IN THE COURT OF COMMON PLEAS
OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA
FRANKLIN COUNTY BRANCH



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| In Re: Estate of Norman F. Shelly | : | Orphans' Court Division |
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| Estate No. 51667 | : | No. 163-1999 |
| | : | |
| | : | The Honorable Carol L. Van Horn |

**OPINION AND ORDER OF COURT**

**Before Van Horn, J.**

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## Statement of the Case

Norman F. Shelly ("Decedent") died on July 27, 1999. After Decedent's death, Thomas Steiger Jr., Esquire, submitted a cardboard panel of a cigarette carton for probate on August 25, 1999, and the Register of Wills issued letters of administration c.t.a. naming Michael J. Cook, who is not related to Norman, as administrator of Norman's estate. The cardboard panel contains no witness attestations and is not notarized; however, an Oath of Non-Subscribing Witnesses executed by two persons who purported to know and recognize Decedent's signature is of record at Will Volume 163, page 283. The cigarette carton document names beneficiaries of Norman's estate ("Beneficiaries") and none of those named beneficiaries are heirs of Decedent.

Charles O. Shelly, an intestate heir, filed an appeal from the decree of probate on November 5, 1999. A petition for class action status was filed simultaneously, but was denied by Court Order on February 10, 2000. On April 12, 2000, an Order was entered enjoining the distribution or sale of assets. On August 15, 2000, David C. Cleaver, Esquire, appealed the probate of the cigarette carton document on behalf of Paul Shelly, the second intestate heir to challenge the cigarette carton writing. On September 15, 2005, Charles O. Shelly and Paul Shelly discontinued their respective appeals from probate. A petition to strike the discontinuance of Charles O. Shelly was filed on November 2, 2005 by the would-be intestate heirs, Margaret P.

Evans, Terry L. Shelly, Larry R. Shank, and Donna Oberholzer ("Four Heirs"). On January 9, 2006, this Court reinstated the appeal of Charles O. Shelly and approved the discontinuance of Paul Shelly's appeal, with prejudice. The appeal of Charles O. Shelly was joined by the Four Heirs on May 31, 2006.[1]

At this time, several motions for summary judgment have been filed. The Four Heirs have filed a Motion for Summary Judgment, as well as a Motion for Summary Judgment Declaring a Partial Intestacy. The Four Heirs' Motion for Summary Judgment reduces the case to a single legal issue: whether the cigarette carton document bearing Decedent's handwriting is a will. The Four Heirs' Motion for Summary Judgment Declaring a Partial Intestacy seeks a declaration by the Court that if the cigarette carton document is found to be a will, then a partial intestacy results, as not all assets are disposed of in the cigarette carton document, and the cigarette carton document contains no residuary clause. The beneficiaries named in the cigarette carton document have also filed a Motion for Summary Judgment or Partial Summary Judgment requesting that the cigarette carton document be declared Norman's Shelly's valid Last Will and Testament, and the appeal of the Four Heirs be dismissed. The Beneficiaries make an additional request that the Court undertake an analysis of the available extrinsic evidence and enter a similar finding based on such analysis.

[1] During this litigation between Norman's intestate heirs and the beneficiaries named by the cigarette carton document, Judy Bonciu, niece of Norman's father, Fred A. Shelly, commenced an action for Declaratory Judgment alleging that Norman was a slayer under Pennsylvania's Slayer's Act of 1943 (20 Pa.C.S. § 8801, *et.seq.*) in that Norman participated, either as a principal or an accessory before the fact, in the willful and unlawful killing of his father, Fred A. Shelly. It was agreed among all parties that Bonciu's Petition for Declaratory Judgment alleging that Norman was a "slayer" should be adjudicated first, because a conclusion that Norman was a "slayer" would have a preclusive effect upon all other pending matters in this case. On July 23, 2003, this Court entered an Opinion and Order finding that the facts were not sufficient to prove that Norman was a "slayer" as defined in the Pennsylvania's Slayer's Act. The Court's decision was affirmed by the Superior Court on June 15, 2004, and Judy Bonciu's Petition for Allowance of Appeal was denied by the Supreme Court per curiam. The Slayer litigation is docketed at No. 28-99-0269.

