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Probate—The Enforcement of Unwritten Wills. *Estate of Reed*, 672 P.2d 829 (Wyo. 1983).

On February 10, 1983, Robert G. Reed spoke into a tape recorder and said, among other things, "I do want it known that these are my truest and strongest feelings . . . I request that all my worldly possessions go to Margaret Buckley, who now resides at 755 Adair Avenue, Sheridan, Wyoming." Mr. Reed also said, "If it becomes necessary as far as burial arrangements, I would prefer to be cremated with no services."² Although these statements clearly expressed Mr. Reed's intentions concerning the disposition of his property, the Supreme Court of Wyoming affirmed the decision of the Sheridan County District Court, holding that tape recorded statements made by the deceased cannot be given effect as a holographic will.³

Several different forms of wills including holographic⁴ and nuncupative⁵ wills are given effect by the courts. A holographic will is given effect because it is difficult to forge another's handwriting and, therefore, the chance of fraud and perjury are reduced. A nuncupative will is given effect because of the extreme circumstance surrounding its creation and the witnesses supporting its validity. For similar reasons the Wyoming Probate Code should be modified to allow for the enforcement of a tape-recorded or video-taped will when it is placed in a sealed envelope and the envelope is signed and dated by the testator and by two disinterested witnesses.

BACKGROUND

The document commonly referred to as a "will," was created to allow property owners reasonable control over the disposition of their property upon their death.⁶ Giving effect to the real intention of the testator is the major justification for legislation in this area.⁷ The right of property owners to dispose of their property by will has been recognized for many centuries.⁸ The right did not exist, however, at common law.⁹ The present right is therefore statutory in nature, subject to the control of each

1. Transcript of the taped statements found at the Robert G. Reed residence (1983).

2. *Id.*

3. *Estate of Reed*, 672 P.2d 829 (Wyo. 1983).

4. See generally 79 AM. JUR. 2D *Wills* § 702 (1975) (general history of holographic wills).

5. See generally 79 AM. JUR. 2D *Wills* § 724 (1975) (general history of nuncupative wills).

6. See generally 79 AM. JUR. 2D *Wills* § 1 (1975) (general origin and development of wills).

7. *Id.*

8. According to 79 AM. JUR. 2D *Wills* § 1 (1975):

The right existed in ancient Egypt, Babylon, and Assyria and was known to the Hebrews, Greeks, and Romans of antiquity. Instruments resembling a modern will were evolved under the Justinian Code, which was promulgated during the latter years of the Roman Empire. Instruments of a form partaking of at least some of the characteristics of modern wills appear to have been in use in England before the Norman Conquest.

9. *Reed*, 672 P.2d at 831.

state legislature.¹⁰ As a result, before a will can be given effect it must comport to the state's statutory scheme and laws.¹¹

Each state has some sort of probate code which governs the creation and effect of wills. In Wyoming, except for holographic wills,¹² all wills must be in writing or typewritten, witnessed by two competent witnesses and signed by the testator or by some person in his presence and by his express directions.¹³ The holographic will is also valid in Wyoming when it is entirely handwritten by the testator and signed by the testator.¹⁴ The theory behind the introduction of holographic wills into probate is to give substantial compliance to the holographic will statutes and at the same time give effect to the intentions of the testator.¹⁵ Legislators reason that it is exceedingly difficult to counterfeit the handwriting of another successfully, and therefore, the possibility of forgery is at a minimum and the intentions of the testator expressed in a holographic will can be given effect.¹⁶ Furthermore, the holographic will provides means by which people who cannot afford the aid of legal counsel can express their testamentary intentions in an enforceable form. Thus, holographic wills are popularly named "poor man's" wills.

The nuncupative will or testament is not written, and only exists when the testator declares his intentions orally before witnesses at the time of the testator's last illness.¹⁷ As with other wills, there must be a showing of testamentary intention before a nuncupative will can be given effect.¹⁸ The nuncupative will applies only to personal property, not to real property.¹⁹ Because of the great risk of fraud, the right to use nuncupative wills has been eliminated in many jurisdictions, and even where allowed, extensive evidence must be presented to support the validity of such a will.²⁰ In the state of Wyoming, the nuncupative will has not been given effect since 1895.²¹ The Wyoming Probate Code only allows for the crea-

10. *Id.*

11. *Id.*

12. "A will which does not comply with W.S. 2-6-112 is valid as an holographic will, whether or not witnessed, if it is entirely in the handwriting of the testator and signed by the hand of the testator himself." WYO. STAT. § 2-6-113 (1977).

