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Put on Your Blinders and Get Your Earplugs: The Nebraska Supreme Court's Construction of the Nebraska Holographic Will Statute Excludes Evidence of Testator Intent in *Estate of Foxtey v. Hogan*, 254 Neb. 204, 575 N.W.2d 150 (1998)

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Note*

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The author would like to thank his parents for their help and Professor William Lyons for pointing him in the right direction.

I. INTRODUCTION

The history of wills tells us that a will is an instrument which is not immediately operative but is revocable before the testator dies.[1] More importantly, a will carries out a person's intent after his or her death.[2] The requirements for a valid will have changed over the years and have traditionally included a great deal of formalism before a court would give a will effect. Recently, courts have been requiring less formalism, and when interpreting wills, they are giving more attention to what the testator truly intended. The Uniform Probate Code, which Nebraska has adopted, recognizes holographic wills as valid testamentary instruments.[3] Holographic wills in general are those that are written, dated, and signed in the handwriting of the testator.[4] The extent of the writing that must be in the testator's handwriting differs from state to state, as do ideas about the amount of extrinsic evidence that can be looked at to determine testator intent. Nebraska has explored the limits of evidence it will consider as well as the extent of the writing required to be in the handwriting of the testator in *Estate of Foxley v. Hogan*.[5]

In *Foxley*, the Nebraska Supreme Court determined that the testator's changes to her attested will were not sufficient to create a valid holographic instrument. In editing the will, the testator crossed out one daughter's name, Jane F. Jones, and wrote the following interlineation: "her share to be divided to between [sic] 5 daughters E.F. 1-3-94."[6] She also crossed out the word "six" as follows: "to my (6) daughters in equal shares" and wrote in the number "5" below it.[7]

At trial, there was evidence that Ms. Foxley had planned to make a change to her will because her daughter, Ms. Jones, had predeceased her. Under Ms. Foxley's original will, Ms. Jones' share of the estate would have gone to Ms. Jones' son, Hogan, and evidence was introduced showing Ms. Foxley disliked Hogan.[8] Ms. Foxley told her attor-

1. *See* THOMAS E. ATKINSON, LAW OF WILLS 2 (2d ed. 1953).
2. *See id.*
3. *See* UNIF. PROBATE CODE § 2-503 (1969). Nebraska adopted § 2-503 of the Uniform Probate Code in 1974 Neb. Laws 354 (codified as NEB. REV. STAT. § 30-2328 (Reissue 1995)).
4. *See* ATKINSON, *supra* note 1, at 355.
5. 254 Neb. 204, 575 N.W.2d 150 (1998).
6. *Foxley*, 254 Neb. at 205, 575 N.W.2d at 152.
7. *Id.* at 206, 575 N.W.2d at 152.
8. *See id.*

ney and one of her daughters that she did not want Hogan participating in her estate but told her attorney that she would "take care of it."[9]

The court's holding in this case unwisely excluded evidence of testator intent. Although Ms. Foxley clearly did not disregard her attested will when she altered it, the court, in its analysis, read only the handwritten words, ignoring the printed words. The effect of this decision on those who attempt to create something of a holographic nature will be to strike down the testamentary instrument unless the language in the handwriting of the testator, standing alone, shows testamentary intent. Under the Nebraska Supreme Court's rule as seen in *Foxley*, a testamentary instrument could be struck down even though testamentary intent is clear from examining the other printed words and looking to evidence of the circumstances surrounding the testator at the time the attested will was edited.