## Summary Judgment Standard

Pa. R.C.P. 1035.2 provides for the entry of summary judgment:

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

The Supreme Court of Pennsylvania states that the "mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial." Ertel v. The Patriot-News. Co., 674 A.2d 1038, 1042 (1996), *cert. denied*, 519 U.S. 1008 (1996). "The purpose of summary judgment is to eliminate cases prior to trial where a party cannot make out a claim or a defense after relevant discovery has been completed." Miller v. Sacred Heart Hospital, 753 A.2d 829, ¶ 10 (Pa. Super. 2000). The moving party has the burden of proving that there is no genuine issue of material fact. Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466 (Pa. 1979). In response, the non-moving party may not rest upon pleadings alone, but must set forth specific facts that demonstrate a genuine issue for trial. Phaff v. Gerner, 303 A.2d 826 (Pa. 1973). In determining whether summary judgment is appropriate, the record should be viewed in the light most favorable to the non-moving party. *E.g*, Mazetti v. Mercy Hosp. of Pittsburgh, 776 A.2d 938, 945 (Pa. 2001).

In following established precedent, the Court uses this framework for each Summary Judgment issue, as analyzed below.

## Discussion

"In the field of wills, the most difficult problem is the determination of whether a holographic paper is a will. . . ." In re Estate of Fick, 211 A.2d 425, 426 (Pa. 1965). This statement made in 1965 by the Supreme Court of Pennsylvania remains true for the parties involved in this case, who have been litigating the present issues for more than six years. The document at issue is the cardboard panel of a cigarette carton. Copies of the panel's sides are attached for reference. The inside side of the panel states in its first section at the top, "FIRST AND ONLY LAST WILL OF NORMAL F SHELLY 2388 BUCHANAN TRAIL WEST GREENCASTLE PA 17225." Next to the "OF" is an outlined box, with "DRAFT?" written inside the box. The remainder of the inside of the panel contains segments separated by lines, containing items of property and names of friends of Decedent. At the bottom of the panel, a segment contains the name and phone number of Decedent's attorney. The next segment contains Decedent's signature, and the following segment contains the date. The exterior of the cardboard panel contains writing and graphics of the cigarette brand, as well as some handwritten notations. The Court considers the inside panel of the cigarette carton to be the document in question as Decedent's will. The panel begins at the top by declaring "FIRST AND ONLY LAST WILL" and concludes at the bottom with Decedent's signature. These formalities comply with the technical requirements of will construction. See In Re: Perry Estate, 32 Pa. D. & C.3d 106, 109 (O.C. Lanc, 1981). The exterior side of the cigarette carton is not signed, and is in no way notated to indicate that it should be considered part of the document contained on the inside panel by page numbers or other symbols. Therefore, the exterior panel will not be considered as part of the cigarette carton document in question.

The parties are in agreement on the issues. The court must determine if the cigarette carton document signed by Decedent is valid as his last will and testament. Blackstone defined a will as "the legal declaration of a man's intentions, which he wills to be performed after his death." In re Kauffman's Estate, 76 A.2d 414, 416 (Pa. 1950). There are four basic requirements to constitute a valid will:

1. Testamentary intent;
2. A positive disposition of assets;
3. Testamentary capacity; [and]
4. Execution in compliance with the requirements of the applicable statute, which are:
    a. The will shall be in writing;
    b. Shall be signed by the testator;
    c. Shall be signed at the end thereof;
    d. Witnesses to identify signature.

In Re: Perry Estate, 32 Pa. D. & C.3d 106, 109 (O.C. Lanc. 1981). The parties agree that at issue in this case is whether the cigarette carton document reflects testamentary intent and contains a positive disposition of assets.

