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Wills - Execution - Attestation

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WILLS—EXECUTION—ATTESTATION—Prospective witnesses to a will saw the testatrix standing in an adjoining room engaged in writing. Soon thereafter, the testatrix asked them to come in and sign a paper. Her name had already been written on the document, and she neither signed it in the witnesses' presence nor in any manner indicated the writing to be her will. The witnesses read enough of the document, however, to know it was a will, before subscribing it in the presence of the testatrix and one another. Three of the testatrix' sons objected to the probate of the will on the ground that it was not duly executed. The lower court denied probate on the ground asserted by the contestants. On appeal, *held,* reversed. The signature of the testatrix on the will was exhibited to the witnesses, and they were requested to sign. Since the requirements of attestation and subscription are synonymous in Wisconsin, all the statutory requirements were met upon the witnesses subscribing the instrument. *In re Estate of White,* 273 Wis. 212, 77 N.W. (2d) 404 (1956).

All present-day statutes dealing with the formal requirements of attestation evolved either from the stringent requirements of the English Wills Act[1] or the more flexible English Statute of Frauds.[2] Wisconsin, which, along with the majority of the jurisdictions, is governed by the latter type statute,[3] has been vexed by the elusive minimum requirements for the valid attestation of a will where the testator has signed the document out of the presence of the witnesses. It is well settled in most of the jurisdictions whose wills statutes are patterned after the Statute of Frauds that a valid attestation does not require the testator to publish to the witnesses the fact that the instrument is his will if the statute does not expressly require it.[4] The majority of these same courts deem it a sufficient attestation if the testator in any way, by word or deed, indicates to the witnesses the nature of the instrument or the fact that the document represents his legal act.[5] However, most of the decisions involving this problem have saved the will on quite another theory. In all but two of the Statute of Frauds type jurisdictions[6] an acknowledgment by the testator of his signature on the document is deemed to be a sufficient attestation.[7] Although this acknowledgment need not be verbal,[8] courts have been reluctant to sanction probate where the testator's role was only a passive one in which he failed to indicate to the witnesses, either by words or actions, that the signature was his[9] or that the document represented his legal act.[10] Going one step farther, the Wisconsin court, it would seem, has nullified the requirement of attestation. Beginning with the proposition that "no physical or mental act is required of attestation that is not also required of subscription,"[11] the court concluded that the terms are synonymous. States whose statutes require only attestation and not subscription recognize the similarity between the terms, but are uniform in holding attestation to be the broader concept, embracing

1 7 Wm. 4 & 1 Vict., c. 26, §9 (1837). This act provided that the testator's "signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator. . . ."

2 29 Car. 2, c. 3, §5 (1677). Under its terms the will "shall be attested and subscribed in the presence of the said Devisor by three or fower credible Witnesses. . . ." For a general discussion of the provisions of the two acts, see ATKINSON, WILLS, 2d ed., §66, p. 321 (1953).

3 See Bordwell, "The Statute Law of Wills," 14 IOWA L. REV. 1 (1928).

4 See 3 UNIV. CIN. L. REV. 191 at 197 (1929); 1 SCHOULER, WILLS, 6th ed., §504 (1923; Supp. 1926).

5 In re Estate of Davis, 168 Kan. 314 at 321, 212 P. (2d) 343 (1949). See also 25 CORN. L.Q. 469 at 471 (1940); ATKINSON, WILLS, 2d ed., §66, p. 323 (1953).

6 In re Riedlinger's Will, 37 N.M. 18, 16 P. (2d) 549 (1932); In re Alexander's Estate, 104 Utah 286, 130 P. (2d) 432 (1943). Both New Mexico and Utah have express statutory provisions which require the testator to sign in the presence of the witnesses.

7 See 25 CORN. L.Q. 469 at 470 (1940); 115 A.L.R. 689 at 697 (1938); THOMPSON, WILLS, 3d ed., §125 (1947).

8 In re Claflin's Will, 73 Vt. 129 at 132, 50 A. 815 (1901); In re Estate of Elkerton, 380 Ill. 394 at 399, 44 N.E. (2d) 148 (1942).

9 In re Will of Lagow, 391 Ill. 72, 62 N.E. (2d) 469 (1945).

10 In Luper v. Werts, 19 Ore. 122 at 136, 23 P. 850 (1890), the court held that "mere silence" on the testator's part "is not enough" to constitute a sufficient acknowledgment.

11 Principal case at 407.

both the mental and visual perception of the testator's acts of execution and the physical subscription in witness of such execution.[12] The vast majority of the jurisdictions whose statutes, like Wisconsin's, require both attestation and subscription have held that there is a distinct difference between the terms.[13] A few jurisdictions recognize a similarity between the terms on the basis of reasoning similar to that of the states whose statutes require only attestation, i.e., they define the term "attestation" to be broad enough to include subscription.[14] None of these courts subscribe, however, as did the Wisconsin court in the principal case, to the converse of the proposition, namely, that the concept of subscription is broad enough to include attestation or is coterminous with it. Indeed, the Wisconsin court had not been so lenient earlier in regard to the attestation requirement, and questioned the validity of probate of a will because one witness merely subscribed but did not attest.[15] Although courts are not always in complete agreement as to the purpose of the formalities surrounding attestation,[16] all statutory regulation in the area appears to have as its ultimate goal the prevention of mistake, imposition, fraud, or deception in the execution of will, while at the same time not restraining or abridging the testator's power to dispose of his property.[17] The holding in the instant case gives only lip-service to the attestation requirement by making it mere form, synonymous with subscription. While the liberal statutory construction used by the court may be desirable to save "home-made" wills, where testator's intent is clear, it would seem to overemphasize the goal of permitting free disposition of one's property without adequately safeguarding against mistake, imposition, fraud, or deception.

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12 Calkins v. Calkins, 216 Ill. 458 at 462, 75 N.E. 182 (1905). See also 45 A.L.R. (2d) 1365 at 1366 (1956).

13 Tobin v. Haack, 79 Minn. 101 at 107, 81 N.W. 758 (1900), held that there could be a subscription in fact without attestation and accepted, by way of dicta, the converse, i.e., there may be a perfect attestation in fact without subscription. See also ROOD, WILLS, 2d ed., §272 (1926).

14 In re Fowle's Estate, 292 Mich. 500 at 505, 290 N.W. 883 (1940). See generally 1 PAGE, WILLS, 3d ed., §307 (1941).

15 In the matter of Downie's Will, 42 Wis. 66 at 76-77 (1877). The court quoted with approval the following passage: " '[T]o attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will, is only to write on the same paper the name of the witness, for the sole purpose of identification.' "

16 Compare Maxwell v. Lake, 127 Miss. 107 at 112, 88 S. 326 (1921), with In re Will of Paradis, 147 Me. 347 at 355, 87 A. (2d) 512 (1952).

17 E.g., Ragsdale v. Hill, 37 Tenn. App. 671 at 688, 269 S.W. (2d) 911 (1954).