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Does Washington Law Require Testator to Sign His Will in Presence of Attesting Witness?

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NOTES AND COMMENT

DOES WASHINGTON LAW REQUIRE TESTATOR TO SIGN HIS WILL IN PRESENCE OF ATTESTING WITNESS?

The Washington statute provides:

> "Every will shall be in writing signed by the testator or the testatrix, or by some other person under his or her direction and in his or her presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator by his direction or request. [1]

It will be observed that while the statute does not, in terms, require testator to sign in the presence of the attesting witness, it does not mention acknowledgment as a mode of execution. What does "attestation" mean? Webster says that "the subscription of a name to a writing as a witness" is an attestation. Our Supreme Court, speaking through Ellis, C. J., said:

> " attestation is the act of witnessing an instrument in writing at the request of the party making the same, and subscribing it as a witness. Bouvier's Law Dict. (Rawle's 3rd Revision) Black's Law Dict. 2d ed."[2]

While our statute is substantially the same as the English Statute of Frauds,[3] it came to us from the Territory of Oregon upon the organization

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[1] Rem. Comp. Stat. Sec. 1395.
[2] *In re Jones Est.*, 101 Wash. 128, 172 Pac. 206 (1918).
[3] 29 Car. II, Sec. 5.

of Washington Territory. It was enacted in Oregon in 1853,[4] and here in 1854.[5] The Supreme Court of Oregon has held under this statute that the testator need only acknowledge his signature, but the decision appears to be based upon a statutory definition of "subscribing witnesses." The court said: "The statute of this state (757, Ann. Code) defines what a subscribing witness is. He is 'one who sees a writing executed or hears it acknowledged, and, at the request of the party thereupon signs his name as a witness'· and I think the word 'attestation, in the absence of any statutory definition implies the same thing. A subscribing witness to a will, therefore, must be something more than a person who subscribes his name as a witness to it. The testator must either sign the will in the presence of the witness, or must acknowledge to him by word or act, that he had signed it."[6] No definition of "subscribing witness" or "attesting witness" is found in the Washington statutes, but, as we have seen, our Supreme Court has defined "attestation" in *In re James Estate, supra.*

It has been claimed that our statute came to us from California, and a case from that state has been cited to the effect that acknowledgment alone is sufficient,[7] but an examination of the decision discloses the fact that the California statute expressly provided for attestation either by seeing testator sign or hearing him acknowledge his signature.[8] In 28 R. C. L. 125, §81, we are told that, "in most jurisdictions a testator has the choice of signing the will in the presence of attesting or subscribing witnesses, or acknowledging his signature or subscription in the presence of the witnesses," and a number of authorities are cited in support of the proposition, and among them the California case of *In re Abbey's Estate, supra.* However, as we have seen, the California rule is based upon a definite statutory provision for acknowledgment. An examination of the remainder of the cases so cited, and of others not there cited, shows that all such cases fall into two classes; one class holding squarely that such a statute as ours does not require signing in the presence of witnesses; the other holding that acknowledgment alone is sufficient because the statute involved expressly so declares. Before noticing these cases further it should be stated that the English rule under the Statute of Frauds appears to have been that signing in presence of witnesses was unnecessary and that acknowledgment alone was sufficient. In *Moore v. King,*[9] Sir Herbert Jenner Fust, speaking for the court said, in referring to the ninth section of the Wills Act (1837), "It has been formerly doubted under the Statute of Frauds, whether an acknowledgment of the signature was sufficient, whether the will must not be actually signed in the presence of the witnesses; here again all doubt is removed by the present action."[10] The ninth section of the Wills Act provided that the signature of testator "shall be made or acknowledged by the testator."

As before stated, English decisions under the Statute of Frauds, section

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[4] Ch. 64, Gen. Laws of Ore.
[5] Wash. Terr. Laws, 1854 p. 312.
[6] *Luper v. Werts,* 19 Ore. 122, 23 Pac. 850 (1890)
[7] *In re Abbey's Est.,* 183 Cal. 524, 191 Pac. 893 (1920).
[8] Calif. C. C. 1267.
[9] Prerog. Ct. of Canterbury, 3 Curt. 243.
[10] 1 Vict. C. 26.

five, were to the effect that acknowledgment alone was sufficient,[11] but apparently the courts were not satisfied of the correctness of the holding, for in *Ellis v. Smith*,[12] Parker, Chief Baron, said: "I confess if this had been *res integra*, I should doubt whether testator's declaration is a proper execution within the fifth clause· because I think an admission that it is sufficient tends to weaken the force of the statute, and let in inconveniences and perjuries which the statute is designed to prevent." Willis, Chief Justice, expressed his doubt also: "I am not satisfied in my own mind, that the testator's acknowledgment is sufficient, but authorities bear me down, and I must yield." The Master of the Rolls, Sir John Strange, expressed the same doubt; while Lord Chancellor Hardwicke used this language: "I agree with all the learned persons who spoke before me, that if it had been *res integra*, I should doubt, but it is now *res judicata*, and *stare decisis* seems wisest." *Ellis v. Smith* was decided in 1754, and there can be little doubt that the Wills Act was designed in part to remove further doubt by expressly providing for acknowledgment.