**A. *Testamentary Intent***

To be accepted as a will, a paper must "not only be testamentary in form but it must be signed by a decedent with a testamentary intent." *Id.* at 110. Testamentary intent is found if "the paper itself disclose[s] an obvious purpose or intention on the part of the maker to thereby make a disposition of his property after his death." In re McCune's Estate, 109 A. 156, 157 (Pa. 1920). In a case where a document alleged to be a holographic last will and testament was not admitted to probate, it became the court's duty to first "examine the paper, its form and its language, and therefrom determine as a matter of law whether or not it shows testamentary intent with reasonable certainty." In re Kauffman's Estate, 76 A.2d 414, 417 (Pa. 1950). There are three

possibilities for the examining Court. First, if the examining Court finds testamentary intent is revealed, the paper should be probated as a will. *See id.* Secondly, if the examining Court does not find that the paper reveals testamentary intent, but is shown to be a document of another type, then the document should not be probated as a will. *See id.* Finally, if the examining court "determines that a real doubt or ambiguity exists, so that the paper offered for probate might or might not be testamentary, depending upon circumstances, then . . . the document presents an ambiguity which will permit the use of extrinsic evidence in aid of resolving the uncertain character of the paper." *Id.*

In determining whether a testator intends to make a testamentary gift, intent is the polestar. *See* In re Estate of Fick, 211 A.2d at 427. Testamentary intent has been found in many forms of holographic papers, including: letters, deeds, certificates of deposit, power of attorney, agreement, check, note, an assignment, and even a letter of instructions to an attorney where it was later proved that the writer intended such a letter to be a will. *See id.* The form of the document is a factor to consider in determining testamentary intent, but it is not determinative. *See* In re Estate of Moore, 277 A.2d 825 (Pa. 1971). An informal document or writing can be found testamentary regardless of the label, form of nature, or character of the document, if the language of the document is sufficient to show a testamentary intent. *Id.* In fact, the informal character of a paper becomes unimportant if it is shown that a decedent intended to make a testamentary gift, and signed the paper with testamentary intent. Appeal of Thompson, 100 A.2d 69, 72 (Pa. 1953); and In re Perry Estate, 32 Pa. D. & C.3d 106, 111 (O.C. Lanc. 1981).

General instructions or memoranda addressed to an attorney for use in drafting a will do not demonstrate the requisite testamentary intent. In re Estate of Ritchie, 389 A.2d 83, 87 (Pa. 1978). However, if the memoranda or instructions were adopted by the testator as his will, with

the intent that they should be interpreted as such, then they will be upheld as a will. *See* Appeal of Scott, 23 A. 212 (Pa. 1892).

The Four Heirs argue that a determination as to whether a document contains testamentary intent with reasonable certainty does not depend on, or require, use of the word "Will." The Four Heirs' point is well taken: a document may declare itself a Will, but lack the requisite testamentary intent. See Chavar Estate, 58 Pa. D. & C.2d 484, 485 (O.C. Northam. 1972). However, the inverse is true as well. As discussed above, a writing "need not assume any particular form or be couched in language technically appropriate to its testamentary character to take effect as a will." Estate of Logan, 413 A.2d 681, 684 (Pa. 1980). In particular, Logan notes, that as long as the instrument is in writing and signed by the decedent at the end thereof and is an otherwise legal declaration of his intention which he wills to be performed after his death, it must be given effect as a will." *Id.* Therefore, a document labeled "letter," or not labeled anything, but possessing the appropriate testamentary intent, could be valid as a will. *See* In re Kauffman's Estate, 76 A.2d 414, 416 (Pa. 1950).

While the Four Heirs advocate that the cigarette carton document is not testamentary merely because it is labeled as a will, the Beneficiaries argue that a will by definition is a testamentary writing. The Beneficiaries cite the definition of "will" as "a legal declaration of how a person wishes his or her possessions to be disposed of after death."[2] The dictionary definition is similar to Blackstone's legal definition, cited above. The Beneficiaries add to their argument that Decedent utilized formal language in the cigarette carton document, evidencing intent that the document be recognized as Decedent's will. Beneficiaries assert that not only did Decedent label the document "will," but he labeled it his "FIRST AND ONLY LAST WILL."

