Montana Law Review

Volume 1
Issue 1 *Spring 1940*

Article 1

1-1-1940

Must Attesting Witnesses Be Able to See Testator's Signature?

James Browning

still it was entitled to qualified privilege because of the mutual interest of sender and recipient.[21] But, of course, inasmuch as the complaint charged malice, qualified privilege could not be taken advantage of by demurrer.[22] Absolute privilege, on the other hand, being independent of malice, may be shown on demurrer where the facts giving rise to the privileged occasion appear on the face of the complaint.[23]

Norman Hanson.

MUST ATTESTING WITNESSES BE ABLE TO SEE TESTATOR'S SIGNATURE?

In only one case, *In re Bragg's Estate*,[1] has the Montana Supreme Court been called upon to construe and apply the provisions of Section 6980, sub-section 2, R. C. M., 1935, which requires that, except as to holographic and nuncupative wills, "the subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him, or by his authority." Since, then, the Montana law with respect to the sufficiency of an acknowledgment of a signature not made in the presence of attesting witnesses depends upon the interpretation of this case, some consideration of the opinion is justified. It is believed that, whatever may be said of the correctness of the actual decision upon the facts, the language of the opinion is such as to leave the rule of the case obscure, and may lead to an interpretation of the case which would be clearly opposed to the weight of authority in jurisdictions having statutes similar to that of Montana.

Both of the attesting witnesses in this case testified that the testatrix did not sign the instrument in their presence nor state that her signature was subscribed thereto, but did declare it to be her will and request them to witness. One of the witnesses

[21]The case would seem to fall under R. C. M., 1935, Sec. 5692(3), in view of the investigative duties of the Board *(cf.* Pierstorff v. Gray's Auto Shop, 58 Ida. 438, 74 P. (2d) 171 (1937)) and of the fact that the employer was under Plan No. 1 of the Workmen's Compensation Act (self-insurance).

[22]Pack v. Wakefield Item Co., 280 Mass. 451, 183 N. E. 70 (1932); KVOS, Inc. v. Associated Press, 13 F. Supp. 910 (W. D., Wash., 1936); Rutledge v. Junior Order of United American Mechanics, 185 S. C. 142, 193 S. E. 434 (1937); Corwin v. Berkwitz, 190 App. Div. 952, 179 N. Y. Supp. 915 (1920); Pienhardt v. West, 217 Ala. 12, 115 So. 88 (1927); Locke v. Mitchell, 7 Cal. (2d) 599, 61 P. (2d) 922 (1936); Powell v. American Towing & Lighterage Co., 131 Md. 539, 102 Atl. 747 (1917); 37 C. J. 50-51.

[23]Miles v. McGrath, 4 F. Supp. 603 (D. Md., 1933); Brown v. Cochran, 222 Iowa 34, 268 N. W. 585 (1936); Layne v. Kirby, 208 Cal. 694, 284 Pac. 441 (1930).

[1]106 Mont. 132, 76 P. (2d) 57 (1938).

stated that he had read over the will and further testified: "I would not swear that her signature was appended to it at the time. I am quite sure it was but I could not exactly swear to it, but I think it was there. I would say it was there if I was going to swear." The other witness testified: "I did not look over the will before I signed, but I heard her say it was her will. I could not swear that her signature was on the will at the time I signed it. My witnessing was on another page." The Supreme Court held that the signature was properly acknowledged and that the will should be admitted to probate.

The Court in the course of its opinion said: "The solution of two questions will be determinative of the action: (1) May the signature to a will be acknowledged by the testator to the attesting witnesses by any other means than by spoken words? (2) If one of the attesting witnesses provided for by the statute did not see, nor might have seen, the signature of the testator on the will when the witness signed as an attesting witness, may the will be denied probate for that reason?"[2] In several places in the opinion the Court stated, apparently without qualification, that "the rule adhered to in the instant case accepts as an acknowledgment of the signature to the will the declaration of the testator publishing the instrument as his will."[3]

The Court's affirmative answer to the first query is amply supported.[4] But did the Montana Court, in giving a negative answer to the second question and in using language such as that quoted above, intend to announce the rule that the declaration of the testator publishing the instrument as his will is a sufficient acknowledgment of his signature previously subscribed thereto, *irrespective* of whether the attesting witnesses either saw or might have seen the testator's signature? If so, then it may be repeated that the Court has taken a position contrary to the weight of authority under similar statutes.

