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Gerald H. Kopel

# THE SIGHT AND SENSE TESTS IN COLORADO

BY GERALD H. KOPEL

Gerald H. Kopel received his B.A. degree in journalism from the University of Colorado in 1951, and his LL.B. degree cum laude from the University of Denver College of Law in March 1958. He is a former copy editor of Denver's Rocky Mountain News. Mr. Kopel is presently practicing law in the Denver firm Kopel and Kopel.

Can a blind person execute a valid will in Colorado? He receives the same privileges accorded a person who is not blind in every state where the point has been adjudicated.[1] But can a person who is *not* blind be sure of executing a valid will in Colorado? This question must remain unanswered until either the legislature or the courts interpret clearly and concisely the meaning of the word "presence" in the Colorado statute requiring witnesses to a will to attest and subscribe it in the presence of the testator.[2]

A will, in Colorado, is a writing by which an individual aged eighteen or older may declare, within statutory limitations, who is to get his property at his death. Witnesses must be present at the execution of a will. They "attest" mentally to the fact that the testator "knows what he is doing." The witnesses also physically sign (subscribe) the

[1] While the point has never been raised in Colorado, other states with similar probate statutes, including Illinois, Louisiana, Kentucky, Massachusetts, Oregon and Virginia, have ruled upon it. In re Calo's Estate, 1 Ill. 2d 376, 115 N.E.2d 778, 780 (1953), "The law of this state does not preclude blind people or people with other physical disabilities from the right to make a last will and testament in accordance with their own wishes the same as people without physical handicaps. It therefore follows that such testators must be equally treated in the eyes of the law." State v. Martin, 2 La. Ann. 667 (1847) (sustained will of Francois Xavier Martin, who had served for thirty-one years on the supreme bench of Louisiana, during the last eight years of which time he was totally blind); Prichard v. Kitchen, 242 S.W.2d 988 (Ky. 1951); Kingman v. Damon, 290 Mass. 472, 195 N.E. 740 (1935); In re Pickett's Will, 49 Ore. 127, 89 Pac. 377 (1907); Sturdivant v. Birchett, 10 Gratt 67 (Va. 1853).

[2] Colo. Rev. Stat. § 152-5-3 (1953): "The testator, in the presence of said witnesses, shall declare said writing to be his last will and testament, and said witnesses, at his request, in his presence and in the presence of each other, shall attest the same by subscribing their names thereto."

will.[3] Controversy over the meaning of *presence* centers mainly around the subscription rather than the attestation.

### IN THE PRESENCE OF THE TESTATOR

The phrase "in the presence of the testator" appears in this or a similar form in almost every state probate statute dealing with witnesses to a will. In some courts it means "within sight," in others, "within range of the senses."

Attestation provisions dealing with "presence" require certain formalities during the execution of wills to protect testators from fraud.[4] But the actual result of strict compliance in some instances has been to deny fulfillment of a testator's wishes, in the "sight" or "vision" courts.[5]

As ably stated by Judge Champlin in the Michigan case of *Bradford v. Vinton:*

> "(S)o astute have some courts been in constructing the statute to prevent frauds upon the testator that they have perpetrated the most glaring frauds upon the testator by defeating his will simply because the footboard of the bed was too high for the testator to see the witnesses sign their names at a table standing at the foot of the bed . . . or because, although the witnesses were in plain sight of the testator, yet when they signed, their backs were towards him. . . ."[6]

While the courts agree that actual sight is a *safe* way to meet the requirements of presence in an attestation provision, many deny that it is the *only* way.[7] There is a tendency to define "presence" as meaning "conscious presence."[8] Here again, the term is susceptible of double meanings. There is very little dispute that "conscious" must mean "awake" or "alert."[9] But to say that the witness is in the presence of the testator

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[3] Elston v. Price, 210 Ala. 579, 98 So. 573 (1923) (to attest will means to take note mentally that statutory requirements to valid execution are being performed); International Trust Co. v. Anthony, 45 Colo. 474, 101 Pac. 781 (1909) (attestation includes not only mental act of observing execution, but also manual act of subscription); In re Klein's Estate, 241 Iowa 1103, 42 N.W.2d 593 (1950) (statute which requires that will be witnessed taken to mean signing in testator's presence); Tilton v. Daniels, 79 N.H. 368, 109 Atl. 145 (1920) (attestation is mental, subscription is mechanical).

