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Wills -- Requirement of Signatory Intent

J. Knox Walker

share of his estate as his brother.[21] Yet, that is the result reached by the majority. It would seem more probable, in view of "the degree of consanguinity to the testator," that each class of beneficiaries instead of each individual was to have an equal share. In the case of an ambiguous will where sufficient evidence was not available as to the testator's true intention, would it not be better to allow this objective standard to prevail?

Because of the many factors which can influence the drawing of a will of this character, and the resulting difficulty in construing it, perhaps both the majority and dissenting view can be justified. By this decision, it would seem that where the phrase in question contains expressions of equality, a *per stirpes* distribution will be reached only if there is explicit language indicating such an intent.

MORTON L. UNION.

Wills—Requirement of Signatory Intent

Testator's attested will, written entirely in the hand of one of the witnesses thereto, was offered for probate. Her name appeared only twice in the instrument, thus:

"Will of Hannah Williams, Sr.
Garysburg, North Carolina.
". . . [Provisions of Will].
"We certify that Hannah Williams, Sr., was in her sound mind.
". . . [date].
[Signatures of Witnesses]"

The scrivener-witness testified that he "put it [the name at the top] in there to identify who she [testator] was and where she lived." The court held the name appearing at the top to be a sufficient "signing," and declared the instrument a valid will.[1]

The original Wills Act[2] in England did not require that the will be signed by the testator if it was properly reduced to writing.[3] Later, the Statute of Frauds[4] provided that the will be "signed by the party so devising the same or by some other person in his presence and by his express directions." *Lemayne v. Stanley*[5] interpreted this to mean that

[21] "Where the question is in the balance of doubt, the doubt is to be resolved in favor of a taking *per stirpes* rather than *per capita*. One reason for this preference is that such a taking is in accord with the laws of descent and in accord with the natural instinct of testators." Claude v. Schutt, 211 Iowa 117, 233 N. W. 41 (1930), cited in dissenting opinion in Coppedge v. Coppedge, 234 N. C. 173, 179, 66 S. E. 2d 777, 781 (1951).

[1] In re Will of Hannah Williams, 234 N. C. 228, 66 S. E. 2d 902 (1951).
[2] 32 Hen. VIII c. 1 (1540).
[3] Brown v. Sackville, 1 Dyer 72a (1553).
[4] 29 Car. II c. 3 §5 (1677).
[5] 3 Lev. 1 (1681).

when the testator's name appeared in the body of the will, in his own handwriting, it was sufficiently "signed." The present English statute,[6] passed as a result of this case,[7] requires that a will be signed at the end.

In this country the statutory requirements of different states vary. Where the statute merely requires that the will be in writing and signed, it is uniformly held that it is immaterial where the signature is placed, provided it can be established that it was attached with the intent to authenticate the instrument. As to the type of evidence necessary to prove the intent of the testator the courts are sharply divided. One line of cases holds that intent may be inferred from the declarations of the testator and circumstances attendant upon the execution of the document.[8] A second group of cases rests on the theory that the intent of the testator to adopt his name as his signature must be manifest upon the face of the will if the name appears elsewhere than at the end.[9] Under the latter theory the mere fact that the testator's name appears at the top or beginning of the will,[10] on the back,[11] or on the envelope in which the will is contained,[12] is not a sufficient signing to validate the will.

Several states, in order to prevent fraudulent additions to wills and to make the testators intent more apparent, require that the testator "sign at the end" or "subscribe" his name. These statutes have not eliminated the problem, since difficult questions of fact as to the intent of the testator have been replaced by equally difficult questions of law as to the legal effect of the word "end."[13] Because of the large

[6] 7 Wm. IV and 1 Vict. c. 26 (1837).

[7] ROLLISON ON WILLS §97 (1939); ROOD ON WILLS §257 (2d ed. 1926).

[8] Armstrong v. Armstrong, 29 Ala. 538 (1857); Meads v. Earle, 205 Mass. 553, 91 N. E. 916 (1910); In re Thomas' Estate, 243 Mich. 566, 220 N. W. 764 (1928); Stone v. Holden, 221 Mich. 430, 191 N. W. 238 (1922); In re Phelan, 82 N. J. Eq. 316, 87 Atl. 625 (1913).

[9] In re Manchester, 174 Cal. 417, 163 Pac. 358 (1917); Timoney v. Booth, 127 N. Y. 109, 27 N. E. 826 (1891).

[10] Meany v. Priddy, 127 Va. 84, 102 S. E. 470 (1920); Ramsey v. Ramsey, 54 Va. (13 Gratt.) 664 (1857).

[11] Roy v. Roy, 57 Va. (16 Gratt.) 418 (1863).

[12] Warwick v. Warwick, 86 Va. 596, 10 S. E. 843 (1890). *But cf.* Alexander v. Johnson, 171 N. C. 468, 88 S. E. 785 (1916).

[13] See, Bond, *When Is a Will Signed "At the End"?*, 9 MICH. L. REV. 342 (1910). The authorities are in accord that it is not necessary that one signing a will affix his legal or true name, In re Southerlands Will, 188 N. C. 325, 124 S. E. 632 (1924), and, where it is established that the signature is really that of the testator, Cartwright v. Cartwright, 158 Ark. 278, 250 S. W. 11 (1923), and it appears that he intended it to be a token of complete execution, the fact that he signs his first name, Knox's Estate, 131 Pa. 220, 18 Atl. 1021 (1890), an abbreviation of his name, Cartwright v. Cartwright, *supra*, or merely his initials, Barnes v. Horne, 233 S. W. 859 (Tex. Civ. App. 1921); Pilcher v. Pilcher, 117 Va. 356, 84 S. E. 667 (1915), will not render it invalid. Nor will it be invalid if it be signed "father," In re Kimmel's Estate, 278 Pa. 435, 123 Atl. 405 (1924), or "mother," In re Henderson's Estate, 196 Cal. 623, 238 Pac. 938 (1925); In re Southerlands Will, *supra;* "Brother Alex," Wise v. Short, 181 N. C. 320, 107 S. E. 134 (1921), or by an affectionate name, In re Button's Estate, 209 Cal. 325, 287 Pac. 964 (1930).