[2] Beneficiaries' Memorandum in Support of Motion for Summary or Partial Summary Judgment, p. 12, citing The American Heritage Dictionary.

Additionally, Beneficiaries assert that Decedent divided his will into several sections with the following sequence: 1) will heading; 2) five (5) dispositive sections; 3) executor and alternate executor sections; 4) special request concerning Decedent's dog; 5) naming attorney section; 6) signature section; and 7) date and location of signing section. As the Conlin Court states, "[w]e cannot overlook the fact that we are dealing with an admittedly genuine writing . . . duly signed and dated. . . ." The Conlin Court recognized the fact that a decedent's full signature at the bottom of a document is "wholly inconsistent with the thought that [he] intended it as a mere memorandum, and consistent only with the idea that [he] intended it as a will. As a memoranda there was no need for the signature: as a will the signature was essential." *Id.*[3] In contrast to this point, the word "DRAFT?" is consistent only with the idea that the Decedent did not intend the document to be a will.

The Four Heirs assert that the present language is insufficient to constitute testamentary intent. Specifically, the Four Heirs argue that the document must contain words contemplating death and an intent to make a posthumous gift. In re Hengen's Estate, 12 A.2d 119, 120 (Pa. 1940). The Four Heirs cite Hengen's Estate to support their contention that testamentary intent is not present in the cigarette carton document because it does not contain words contemplating death and an intent to make a posthumous gift.[4] In the case of Hengen's Estate, a codicil found with a will stated only, "I want Mamie to have my House 544 George St. M. L. Henge." 12 A.2d at 119. The codicil was admitted to probate and then appealed on the grounds that the writing was not testamentary in character. Hengen's Estate, 12 A.2d at 120. The Supreme Court

[3] In Conlin Estate, the opinion discussed above was formed based on a pure examination of the document. The Conlin Court went on to examine extrinsic evidence because they conceded that an element of doubt was present. After a factual examination, the court concluded that the writing in question was the last will and testament of Ms. Conlin, as it did show testamentary intent The Conlin Estate was appealed to the Pennsylvania Supreme Court, which reversed the case on the distribution of assets, but did not discuss the testamentary character of Ms. Conlin's will document. 131 A.2d 117.

[4] Margaret P. Evans, Terry L. Shelly, Larry R. Shank and Donna Oberholzer's Motion for Summary Judgment, p. 7.

recognized, again, that no particular form or language is required to constitute proper testamentary character in order for a document to take effect as a will. Acknowledging that the words "I want Mamie to have my House" were not followed by the words, "after my death," or any words of similar meaning, the court nonetheless recognized that "undoubtedly the language was intended to have the effect of conveying the real estate described, and since it could not possibly have that effect except as a testamentary instrument, after the death of the donor, the paper was prima facie testamentary in character. . . ." *Id.* Similarly, in the instant matter, Decedent did not spell out that the effect of his "FIRST AND ONLY LAST WILL" was to take place after his death. While an argument has been made that such was nonetheless Decedent's intent, the fact remains that "DRAFT?" appears in a box on the cigarette carton document, located between the words quoted above and Decedent's name, and the Court cannot ignore such a strong qualification. It is true that the Supreme Court found it noteworthy in Hengen's Estate that the deceased did not destroy the paper, "as he would have done if he did not intend it to be operative. . . ." *Id.* In the unfortunate case at bar, Decedent committed suicide, and thus his death was within his control. Decedent may have chosen not to destroy the cigarette carton document before his demise, but he also chose not to sign a final will.