[4] Kitchell v. Bridgeman, 126 Kan. 145, 267 Pac. 26 (1928); McKee v. McKee's Ex'r, 155 Ky. 738, 160 S.W. 261 (1913); In re Cox's Will, 139 Me. 261, 29 A.2d 281 (1942); In re Lane's Estate, 265 Mich. 539, 251 N.W. 590 (1933); 94 C.J.S. p. 966 Wills § 167; B (1956): "The purpose . . . is to guard against and prevent mistake, imposition, undue influence, fraud or deception and not to restrain the power of testators to dispose of their property."

[5] Hacket v. Hicks, 322 Ill. App. 76, 53 N.E.2d 742 (1944); Miller v. Talbott, 115 Mont. 1, 139 P.2d 502 (1943); In re Cagle's Estate, 132 Neb. 47, 270 N.W. 664 (1937); Reynolds v. Reynolds, 1 Speers 103, 105 (S.C. 1843), "The particular case is hard upon the legatees, because there appears to have been no fraud whatever. But we are obliged to take the law as written in the Act, and to prevent frauds in general, they must suffer from the strict enforcement of its wise general provisions against fraudulent wills." Thompson, Real Property § 2616 (1957), "There is no doubt that in many cases, the testator's wishes have been thwarted by adhering to a strict interpretation of the words 'in the presence of the testator.'"

[6] 59 Mich. 139, 26 N.W. 401, 405 (1886).

[7] E.g., In re Tracy's Estate, 80 Cal. App. 2d 782, 182 P.2d 336 (2d Dist. 1947); Riggs v. Riggs, 135 Mass. 238, 241 (1883): "As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may note the presence of another by the other senses, as hearing or touch." In re Demaris' Estate, 166 Ore. 36, 110 P.2d 571 (1941).

[8] See notes 35, 36 and 37 infra.

[9] Callahan v. Feldman, 90 Colo. 540, 11 P.2d 217 (1932); In re D'Avignon's Will, 12 Colo. App. 489, 55 Pac. 936 (1899) (mentally observant); Orndorff v. Hummer, 12 B.Mon. 619 (Ky. 1851) (testator insensible or asleep); Walters v. Walters, 89 Va. 849,17 S.E. 515 (1893) (testator in dying stupor); Atkinson, Wills 341 (2d ed. 1953): "It is not sufficient that the testator and the witness be together at the time when the latter signs, if the testator has not the physical or mental capacity to know that the act is being done."

also connotes the idea that the witness is somewhere in the *proximity* of the testator.

If the sight test is used, the witness must be somewhere within the vision of the testator. If the conscious presence test is used, many courts interpret the words in a manner similar to the definition given by Black's Law Dictionary: "Will is attested in presence of the testator if witnesses are within range of any of testator's senses."[10]

Before discussing the versatility of the "conscious presence" or "senses" test, it would be best first to develop the English and American history of presence. The Statute of Frauds of 1677, section 19, did not require attesting witnesses as to wills of personalty.[11] But under section 5 as to devises of land, it stated that a will "shall be attested and subscribed, in the presence of the said devisor by . . . witnesses."[12] The English Wills Act of 1837 provided uniform rules for the execution of wills of realty and personalty. The act required that a will be attested and signed by two or more witnesses in the testator's presence.[13] Almost all American wills acts, specifically or by judicial interpretation, require that a will be subscribed in the presence of the testator.[14]

For more than a century and a half after the Statute of Frauds, because of a desire to enforce the strict technicalities of the statute and an innate fear of dangerous precedents, only the sight test was applied by the courts. A conflict first appeared as the liberal courts sought a more just solution. The result was the conscious presence test based on the ordinary definition of the word "presence."[15]

## THE SIGHT TEST

The sight test has taken myriad forms. The following are standard examples of its twists and turns:[16]

(a) The testator must be able to see the act of signing without effort or change of position.[17]

(b) It is in his presence if the testator can see by turning his head, or by making a slight movement necessary to see, if he is physically capable of making the movement,[18] or of moving without hardship, peril, or violation of doctor's orders.[19]

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[10] Black, Law Dictionary 1346, (4th ed. 1951). This is the first time that this dictionary has ever defined the term "Presence of the Testator." It will not be found in the earlier editions, under "Presence." The definition follows the modern trend rather than the majority view. Another definition is found in Thompson, Real Property § 2616 (1957), "the will is sufficiently signed in the presence of the testator if they sign within his hearing, knowledge, and understanding and so near as not to be substantially away from him."

