

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. _____

Attorney for Appellant:

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IN THE MATTER OF THE ESTATE)
 OF DARCY BROCKBANK,)
)
 Deceased.)
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)

NOTICE OF APPEAL

NOTICE is given that Appellant, Ted Tenold, a Petitioner in that cause of action filed in the Twenty-First Judicial District Court, in and for the County of Ravalli, as case DP-22-135, hereby appeals to the Supreme Court of the State of Montana, pursuant to Rule 4 Mont. R. App. Proc., from the *Opinion and Order*, entered in such action on September 18, 2023 (Ct. Dckt. # 35), a copy of which is attached.

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THE APPELLANT FURTHER CERTIFIES:

1. That this appeal is not subject to the mediation process by Rule 7, Mont. R. App. Proc.
2. That this appeal is not an appeal from an order certified as final under Rule 54(b), Mont. R. Civ. Proc.
3. That the notice required by Rule 27, Mont. R. App. Proc. does not apply.
4. That Appellant is currently arranging to have all available transcripts of the proceeding in this cause ordered from the court reporter.
5. That included herewith is the filing fee prescribed by statute.

DATED this 19th day of September, 2023.

ST. PETER LAW OFFICES, P.C.

By: /s/ Don C. St. Peter
Don C. St. Peter

HON. HOWARD F. RECHT
District Judge, Dept. No. 1
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MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

IN THE MATTER OF THE ESTATE OF:

DARCY BROCKBANK,

Deceased.

Cause No. DP 22-135

Department No. 1

OPINION AND ORDER

The Petitioner Ted Tenold, represented by St. Peter Law Offices, P.C., filed a *Petition for Formal Probate of Will* (“*Petition*”) on December 14, 2022. Stuart Brockbank (now dismissed from this matter—see *Order Re Motions to Dismiss* (Doc. 32)) and Josephine Brockbank, represented by Passamani & LeTang, PLLC, filed an *Objection to Petition for Formal Probate of Will and Appointment of Personal Representative, Request for Relief* (“*Objection*”) on February 13, 2023. A hearing was held on June 20, 2023. The Petitioner filed a post-hearing *Brief in Support of Petition for Formal Probate of Will* (“*Petitioner’s Brief*”) on July 11, 2023. The Respondent also filed an *Objectors Post Hearing Brief* (“*Objector’s Brief*”) on July 11, 2023. This matter is ripe for ruling.

ORDER

The *Petition* is DENIED.

BACKGROUND

The facts are uncontested in this matter.

The decedent, Darcy Brockbank (“Darcy”), died on February 24, 2022, at 52 years of age. He passed away in Kyiv, Ukraine, during the Russia/Ukraine conflict. Before he died, Darcy sent a text message to his friend, Peeti Karnasuta, who lives in Bangkok, Thailand. He also sent a similar message to his other friends, Ted Tenold and David Holden, on or around the same time. Ted was a friend of Darcy’s and was his partner in their sword company, and Ted considered him like family. David was also a friend and client of Darcy’s, and they spoke often. The text message read, in its most relevant part, “touching up my will at the moment because of my brothers trying to steal from my father’s estate and from my mother . . . i wanted to let you know that my sword company is going to go to you and david and ted.” *Exhibit A, attached to Petition*. Darcy mentioned having health problems in his text message, and his friends knew he was in poor health. *See Petitioner’s Brief, 2–3*.

The text message was sent via the phone application “WIRE,” and it was an encrypted self-deleting text message. *Objector’s Brief, 2; Petitioner’s Brief, 3*. Darcy’s username was “dbx” and his profile picture was a bike/motorcycle. Peeti recognized the username and profile picture as Darcy’s. Peeti took a screenshot of the text message, as it was set to delete. Peeti testified that he screenshotted the message because he thought it was important. In the text message, Darcy stated his brothers were “trying to steal from my father’s estate and from my mother.” *Exhibit A*. Ted, David, and Peeti were aware of Darcy not trusting his brothers after his father’s death. *See Petitioner’s Brief, 2–3*. The self-deleting text message mentioned that Darcy was “touching up” his “will at the moment.” *Exhibit A*.

