1958

*Feb. 11, 12
June 3

IN THE ESTATE OF MARY WINIFRED GRAY, DECEASED.

DOROTHY MARGARET BEATRICE BENNETT AND DOROTHY MARGARET BEATRICE BENNETT AND CHARLES PAUL BENNETT, AS PARENTS AND NATURAL GUARDIANS OF JUDITH ANN BENNETT, AN INFANT (*Applicants*) .....APPELLANTS;

AND

THE TORONTO GENERAL TRUSTS CORPORATION AS OFFICIAL GUARDIAN OF THE EASTERN JUDICIAL DISTRICT OF THE PROVINCE OF MANITOBA (*Respondents*) .....RESPONDENTS.

DOROTHY MARGARET BEATRICE BENNETT AND DOROTHY MARGARET BEATRICE BENNETT AND CHARLES PAUL BENNETT, AS PARENTS AND NATURAL GUARDIANS OF JUDITH ANN BENNETT, AN INFANT (*Applicants*) .....APPELLANTS;

AND

CARL EVERETT GRAY (*Respondent*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Wills—Validity—Holograph will—Letter from deceased—Whether settled testamentary intention expressed—The Wills Act, R.S.M. 1954, c. 293, s. 6(2).

Although it is established under the authorities that a letter wholly written and signed by a deceased person may constitute a valid holograph will, it will not have that effect unless it contains a deliberate or fixed and final expression of intention as to the disposal of the writer's property upon his death. The burden is upon the party setting up such a paper as a will to show either by its contents or by extrinsic evidence that it is of that character and nature. *Whyte et al. v. Pollok* (1882), 7 App. Cas. 400; *Godman v. Godman*, [1920] P. 261, applied.

APPEALS from two judgments of the Court of Appeal for Manitoba[1], reversing a judgment of Philp Sur. Ct. J. Appeals dismissed.

Application was made for probate of a will of Mary Winifred Gray, deceased, dated January 6, 1949; at the same time, there was submitted for probate a letter dated

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*PRESENT: Kerwin C.J. and Rand, Cartwright, Fauteux and Abbott JJ.

[1] (1958), 65 Man. R. 178, 22 W.W.R. 241, 9 D.L.R. (2d) 371.

September 27, 1952, which the proponents contended constituted a valid holograph will or codicil. Appearances were filed by the parties interested under the two documents respectively, and the trial of an issue was directed. At the conclusion of this trial, the Surrogate Court judge held that the letter of September 27, 1952, was a valid holograph will and that it had revoked the will dated January 6, 1949. He accordingly ordered that it be admitted to probate.

Notices of appeal to the Court of Appeal were given by Carl Everett Gray, a son of the deceased and a beneficiary under the 1949 will, and by The Toronto General Trusts Corporation as official guardian on behalf of grandchildren of the deceased who would have benefited under the 1949 will. Both appeals were allowed by the Court of Appeal and the beneficiaries under the 1952 document appealed to the Supreme Court of Canada.

Philip C. Locke, Q.C., for the appellants.

E. B. Pitblado, Q.C., for The Toronto General Trusts Corporation as official guardian, respondent.

H. P. Clubine, for the executors under the 1949 will, respondents.

F. J. Sutton, Q.C., for C. E. Gray personally, respondent.

The judgment of Kerwin C.J. and Cartwright, Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—The crucial question to be determined in this case is whether, contrary to the views held by the majority of the Court of Appeal for Manitoba[1], but in accordance with those entertained by Tritschler J.A. and by the judge of the Surrogate Court, a letter, wholly written and signed by the late Mary Winifred Gray on September 27, 1952, and addressed to A. L. Dysart, Q.C., of Winnipeg, her solicitor and for years a close friend of the Gray family, does manifest on her part a *deliberate and final intention* as to the disposal of her property upon her death.

A recital, reduced to what is of substance, of certain events stated in chronological sequence, may first be given:

(i) On January 6, 1949, the deceased, Mary Winifred Gray, executed a formal will, admittedly valid under *The Wills Act*, R.S.M. 1940, c. 234 (now R.S.M. 1954, c. 293),

[1] (1958), 65 Man. R. 178, 22 W.W.R. 241, 9 D.L.R. (2d) 371.

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by the terms of which she left: (a) a life interest in her estate to her husband J. J. Gray, and (b) upon his death, after payment of certain legacies, the residue of her estate to her four children in the proportion of 30 per cent. to each of her two sons and 20 per cent. to each of her two daughters, Dorothy (Dixie) and Jacqueline.

(ii) J. J. Gray predeceased his wife, having died the same month, *i.e.*, in January 1949.

(iii) Three and one-half years later, *i.e.*, in August 1952, Mrs. Gray consulted Mr. Dysart with respect to her will, expressed dissatisfaction with it as well as the intention to make a new one. She informed him that she was leaving Winnipeg for Kenora, in the evening, and that she would write him to give him the particulars of what she wished her new will to contain.

(iv) About a month passed and on September 27, 1952, Mrs. Gray wrote Mr. Dysart the letter giving rise to the present controversy and which must be reproduced in its entirety:

KENRICIA HOTEL
in *The heart of the Lake of the Woods*
KENORA, ONTARIO
CANADA

Mr. A. L. Dysart,
211 Somerset Bldg.,
Winnipeg.