[11] 29 Car. II C.B.V. (1677); Atkinson, Wills 19-20 (2d ed. 1953).

[12] Atkinson, Wills 20 (2d ed. 1953).

[13] 7 Wm. IV and I Vict. C. 26 (1837); Atkinson, Wills 21 (2d ed. 1953).

[14] Arkansas formerly did not, but now does, so require by statute. Probate Code § 60.403 B (1949). Miller v. Mitchell, 224 Ark. 585, 275 S.W.2d 3 (1955); Meek v. Bledsoe, 221 Ark. 395, 253 S.W.2d 369 (1952); Rogers v. Diamond, 13 Ark. 474 (1853). Compare In re Martin's Estate, 270 App. Div. 875, 60 N.Y.S.2d 777 (4th Dep't 1946) (allowed subscription several days after the other formalities of execution, and without any knowledge by the witness of the testator's whereabouts), with In re Malley's Will, 6 Misc. 2d 31, 159 N.Y.S.2d 1011 (Surr. Ct. 1957); In re Davis' Will, 7 Misc. 2d 618, 158 N.Y.S.2d 177 (Surr. Ct. 1956). Atkinson, Wills 339 n.2 (2d ed. 1953).

[15] Note, 13 Rocky Mt. L. Rev. 345, 346 (1941).

[16] Excellent comments on sight and conscious presence cases can be found in In re Demaris' Estate, 166 Ore. 36, 110 P. 2d 571 (1941); Thompson, Real Property § 2616 (1957); Note, 13 Rocky Mt. L. Rev. 345 (1941).

[17] Hamlin v. Fletcher, 64 Ga. 549 (1880); Reed v. Roberts, 26 Ga. 294 (1858); Quirk v. Pierson, 287 Ill. 176, 122 N.E. 518 (1919); Reynolds v. Reynolds, 1 Spears 103 (S.C. 1843); In re Jones' Estate, 101 Wash. 128, 172 Pac. 206 (1918).

[18] Poindexter's Adm'r v. Alexander, 277 Ky. 147, 125 S.W.2d 981 (1939); Brittingham v. Brittingham, 147 Md. 153, 127 Atl. 737 (1925); Burney v. Allen, 125 N.C. 314, 34 S.E. 500 (1899).

[19] Gorden v. Gilmer, 141 Ga. 347, 80 S.E. 1007 (1914); Burney v. Allen, 125 N.C. 314, 34 S.E. 500 (1899).

(c) The signing is in the presence of the testator when he sees or can see if he so desires.[20]

(d) The testator must see the witness, although he cannot see the hand or paper during the signing.[21]

(e) The testator must see not only the witnesses while they are writing, but their hands, the pen, and the will itself.[22]

(f) The testator must see the will.[23]

(g) Even if the witnesses are outside the room, they are considered within the presence of the testator if he is able to see them sign.[24]

(h) If the witnesses sign in the same room as the testator, there is a presumption that they sign in his presence. If they sign outside the same room, the presumption is contrary.[25]

It is often argued that the requirement of signing in the presence of the testator is intended to prevent substitution of some other writing, to make certain that the genuine will is the one which the witnesses sign.[26] How can such a result be guaranteed by decisions approving subscription of a will which the testator might have seen if he had desired, or could have seen by changing his position; or by decisions stating that it is sufficient if he saw the witnesses but not the will, or presuming that he saw if they signed in the same room? The variations in interpreting the vision tests are obvious attempts by courts to produce graceful exits from untenable positions and to do equity when equity is called for.[27]

To see is to perceive with the eyes. Common sense will inform any layman that a testator with vision who fails to perceive has no more knowledge than does a blind man as to whether the witnesses signed the genuine will or substituted another in its place, unless the will is then shown again to the testator.