The Beneficiaries proceed step by step through a discussion of the various parts of the cigarette carton document, addressing how each segment corresponds to the formal construction of a will. The Beneficiaries rely on these so-called formalities as evidence of Decedent's testamentary intent. As discussed above, however, the formalities of a will are not determinative. To constitute a will, the document must be a "legal declaration of [the Decedent's] intention which he wills to be performed after his death. . . ." Hengen's Estate, 12 A.2d at 120. While the cigarette carton document may be labeled as a will, that label is not

determinative. A list of various items of property even when associated with names of people, does not qualify as testamentary in character. Snyder's Estate, 58 Pa. D. & C. 541 (O.C. Allegheny 1972); McGrory v. Fisher, 103 A. 589, 590 (Pa. 1918); Estate of Ritchie, 389 A.2d 83, 87 (Pa. 1978). In Snyder's Estate, two codicils were probated, and an appeal followed. Both documents contained dispositive language, contemplated death, contained several statements describing the proposed beneficiary's relationship to the decedent as well as the intended gift, and included a list of numeric denominations beside each name. Several of the names and pieces of property were accompanied by an additional descriptive statement. *See* Snyder's Estate, 58 Pa. D. & C. 541. In Estate of Ritchie, a declaration, "For Aileen and Jane, Executors," followed by a list of properties belonging to the decedent, was found to lack sufficient testamentary character to be effective as a will. 289 A.2d at 89.

Contention in this case surrounds the word "DRAFT?" that appears outlined in a box at the top of the document. The Four Heirs argue that the cigarette carton document is a draft because that is what it claims itself to be, and because the document does not address all of Decedent's assets. On the other hand, the Beneficiaries assert that because the "DRAFT?" is outlined in a box, it has been excluded from the rest of the document. The word draft could be interpreted as an instruction or direction to an attorney, as the Four Heirs assert, or it could merely be a label of the document. The Beneficiaries' argument that because "DRAFT?" is blocked off, it is not part of the document, is without merit. Just as a court cannot add words to a will, a court cannot ignore the words Decedent used. Fleigle Estate, 28 Pa. D. & C.4th 282, 287 (Pa.Com.Pl. 1993), *affirmed*, 664 A.2d 612 (Pa. Super. 1995). The Beneficiaries failed to present the argument that the word's presence is merely to label the document, and testamentary character could be found because the label of a document is not determinative of its testamentary

character. "It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appear[s] to be the nature of its contents, any contrary title or designation which he may give it will be disregarded." In re McCune's Estate, 109 A. 156 (Pa. 1920). However, in this case, the document is labeled as a will. The "DRAFT?" is not the name of the document, rather it is a notation underneath the word "WILL." The Court cannot disregard this notation. The word "DRAFT?" appears for some reason. While the Court may never know if "DRAFT?" was directed at an attorney, or at the Decedent himself, in either instance it indicates an instruction, or at the very least, doubt as to the finality of the document in question. The word indicates that some further action was to be taken. Instructions and memoranda for use in drawing a will are not sufficient to establish testamentary intent. Estate of Ritchie, 389 A.2d 83, 87 (Pa. 1978).

In addition to the "DRAFT?" at the top of the document, the rest of the document should be considered in a determination of testamentary character. The body of the document contains a list of assets and names, without the use of dispositive terms. There are some notations and arrows throughout the body of the document. Each listing is separated by lines, into segments. At the bottom of the document, the Decedent's signature, appears, underneath the name and phone number of an attorney. Written beside Decedent's signature are the words, "First Last Only" and the word "Sane" is written on an angle beside those words. Beneath Decedent's signature are a date and a place. At the end of the document the words, "Trunk GTS" appear. These segments do correspond with many of the formalities typically found in wills; however, they are not sufficient to overcome Decedent's own doubt. Testamentary intent is a requirement

of a valid will. This requirement ensures that the testator's wishes are carried out. Doubt on the part of the testator inherently destroys testamentary character and thus the validity of the will.

