Fits, Starts, and Finishes

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David Horton, *Wills Without Signatures*, 99 **B.U. L. Rev.** 1623 (2019).

Intents and acts are different things. Intent without act rings hollow or benign, and acts without intent can be perplexing or seem cavalier. But add one to the other—animate the intent through act, i.e. externalize what lives in the mind of one into the world of all—and powerful legalities result. Accidents turn into assaults; manslaughter into murder. Such casual communications as drafts or unsent texts could even become a last will and testament, accepted into probate as dispositive acts. This last context frames the inquiry that Professor David Horton explores with mastery in *Wills Without Signatures*.

It might seem that the unsigned will is too narrow an issue to warrant consideration. “No such thing,” one might say. “No signature, no intent; no intent, no will.” But with both precision and sweep, Professor Horton deconstructs that claim to build all sorts of bridges between small views and big pictures and much in between. The task is neither light nor insignificant. Old rules die hard. But with the continued relaxation of formalism and formalities, the constant expansion of technology, and the increasingly casual and tech-dependent ways in which people behave, unsigned (at least in the traditional sense) documents might indeed reflect the genuine last wishes of their makers. If so, and if “testamentary freedom” deserves the veneration that law and society claim for it, what can or must be extrapolated about intent/signature interplays demands analytic care.

Orthodox wills law is clear. Mirroring the equation above, valid wills require the confluence of testamentary intent plus formalities (legal acts). This duality makes particular sense within wills law, where the probate context itself generally ensures that the best evidence of the alleged testator’s alleged intent died when she did. By demanding some variation of the (hand)writing, witness, and signature trio, law seeks assurance that testamentary intent as claimed is likely true, and that the proffered document indeed represents the decedent’s near sacred desires. So viewed, the intent actuates the conduct, just as the conduct reveals the intent. But Professor Horton invites the deeper questions that such a calculation makes. In approaching the validity of the unsigned will, he at times sidles (and at other times, squares) up to far larger issues of the tricky interplay between intent, act, and proof—as well as intent, assent, and consent—including the slippery quality found in their testamentary form. Moreover, he does so with range, tying past to present practice and theory in a way that reveals a workable future path.

Wills Without Signatures begins on 17th century ground, when the pre-Statute of Frauds life for a decedent bequeathing chattels sometimes permitted their deathtime transfer even when no signature was affixed to a writing (or indeed, through no writing at all). By so situating matters within ecclesiastical English law and its colonial counterpart, Professor Horton reveals that notwithstanding the relentless formalism of the later Wills Act, the possibility of an unsigned will is actually less “new” than it seems. He continues by tracing the Australian and American experience with the “harmless error” doctrine, through which even wildly non-compliant documents might be accepted as wills given enough clarity and surety that their makers so intended them. Here is where things get even more interesting, at least where signatures are concerned.

What does a signature add? What does its absence remove? As earlier described, formalists would

respond “everything.” But Professor Horton is dissatisfied with both that conclusion and the tepid underperformance of harmless error as its corrective, at least as often applied. For example, to demand “clear and convincing” evidence that a particular decedent intended a particular document to constitute her particular, capital “w” Will would render “blazingly idiosyncratic” any attempt to locate intent (or assent) within—and therefore qualify any “mere” draft, physical/digital file or correspondence awaiting some future finalized product as—having met the standard. Instead, he threads back to then extends a “momentum theory” that he’d sourced to earlier cases and related fields. Thereunder, an unsigned (and given the usual order of things, also likely unwitnessed) document *could* qualify as a valid will nevertheless whenever facts revealed “formidably” the likelihood that the testator had materially assented to its terms through readiness to soon sign either it or its polished iteration. This, to Professor Horton, could rescue all manner of unexecuted drafts, instructions, or texts—even those that the testator may not yet have read—from testamentary oblivion, as well as encourage a more sympathetic, intent-furthering cast to the problems lurking within digital wills. His theory is imaginative but careful; practical, grounded, but inspired. Moreover, it undertakes to self-limit so as to protect against some “anything goes” view of the will.

Concern might remain over the elasticity of such terms as “formidable, material, ready, and ‘soon’” in imputing final assent to some technically inchoate plan. That said, such imprecision is not new, and as the reality of “circumstantial evidence” reflects, may be unavoidable whenever law peers into affairs of the mind. It would seem peculiar were law quite willing to punish crimes or deter torts based on indirect evidence of intent, yet ignore its fair appearance for death-time gifts, where the decedent to whom it is posthumously assigned will not suffer any negative consequences of finding it anyway. If intent matters (and it does) but accidents and other things happen (which they do), the safer bet for the fairness of probate is to meet testamentary intent where it surfaces, even if in non-traditional ways. Indeed, there must have been at least some intent in play, or there would not even be any testament-like (albeit unsigned) iteration to begin with and with which to later work.

I spent a good part of one 6-year-old summer trying to climb my grandmother’s maple tree. I tried jumping, running starts, ropes, stacked bricks—small solutions that offered no foothold. Later that fall, my mother encouraged me to try again. This time, I pushed off from her shoulders while pulling up into the lowest fork. I kept climbing, pulling down increasingly smaller branches along the way. I’d been looking at problems in the unyielding trunk: bark, roughness, and sap. I’d pictured the payoff as equally limited: the chance to sit in the tree. But as I cleared that initial hurdle, the view changed. And I remember thinking that the higher I could go, the farther I could see, and the more I could, by looking down toward the trunk then up toward the sky, somewhat picture time. In a way, this is what Professor Horton offers to those for whom intent really matters, and it is more than merely the possibility that an “unsigned will” is not, in fact, an oxymoron. He has given us shoulders, perspectives, possibilities, context, more questions worth asking, empathy, and a longer, broader view.

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