If actual sight is a safe test of subscription, the *possibility* of sight is no better safeguard than the conscious presence test. The majority

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[20] Bullock v. Morehouse, 19 F.2d 705 (D.C. Cir. 1927); Bronson v. Martin, 384 Ill. 129, 51 N.E.2d 149 (1943); Dubach v. Jolly, 279 Ill. 530, 117 N.E. 77 (1917). Colorado writers on the subject of presence would attempt to classify this state under rule (a) or (c). As to rule (a): Note, 23 Rocky Mt. L. Rev. 458, 462 (1951): "Some states require that the testator must have been able to see the witnesses in his then actual position, the so-called strict sight test, and this may well be the law in Colorado." As to rule (c): Note, 13 Rocky Mt. L. Rev. 345, 347-48 (1941): "Colorado . . . hold(s) it sufficient if the testator might see the witnesses sign from his actual position or by making a reasonable change of position." Both note writers cited Burnham v. Grant, 24 Colo. App. 131, 134 Pac. 254 (1913) as the basis for their reasoning. It is this author's opinion that both writers were wrong in their conclusions. See text at footnotes 54, 55, 56, 57.

[21] Moore v. Glover, 196 Okla. 177, 163 P.2d 1003 (1945). Testator sat in a car. The witness, a filling station operator, signed the will at his desk in the filling station, four feet from the car. The testator saw the witness enter the filling station and there was a glass window through which the witness could have been seen sitting at a desk. But the testator could not have seen the will or the pen in the witness' hand or the movement of his hand while in the act of signing the will. The subscription was held valid. Earl v. Mundy, 227 S.W. 716 (Tex. Civ. App. 1921).

[22] Green v. Davis, 228 Ala. 162, 153 So. 240 (1934); Walker v. Walker, 342 Ill. 376, 174 N.E. 541 (1930).

[23] Burney v. Allen, 125 N.C. 314, 34 S.E. 500 (1899); Graham v. Graham, 32 N.C. 219 (1849).

[24] Moore v. Glover, 196 Okla. 177, 163 P.2d 1003 (1945).

[25] Poindexter's Adm'r v. Alexander, 277 Ky. 147, 125 S.W.2d 981 (1939); In re Beggan's Will, 68 N.J. Eq. 572, 59 Atl. 874 (1905).

[26] Dubach v. Jolly, 279 Ill. 530, 117 N.E. 77 (1917); Kitchell v. Bridgeman, 126 Kan. 145, 267 Pac. 26 (1928); McKee v. McKee's Ex'r, 155 Ky. 738, 160 S.W. 261 (1913); In re Lane's Estate, 265 Mich. 539, 251 N.W. 590 (1933); Atkinson, Wills 340 (2d ed. 1953).

[27] In re Lane's Estate, 265 Mich. 539, 251 N.W. 590, 591 (1933): "In placing a construction upon the language of this statute, we must not lose sight of the fact that wills are frequently prepared by persons unfamiliar with its provisions and executed at times and under circumstances where the necessity of strict conformity is not apparent to the testator or the witnesses thereof."

of the courts applying the sight test do not require *actual* sight, but employ "possibilities" to avoid rendering decisions contrary to testators' wishes. But they in turn often frustrate testators' intentions by drawing the line at "visual" possibilities.

### "IN THE PRESENCE OF" A BLIND TESTATOR

In cases dealing with the validity of wills signed in the presence of blind testators, the "sight" courts are in the unenviable position of swallowing their tenets in order to do justice.[28] Some courts, with bulldog tenacity, declare that the attestation and subscription are valid if the parties were so situated that the testator *could have seen* had he not been blind.[29] Judge Champlin, in *Bradford v. Vinton* disputed this theory and the sight theory in general:

> "If this is the correct criterion, then the rule . . . (depends on) the degree of eyesight a person has. What would be in the presence of a far-sighted person, would be in the absence of a near-sighted one . . . and a person wearing his eye-glasses or spectacles would have a larger presence than when he laid them aside. Under such a rule, the oculist would appear to be the most important witness to establish or destroy the legal attestation and execution of a will."[30]

Other courts have admitted defeat and conceded that the other senses must act as substitutes for that of sight.[31]

### THE CONSCIOUS PRESENCE TEST

The conscious presence test gives credit to the courts for their ability to discern a fraud from the circumstances of a case, and to the witnesses for some semblance of honesty.[32] Courts which follow the true "conscious presence" test consistently declare that the word "presence" should be held to convey the idea attached to its ordinary signification in the common use of language, and that "presence" is not a technical term or scientific word.[33] They point out that the statutes use the word "pres-

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28 Graham v. Graham, 32 N.C. 219 (1849) (where testator could see only the backs of witnesses, but not the paper they were subscribing, it was not a valid attestation in his presence); In re Allred's Will, 170 N.C. 153, 86 S.E. 1047 (1915) (attestation in the same room where blind man is, while his intellect and hearing remain unimpaired, and he is conscious of what is going on, is sufficient signing in his presence).