Sep 27/52
Hotel Kenricia

Dear Mr. Dysart

When I was in your offis about a month ago I Promised to let you know how I would like my will to be made out. I have no Ida at all about such matters so Ill leave all that to you, but I do know its Important to have such matters settled before its to late. I will try to outline the way I would like to leave the little I have. the two boys are provided for and do not expect any thing from me. to Dixie her real name is Margaret Dorothea Beautrick Gray Bennett Wife of Charls Paul Bennett the sum of thirty thousand dollars. (30,000) my house if I own a house at the time of my death Also all my furniture and my Car Also my Clothing and fur Coats.—to my daughter Jacquline Dinnia Gray wife of Victor Fregeau the sum of ten thousand dollars (10,000). and to my Grand daughter, Joyce Gray, I leave five thousand dollars. and I also want to leave to my dearly Beloved Grand daughter Judith Ann Bennett fifteen thousand dollars and my summer home on Coney Island in Kenora Ont and also the furnitur in the cottage my watch or any Jewelery and my diamond rings—To the Reverend A. X. MacAulay one thousand dollars to have holey Masses offered to God for the repose of my soul.

Dear Mr. Dysard I will be in Winnipeg in a few days I will call you. thanks for your trouble and for all your kindness to us.

Very sincerely,
Mary W. Gray

This letter was received by Mr. Dysart who waited for the announced visit of Mrs. Gray.

(v) Again several weeks passed and eventually Mrs. Gray came to see Mr. Dysart. Of this interview, Mr. Dysart took no notes. Speaking from memory, he testified that Mrs. Gray told him of her opposition to the appointment of a trust company as executor. She did not want to appoint her sons, nor could she decide to appoint her daughters. She asked Mr. Dysart to accept the appointment, which he declined to do, fearing, as he told her, that the sons might hold him responsible for their being excluded from the will as beneficiaries as well as executors. The matter was left in abeyance, Mrs. Gray telling Mr. Dysart she would come to see him again.

(vi) Several months later, *i.e.*, on May 29, 1953, Mrs. Gray saw Mr. Dysart. According to the notes he then made of the interview, amongst other matters, that of the will was considered. Mrs. Gray said that the guest house which, according to her letter of September 27, 1952, was intended for her granddaughter Judith Ann Bennett, was to go to her daughter Dorothy. Except for this difference, what she then said she wanted in the will was, on the evidence of Mr. Dysart, *"almost"* the same as in the letter of September 27, 1952. Evidently, it would appear that all the details of the will were not settled, for on the evidence of Mr. Dysart, the question of residue had never been discussed and, in the words of Mr. Dysart, "the *main* obstacle was still the question of the executors".

(vii) From then on, *i.e.*, from May 29, 1953, up to the death of Mrs. Gray, which took place nearly three years afterwards, Mrs. Gray met Mr. Dysart, both professionally and socially, but according to the latter's recollection, at none of these meetings was the matter of the will of Mrs. Gray brought up.

(viii) During the period just mentioned, Mrs. Gray, about April 1954, paid into the office of Mr. Dysart the sum of $10,000, to purchase a real property in the name of Mrs. Bennett (Dorothy) and her husband. This payment was in the nature of a gift *inter vivos* from Mrs. Gray to her daughter, as a gift tax was paid.

(ix) Mrs. Gray died in the city of Winnipeg—where she appears to have had her residence and domicile—on April 5,

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1956, consequently three and one-half years after writing the letter of September 27, 1952, without a formal will, other than the one of January 6, 1949, having been made by her or prepared by Mr. Dysart, or the latter having been instructed to do so.

Under s. 6(2) of *The Wills Act, supra,* a will in the holographic form, *i.e.,* a will "wholly in the handwriting of the testator and signed by him" constitutes a valid will.

That the letter of September 27, 1952, satisfies the requirement, as to form, is beyond question; the point in issue being whether, as to substance, this holographic paper is testamentary.

There is no controversy, either in the reasons for judgment in the Courts below, or between the parties, that under the authorities, a holographic paper is not testamentary unless it contains a *deliberate or fixed and final expression of intention* as to the disposal of property upon death, and that it is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature: *Whyte et al. v. Pollok*[1]; *Godman v. Godman*[2]; *Theakston v. Marson*[3].

Whether the letter of September 27, 1952, contains *per se* a deliberate or fixed and final expression of intention must be determined by the phrases immediately preceding and following the intermediate part of the letter where the wishes of Mrs. Gray are expressed; for, read as a whole, the letter has one single subject-matter, indicated as follows by Mrs. Gray: "I Promised to let you know how I would like my will to be made out."