The Beneficiaries also submit that the cigarette carton document should be construed as Decedent's will based on the presumption against intestacy. There is a presumption that a testator intends to dispose of his whole estate, and a construction should not be adopted that will lead to an intestacy, if such can be avoided. *See* In re McKean's Estate, 48 A.2d 74, 76 (Pa. Super. 1946). It must be noted, however, that the rights of intestate laws are taken away only by a will which effectually disposes of the Decedent's estate. *See id.* It must also be noted, that the presumption against intestacy is met by an "equally potent presumption that an heir is not to be disinherited except by plain words or necessary implication." In re Estate of Beisgen, 128 A.2d 52, 57 (Pa. 1956). While both of these presumptions may play a role in many cases, the Court recognizes that presumptions are not definitive. In this case, Decedent was able to overcome the presumption against intestacy by failing to create a valid will, thus falling subject to the presumption of intestacy laws.

Based on a thorough examination of the document, as well as relative case law, the Court cannot conclusively determine testamentary intent on the face of the cigarette-carton document.

**B.** ***A Positive Disposition of Assets***

A will cannot be valid without testamentary intent, which was not found above; nonetheless, the Court will undertake a discussion of the disposition of assets argued for by the Beneficiaries since each of these elements of a valid will may be subject to appellate scrutiny.

The Beneficiaries argue that the cigarette carton document does make a positive disposition of assets, as that is what a will does. Because this document is labeled as a "will," and lists assets and beneficiaries section by section, no verbs or prepositions in the schedule of assets and beneficiaries are necessary. The Beneficiaries assert that the language of the document presents a clear implication that the Decedent's assets are directed "to" named beneficiaries. The Beneficiaries claim that if the document contains an "oversight the courts have no authority to insert a provision . . .under the assumption that it was the intention of the testator. It is only when the language of the will expressly or by clear implication discloses the intention of the testator that the courts may carry it out." Estate of Swope, 119 A.2d 57, 58-59 (Pa. 1956). The Beneficiaries reliance on this authority is misplaced. In Swope, the Supreme Court affirmed the lower court's determination that a statement was not dispositive when one of the words in the statement was unintelligible. The Swope Court not only found the statement containing the unintelligible word not dispositive, it also determined that even if that word was eliminated from consideration, and the statement read, "I here by name my Nepew[sic] Donald Swope exectutor[sic] and * * * the sum of $5,000. . . ." there was no positive disposition of assets. Estate of Swope, 119 A.2d at 59. The Swope Court emphasized that the testator may have meant to give his nephew a sum of $5,000, but the words he employed do not make that statement. *See id.* Therefore, the Swope case supports not the Beneficiaries, but rather the Four Heirs' argument that the cigarette carton language is not dispositive, even though an asset is listed along with the name of a possible beneficiary. For example, the first segment of the cigarette carton document that the Beneficiaries claim is dispositive consists of the words, "Farm Marcreek Farms." Just as in the Swope case, there is no dispositive language present.

The Beneficiaries next argue that the Court may infer that a word is missing and insert that word in order to complete the will. The Beneficiaries cite In Appeal of Hellerman as authority to supply a word "where there is a clear inference by the whole will that it was omitted by mistake." 8 A. 768, 770 (Pa. 1887). It is true that the Hellerman Court supplied the words "per annum" to a clause in the testator's will, however, the will in that case contained multiple clauses of identical language. The clause in question was the fifth of seven clauses and repeated the language of the others, before and after; however, the words "per annum" were missing. The Court reasonably inferred that the testator omitted the missing words by mistake, and inserted them to make sense of the clause, and continue the action that the appellant had been taking for the previous five (5) years. *See id.* The instant matter does not involve a similar circumstance. The cigarette carton document does not contain similar statements, with a word or phrase omitted in one bequest. Instead, the cigarette carton document, though labeled as a will at the top, is notated as a "DRAFT?" and contains a list. Whether instructions to a particular attorney or to Decedent himself, the list contained in the document does not possess the dispositive language of the Hellerman document.