29 Welch v. Kirby, 255 Fed. 451 (8th Cir. 1918). Testatrix was in a room connected with another room by an open archway. The witnesses signed on a table in the latter room while the testatrix was ten feet away. Had she had eyesight, the testatrix could have seen the signing.

The court could not find a logical way out of its predicament. First it asserted that protection is gained only by the testatrix's observation. Then the court said it would be easy to switch papers on a blind person. Hearing was not a good test, the court decided, because all the testatrix would know was that someone was writing something upon some paper near her.

The court declared "The statute must receive a rational, practical construction, which will enable reasonably careful blind people to execute wills." Id. at 454. And in the same breath, the court added "In our judgment, the rule for a blind testator is the same as that which would be applied if he had sight." Id. at 455.

A dissent by District Judge Wade stated he would not have used the sight test for blind persons. His theory was that the signing must be done in such proximity to the blind person that he can, by means of his remaining senses, know what is being done. The proximity would have to be so close that any movement of suspicious significance, such as undue delay, or a movement about the table, would be "sensed" by the testator.

30 59 Mich. 139, 26 N.W. 401, 405 (1886).

31 In re Calo's Estate, 1 Ill. 2d 376, 115 N.E.2d 778, 781 (1953); Dubach v. Jolly, 279 Ill. 530, 117 N.E. 77, 80 (1917); In re Allred's Will, 170 N.C. 153, 86 S.E. 1047 (1915); Atkinson, Wills, 344 (2d ed. 1953). "The problem of when the witnesses are deemed to sign the will in the presence of a blind testator puts to a test the general theory that the testator should be in a position to see the witness."

32 Note, 13 Rocky Mt. L. Rev. 345, 351 (1941).

33 In re Hoffman's Estate, 137 Cal. App. 2d 555, 290 P.2d 669, 672 (2d Dist. 1955) (court quoted Webster's Dictionary, on presence as "the part of space within one's ken, call, influence, etc.; immediate nearness or vicinity of one; proximity"); In re Lane's Estate, 265 Mich. 539, 251 N.W. 590 (1933); Bradford v. Vinton, 59 Mich. 139, 26 N.W. 401 (1886); In re Larson's Estate, 141 Minn. 373, 170 N.W. 348 (1919).

ence" but do not define it, and that neither the word "room" nor the word "sight" occurs in the statutes.[34]

The "big three" among the conscious presence courts are California, Oregon and Kansas.[35] The courts of Virginia, Minnesota, Michigan and possibly Wisconsin have followed the conscious presence test with slight reservations.[36] New Hampshire, Massachusetts and possibly Missouri may be considered as favoring the conscious presence test.[37] Arkansas' position since 1949 can be classed as undecided.[38]

Two recent California decisions on the conscious presence test are *In re Tracy's Estate*[39] and *In re Hoffman's Estate*.[40] In the 1947 *Tracy* case, the testator was suffering from cancer and was confined to a small bedroom. The paper the witnesses were to subscribe was a revocation of a will, but in California the same formalities were required for revocation as for execution of a will. There was no place in the room where the witnesses could conveniently sign. The testator *directed* them to take the instrument into the adjoining room and sign it on the table there. He could see into the room and hear the witnesses, but he could not actually see the act of signing. The court said conscious presence met the requirements of the statute and defined the rule to mean that the testator need not actually view the act of signing, but that the following elements must be present: the witnesses must sign within the testator's hearing; the testator must know what is being done; and the signing by witnesses and testator must constitute one continuous transaction.

The 1955 case *In re Hoffman's Estate* concerned a second codicil to a lost will and codicil. Hoffman, the testator, was a patient at a sanitarium. He asked two nurses to sign the codicil. They signed within a few feet of Hoffman, but were separated from him by a partly closed door. There was no *direction* by the testator to the witnesses to sign elsewhere, but the court held the requirement of presence should be given a liberal and practical interpretation and that "this was nothing if not within the testator's conscious presence."[41] There was one continuous transaction and the testator knew what was being done, but hearing played no role in the court's decision.