13. WYO. STAT. § 2-6-112 (1977) states that:

Except as provided in the next section [WYO. STAT. § 2-6-113 (1977)], all wills to be valid shall be in writing, or typewritten, witnessed by two (2) competent witnesses and signed by the testator or by some person in his presence and by his express direction. If the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency shall not prevent the probate and allowance of the will. No subscribing witness to any will can derive any benefit therefrom unless there are two (2) disinterested and competent witnesses to the same; but if without a will the witness would be entitled to any portion of the testator's estate, the witness may still receive the portion to the extent and value of the amount devised.

14. WYO. STAT. § 2-6-113 (1977).

15. Annot., 89 A.L.R. 2d 1198 (1934).

16. 79 AM. JUR. 2d Wills § 702 (1975).

17. Wiley's Estate, 187 Pa. 82, 40 A. 980 (1898).

18. 79 AM. JUR. 2d Wills § 702 (1975).

19. *Id.*

20. Merrill v. State, 21 Wyo. 421, 133 P. 134 (1913).

21. *Id.*

tion of a will which is signed and witnessed²² or holographic in its entirety.²³ The holding in *Reed* supports the theory that a will must comport with the state statute before it is given effect.²⁴

PRINCIPAL CASE

In *Reed*, the Petitioner, Margaret Buckley, requested that Mr. Reed's recording be admitted into probate and that she be appointed executrix of the will.²⁵ The district court ruled that the proposed will did not satisfy the formal requirements set forth in the Wyoming Probate Code and, therefore, was not a will at all. In the Wyoming Supreme Court, Buckley asserted the following arguments:

I. The sound recording and transcript of the decedent complies with the Wyoming Probate Code regarding holographic wills.²⁶

II. The sound recording and transcript clearly express the intent of the decedent.²⁷

III. The Wyoming Rules of Evidence require that the sound recorded will be admitted by the courts as a writing sufficient in form to comply with Wyoming's holographic wills statute.²⁸

The Supreme Court rejected Buckley's first argument based on rules of statutory interpretation and construction.²⁹ The court noted that the right to make a will was statutory and, therefore, subject to the control of the legislature.³⁰ The Wyoming Probate Code sets out two available forms of valid wills.³¹ Applying the "plain meaning" rule of statutory interpretation³² the court concluded that the decedent's tape recorded will did not meet the requirements of either form.³³ The court distinguished several cases which Buckley relied on to support her first argument.³⁴ These cases involved situations in which a recording was offered into

22. WYO. STAT. § 2-6-112 (1977).

23. WYO. STAT. § 2-6-113 (1977).

24. *Reed*, 672 P.2d at 831.

25. *Id.*

26. Brief of Appellant at i, Estate of Reed, 672 P.2d 829 (Wyo. 1983).

27. *Id.*

28. *Id.*

29. *Reed*, 672 P.2d at 831.

30. *Id.*

31. WYO. STAT. § 2-6-112 (1977); WYO. STAT. § 2-6-113 (1977).

32. *State v. Stern*, 526 P.2d 334, 346 (Wyo. 1974).

33. *Reed*, 672 P.2d at 833.

34. Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982), concerned a testator's will which was admitted to probate and was partially handwritten by the testator and partially printed. The California Supreme Court noted that the pre-printed words were immaterial and not essential to the validity of the testamentary disposition and concluded that the handwriting of the testator was sufficient to meet the requirements of the California holographic will statute. The decision in *Black* stressed a policy of favoring the validity of a will and giving great latitude in the interpretation of probate statutes. The Wyoming Supreme Court distinguished *Black* from *Reed* by pointing out that there was some writing in *Black* which met the requirements of the California statute. In contrast, *Reed* had no writing sufficient to satisfy the Wyoming statute.

Belfield v. Coop, 8 Ill. 2d 2934, 134 N.E.2d 249, 58 A.L.R. 2d 1008 (1956), and *Hult-*

probate as evidence of intent, but not as the testamentary instrument. The court summarized its analysis of Buckley's first argument by stating, "The use of a tape recording or other type of voice print as a testamentary instrument is a decision for the legislature to make."³⁵

Buckley's second argument did not persuade the court because, in the court's words, "Intent is immaterial here because there is no valid will."³⁶ The testator's intent is disregarded when the form in which it is presented is not acceptable as a will.