II. BACKGROUND

One of the underlying purposes of the Nebraska Probate Code is "to discover and make effective the intent of a decedent."[10] To reach that end, the "code shall be liberally construed and applied"[11] and, as a general rule, the circumstances surrounding the testator at the time the instrument was created may be considered by the court in finding intent.[12]

A. Holographic Wills and Codicils

In Nebraska, when a person writes, dates, and signs a will in his or her own handwriting, the instrument is accepted as a valid will even though there are no witnesses as normally required for a will to be valid.[13] This type of testamentary instrument is referred to as a holographic will.[14] The policy behind accepting holographs is to allow people to write wills themselves if they can not obtain legal assistance.[15] Holographs are important when the testator can not afford to execute an attested will or if the person does not have time to have one drawn up with the traditional, formal requirement of two witnesses.[16]

9. *See id.*
10. NEB. REV. STAT. § 30-2202 (Reissue 1995).
11. *Id.*
12. *See* ATKINSON, *supra* note 1, at 810.
13. *See* NEB. REV. STAT. § 30-2328 (Reissue 1995).
14. *See id.*
15. *See, e.g.*, UNIF. PROBATE CODE § 2-503 cmt. (1969).
16. *See id; see also* Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 160 (1988) (noting that holographic wills are for the convenience of the testator and enable those unable to obtain legal assistance to make a valid will in their own handwriting).

It is clearly better to allow a person to write a will by hand than to allow that person to die intestate. Because the holographic will statute relaxes the traditional formality requirements, the code allows more instruments to be accepted as valid wills.

Holographic wills are recognized in over half the states but to varying degrees in each state.[17] In the most conservative holographic will states, the requirements include that the instrument be entirely written, dated, and signed in the handwriting of the testator, and those states will not consider anything printed or typed as part of the will.[18] Nebraska, on the other hand, has followed the less formalistic requirements of the original Uniform Probate Code.[19]

The Nebraska holographic will statute states that an instrument "is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator."[20] Applying this statute, the Nebraska Supreme Court determined in *Cummings v. Curtiss*[21] that a holographic will is valid if the intent of the testator can be determined from the handwritten portions of the instrument.[22] In reaching its decision, the court relied on case law from other states interpreting statutes similar to Nebraska's. The court came to the conclusion that all language, except for that in the testator's handwriting, is to be disregarded in determining testator intent when on a printed will form.[23] Nebraska's position has been that a will could be handwritten on a printed will form so long as the handwritten portions, standing alone, clearly express testamentary intent.[24] However, Arizona, one of the states Nebraska relied upon for this rule, went further to say that "[s]uch handwritten provisions may draw testamentary context *from both the printed and the handwritten language*" on a printed will form.[25]

Under the Nebraska Probate Code, a will is defined as "any instrument, including a codicil or other testamentary instrument complying with [the sections of this Code], which . . . revokes or revises an earlier

17. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 cmt. a (Tentative Draft No. 2, 1998).
18. *See id.*
19. Nebraska adopted this portion of the Uniform Probate Code in 1974 Neb. Laws 354 (codified as NEB. REV. STAT. § 30-2328 (Reissue 1995)).
20. NEB. REV. STAT. § 30-2328 (Reissue 1995).
21. 219 Neb. 106, 361 N.W.2d 508 (1985).
22. *See id.*
23. *See id.* at 109, 361 N.W.2d at 510 (1985). Nebraska followed the case law of other states with similar statutes. *See, e.g.*, Estate of Johnson v. Johnson, 630 P.2d 1039 (Ariz. Ct. App. 1981); Succession of Burke, 365 So. 2d 858 (La. Ct. App. 1978); Watkins v. Boykin, 536 S.W.2d 400 (Tex. Civ. App. 1976).
24. *See Cummings*, 219 Neb. at 109, 361 N.W.2d at 510.
25. Estate of Muder v. Muder, 765 P.2d 997, 1000 (Ariz. 1988) (emphasis added).

executed testamentary instrument."[26] *Black's Law Dictionary* defines a codicil as follows:

> A supplement or an addition to a will; it may explain, modify, add to, subtract from, qualify, alter, restrain or revoke provisions in existing will. Such does not purport to dispose of entire estate or to contain the entire will of testator, nor does it ordinarily expressly or by necessary implication revoke in toto a prior will.[27]

A tentative draft of the *Restatement (Third) of Property* states, "In a jurisdiction that permits holographic wills, the testator may validly make a handwritten alteration of a previously executed attested will if he or she signs the alteration. . . . The handwritten alteration is treated as a holographic codicil."[28]

B. Construction vs. Interpretation of Wills

Courts interpret wills by examining the will itself as well as the circumstances surrounding the testator at the time the instrument was executed.[29] In order to discover the testator's probable meaning, a court must put "itself into the testator's armchair so as to see what he knew, liked, disliked and how he talked and wrote about the matters connected with his disposition."[30]

Construction is the assignment of meaning to a testator's words through specific rules.[31] These rules can be viewed as a set of presumptions about a person's will, such as the presumption against intestacy and the presumption in favor of the spouse and heirs.[32] Construction of a will is done when testator intent can not be found through interpretation.[33] If a court goes into construction, it is not trying to find intent anymore. Therefore, the court follows rules of construction to find an acceptable resolution of the language where intent was either absent during drafting or sufficient intent could not be found through interpretation.[34]

C. Nebraska's Position Regarding the Handwritten Alteration of an Attested Will

In *Estate of Foxley v. Hogan*, Ms. Foxley executed a valid will which provided that the majority of her estate be divided between her

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26. NEB. REV. STAT. § 30-2209 (53) (Cum. Supp. 1998).
27. BLACK'S LAW DICTIONARY 258 (6th ed. 1990).
28. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 cmt. g (Tentative Draft No. 2, 1998).
29. *See, e.g.*, ATKINSON, *supra* note 1, at 810.
30. *Id.*
31. *See id.* at 814.
32. *See id.*
33. *See id.* at 813.
34. *See id.*

six daughters.[35] Subsequent to the execution of her will, one of the daughters, Jane Jones, died and was survived by her only son, Hogan.[36] At trial, evidence was adduced that Ms. Foxley did not like Hogan.[37] After she discovered that Hogan was to receive his mother's share of a trust that had previously been established, Ms. Foxley told her attorney that "she wanted Hogan bought out" of the trust.[38] She also "emphatically"[39] indicated to him that she did not want Hogan participating in her estate and "that she would 'take care of it.'"[40] The attorney understood Ms. Foxley's statement to mean "butt out . . . this is my business."[41] Another of Ms. Foxley's daughters testified that Ms. Foxley explicitly stated her desire to exclude Hogan from participating in her estate and that she regretted overlooking the possibility of one of her daughters predeceasing her when she established the trust.[42]

Upon Ms. Foxley's death, a folder containing the executed will and a photocopy of the will were found in her den.[43] The photocopy had been altered on the first page as follows:

ARTICLE I

My only children are William C. Foxley, Sarah F. Gress, John C. Foxley, Winifred F. Wells, Elizabeth F. Leach, Shiela F. Radford, Mary Ann Pirotte and ~~Jane F. Jones.~~ her share to be divided to between ARTICLE II 5 daughters E.F. 1-7-94

The third page had been changed as follows:

ARTICLE III

I hereby give, devise and bequeath all of the rest of my proper to my ~~six~~ (6) daughters in equal shares.
5

The parties conceded that the changes, the signature, and the date of the changes were all in Ms. Foxley's handwriting.[44]

35. *See* Estate of Foxley v. Hogan, 254 Neb. 204, 205, 575 N.W.2d 150, 152 (1998).
36. *See id.*
37. *See id.* at 206, 575 N.W.2d at 152.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *See id.*
43. *See id.* at 205, 575 N.W.2d at 152.
44. *See id.* at 208, 575 N.W.2d at 153.

The Nebraska Supreme Court held that the handwritten changes made by Ms. Foxley did not "constitute a valid holographic codicil."[45] In reaching this conclusion, the court indicated that the "holographic words, standing alone, [did not] demonstrate a clear testamentary intent"[46] and "[w]ithout the requisite testamentary intent, Foxley's handwritten words cannot be deemed material provisions."[47]

Conversely, the Nebraska Court of Appeals had found that Ms. Foxley's changes constituted a valid holographic codicil in part because "[h]er intentions were emphatically, unequivocally, and repeatedly demonstrated by her spoken words, her writings, and her actions."[48]

The court of appeals observed that, with regard to a preprinted will form, testamentary context might be drawn from the printed form and the portions written in by the testator.[49] The court saw the *Foxley* case as distinguishable from a prior Nebraska case, *Cummings v. Curtis*.[50] In *Cummings*, the Nebraska Supreme Court stated that handwritten words on a preprinted will form probably constituted an invalid will because the handwritten portions read alone did not clearly express testamentary intent.[51] The distinction is that Ms. Foxley had a validly executed will that was originally drafted by her attorney, rather than a printed will form.[52] The court of appeals stated that "by crossing out 'Jane F. Jones' and writing 'her share to be divided to between 5 daughters' on the photocopy, Foxley clearly demonstrated a testamentary intent."[53] It was clear to the court that "'her share' is Jane F. Jones' share" and that the changes made by Ms. Foxley importantly included the strike through of her daughter's name.[54]

Finally, the court of appeals observed that all of the "statutory safeguards for preventing fraud have been complied with" and there was no evidence of fraud in the case at hand.[55] Also, "[a]n overly technical application of the holographic will statute to handwritten testamentary dispositions, which generally are made by persons without

45. *See id.* at 212, 575 N.W.2d at 155.
46. *Id.* at 210, 575 N.W.2d at 155.
47. *Id.* at 211, 575 N.W.2d at 155.
48. Estate of Foxley v. Hogan, 6 Neb. App. 1, 13, 568 N.W.2d 912, 919 (1997), *rev'd*, 254 Neb. 204, 575 N.W.2d 150 (1998).
49. *See id.*, 6 Neb. App. at 7, 568 N.W.2d at 916. ("We see no need to ignore the preprinted words when the testator clearly did not." (quoting *In re* Estate of Muder, 765 P.2d 997, 1000 (Ariz. 1988))).
50. 219 Neb. 106, 361 N.W.2d 508 (1985).
51. *See Foxley*, 6 Neb. App. at 7, 568 N.W.2d at 916.
52. *See Foxley*, 6 Neb. App. at 8, 568 N.W.2d at 916 (citing Cummings v. Curtiss, 219 Neb. 106, 361 N.W.2d 508 (1985)).
53. *Id.* at 8, 568 N.W.2d at 917.
54. *Id.* at 10, 568 N.W.2d at 918.
55. *Id.* at 13, 568 N.W.2d at 919.

legal training, would seriously limit the effectiveness of the legislative decision to authorize holographic wills."[56]

III. ANALYSIS

Ms. Foxley's testamentary intent can easily be determined by examining both the handwritten alterations and the altered, attested will in conjunction with the circumstances surrounding her at the time she made the alterations. The Nebraska Legislature's requirement that the Nebraska Probate Code be liberally construed in order to discover and make effective testator intent should have resulted in Ms. Foxley's edited will being validated.

A. Altered Holographic Wills vs. Printed Will Forms

It seems more worthy to give effect to an attested will with changes made to it rather a printed will form with the blanks filled in because the words in the attested will were originally the testator's own. Conversely, a will form is mass produced and the testator adds to the preprinted words on the form by simply filling in the blanks.[57] An attested will, entirely from the testator, rather than partially, as on a will form, is more indicative of what he or she intended because it was wholly made to fit the testator's particular situation. It seems less likely that this level of specificity would be present where the testator merely filled in the blanks of a will form, and therefore, less indicative of intent.

In *Cummings v. Curtiss*, the Nebraska Supreme Court considered whether handwritten words on a printed will form could constitute a valid holographic will.[58] When determining whether there may have been testamentary intent, the court looked to other states' interpretations of statutes similar to Nebraska's and considered only the handwritten words, ignoring the printed words.[59]

Arizona case law, which Nebraska relied upon in part in the *Cummings* case, at one point followed the "ignore the printed word" line of analysis as well.[60] However, in a later case, *Estate of Muder v. Muder*,[61] the Arizona Supreme Court went further by looking at the