number of wills that have been held invalid on this point, although no question of their genuineness was raised, it has been said that "the remedy has proved in practice far worse than the disease."[14]

In North Carolina attested wills must be *"signed"* by the testator and *"subscribed"* by the witnesses; holographic wills must be *"subscribed"* by the testator or the testator's name *"inserted in some part of"* the will.[15] The Supreme Court has consistently held that the signature of the testator to a holographic or attested will may appear at any place on the instrument, but the subscription of a witness must appear at the end.[16]

For many years the North Carolina Court required a showing of signatory intent on the part of a testator.[17] But, in 1934, the case of *In re Will of Rowland*[18] apparently abrogated this requirement, at least as to holographic wills. There, an otherwise unsigned paper writing, entirely in the hand of the testator, contained the following clause: "I do hrby give W A Rowlal on the North west forner oo *sad land of H L Rowled* this being my will. . . ." [Emphasis added.] The court held that the statute only required that the name be "inserted in" some part of the will and that this writing fully satisfied such requirement. It

[14] Matter of Andrews, 43 App. Div. (N. Y.) 394 at 401 (1857).

[15] N. C. GEN. STAT. §31-3 (1943): "No last will or testament shall be good or sufficient, . . . unless [it] . . . shall have been written in the testator's lifetime, *and signed by him, or by some other person in his presence and by his direction,* and subscribed in his presence by two witnesses at least, . . . or unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safekeeping, *and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will. . . .*"

[16] Alexander v. Johnston, 171 N. C. 468, 88 S. E. 785 (1916); Peace v. Edwards, 170 N. C. 64, 86 S. E. 807 (1915); Burriss v. Starr, 165 N. C. 657, 81 S. E. 929 (1914); Boger v. Cedar Cove Lumber Co., 165 N. C. 557, 81 S. E. 784 (1914); Richards v. W. M. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485 (1911); Hall v. Misenheimer, 137 N. C. 184, 49 S. E. 104 (1904); Devereux v. McMahan, 108 N. C. 134, 12 S. E. 902 (1891). Where the testator signs the will subsequent to the signing of the witnesses there is a split of authority as to the validity of the will. One line of cases holds that to witness a future event is equally impossible whether it occur the next moment or the next week. Brooks v. Woodson, 87 Ga. 379, 13 S. E. 712 (1891); In re Kahl's Estate, 278 Mich. 561, 270 N. W. 787 (1936). Another view is that the witnessing of a will constitutes two separate acts, the subscribing of the name being manual and the attesting being a mental process; there is no need that they be simultaneous. Therefore, when the testator signs after the witness has subscribed and the witness sees him sign, then the attestation is complete. Bloechle v. Davis, 132 Ohio 415, 8 N. E. 2d 247 (1937), 11 U. OF CIN. L. REV. 390 (testator signed four days after witness). A third theory, which seems to be the one followed in North Carolina, is that where the parties sign in the presence of each other, so close together in point of time as to constitute the same transaction, it is immaterial which one signed first. Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689 (1902). *But see,* In re Will of Pope, 139 N. C. 484, 486, 52 S. E. 235, 236 (1905); In re Will of Franks, 231 N. C. 252, 256, 56 S. E. 2d 668, 670 (1949).

[17] Burriss v. Starr, 165 N. C. 657, 81 S. E. 929 (1914); Boger v. Cedar Cove Lumber Co., 165 N. C. 557, 81 S. E. 784 (1914); Richards v. W. M. Ritter Lumber Co., 158 N. C. 54, 73 S. E. 485 (1911).

[18] 206 N. C. 456, 174 S. E. 284 (1934), appearing also in 202 N. C. 373, 162 S. E. 897 (1932).

would seem to follow from this that if by chance the testator's name appears at any place in the will, it may be probated.

The instant case, in holding that the name of testator written by the scrivener-witness was sufficiently signed, seems to have accomplished the same result as to attested wills. Basing its decision upon a twofold line of reasoning, the court first looked to the long line of cases holding that the signature of a testator may appear at any place on the instrument.[19] Then, by applying the statute,[20] which provides that the signing may be by another if made in the testator's presence and at his direction, the court concluded that the signature by another could also appear at any place on the instrument. This reasoning is sound only if the placing of the name by the other is intended by the testator to be his signature. For, in all the cases cited in support of the court's reasoning, the name was placed on the instrument in the *handwriting of the testator with apparent signatory intent.*[21] As the decision was not based upon any theory of the testator's intent, and as the cases cited do not necessarily support the reasoning, the requirement of such intent in attested wills is apparently abolished.

If the name is so placed on the instrument as to make it uncertain whether the testator intended the signature to be his final and conclusive act, then further and satisfactory evidence of such intent should perhaps be required. This could be accomplished by a provision in the Wills Act requiring that the name appear in a holographic or attested will "in such a manner as to make it manifest that the name was intended as a signature."[22]

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[19] In re Will of Goodman, 229 N. C. 444, 50 S. E. 2d 34 (1948); Paul v. Davenport, 217 N. C. 154, 7 S. E. 2d 352 (1940); Corp. Comm. v. Wilkerson, 201 N. C. 344, 160 S. E. 292 (1931); cases cited note 16 *supra.*

[20] See note 15 *supra.*

[21] See note 19 *supra.*

[22] See Code of Va. §64-51 (1950).