The court's consideration of Buckley's final argument involved the role of rules of evidence in our legal system.³⁷ The court maintained that rules of evidence are procedural in nature and not a source of substantive law. As such, rules of evidence cannot be used to change, modify, or enlarge a statute.³⁸ Thus Rule 1001(1) of the Wyoming Rules of Evidence will not expand the plain meaning of the word "handwriting" as it is used in the probate code.³⁹

ANALYSIS

The Wyoming Supreme Court resolved issues of statutory construction and interpretation when it decided *Reed*. The *Reed* case also raises the issue of what types of recorded wills should be given effect. The advances of technology in today's society should enable the recorded will to become more prevalent.⁴⁰

In *Reed*, Buckley argued that a tape-recorded will was sufficient to meet the form requirements of holographic wills set forth in section 2-6-113 of the Wyoming statutes, which requires that the will be entirely handwritten by the testator.⁴¹ By applying the definition of "writings" in rule 1001(1) of the Wyoming Rules of Evidence,⁴² to the word "handwriting" used in section 2-6-113 of the Wyoming statutes,⁴³ Buckley maintained

quist v. Ring, 301 S.W.2d 303 (Tex. Civ. App. 1957), are cases in which a tape recording was allowed into evidence during probate proceedings for evidentiary reasons only. The recordings were not intended to express the testamentary intentions of the deceased, this intention being provided in both cases by a writing. The Wyoming Supreme Court distinguished these cases from *Reed* because of the presence of some writing.

35. *Reed*, 672 P.2d at 833.

36. *Id.*

37. *Id.* at 834.

38. *Id.*

39. W.R.E. 1001(1). "Writings' and 'recordings' consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation."

40. The facts in *Reed* did not satisfy the requirements of the Wyoming Probate Code. Further, the facts would not satisfy the requirements for the enforcement of a recorded will which is suggested in this note. On the other hand, there are many situations which could arise in the future involving the illiterate, the aged, the handicapped, and others who wish to express their testamentary intentions by recording. The suggested statutory changes are located at note 60.

41. WYO. STAT. § 2-6-113 (1977).

42. W.R.E. 1001(1).

43. WYO. STAT. § 2-6-113 (1977).

that the requirement of handwriting was satisfied. The court held that the word "writings"⁴⁴ was not intended to replace the word "handwriting"⁴⁵ and that the requirement was not satisfied.

Because the facts in *Reed* did not satisfy the witness requirement of section 2-6-112 of the Wyoming statutes, Buckley was forced to argue that the recording satisfied the requirements of the holographic will statute, section 2-6-113 of the Wyoming statutes. On the other hand, if there had been witnesses, Buckley could have then argued that the "writing" requirement of section 2-6-112 was satisfied, because the recording fit the definition of the word "writings" set forth in rule 1001(1) of the Wyoming Rules of Evidence. The court would be hard pressed to hold that "writing" had a different definition for each application.

One could conclude from the argument outlined above that there is no need for any statutory reform. All that a property owner would need to do in order to satisfy the requirements of section 2-6-112 of the Wyoming statutes, would be to record his will, seal it in an envelope, sign and date it, and have witnesses sign the envelope. No property owner is likely to take the chance that the court would support this argument. There would still be a constant fear that the court would maintain the reasoning of *Reed*, that such a rule would enlarge or expand the reach of the statute and, therefore, the rule is not acceptable.⁴⁶

If one assumes that the court will not accept recorded wills, then the justifications for legislative reform in this area must be explored. One of the initial reasons for the enactment of legislation on the subject of wills is to ensure that the intention and wishes of the testator are given effect.⁴⁷ If there is no showing of "animus testandi" there cannot be a will.⁴⁸ The Wyoming legislature has addressed this important concept in section 2-6-105 of the Wyoming statutes.⁴⁹ The "animus testandi" must be expressed in the holographic will in order for it to be given effect even if all other requirements of holographic wills are satisfied.⁵⁰ Courts often look at extrinsic evidence in order to determine if the necessary testamentary intention was present at the time the written document was prepared. It is apparent that the basic reason for judicial and legislative involvement in the testamentary process is to give effect to the intention of the deceased. The paramount reason for legislative reform, allowing for the enforcement of recorded wills, is to give effect to the testator's intentions.