There has been no validly executed original “Last Will and Testament” by Darcy.
Petition, 3.

SUMMARY OF ARGUMENTS

The Petitioner argues that the text message is a valid will under Mont. Code Ann. § 72-2-523. The Petitioner cites *In re K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691, which states that the standard is “simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of the proof.” *In re K.L.* further states that the standard does not require “unanswerable or conclusive evidence.” The Petitioner also cites *In re Estate of Ramirez*, 264 Mont. 33, 36, 869 P.2d 263, 265 (1994), which states that a testator need not even “realize that he is making a will, nor are there any particular words necessary to show testamentary intent.” The intention required is “to dispose of property after the testator’s death.” *Id.*

The Petitioner points to cases in Australia and Michigan where courts probated an electronic writing. In the Michigan case *Guardianship & Alts., Inc. v. Jones (In re Estate of Horton)*, 325 Mich. App. 325, 925 N.W. 2d 207 (2018), the decedent committed suicide and left a note via the “Evernote” application on his phone. *Petitioner’s Brief*, 6. Evernote required an email and password to login. Although the note did not state it was a will, the Michigan court held it was a valid will, as it provided specific instructions with how the decedent wanted his property distributed after his death. *Id.*, citing *In re Estate of Horton*.

The Petitioner argues the Wire phone application is “more secure than a regular text message and a signature is not required for identification, as Darcy was verified when establishing the account and his username was unique to him.” *Petitioner’s Brief*, 8. The Petitioner contends the self-deleting “had to be changed by the sending party,” and that the

sending party “was not notified for the self-deleting status after the original set up of the account.” *Id.* The Petitioner argues the text message, although self-deleting, still shows Darcy’s intent, as he was in poor health, and he sent it to all the parties it concerned. The Petitioner also compares the current matter to *In re Estate of Kuralt*, 2000 MT 359, 303 Mont. 335, 15 P.3d 931, to support his argument that the text message shows testamentary intent. *See Petitioner’s Brief*, 9–10.

The Respondent maintains the self-deleting message is not a witnessed will nor a holographic will, per Mont. Code Ann. § 72-2-522(1) and (2), and the Petitioner fails to show by clear and convincing evidence that the self-deleting text was intended to be Darcy’s will. *Objector’s Brief*, 6–7. The Respondent also points out that Montana has not adopted the Uniform Electronic Wills Act (“UEWA”), and that Montana has not recognized electronic wills. *Id.*, 8. The Respondent states that all cases regarding Mont. Code Ann. § 72-2-523(1) address “tangible, written wills.” *Id.*

The Respondent argues Montana district courts “sit in probate” and thus have limited jurisdiction, meaning they must follow statutory law regarding the recognition and construction of wills. *Id.*, 9–10. Because of this, the Respondent contends this is better left to the Montana Legislature to decide whether courts should recognize electronic wills. Concerning the self-deleting text itself, the Respondent points to several factors as to why it cannot constitute a valid electronic will, including: the title of the self-deleting text message (“Still no news about the Norishige wak?”); the decedent’s name is not stated; there is no signature nor handwriting; there is a lack of identifying the parties; no witness signatures; no notarization; states that the decedent is “touching up [his] will at the moment;” and the fact that the text message was self-deleting. *Id.*, 10–13.

Lastly, the Respondent argues there is no *animus testandi*, intent that a testator intends for a writing to constitute a last will and testament. To support this argument, the Respondent cites *In re Watts' Estate*, 117 Mont. 505, 512-513, 160 P.2d 492, 495–96 (1945), which states, “when it is claimed that the intention of a deceased was that a paper should stand for a last will and testament, it must be plainly and satisfactorily apparent that the testator intended *the very paper* to be his will. Unless it so appears, the paper must be rejected.” (Emphasis in original). The Respondent contends the self-deleting text was informative and not testamentary, which is further evidenced by the fact that Darcy did not direct anyone to preserve his message. *Objector's Brief*, 17.

