probably the principal reason for its performance should be non-testamentary.

BETTIE GILBERT

ADMINISTRATIVE FINDINGS AND THE KENTUCKY WORKMAN'S COMPENSATION BOARD

The increasing complexities of government have caused the development in comparatively recent years of a new type of governmental unit—the administrative body.[1] It was discovered that a government operating upon a classical separation of powers was unable to cope adequately with the new demands upon government.[2]

To this new type of body, created by the legislative branch, were intrusted functions, legislative, judicial, and executive, to enable it to act with the requisite efficiency. The advantage of such bodies became readily apparent—they acted speedily, informally, and rapidly became expert.[3]

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[28] 139 Misc. 658, 249 N. Y. S. 753 (1931).

[29] Thomas v. Anderson, 245 Fed. 642 (1917); In re Perry's Will, 125 Misc. 616, 214 N. Y. S. 461 (1926).

[30] Early v. Arnold, 119 Va. 500, 89 S. E. 900 (1916).

[1] "Administrative tribunals, often spoken of as bureaus, boards or commissions, did not come because anyone wanted them to come. They came because there seemed to be no other practical way of carrying on the affairs of government and discharging the duties and obligations which an increasingly complex social organization made it necessary for the government to perform." Rosenberg, Administrative Law and the Constitution (1929) 23 American Political Science Review 32.

[2] "It is a common-place that the exigencies of effective administration permit little more than lip service to the classic notion that all government activity should be chopped into blocks and handed out, like Gaul, to three separate custodians." Hyneman, Administrative Adjudication: An Analysis (1936) 51 Pol. Science Quart. 383.

[3] "The ideal which has been presented in justification of these new administrative agencies . . . is the ideal of specific knowledge, flexibility,