It is true that a large majority of the States which have adopted statutes modeled after the Statute of Frauds,[5] have interpreted that statute as requiring either signature by the testator in the presence of the witnesses or an acknowledgment of the *instrument* (not necessarily of the *signature*) by the testator in their presence. Consistently with this position, these courts have held that it is not necessary that the witnesses either see, or have an opportunity to see, the testator's signature to the in-

[2] 106 Mont. at page 137, 76 P. (2d) at page 59.
[3] 106 Mont. at page 151, 76 P. (2d) at page 66, and 106 Mont. at page 154, 76 P. (2d) at page 68.
[4] PAGE ON WILLS, Sec. 329, p. 525; 68 C. J. 696, 28 R. C. L. 122 Sec. 75.
[5] 29 CAR. II, ch. 3, Sec. 5. (1676). "All devises and bequests of any land or tenements . . . shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

strument.[6] Even under statutes of this type, however, a few courts have required that there be the opportunity to see testator's signature as a condition to valid attestation.[7]

Montana's statute, Sec. 6980, however, like the statutes in New York, California, New Jersey, and several other American jurisdictions, is modeled after the English Statute of Victoria,[8] and by its terms expressly requires that the testator sign in the presence of the witnesses or that he acknowledge his *signature* to them. The uniform construction under this type of statute has been that "acknowledgment by testator is insufficient unless the witnesses have an opportunity of seeing the signature of the testator. If the attesting witnesses did not have an opportunity of seeing the signature of the testator at the time of the execution of the will . . . the will is invalid; since testator has neither signed in the presence of the witnesses, nor has he acknowledged his signature in their presence within the meaning of the statutes."[9] This statement of the law is supported by a long and uniform line of New York cases.[10] Decisions of the New Jersey courts under a similar statute are in accord.[11] A study of the

[6] A few comparatively recent cases are illustrative of the point: In re Dougherty's Estate, 168 Mich. 281, 134 N.W. 24, 33 L.R.A. (N.S.) 161 (1912) with a good note in the L.R.A. citation particularly complete on English cases; Wersech v Phelps, 186 Ind. 290, 116 N.E. 49 (1917); Valentine v. Second Baptist Church of Chicago, 293 Ill. 71, 127 N.E. 178 (1920); Thorton v. Thorton, 314 Ill. 360, 145 N.E. 603 (1924); and see SCHOULER ON WILLS, Sec. 521, p. 593, and Sec. 527, p. 602; PAGE ON WILLS, Sec. 362, p. 580, and Sec. 330, p. 528; 68 C. J. 694 and 698, Secs. 354 and 362.

[7] Perhaps the best known case of this group is Nunn v. Ehlert, 218 Mass. 471, 106 N.E. 163, L.R.A. 1915B 87 (1914). A large number of cases may be found, which, though not controlling decisions for the proposition stated because the fact situation was not such as to necessitate ruling upon the specific question, are at least in so far in accord that they recognize that it is the *signature* rather than the *instrument* which is the subect of acknowledgment and refuse probate of the will where the signature of testator was not visible. In re Ludwig's Estate, 79 Minn. 101, 81 N.W. 758 (1900); Richardson v. Orth 40 Ore. 252, 66 Pac. 925, 69 Pac. 455 (1901); Albert v. Stafford, 123 Va. 338, 96 S.E. 761 (1918); Maxwell v. Lake, 127 Miss. 107, 88 So. 326 (1921).

[8] 1 VIC. ch. 26, Sec. 9 (1837).

[9] PAGE ON WILLS, Sec. 330, p. 528.

[10] Lewis v. Lewis, 11 N. Y. 220, affirming 13 Barb. 17 (1854); Mitchell v. Mitchell, 77 N.Y. 596, affirming 16 Hun 97 (1878); In re Mackay's Will, 110 N.Y. 611, 18 N.E. 433, 1 L.R.A. 491 (1888); In re Eakin's Will, 13 Misc. Rep. 557, 35 N.Y.S. 489 (1895); In re McDougall's Will, 34 N.Y.S. 302, affirming 87 Hun 349 (1895); In re Laudy's Will, 148 N.Y. 404, 42 N.E. 1061 (1896); In re De Haas's Will, 41 N.Y.S. 696, 9 App. Div. 561 (1896); Matter of Keefe's Will, 155 App. Div. 575, 141 N.Y.S. 5 (affirmed in 209 N.Y. 535, 102 N.E. 104) (1913); Matter of Cogan's Will, 184 App. Div. 198, 171 N.Y.S. 643 (affirmed in 226 N.Y. 694, 123 N.E. 860) (1918); In re Redway's Will, 238 App. Div. 653, 265 N.Y.S. 848 (affirmed in 265 N.Y. 579, 193 N.E. 301) (1933).