56. *Id.* (quoting Estate of Black v. Rombotis, 641 P.2d 754, 756 (Cal. 1982)).
57. The Nebraska Court of Appeals also recognized this distinction in the *Foxley* case. *See* Estate of Foxley v. Hogan, 6 Neb. App. 1 at 8, 568 N.W.2d 912 at 917 (1997), *rev'd*, 254 Neb. 204, 575 N.W.2d 150 (1998).
58. *See* Cummings v. Curtiss, 219 Neb. 106, 361 N.W.2d 508 (1985). The court's opinion on this matter was less than a holding because it was not required to hold whether or not it actually was a holographic will. *Cummings* was a fraudulent misrepresentation case where a client sued her attorney.
59. *See id.* at 109, 361 N.W.2d at 510.
60. *See* Estate of Johnson v. Johnson, 630 P.2d 1039 (Ariz. Ct. App. 1981).
61. 765 P.2d 997 (Ariz. 1988)

printed and handwritten words together in determining testamentary intent.[62] The court interpreted a statute almost identical to Nebraska's and held that, in enacting the statute, the Arizona Legislature "intended to allow printed portions of the will form to be incorporated into the handwritten portion of the holographic will."[63] The Arizona courts have not specifically ruled on facts like those in *Foxley* where an attested will was altered. However, it seems that if the Arizona Supreme Court has allowed handwritten words to be read in conjunction with words on a printed will form, that court would be even more likely to read handwritten words with those on an attested will like that of Ms. Foxley's.

A tentative draft of the *Restatement (Third) of Property* recognizes alterations to attested wills.[64] It states that "[i]n a jurisdiction that permits holographic wills, the testator may validly make a handwritten alteration of a previously executed attested will . . . . The handwritten alteration is treated as a holographic codicil."[65] The recognition of alterations of attested wills seems rational, especially when the intent of the testator is as clear as that of Ms. Foxley.

B. The Nebraska Probate Code's Requirement that the Material Provisions of a Holographic Will be in the Handwriting of the Testator

In *Foxley*, the Nebraska Supreme Court seemed concerned with the requirement that the material provisions be in the handwriting of the testator under the holographic will statute.[66] An argument can be made for the Nebraska Supreme Court's strict interpretation of the statute, that is, reading only the handwriting of the testator when determining testator intent. In fact, this is the most common position of the state courts that have ruled on the subject.[67] One might say that if the legislature intended to allow the reading of the handwritten as well as the printed words, they would have explicitly stated it in the statute.

An explicit codification by the legislature should not be necessary, however, considering that it has already stated that the code "shall be *liberally* construed" to "make effective the intent of the decedent."[68] A

62. *See Muder*, 765 P.2d at 1000 ("We see no need to ignore the preprinted words when the testator clearly did not.").
63. *Id.*
64. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 cmt. g (Tentative Draft No. 2, 1998).
65. *Id.*
66. *See* Estate of Foxley v. Hogan, 254 Neb. 204, 209, 575 N.W. 2d 150, 154 (1998).
67. *See* Estate of Johnson v. Johnson, 630 P.2d 1039 (Ariz. Ct. App. 1981); Succession of Burke, 365 So. 2d 858 (La. Ct. App. 1978); Watkins v. Boykin, 536 S.W.2d 400 (Tex. App. 1976). *But see* Estate of Muder v. Muder, 765 P.2d 997 (Ariz. 1988).
68. NEB. REV. STAT. § 30-2202 (Reissue 1995) (emphasis added).

liberal construction of the material provision requirement would allow courts to read the printed portion along with the handwritten changes if it is clear that the testator did not ignore the printed portions. Arizona has held that handwritten provisions on a printed will form can draw testamentary context from the handwritten words in conjunction with the printed words[69] under a code system quite similar to Nebraska's system.[70] The Arizona Supreme Court stated that their statute does not require the court to ignore the printed words when it is clear that the testator did not ignore them.[71]