LEGAL STANDARD

Pursuant to Mont. Code Ann. § 72-2-522(1), a will must be: (a) in writing; (b) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (c) signed by at least two individuals within a reasonable time after having witnessed the signing of the will. Mont. Code Ann. § 72-2-522(2) specifies that a holographic will is valid, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting. Although there may be a document or writing added upon a document that was not executed in compliance with Mont. Code Ann. § 72-2-522, “the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent's will.” Mont. Code Ann. § 72-2-523.

“Montana courts are guided by the bedrock principle of honoring the intent of the testator.” *In re Estate of Kuralt*, ¶ 17. To find testamentary intent, there must be the intention to

dispose of property after the testator's death. *In re Estate of Ramirez*, 264 Mont. at 36, 869 P.2d at 265. "There is no requirement that the testator realize that he is making a will, nor are there any particular words necessary to show a testamentary intent." *Id.* Whether there is sufficient testamentary intent should be determined by first looking to the writing itself; if the intent is not clear from the writing, then the surrounding circumstances may be considered. *Id.*

"There is no definite fixed rule by which testamentary intent may be gauged. Each case must stand on its own peculiar facts and circumstances." *In re Augestad's Estate*, 111 Mont. 138, 140, 106 P.2d 1087, 1088 (1940). "The intention of the deceased to dispose of property after his death by the instrument in question must be clear." *Id.*, 111 Mont. at 142, 106 P.2d at 1088. "[I]t is the *contestant* of a will who has the burden of establishing *lack* of testamentary intent." *In re Estate of Ramirez*, 264 Mont. at 36, 869 P.2d at 265, *citing* Mont. Code Ann. § 72-3-310. A valid will must exist before it can be construed or interpreted. *In re Estate of Unruh*, 204 Mont. 524, 526, 665 P.2d 782, 783 (1983); *In re Estate of Gudmunsen*, 169 Mont. 53, 57, 545 P.2d 146, 148 (1976).

DISCUSSION

The primary issue is whether a self-deleting text message shows testamentary intent and can be probated. There is no dispute of fact between the parties—rather, the question is whether the text message can be probated as a matter of law. It is clear that Darcy's text message does not meet the requirements of Mont. Code Ann. § 72-2-522 (it is an electronic message; it was not signed, witnessed, nor handwritten). For Darcy's text message to be considered pursuant to Mont. Code Ann. § 72-2-523, there needs to be clear and convincing evidence that the decedent intended the document or writing to constitute his will. The Court finds the self-deleting text message does not constitute a valid will.

Although courts are guided by the principle of honoring the testator's intent, a court must find that the testator intended to dispose of the property by the instrument in question. Here, it is apparent that Darcy, through his text message, intended for Ted, Peeti, and David to inherit his sword business; however, the text message expressly states, "touching up my will at the moment." This implies that he was making changes to his will and intended his will to be the instrument conveying his wishes, not the text message itself. The text message deleted after it sent to both Ted and David; Peeti was the only one who screenshotted it, and he did so at his own discretion, not at the instruction of Darcy.

The Petitioner cites *In re Estate of Horton*, a Michigan case, where the decedent committed suicide and left a note on his phone expressing how he wished to have his property distributed. The Michigan Court affirmed the probate court's findings, holding, "Finding that decedent clearly and unambiguously expressed his testamentary intent in the electronic document in anticipation of his impending death, the probate court concluded that decedent *intended the electronic document to constitute his will.*" *In re Estate of Horton*, 325 Mich. App. 325, 335, 925 N.W. 207, 213 (2018) (emphasis added).