44. W.R.E. 1001(1).

45. WYO. STAT. § 2-6-113 (1977).

46. *Reed*, 672 P.2d at 834.

47. 79 AM. JUR. 2D *Wills* § 2 (1975).

48. *See, e.g., Stark v. Stark*, 201 Ark. 133, 143 S.W.2d 875 (1940).

49. "The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this article apply unless a contrary intention is indicated by the will." WYO. STAT. § 2-6-105 (1977).

50. *Golder v. Golder*, 31 Cal. 2d 848, 193 P.2d 465 (1948).

Originally a will did not have to be in writing.⁵¹ The non-written will, however, presented a great opportunity for fraud and perjury.⁵² In order to reduce the likelihood of fraud and perjury, the statute of frauds and probate codes, requiring written wills, were enacted.⁵³ In addition, the writing requirement also helped to preserve the will over time.

The requirement of credible witnesses also reduces the likelihood of fraud and perjury.⁵⁴ The requirements of writings and witnesses are still present in the Wyoming Probate Code.⁵⁵ There is no doubt that these safeguards helped to prevent the possibility of fraud and perjury.

Due to the highly technical nature of today's society, the necessity for a writing is reduced. The recorded will, like a typewritten will, can also prevent fraud, perjury, undetected tampering, or destruction. The recorded will is at least as effective in preventing fraud as the holographic or nuncupative will, provided certain requirements have been met.

The tape recording has been used in criminal cases to verify conversations and statements for some time.⁵⁶ The courts in criminal cases have required that the following facts be presented before a recording is admitted:

- 1) That the recording device was capable of taking the conversation now offered in evidence.
- 2) That the operator of the device was competent to operate the device.
- 3) That the recording is authentic and correct.
- 4) That changes, additions or deletions have not been made in the recording.
- 5) That the recording has been preserved in a manner that is shown to the court.
- 6) That the speakers are identified.
- 7) That the conversation elicited was made voluntarily and in good faith without any kind of inducement.⁵⁷

The courts feel the likelihood of fraud is minimal, and therefore, the recording is admissible as evidence in a criminal proceeding where the life and liberty of an individual are often at stake. There appears to be no reason why the recording should not be allowed into probate where only property distribution is in question.

The last issue which needs to be addressed before statutory reform in this area can be enacted is the statute of frauds. The Wyoming Statute

51. *In Re Henry's Estate*, 263 Mich. 410, 248 N.W. 853 (1933).

52. *Dreyfus' Estate*, 175 Cal. 417, 165 P. 941 (1917).

53. *Id.*

54. *Id.*

55. WYO. STAT. § 2-6-112 (1977).

56. *United States v. McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958).

57. *Id.* at 430.

of Frauds⁵⁸ will not give effect to the transfer of real property without a writing. The statute of frauds would have to be amended to allow for the enforcement of recorded wills, or the legislature could simply designate a recorded will as a sufficient "writing" to satisfy the statute of frauds.

CONCLUSION

The court made the correct decision in *Reed*. The recording of Mr. Reed did not satisfy the required form set forth in the Wyoming statutes.⁵⁹ The Wyoming legislature, however, should pass measures allowing for the enforcement of recorded wills which satisfy prescribed requirements.⁶⁰ Recorded wills, both tape-recorded and video-taped, have unlimited possible applications in the future, including use by the illiterate, the aged, the handicapped, and others who wish to express their testamentary intentions in their own words.

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58. WYO. STAT. § 1-23-105(a)(v) (Supp. 1984).

59. WYO. STAT. § 1-6-112 to -113 (1977).

60. The revisions to section 2-6-112 of the Wyoming Probate Code, WYO. STAT. § 2-6-112 (1977), which would be required to effectuate the enforcement of recorded wills are set out in italics below.

Except as provided in the next section [§ 2-6-113], all wills to be valid shall be in writing, or typewritten, or *recorded*, witnessed by two (2) competent witnesses and signed by the testator or by some person in his presence and by his express direction. If the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency shall not prevent the probate and allowance of the will. No subscribing witness to any will can derive any benefit therefrom unless there are two (2) disinterested and competent witnesses to the same; but if without a will the witness would be entitled to any portion of the testator's estate, the witness may still receive the portion to the extent and value of the amount devised.