The Four Heirs point out that "[t]o make a testamentary disposition of property, a decedent must set forth both the thing given and the person to whom it is given with such certainty that a court can give effect to the gift when the estate is to be distributed." Estate of Fleigle, 644 A.2d 612, 615 (Pa. Super. 1995). If the document is not "sufficiently certain and definite to be capable of intelligent interpretation and enforceability," it does not make a positive disposition of assets. *Id.* The Four Heirs go on to assert that Pennsylvania's appellate courts have voided documents that name beneficiaries and list property, but fail to adequately connect on to the other. In one instance, a document was addressed to a decedent's two daughters, "For

Aileen and Jane Executors, " and went on to list property. The end of the document stated "all assets 50/50" followed by the decedent's signature and the date. In re Estate of Ritchie, 389 A.2d at 85. In Ritchie, the Supreme Court determined that the document did not positively dispose of the estate's assets. Instead, the language of the document, without use of any dispositive terms, indicated that it was a memorandum rather than a will.

There is one instance of a dispositive word in Decedent's cigarette carton document. The fifth segment the Beneficiaries have identified as dispository contains the word "DEVIDE," which presumably is meant to be "divide." While the word divide could indicate a positive disposition of assets, the property identified to be divided is simply, "MONEY." Additionally, the segment containing the "MONEY.DEVIDE" statement, is followed within the segment by a proposed beneficiary, "MICHAEL COOKS SONS," but an arrow from the previous segment, containing the name, "MICHAEL COOK-SR. LIVING MY AGE" was drawn to "MONEY.DEVIDE." Thus, this bequest is in no way clear, and does not identify "both the thing given and the person to whom it is given with such certainty that a court can give effect to the gift." Estate of Fleigle, 664 A.2d at 615.

The remaining segments do not provide clarity. The cigarette carton document goes on to say: "TOP PERSON MICHAEL COOK BEST FRIEND + RELIVATE" [sic]; "NEXT PERSON STEVE BROWN NEXT BEST FRIEND;" and "PLEASE TAKE CARE OF LAST DOG BO.BO. SOMEONE PLEASE." Although Beneficiaries suggest that the first two segments proclaim Michael Cook as executor, and Steve Brown as executor if Michael Brown serve, there is nothing in the document to proclaim that theory. "TOP PERSON" could mean anything from pallbearer to farm employee. Particularly in this case, the subject matter of the proposed disposition is unknown. There can be no positive disposition of assets where the

subject matter of the bequest is not known, even if a beneficiary is stated. *See* Estate of Hopkins, 570 A.2d 1058, 1060 (Pa. Super. 1990). "'Where a writing by its terms clearly does not constitute a testamentary disposition,' testamentary intent is not relevant." *Id.*

Decedent wrote that someone should take care of his dog, but did not identify any person to do so. As has previously been stated, a testamentary disposition must include "both the thing given and the person to whom it is given. . . ." Estate of Fleigle, 664 A.2d at 615. Decedent also included a segment containing only Attorney David S. Keller's name, phone number and address. This segment appears just before Decedent's signature and its meaning is entirely unclear. The Beneficiaries claim a specific intent behind each of Decedent's words. The Court, however, cannot accept the Beneficiaries' interpretation of Decedent's words. "A testator's intent is not to be arrived at by the expounder's subjective deductions as to what the testator might have meant, or perhaps did mean, but did not say: [t]he scope of the inquiry is limited to the meaning of what the [testator] said." Estate of Swope, 119 A.2d 57, 58 (Pa. 1956).

For all of the reasons discussed above, the segments contributing to the body of the cigarette carton document fail to identify with clarity either the thing that is to be given or the person to whom the thing is given with reasonable certainty such that a court can effectuate the document. Therefore, the Court finds that the cigarette carton document lacks a positive disposition of assets and fails to constitute a will for lack of satisfying the second requirement of a valid will as set forth in Kauffman Estate.