There are several differences between the facts in *Horton* and the case before this Court. For example, the decedent hand wrote a note "directing the reader to his cell phone with specific instructions as to how to access a document he had written electronically in anticipation of his imminent death by his own hands." *Id.* The decedent's electronic note was also entitled, "Last Note," and it had his name typed at the end of the document. *Id.*, 325 Mich. App. at 327, 925 N.W. at 209. These differing facts show that, in *Horton*, the decedent intended the electronic document to be his will, unlike here, where Darcy stated he was "touching up his will," and sent a self-deleting text that only one of his friends saved.

The Petitioner also cites *Kuralt*, where the decedent wrote a letter to his mistress stating she was to inherit property in Montana. Although the letter was not intended to be his will (he wrote that he was going to speak with his lawyer about the will), there was other evidence that led to the Court to probate the decedent's letters, including: the long-term relationship between his mistress and him, as well as his support for her and her children; he had already conveyed 20 acres to her for no real consideration; he did not want to consult with a lawyer to formalize his intent because he wanted to keep their relationship a secret; and the decedent had underlined the word "inherit" in his letter. ¶¶ 19–20. Additionally, this Court notes that the letters Kuralt wrote were in his handwriting and signed by him.

The case *In re Estate of Ramirez* differs from Darcy's situation as well, as it involved probating handwritten and signed letters as holographic wills. The case before the Court concerns an electronic text message that was not intended to be saved, as evidenced by it not being written on a stable application (i.e., it was not written in a word document, email, or other electronic form that would not be deleted within twenty-four hours). The name of the message thread between Peeti and Darcy was entitled, "Still no news about the Norishige wak?", and the text message was self-deleting, a function Darcy could have removed from his settings but did not. The message thread could have been titled, "Will Planning," or something to that affect, but it was not.

The facts show Darcy intended to work on his will to reflect his wishes. Unfortunately, there is no will, only his self-deleting text that was written in a message thread unrelated to wills. As *In re Watts' Estate* states, "Heirs at law are not to be disinherited unless such intention is clearly manifested and expressed with legal certainty." 117 Mont. at 512, 160 P.2d at 495. In this matter, there is Darcy's statement, but no legal certainty. Also, by making the text self-

deleting, Darcy scheduled its destruction. Mont. Code Ann. § 72-2-527(1)(b). The only reason the text was preserved was because a screen shot was taken, but there is no evidence Darcy knew about this or intended it to occur.

The Court acknowledges there is a history of cases where Montana courts have found testamentary intent in letters and informal writings. As *In re Estate of Ramirez* states, the decedent need not even realize he is writing a will or use particular words to show testamentary intent. However, the Court is limited to interpreting the plain language of the probate statutes and applying it considering the circumstances of the case. Mont. Code Ann. § 72-2-523 explicitly states:

Although a document or writing added upon a document was not executed in compliance with 72-2-522, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that *the decedent intended the document or writing to constitute:*

(1) the decedent's will[.]

(Emphasis added).

Here, the Court cannot find that Darcy intended his self-deleting text message to constitute his will. Additionally, the Montana probate statutes do not address electronic wills, and it is up to the legislature to address that in the future, not this Court. Nevertheless, the Court does not find the Petitioner's argument to be frivolous. As the times change, methods of communication do as well. Case law shows that interpreting testamentary intent varies depending on the circumstances, and it is likely electronic documents and messages may be brought up again in the future regarding wills and testamentary intent. But in this case, Darcy was aware he had health problems and the only showing of his intent to leave his sword business

to his comrades was the self-deleting text message. This alone is not enough, under the current Montana probate statutes and law.

DATED: September 18, 2023

A handwritten signature in blue ink, appearing to read "Howard F. Recht", written over a horizontal line.

HON. HOWARD F RECHT, District Judge

cc: counsel of record

CERTIFICATE OF SERVICE

I, Donald Craig St. Peter, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 09-19-2023:

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Dated: 09-19-2023