However, the Arizona Supreme Court did give a caveat to the rule by stating that so long as the "protection afforded by requiring the material provisions be in the testator's handwriting is present," looking to the printed words is acceptable.[72] The court did not specify what the "protection afforded"[73] includes, but it most likely includes the avoidance of fraud by potential beneficiaries taking advantage of testators in vulnerable moments, and changes made right after a fight with a potential beneficiary.[74] Ms. Foxley was protected from both of these in her situation. First, she did not have any fights with Hogan or anyone else of which we know just before she made the changes. In fact, there is evidence that Ms. Foxley had a long standing dislike for Hogan.[75] Second, no one had the opportunity to take advantage of Ms. Foxley because she insisted on taking care of the problem herself.[76] However, the legislature may have had other protections in mind for the testator when it enacted the requirement that the material provisions be in the handwriting of the testator. In contemplating what those protections may have been, it seems unlikely that Ms. Foxley would have been unprotected in her situation. The alterations to the will were completely her idea after she discovered Hogan would become a beneficiary of a trust in the place of her deceased daugh-

69. *See Muder*, 765 P.2d at 1000. Nebraska has followed Arizona case law in the past on similar holographic will issues. *See* Cummings v. Curtiss, 219 Neb. 106, 109, 361 N.W.2d 508, 510 (1985) ("[O]nly the portion of the will actually in the handwriting of the testator is to be considered." (citing Estate of Johnson v. Johnson, 630 P.2d 1039 (Ariz. Ct. App. 1981))).

70. *Compare* NEB. REV. STAT. § 30-2328 (Reissue 1995), *with* ARIZ. REV. STAT. ANN. § 14-2503 (West 1995).

71. *See Muder*, 765 P.2d. at 1000.

72. *Id.*

73. *Id.*

74. *See* Estate of Foxley v. Hogan, 254 Neb. 204, 210, 575 N.W.2d 150, 155 (1998). The Nebraska Supreme Court expressed its concerns about what would happen if it were to read the handwritten words as well as the printed words that Ms. Foxley had edited. It seems that these sorts of things were of the type the material provisions requirement was intended to protect.

75. *See id.* at 206, 575 N.W.2d at 152.

76. *See id.*

ter.[77] Further, Ms. Foxley was the one who initiated the changes to her will. She needed no prompting from her relatives or attorneys.[78]

C. The Nebraska Supreme Court's Requirement that Ms. Foxley's Words Alone Must Establish Intent

Ms. Foxley's intent was clear from the alterations to her attested will as well as from the circumstances surrounding her when she made the changes. However, the Nebraska Supreme Court unwisely excluded her edited words in holding that only Ms. Foxley's handwriting, standing alone, was to be considered to establish her testamentary intent.[79] Obviously, the court would find it difficult to make sense of her handwritten words standing alone when Ms. Foxley herself did not ignore the printed words while editing her will. Under this test, it is quite challenging to find testamentary intent in any case where someone has altered an attested will by hand.

When Ms. Foxley crossed out the name "Jane F. Jones" she clearly did not ignore the document she was altering. As discussed earlier, Arizona has allowed handwritten and printed portions of a will to be read together to determine a testator's intent.[80] The Arizona Supreme Court stated that if the testator did not ignore the preprinted words, the court would not ignore them either.[81]

In *Foxley*, the Nebraska Supreme Court indicated that "the holographic words, standing alone, [did not] demonstrate a clear testamentary intent" and to weaken this rule through reading the printed words with the handwritten words would "invite mischief or outright fraud" by potential beneficiaries.[82] The court questioned where it would stop if the court were to "make an exception in this case to the rule that holographic words, standing alone, have to demonstrate a clear testamentary intent."[83] The court's fear of looking to the printed words seems unfounded if the "protection afforded by requiring the material provisions be in the testator's handwriting is present."[84] As demonstrated, those protections were present in Ms. Foxley's case.[85]

It is possible that the Nebraska Supreme Court finds it easier to make decisions in cases involving wills when the decision turns on a formalistic requirement instead of determining the true intent of the testator. Indeed, it is much easier to look solely at the handwritten

77. *See id.*
78. *See id.*
79. *See id.* at 211, 575 N.W.2d at 155.
80. *See supra* text accompanying notes 70-73.
81. *See* Estate of Muder v. Muder, 765 P.2d 997, 1000 (Ariz. 1988).
82. Estate of Foxley v. Hogan, 254 Neb. 204, 210, 575 N.W.2d 150, 155 (1998).
83. *Id.*
84. Estate of Muder v. Muder, 765 P.2d at 1000.
85. *See supra* text accompanying notes 70-80.

words and say they do not make sense standing alone than to try to discover a person's true intent. The division between whether an instrument is valid or not is much clearer under the Nebraska Supreme Court's current test.

However, the Nebraska Legislature has stated that one of the policies behind the probate code is to determine the intent of the decedent.[86] Therefore, it seems that the court's test does not fully comply with what the legislature requires.

D. Ms. Foxley's Intent and the Circumstances Surrounding Her at the Time She Altered Her Attested Will

If the court were to put "itself into the testator's armchair"[87] in the *Foxley* case, it would discover that Ms. Foxley's clear intent was to cut Hogan out of her will. In fact, upon examination of all the evidence, it would have been a surprise if Ms. Foxley had not altered her will in some way after her daughter's death.

It seems logical that any time a person has named someone as a beneficiary and that beneficiary predeceases the testator, the testator may want to change his or her will. When one considers Ms. Foxley's feelings for Hogan, the person who would be the beneficiary in her daughter's place, it would have been surprising if she had not changed her will. The evidence introduced at trial regarding (1) the statements to her attorney and daughter about having Hogan "bought out" of a trust she had established; (2) the statement that she did not want Hogan participating in her estate and that she would "take care of it"; and (3) her dislike of Hogan,[88] indicate Ms. Foxley's desire to not only change her will, but to take care of it herself. These facts clearly indicate that Ms. Foxley wanted to change her will specifically to exclude Hogan from her estate proceedings.

The argument that tended to show a lack of intent by Ms. Foxley to exclude Hogan from the will is that she altered a photocopy of her will rather than the original.[89] If the Nebraska Supreme Court were to adopt a rule allowing the reading of both the alterations and the altered document, questioning Ms. Foxley's use of a photocopy would be irrelevant so long as she dated and signed the changes as required by the holographic will statute. By dating and signing the changes, Ms. Foxley showed her intent to adopt the alterations as her will. She probably would not have signed the changes if she did not want them to be given effect or merely intended them to be notes.

86. *See* NEB. REV. STAT. § 30-2202 (Reissue 1995).

87. ATKINSON, *supra* note 1, at 810.

88. *See* Estate of Foxley v. Hogan, 254 Neb. at 206, 575 N.W.2d at 152.

89. *See id.*

Ms. Foxley may have had many reasons for altering the photocopy instead of the original and our attempts to rationalize this would be purely speculative. The fact remains that she made many statements to those close to her regarding her dislike of Hogan at the time she made the alterations and the signature next to the alterations indicates a desire to give the changes effect.

E. The Unstated Concern that the Absence of Witnesses Casts Doubt on Whether Ms. Foxley Had Testamentary Intent When She Made Handwritten Alterations to Her Attested Will

The problem that the Nebraska Supreme Court had with Ms. Foxley's changes to her will was, perhaps, the unstated concern that without a witness to Ms. Foxley's execution of the formalities of the document, there is less chance that there was testamentary intent. Witnessed wills may help give a court reasonable certainty that the instrument was intended as a will, that it was actually executed by the decedent, and that the testator was free from at least immediate duress during execution.[90] The Nebraska Legislature has said that witnesses are not required for a valid holographic will,[91] therefore the inherent certainties associated with a witnessed will might not be present in a holographic will.

The Nebraska Supreme Court's insistence on looking only at the handwritten words seems to indicate a suspicion of holographic wills. Should the court cast doubt on a holographic instrument when there are no witnesses in light of the fact that the Nebraska Legislature has said holographic wills are valid even when witnesses are absent?[92] Obviously not.