### C. *Ambiguities*

Ambiguities are present in the cigarette carton document. As discussed above, there are numerous instances where the words on the face of the document are unclear. When

ambiguities are present in a will, the Court must determine whether the ambiguities are patent or latent. A patent ambiguity is apparent on the face of the will. 9 Summ. Pa. Jur. 2d Probate, Estates, and Trusts § 2:39. In this case, a patent ambiguity exists in the fact that the document is labeled, "FIRST LAST ONLY WILL" and the word "DRAFT?" appears underneath the word "WILL." A latent ambiguity exists when the words of a will are on their face plain, consistent, and certain, and the uncertainty arises from extrinsic facts or circumstances in relation to the property bequeathed. *Id.* The ambiguities present in the cigarette carton document are patent. Extrinsic evidence is not admissible to explain patent ambiguities. *E.g.* In re Estate of Beisgen, 128 A.2d 52, n. 3 (Pa. 1956). The Beisgen Court explains that the dangers of admitting extrinsic evidence to prove a testator's intent include: fraud, changing or defeating the testator's intention, or nullifying the provisions of the Wills Act. . . ." *Id.* at 55. The Beisgen Court then instructs that to determine the testator's intent, the Court must place itself in the armchair of the testator and examine "DRAFT?" *See id.* at 56. The Beisgen Court's task was to examine the meaning of the words "personal effects," and it concluded that the words did not include cash or stock. *Id.* at 57. In this case, the word "DRAFT?" was written underneath the word "WILL," which indicates that it was written at least after the heading of the document. Thus, at some point while writing the document, the Decedent felt enough doubt concerning the contents of the document that he felt it was necessary to add the word "DRAFT?" to the panel. Whether this occurred before or after the document was signed will never be known, but the fact that it appears under the word "WILL" is sufficient to establish that the Decedent had some uncertainty pertaining to the document. For this reason, the Court must accept the presence of the word "DRAFT?" and find that the cigarette carton document lacks both testamentary character and a positive disposition of assets, thereby making the cigarette carton document invalid as a will. The Court

recognizes the frustration that such a document causes, but must read the words on the page as written, without omitting or interjecting any meaning from the Decedent's own inscription.

## Conclusion

The Court grants summary judgment in favor of Margaret P. Evans, Terry L. Shelly, Larry R. Shank, and Donna Oberholzer's Motion, and denies the Motion of the Beneficiaries. For this reason, the Court need not address the Four Heirs' Motion for Summary Judgment Declaring a Partial Intestacy. For the numerous reasons discussed herein, Court finds that the will submitted to probate for Decedent Norman F. Shelly is invalid under Pennsylvania law.

**IN THE COURT OF COMMON PLEAS**
**OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA**
**FRANKLIN COUNTY BRANCH**

| | | |
|---|---|---|
| In Re: Estate of Norman F. Shelly | : | Orphans' Court Division |
| | : | |
| Estate No. 51667 | : | No. 163-1999 |
| | : | |
| | : | The Honorable Carol L. Van Horn |

**ORDER OF COURT**

**AND NOW, this 12th day of February, 2007,** after consideration of Margaret P Evans, Terry L. Shelly, Larry R. Shank and Donna Oberholzer's Motion for Summary Judgment; Beneficiaries' Motion For Summary or Partial Summary Judgment, briefs submitted by counsel and argument presented to the Court on this matter,

**IT IS HEREBY ORDERED THAT:**

(1) Margaret P Evans, Terry L. Shelly, Larry R. Shank and Donna Oberholzer's Motion for Summary Judgment is hereby **granted**.

(2) Beneficiaries' Motion For Summary or Partial Summary Judgment is hereby **denied**.

*Pursuant to the requirements of Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Opinion and Order of Court, including a copy of this Opinion and Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.*

By the Court,

Carol L. Van Horn
J.

copies:
James M. Stein, Esquire, Attorney for Terry L. Shelly, Larry R. Shank., and Donna Oberholzer
Karl Prior, Esquire, Attorney for Margaret P. Evans
Thomas J. Finucane, Esquire, Attorney for Beneficiaries and Administrator c.t.a.
William C. Cramer, Esquire, Attorney for Charles O. Shelly
Thomas B. Steiger, Jr., Esquire