[11] In re Cole's Will, 47 Atl. 385 (N.J., 1900); In re Sage's Will, 90 N.J. 209, 107 Atl. 151 (affirmed in 90 N.J. 580, 107 Atl. 445) (1919). Decisions from Oregon and Minnesota, frequently cited in accord, have

textwriters and cyclopedists discloses a singular uniformity of opinion in agreement with the same proposition.[12]

An examination of the opinion in the principal case reveals that the Montana Court recognized as conflicting with its decision, two of the authorities cited above, *viz.*, JARMAN ON WILLS and the New York case *In re Mackay's Will.* On the other hand the Court cited with approval, though upon other propositions, decisions from New York and California, and the New Jersey decisions generally, all of which recognize the doctrine that no acknowledgment is sufficient which lacks the condition of opportunity for the witnesses to see testator's signature at the time of attestation. That the very cases cited by the Montana Court represent holdings inconsistent with the apparent rule of the case would seem to indicate that the Court did not intend its language to be interpreted in the manner suggested here. Reference to the "determinative" queries quoted above from the Montana opinion suggests an alternative explanation for the language of the decision. The wording of the second question put by the court perhaps indicates that the Court may have intended to put its decision upon the ground that Section 10505 renders it unnecessary for the testator to acknowledge his will to *both* of the attesting witnesses required under the statute. This possibility is strengthened by the statement of the dissenting justice that "It is my strong conviction that an acknowledgment of subscription to one of the witnesses only is insufficient."[13]

It seems probable that the section alluded to[14] was intended to apply only to the general question of sufficiency of proof in the trial of cases, and was not intended to render the mandate of Section 6980, that "there must be two attesting witnesses," a requirement of mere presence and mechanical subscription by one of the two. While the section may justify the Court in admitting a will to probate on the favorable direct testimony of one witness "entitled to full credit," even though he may not be an attesting witness to the will at all, and may give evidence in direct conflict with that of either or both of the attesting witnesses, it can scarcely justify the Court in holding that the formal requisites of due execution prescribed by the statute need, in actual fact, be satisfied as to a single witness only. The cases generally repudiate such a doctrine.[15]

been set out above as falling under statutes similar to the Statute of Frauds. An examination of the statutes of these States seems to the writer to justify this classification.

[12]PAGE ON WILLS as above quoted, and also Sec. 362, pp. 579 and 80 SCHOULER ON WILLS, 6th Ed. Sec. 527, p. 602; 68 C. J. 698, Sec. 362; 28 R. C. L. 125, Sec. 81; Note in 38 L.R.A. (N.S.) 161, cited above, JARMAN ON WILLS, 7th Ed. pp. 101, 102.

[13]106 Mont. at page 165, 76 P. (2d) at page 73.

[14]Sec. 10505. "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason."

[15]Mitchell v. Mitchell, *supra*; Matter of Keefe's Will, *supra*; Wood v.

As suggested in the preceding paragraph, the case of *In re Bragg's Estate* may be explained on the basis of the strong line of authority holding that a will should not be allowed to fail because of the faulty memory, negligence, or evil motives of one or both of the attesting witnesses, particularly in face of a perfect attestation clause.[15]

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Davis 191 Ga. 690, 131 S.E. 885 (1926); In re Redway's Will, *supra*, PAGE ON WILLS, Sec. 330, p. 529; SCHOULER ON WILLS, Sec. 526, p. 601; 68 C. J. 699, Sec. 365.

[15]In re Miller's Estate, 37 Mont. 545, 97 Pac. 935 (1908); Trustees of Audubon Seminary v. Calhoun, 25 N. Y. 422 (1862); Abbott v. Abbott, 41 Mich. 540, 2 N. W. 810 (1879); In re Will of Cotrell, 95 N. Y. 329, 5 Civ. Proc. R. 340 (1884); Laudy's Will, 161 N. Y. 429, 55 N. E. 914 (1900); Farley v. Farley, 50 N. J. Eq. 434, 26 Atl. 178 (1893); Holyoke v. Sipp, 77 Neb. 394, 109 N. W. 506 (1906); In re Morley's Will, 140 App. Div. 823, 125 N. Y. S. 886 (1910); In re Carey's Will, 56 Colo. 77, 137 Pac. 1175, 51 L. R. A. (N.S.) (1913); Woodstock College of Baltimore v. Hankey, 129 Md. 675, 99 Atl. 962 (1917); Appeal of Pope, 93 Conn. 53, 104 Atl. 241 (1918); Tyler's Estate, 121 Cal. 405, 53 Pac. 928 (1898); German Evangelical Bethel Church of Concordia v. Reith, 327 Mo. 1098, 39 S. W. (2d) 1057 (1931); 76 A. L. R. 604 (note on effect of attestation clause); In re Warren's Estate, 138 Ore. 283, 4 Pac. (2d) 635 (1931) (with note on failure of memory, etc., of witnesses); PAGE ON WILLS, Secs. 675-678, pp. 119 to 1126, and Sec. 355, p. 570; 68 C. J. 1019-1020, Secs. 801-802; 28 R. C. L., Secs. 372-373, pp. 372-373.