In the 1928 Kansas case of *Kitchell v. Bridgeman*[42] the testator, a Civil War veteran, was hospitalized in a soldiers' home. He was in a ward without tables. The witnesses signed their names to his will at a table just outside the door of his ward and nine feet away. It was impossible for him to see them subscribe. The court decided the signing was done within his presence because it was clear that there was no substitution of wills, the signing occurred within a few feet of where he was lying, the witnesses came to the hospital for the purpose of sub-

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34 Nock v. Nock's Ex'rs, 10 Gratt 106 (Va. 1853).

35 In re Hoffman's Estate, 137 Cal. App. 2d 555, 290 P.2d 669 (2d Dist. 1955); In re Tracy's Estate, 80 Cal. App. 2d 782, 182 P.2d 336 (2d Dist. 1947). While California's two most recent decisions on conscious presence are not from the highest court, they are in accord with the favorable history of the conscious presence test in that state. Kitchell v. Bridgeman, 126 Kan. 145, 267 Pac. 26 (1928); In re Demaris' Estate, 166 Ore. 36, 110 P.2d 571 (1941).

36 In re Hill's Estate, 349 Mich. 38, 84 N.W.2d 457 (1957); In re Cytacki's Estate, 293 Mich. 555, 292 N.W. 489 (1940); In re Lane's Estate, 265 Mich. 539, 251 N.W. 590 (1933); Cook v. Winchester, 81 Mich. 581, 46 N.W. 106 (1890); Cunningham v. Cunningham, 80 Minn. 180, 83 N.W. 58 (1900); Nock v. Nock's Ex'rs, 10 Gratt 106 (Va. 1853); In re Wilm's Estate, 182 Wis. 242, 196 N.W. 255 (1923).

37 Raymond v. Wagner, 178 Mass. 315, 59 N.E. 811 (1901); Riggs v. Riggs, 135 Mass. 238 (1883); Callaway v. Blankenbaker, 346 Mo. 383, 141 S.W.2d 810 (1940); Healey v. Bartlett, 73 N.H. 110, 59 Atl. 617 (1904).

38 See note 14, supra.

39 80 Cal. App. 2d 782, 182 P.2d 336 (2d Dist. 1947).

40 137 Cal. App. 2d 555, 290 P.2d 669 (2d Dist. 1955).

41 290 P.2d at 673.

42 126 Kan. 145, 267 Pac. 26 (1928).

scribing and the testator understood their purpose, the testator's mind was sound, he was conscious of what was happening and knew that the witnesses had removed themselves from the ward, the execution and attestation could be considered a single transaction and the acts were done within the testator's hearing, knowledge and understanding. The court concluded that a substantial compliance is enough, and slight or trifling departures from technical requirements will not operate to defeat a will.

The 1933 Michigan case *In re Lane's Estate*[43] was startlingly similar to *Kitchell v. Bridgeman* except that in the *Lane* case, the witnesses were thirty, rather than nine feet away from the testator, and after signing the will the witnesses immediately showed and acknowledged their signatures on the will to the testator. This additional requirement that the witnesses acknowledge their signatures and show the will to the testator moments after they sign also appears to be the rule in Minnesota and Virginia.[44]

A case whose peculiar facts may explain its apparently extreme result is the 1941 Oregon case, *In re Demaris' Estate.*[45] There, the testator, Demaris, lying ill in the treatment room of his physician's office, executed his will (which had been typed by the doctor) and handed it to the doctor. Demaris then suffered a sudden attack of vomiting, and both witnesses (the doctor and his nurse) were engaged for fifteen minutes in treating him. They then subscribed the will in the consultation room, twenty feet away from where Demaris lay, completely out of his range of vision, and without any request from him to sign. After both witnesses signed, the doctor filed the will in his office. It was never read to or by Demaris, but, several days later, shortly before he died, he asked about it and expressed his approval of the contents, its attestation, and subscription. Although there had not been a single *continuous* transaction, the court decided the formalities of execution had been met because the test of presence is fulfilled when the witnesses are within the range of any of the senses the testator possesses, so that he knows what is going on (the witnesses were within the testator's range of voice and hearing). The court reasoned that a request to prepare a will carries with it an implied request for attestation and subscription. Moreover the will was prepared, executed, attested, and subscribed in the presence of those who later attacked it.

### BASIC REQUISITES FOR CONSCIOUS PRESENCE

The courts which follow the conscious presence test consistently point out that in attestation and subscription, the possibilities of fraud are outweighed by the probabilities of honesty.[46] They assert that there must be a liberal and practical interpretation of attestation and subscription requirements,[47] and that due regard must be had for the circumstances of each case.[48]

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[43] 265 Mich. 539, 251 N.W. 590 (1933).

[44] Cunningham v. Cunningham, 80 Minn. 180, 83 N.W. 58 (1900); But see In re Larson's Estate, 141 Minn. 373, 170 N.W. 348 (1919); Sturdivant v. Birchett, 10 Gratt 67 (Va. 1853).

[45] 166 Ore. 36, 110 P.2d 571 (1941).

[46] Kitchell v. Bridgeman, 126 Kan. 145, 267 Pac. 26 (1928); In re Lane's Estate, 265 Mich. 539, 251 N.W. 590 (1933).

[47] In re Hoffman's Estate, 137 Cal. App. 2d 555, 290 P.2d 669 (2d Dist. 1955); In re Larson's Estate, 141 Minn. 373, 170 N.W. 348 (1919).

[48] In re Cytacki's Estate, 293 Mich. 555, 292 N.W. 489 (1940); Nock v. Nock's Ex'rs, 10 Gratt 106 (Va. 1853).

The following, as gleaned from the leading cases, appear to be the basic requisites of the conscious presence test:

(a) The execution of a will must be one continuous transaction, except in emergency situations.[49]

(b) The testator must understand what is being done, and, if possible under the circumstances, understand the reason for his inability to see or hear the subscription and attestation.[50]

(c) The question of distance between the testator and the witnesses is relative to whether the witnesses are somewhere within the range and *influence* of those senses which the testator possesses.[51]

## THE COLORADO TEST

There have been two Colorado cases on attestation and subscription interpreting the phrase "in the testator's presence." The first case, *International Trust Co. v. Anthony,*[52] dealt mainly with an interpretation of a statute then in effect which called only for attestation in the presence of the testator. The court squarely held that the word "attestation" included "subscription," and therefore the codicil in question was not attested in the presence of the testator.

The facts were that one of the witnesses to the codicil, a household servant of the testator, heard the codicil read by the testator while she dusted his room, but she did not sign it at that time. A week later, and one day before the testator died, this witness signed the codicil in the testator's kitchen. The testator lay upstairs, ill in bed and without knowledge that the witness was going to sign.[53] The lower court, in granting a motion to dismiss, warned that if a witness could withhold his signature for such a great length of time, such a construction of the statute would open an avenue to litigation and fraud.

The appellants argued in the supreme court that subscription was not necessary because the statute used only the word "attestation," but the court held to the contrary.

As indicated by the above discussion, the facts in the *Anthony* case would not have met the requirements of the most liberal conscious presence courts. What the Colorado court would have decided if the witness had signed at the time of attestation, but out of the testator's range of vision, is purely conjectural. The *Anthony* case did not define "presence."

[49] In re Tracy's Estate, 80 Cal. App. 2d 782, 182 P.2d 336 (2d Dist. 1947); In re Demaris' Estate, 166 Ore. 36, 110 P.2d 571 (1941); Sturdivant v. Birchett, 10 Gratt 67 (Va. 1853).

[50] In re Tracy's Estate, supra note 49; Kitchell v. Bridgeman, 126 Kan. 145, 267 Pac. 26 (1928); Raymond v. Wagner, 178 Mass. 315, 59 N.E. 811 (1901); Riggs v. Riggs, 135 Mass. 238 (1883); In re Lane's Estate, 265 Mich. 539, 251 N.W. 590 (1933); Cunningham v. Cunningham, 80 Minn. 180, 83 N.W. 58 (1900); In re Demaris' Estate, supra note 49.

[51] In re Hoffman's Estate, 137 Cal. App. 2d 555, 290 P.2d 669 (2d Dist. 1955); Kitchell v. Bridgeman, supra note 50; In re Demaris' Estate, 166 Ore. 36, 110 P.2d 571 (1941); In re Wilm's Estate, 182 Wis. 242,196 N.W. 255 (1923).

[52] 45 Colo. 474, 101 Pac. 781 (1909).

[53] Facts derived from trial transcript in International Trust Co. v. Anthony, 45 Colo. 474, 101 Pac. 781 (1909). (Colo. Sup. Ct. case No. 5554.)

Four years later, in 1913, the Colorado Court of Appeals decided *Burnham v. Grant.*[54] The testator, who was sixty-eight, was seriously crippled by reason of a prior accident, and the will was executed while he lay in bed.

In the court of appeals, the appellants, who were contesting the will, objected to an instruction given by the court below.[55] The instruction had stated that if the witnesses signed in the same room as the testator, with his view of their signing uninterrupted and within his range of vision, and he either saw or could have seen if he had wanted to, then the will was properly executed.

The court of appeals held for the respondents, stating that if the witnesses when signing a will are in such a place that the testator can see them if he chooses, they are in his presence within the meaning of the statute. The evidence showed that the testator was in a position where he could have seen the witnesses and what they were doing. In reaching their conclusion, the court relied heavily on an Illinois case.[56]

The *Burnham* case did not establish the "possibility of sight" as the limiting test for presence in Colorado for the following reasons: The appellants' argument was for a strict or actual sight test. The Colorado court, in denying that contention, was adopting a liberal construction of the word "presence" as compared to the strict interpretation sought by the appellants. The decision was one of expansion, rather than limitation. It was not necessary to consider the conscious presence test to decide the case. The court did not say that the possibility of sight was the *only* way to satisfy the requirement of presence, as had the Illinois case which

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[54] 24 Colo. App. 131, 134 Pac. 254 (1913).

[55] Burnham v. Grant, 24 Colo. App. 131, 141. The instruction to the jury, with letters used instead of names, was "if X signed the instrument in the presence of Y and Z, who were in the same room with X, and only a few feet from him, with the view between X and Y-Z uninterrupted, and Y-Z, at the time within the range of vision of X, and if X, taking into account his then condition or state of health, and his then position, as shown by the evidence, either saw, or could have seen, if he had wished to, and had looked in the proper direction, the witnesses, and enough of the act then being done by them, to know on his part from what he so saw, or m ght have seen if he had wished, and from what he knew of the then surrounding circumstances, that Y-Z, were then signing their names as witnesses to the said instrument in writing, as the will of X, then upon that question you should find the alleged will in question to be properly attested."

[56] Ambre v. Weishaar, 74 Ill. 109 (1874). The testatrix was ill in bed. The witnesses were in the dining room. From where the testatrix was sitting, upright in bed, there was a line from her head which would strike somewhere in the center of a table where the witnesses signed. The door between the rooms was open. The court said, (p. 113): 'It is not necessary that the testator should actually see the witnesses signing . . . it is presumed that if he might see, he did see." Id. at 113. Going further, the court said it was unwilling to allow evidence that the testator did not in fact see the will witnessed to have controlling influence as to the attestation being in his presence.

the Colorado court cited.[57] It simply stated that under the evidence presented, the instruction by the lower court based upon the testimony before it was sufficient in its use of the "possibility of sight" test. Questions which are not considered by the court (in this case, the limits of presence) are not concluded by the decision in the case, and the judgment is not an authority upon such questions.[58]

No better closing argument against the use of the sight test in Colorado as a test of limitation of presence can be found than that of Judge Champlin in *Bradford v. Vinton:*

> "Why should such a meaning (sight) be put upon the word 'presence' that implies that every person who is called upon to witness the execution of a will is presumed to be willing and anxious to foist upon the testator a spurious document, and hence required to write his name under the eye, if he has one, of the testator? Such a construction must have been born of suspicion and reared and maintained in distrust of the morality and honesty of our fellow-beings, and I think ought to be relegated to that age . . . whence it originated. The common experience of mankind does not demonstrate that all men are dishonest, and watching and seeking an opportunity to perpetrate a fraud, or to take advantage of the weak and helpless."[59]

[57] Ambre v. Weishaar, 74 Ill. 109, 113 (1874), "And when the devisor cannot by possibility, see the act done, that is out of his presence."
[58] Worthley v. Worthley, 44 Cal. 2d 465, 283 P.2d 19, 24 (1955); Jackson v. Harris, 64 Nev. 339, 183 P.2d 161, 166 (1947).
[59] 59 Mich. 139, 26 N.W. 401, 405 (1886).