In the opening and closing phrases of the letter, Mrs. Gray conveys to Mr. Dysart sentiments of unreserved trust, reliance and dependence. Born, as admittedly shown by extrinsic evidence, out of an intimate relationship of many years between Mr. Dysart, on the one hand, and Mr. and Mrs. Gray and their children, on the other, these sentiments were those accompanying the mind of Mrs. Gray when, after expressing them, she wrote: "I will try to outline the way I would like to leave the little I have." And having

[1] (1882), 7 App. Cas. 400. [2] [1920] P. 261.
[3] (1832), 4 Hag. Ecc. 290, 162 E.R. 1452.

done so, she closed the letter by informing Mr. Dysart that she would be in Winnipeg in a few days and that she would call him.

I am unable to dismiss the view I formed that, read as a whole and according to its ordinary and natural sense, this letter amounts to nothing more than what is a preliminary to a will. While Mrs. Gray indicated to Mr. Dysart the legacies she then contemplated her will to contain, it is clear, in my view, that she did not want that letter to operate as a will. Indeed, by her letter, she is committing to future consultation with Mr. Dysart both the finality of her decisions, if not of her deliberations, and that of the form in which they should eventually be expressed in a regular will, the preparation of which is entrusted to Mr. Dysart himself. If this interpretation properly attends the document, the letter has not *per se,* and cannot acquire without more, a testamentary nature, and the proposition stated in *Godman v. Godman, supra,* at p. 271, "that a document which is in terms an instruction for a more formal document may be admitted to probate if it is clear that it contains a record of the deliberate and final expression of the testator's wishes with regard to his property", as well as the proposition stated in *Milnes v. Foden*[1], that "It is not necessary that the testator should intend to perform or be aware that he has performed a testamentary act", are of no application in the present case.

What took place from the date of the letter, September 27, 1952, to the day of the death of Mrs. Gray, April 5, 1956, affords no evidence either that her letter contained a deliberate or fixed and final expression of intention or that it acquired such a testamentary character by subsequent and sufficient manifestation of intention on her part. Indeed the evidence shows that Mrs. Gray failed to pursue what she indicated in her letter she contemplated doing subject to consultation with Mr. Dysart, though there were, during this lengthy period of time, the fullest opportunities and facilities to do so, and that the most reasonable explanation for this failure is the abandonment of her original intention. No decision was ever reached as to the choice of an executor; nor was even the disposal of the residue of the estate ever considered; nor did she, at any time, decide to instruct

[1] (1890), 15 P.D. 105 at 107.

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Mr. Dysart to proceed with the preparation of the will, notwithstanding that both were perfectly aware that the formal will, executed by Mrs. Gray at the same time as that of her husband on January 6, 1949, was still in existence. There were, moreover, intervening facts affecting the contemplated apportionment of her estate. Thus there was, at a time unrevealed by the evidence, a change of mind as to the disposal of the guest-house, of which Mrs. Gray apprised Mr. Dysart on May 29, 1953, on the occasion of the second and last interview during which the matter of the will, amongst others, was considered. This change is cogent evidence of a still deliberating mind. There was also subsequently, in April 1954, the gift of $10,000 she made to her daughter Dorothy.

It was suggested that, at this interview of May 29, 1953, there was an affirmation of intention within the meaning of and with the effect indicated in *Bone et al. v. Spear*[1] and *In re Toole Estate*[2]. The circumstances of these cases differ entirely from those of the present; and these decisions cannot apply thereto. Furthermore, and whatever may have been her motives, Mrs. Gray did not then, any more than on the previous occasion, decide to instruct Mr. Dysart to proceed with the preparation of the will.

Having reached the view that the letter of September 27, 1952, was not written *animo testandi,* it becomes unnecessary to deal with the other points raised.

I would dismiss the appeals with all costs payable out of the estate, those of the executors and the Official Guardian to be as between solicitor and client.

RAND J.:—I am quite unable to say that the Court of Appeal[3] was wrong in holding the letter of September 27, 1952, by the deceased widow, not to be a holographic will. This letter was written almost three years after the death of her husband. Its tenor does not import finality either absolute or provisional; it admittedly enumerates items to be contained in a new will; and the conduct of the deceased in the discussion with her solicitor shortly after the receipt of the letter and later in May 1953 when she again visited him confirms the facts that she was fully aware of the existing will of 1949 and that there were still details to be settled

[1] (1811), 1 Phillim 345, 161 E.R. 1005. [2] (1952), 5 W.W.R. (N.S.) 416.
[3] (1958), 65 Man. R. 178, 22 W.W.R. 241, 9 D.L.R. (2d) 371.

for the new one. Some items included in the letter were not, on the latter occasion, mentioned—furniture, an automobile, and personal jewelry; and she did not make clear the identity of a house that was to go to a daughter. In 1954 she advanced $10,000 as a cash payment on the price of a house purchased in the name of the same daughter and her husband, the latter of whom was not mentioned in the will or in the discussion of 1953. Her death took place early in 1956 after apparently an illness of some months; but from May 1953 on there had been no further communication with the solicitor.

I would, therefore, dismiss the appeals with all costs payable out of the estate, those of the executors and the Official Guardian to be as between solicitor and client.

Appeals dismissed.

Solicitor for the appellants: Philip C. Locke, Winnipeg.

Solicitors for the respondent Gray: Leech, Leech & Sutton, Winnipeg.

Solicitors for the respondent corporation: Pitblado, Hoskin & Company, Winnipeg.