In this country under statutes similar to ours, it has been held in the following states and perhaps others, that acknowledgment alone is sufficient: Alabama,[12] Indiana,[13] Michigan,[14] North Carolina,[15] Missouri, [16] Massachusetts,[17] Maryland,[18] Pennsylvania,[19] Vermont.[20]

In the following states the decisions were based upon statutes that expressly authorized the due execution of a will either by witnesses seeing testator sign or hearing him acknowledge his signature, or his will. Oklahoma,[21] New York,[22] Illinois,[23] Kentucky [24]

The case of *Chaffee v. Baptist Missionary Convention*,[25] an early New York case, and *Ray v. Walker supra*, have been cited by some text-writers as holding that testator must sign in the presence of the witnesses, but neither case can fairly be so considered, for an examination of the decisions discloses that either method of execution is expressly permitted by the statute.

We seem to have had no decision of this question by our Supreme Court, although it is stated in the syllabus of one case that the statute requires testator to sign in the presence of the witnesses.[25] Reading the opinion,

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[11] *Johnson v. Johnson*, 1 Cr. & M. 140; *White v. Trustees*, 6 Bing. 310; *Ellis v. Smith*, 1 Ves. Jr. 11.

[12] *Ritchey v. Jones*, 210 Ala. 204, 97 So. 736 (1923)

[13] *Wersick v. Phelps*, 186 Ind. 290, 116 N. E. 49 (1917)

[14] *Noseck's Est.*, 229 Mich. 559, 201 N. W 884 (1925)

[15] *In re Deyton's Will*, 177 N. C. 994, 99 S. E. 424 (1919)

[16] *Ray v. Walker* 293 Mo. 447, 240 S. W 187 (1922)

[17] *Nunn v. Ehlert*, 218 Mass. 471, 106 N. E. 163 (1914).

[18] *Woodstock v. Hankey*, 129 Md. 675, 99 Atl. 962 (1917).

[19] *In re Kessler's Est.*, 221 Penn. 314, 70 Atl. 770 (1908).

[20] *In reClaflin's Will*, 73 Vt. 129, 50 Atl. 815, 817 Am. St. Rep. 693 (1901)

[21] *In re Stover's Will*, 104 Okla. 251, 231 Pac. 212 (1924).

[22] *Baskin v. Baskin*, 36 N. Y. 416 (1867)

[23] *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rept. 151 (1895) *Valentine v. Church*, 293 Ill. 71, 127 N. E. 178 (1920)

[24] *Robertson v. Robertson*, 232 Ky 572, 24 S. W (2nd) 282 (1930).

[25] *Chaffee v. Bap. Miss. Conv.*, 10 Paige (N. Y.) 85, 40 Am. Dec. 225 (1843)

[26] *In re Jones, Est.*, 101 Wash. 128, 172 Pac. 206 (1918)

however, we learn that the will was neither signed in the presence of the witnesses nor acknowledged to them. It may be that the court would have held that an acknowledgment alone would not suffice, but this does not appear in the opinion.

The general practice in Washington appears to be to require testator to sign in presence of the witnesses. Certainly this would seem to be the safer practice until the question shall have been settled here. It will be noticed that in practically all the printed forms for wills in use in Washington the attesting clause not only sets forth that testator signed in the presence of he witnesses, but also makes the statement that the witnesses signed in the presence of each other. While the signing in each other's presence is not expressly required by the statute, it is usually done, and it is a wise precaution to take, for it is required in some of the states. The statute does specifically require the witnesses to sign in testator's presence. If acknowledgment alone is sufficient, testator may acknowledge at different times to the several witnesses, and, if each of them then signs as a witness, it would seem to satisfy the requirement of the statute. Perhaps another reason for the prevailing practice may be found in the uncertainty as to the requirements of the law of the state where a will executed here may be offered for original probate, and especially where it devises lands lying in another state or contains a general residuary clause covering after-acquired property. While our law would, of course, govern as to personal estate, it would not govern where the will happens to cover lands lying without the state. It is to be presumed that a careful lawyer would have the will so executed and the attestation clause so framed as to meet the most exacting law of any state in those cases where the will makes specific devise or devises of lands in other jurisdictions, or contains a general residuary clause. Not all of the states have provisions like our statute to the effect that a will offered for original probate here shall be deemed good if executed according to the law of the place where made or of testator's domicile.[27] Presumably all of the states would recognize and admit to ancillary probate a will properly exemplified as admitted to probate in the state where made.

Notwithstanding the practically unanimous holdings to the effect that under sections like ours a testator may legally execute his will by acknowledgment alone, the writer believes it safer to sign in the presence of the witnesses until the law shall have been authoritatively settled by a decision of our Supreme Court.

Where acknowledgment is permitted it is well settled that "No formal or precise method of acknowledgment is necessary." Any act, sign or gesture, clearly indicating that testator acknowledges is sufficient.[28]

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[27] Rem. Comp. Stat. Sec. 1395.
[28] 1 Page on Wills, 2nd ed., Sec. 329.