The Nebraska Supreme Court did not explicitly state that the absence of witnesses was determinative of whether there is testamentary intent,[93] but courts in other states have taken great comfort in recognizing testamentary intent when witnesses are present.[94] No

90. *See, e.g.*, Estate of Brown v. Nicholas, 218 Cal. Rptr. 108, 110 (Cal. Ct. App. 1985).
91. *See* NEB. REV. STAT. § 30-2328 (Reissue 1995).
92. *See id.*
93. *See Foxley*, 254 Neb. at 207, 575 N.W.2d at 153.
94. *See, e.g.*, Estate of Brown v. Nicholas, 218 Cal. Rptr. at 110; Vickey v. Vickey, 170 So. 745, 746 (Fla. 1936) (noting that a will "should be presumed to have been made with testamentary intent when appearing to have been executed within required legal formalities with necessary witnesses, even though execution as part of the ceremony of initiating testator into a secret society."); *In re* Sunday's Estate, 31 A. 353, 356 (Pa. 1895) ("Testamentary intent is the very breath of life of a will, and, of course, must be established by two witnesses."); Boyd v. Boyd, 680 S.W.2d 462, 464 (Tenn. 1984) (noting that witnesses may well serve to verify testamentary intent); Phillips v. Najar, 901 S.W.2d 561, 562 (Tex. App. 1995)

witnesses means that there was no one present to attest to the formalities of execution. The absence of outside verification does seem to indicate the presence of more uncertainty as to whether an instrument evidences testamentary intent. But, it certainly is not the place of the Nebraska Supreme Court to insert its fears where the Legislature has said there shall be none.

The fact that there were no witnesses present at the time Ms. Foxley executed the alterations may have played a role in the court's decision to disregard the language altered by Ms. Foxley.[95] Looking at the language she altered would have shown that the court was not concerned with whether there were witnesses because she clearly did not disregard the language in the original will. If it is clear from the circumstances surrounding her at the time of execution that she intended to exclude Hogan, and the manner in which she made the alterations indicates reference to the altered document, then the altered document should be looked at by the court. It makes little sense to ignore the altered document unless there is concern about the absence of witnesses.

F. The Effect of *Foxley* on Holographs in Nebraska

Estate of Foxley v. Hogan has the practical effect of striking down any holographic instrument which has too little of its language in the handwriting of the testator. This will be the result even in a case like *Foxley* where the testator's intent is clear. The handwritten portions of the instrument read in conjunction with any printed words on the paper and clear from the circumstances surrounding the testator at the time of the writing clearly show Ms. Foxley's intent.

It is difficult to determine what would be a sufficient amount of language in the handwriting of the testator to satisfy the Nebraska Supreme Court, but from the opinion in *Foxley*, it seems that the amount needs to be substantial. Unfortunately, the test remains that if the handwritten words, standing alone, do not make sense and fully evidence testamentary intent, the holographic instrument is not valid.[96]

(finding a valid signature when the testator instructed someone else to affix her name to her will with a rubber stamp because "she gave the instruction in front of all witnesses and expressed to them her testamentary intent"); *In re* Watkins' Estate, 198 P. 721 (Wash. 1921) (relying on the fact that there were witnesses to the will who stated that the testator had testamentary intent in signing the will as a prerequisite to receiving a degree from a secret order during the ceremony of conferring that degree).

95. *See* Estate of Foxley v. Hogan, 254 Neb. 204, 207, 575 N.W.2d 150, 153 (1998).

96. *See id.* at 212, 575 N.W.2d at 155.

IV. CONCLUSION

The Nebraska Supreme Court's narrow construction of the probate code found in *Estate of Foxley v. Hogan* represents a step backwards for Nebraska in the trend toward less formalistic requirements when determining whether a document is a testamentary instrument. The court's construction of the code in this case was done in the face of the code's requirement that it be liberally construed in order to discover and make effective the intent of the decedent.

If Nebraska were to adopt a position allowing both the handwritten and printed words to be looked at in a case where someone has altered his or her attested will, the best consequence would be to give effect to clear testator intent. Indeed, "[i]f testators are to be encouraged by a statute . . . to draw their own wills, the courts should not adopt, upon purely technical reasoning, a construction which would result in invalidating such wills."[97]

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97. *In re* Soher's Estate, 21 P. 8, 10 (Cal. 1889).