**26.09 TESTAMENTARY INTENT**

Instruction withdrawn 1995. See Comment.

Comment

The issue of testamentary intent usually arises in two broad contexts: when it is asserted that a will was executed as a sham or joke and was never intended to take effect, Lister v. Smith, 3 SW. & Tr. 282, 164 Eng. Rep. 1282 (Courts of Probate 1863), and when it is asserted that the testator subjected the operation of his or her will to a valid condition precedent, which never occurred. Eaton v. Brown, 193 U.S. 411 (1904); Wood v. Greimann, 165 F.2d 637, 11 Alaska 498 (1948); In re Pearl's Estate, 11 Alaska 214 (1946). Some courts have admitted only clear and positive extrinsic evidence to show the testator's intention. See, e.g., Vroom v. Curtiss, 18 Cal.2d 512, 116 P.2d 438 (1941); accord Thomas Edgar Atkinson, Handbook of the Law of Wills ¤ 46 (sham wills) & § 83 (conditional wills) (2d ed. 1953).

No reported Alaska decision has formulated a test of testamentary intent for either of the two contexts in which the question may be presented. However, AS 13.11.230 states that "[t]he intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions."