

## LEGISLATION

## Ambiguities in the Signature Requirements of the Pennsylvania Wills Act

The problems incident to signature requirements are exceeded in importance by many other questions in the law of wills, but the desirability of a uniform understanding of such formal requirements among practicing attorneys and the courts alike can not be too greatly stressed. The basic provisions for execution of wills in Pennsylvania go back to the Acts of 1833<sup>1</sup> and 1848.<sup>2</sup> Both of these acts were couched in language encouraging confusion and ambiguities as is evidenced by the decisions which followed them.<sup>3</sup> When the Commissioners appointed for the revision of the law of decedents' estates reported their proposed changes in the law of wills they approved the retention of the old Act of 1833 and suggested some slight alterations of the Act of 1848. The words of the Commissioners in support of their complete retention of the former act are worthy of comment, "The first part of the section as now reported is copied from the present law. Its language is vague, if it be literally interpreted, but its meaning has been so often elucidated by the decisions of the courts that the Commissioners have felt it to be unwise to remould it, and, for the sake of achieving technical clarity of expression, raise new questions which would excite litigation."<sup>4</sup>

Unfortunately, the hope of the Commissioners that the substantial retention of the earlier provisions would discourage litigation and crystallize the law has never been realized in fact. Since 1917, and especially in recent years the confusion has persisted.

The scope of this note is to point out a few of the many ambiguities which have resulted from the present sections of the Wills Act and to suggest revision in the light of past experience.

## PROBLEMS ARISING UNDER SECTION 2.

The pertinent sections of the Wills Act now read as follows:

*Section 2:*—"Every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction. . . ."<sup>5</sup>

*Section 3:*—"If the testator be unable to sign his name, for any reason other than the extremity of his last sickness, a will to which his name is subscribed in his presence, by his direction and authority, and to which he makes his mark or cross, unless unable so to do,—in which

1. Act of April 8, 1833, P. L. 249, § 6. The full original wording of this Act is now included in Section 2 of the 1917 Wills Act. See note 5.

2. Act of Jan. 27, 1848, P. L. 16, § 1. This Act provided: "Every last will and testament . . . to which the testator's name is subscribed, by his direction and authority, or to which the testator hath made his mark or cross, shall be . . . taken to be valid in all respects: *Provided*, The other requisites, under existing laws, are complied with."

3. For example, compare the language in *Stricker v. Groves*, 5 Whart. 386 (1840) with that of *Appeal of Ruoff*, 26 Pa. 219 (1856) and *Showers v. Showers*, 27 Pa. 485 (1856).

4. REPORT OF THE COMMISSION APPOINTED TO CODIFY AND REVISE THE LAW OF DECEDENTS' ESTATES (1917) p. 58.

5. PA. STAT. ANN. (Purdon, 1930) tit. 20, § 191.

case the mark or cross shall not be required,—shall be as valid as though he had signed his name thereto. . . .”<sup>6</sup>

The provisions of Section 2 were obviously designed to cover cases involving the situation where a testator is in his last illness.<sup>7</sup> A cursory reading of the language does not reveal its ambiguity, but closer examination indicates that there are three possible meanings which may fairly be attached to it. To illustrate these possibilities suppose the following two situations:

CASE 1:—T, a victim of heart attack, has his will prepared by his attorney. He has read the will as prepared and approved it. As he is about to sign it he is suddenly stricken. Before he can sign it himself or expressly direct anyone else to sign it, T dies.

CASE 2:—T, though in his last sickness, is neither too ill to sign the will himself nor expressly to direct another to sign for him. T directs A to sign for him.

In Case 1 it will be seen that the will was never signed. A number of cases arising under the Act of 1833, which are ostensibly still law today, interpreted the phraseology of what is now Section 2 to mean that it is not necessary that a will should “be signed by the testator or by any person in his presence, and by his express direction”, if he is prevented by the extremity of his last sickness from giving such direction to another as well as from signing it himself.<sup>8</sup> These cases have, however, been strictly limited to the “extremity” of a testator’s last sickness.<sup>9</sup>

Case 2 illustrates two other possible meanings which might be given to Section 2. A literal and grammatical reading of the language would seem to indicate that testator has the option of signing the will himself or expressly directing another person to sign in his behalf.<sup>10</sup> Nevertheless, the courts have made it mandatory on testator to sign himself.<sup>11</sup> He will only be excused from this requirement where it is shown that he was in fact prevented by “the extremity of his last sickness.”<sup>12</sup>

6. PA. STAT. ANN. (Purdon, 1930) tit. 20, § 192.

7. REPORT OF THE COMMISSION APPOINTED TO CODIFY AND REVISE THE LAW OF DECEDENTS’ ESTATES (1917) p. 59. The language apparently intended Section 3 to cover physical weakness incurred from nervous diseases as well as loss of the use of both arms. There is no indication that the term should cover cases of last illness.

8. *Showers v. Showers*, 27 Pa. 485 (1856); *Smith v. Beales*, 33 Pa. Super. 570 (1907). This rule was approved in *Butler’s Estate*, 223 Pa. 252, 72 Atl. 508 (1909); *Wall v. Wall*, 123 Pa. 545, 16 Atl. 598 (1889).

9. *Appeal of Ruoff*, 26 Pa. 219 (1856). In view of the more recent interpretations of Section 2, it is doubtful whether the *Showers* rule is still in effect. Cf. *Plate’s Estate*, 148 Pa. 55, 23 Atl. 1038 (1892); *Hunter’s Estate*, 328 Pa. 484, 196 Atl. 35 (1938) (decided under § 3). Several lower courts have asserted that there can be no will without the signature of the testator; *Robbin’s Estate*, 83 Pitt. Leg. J. 65 (1934); *Heisel’s Estate*, 79 Pitt. Leg. J. 12, 14 (1930).

10. The discussion in some of the cases would seem to indicate the option in testator. See, for example, *Hunter’s Estate*, 328 Pa. 484, 488, 196 Atl. 35, 37 (1938); *Carmello’s Estate*, 289 Pa. 554, 558, 137 Atl. 734, 735 (1927).

11. But most states have statutes permitting signing by agent. For a complete analysis of comparable statutory requirements in other states, see the newly compiled supplement. THOMPSON, WILLS (2d ed. 1936) (Supp. 1940) § 595 *et seq.* See also a series of articles, Bordwell, *Statute Law of Wills* (1928) 14 IOWA L. REV. 1, 8.

12. *Rosato’s Estate*, 322 Pa. 229, 231, 185 Atl. 197 (1936). It is not surprising that there have been few clear pronouncements on this point by the Supreme Court for the reason that the rigid limitation that testator must be “in extremis” removes most of the cases to Section 3 on grounds of physical weakness. For example, see *Hunter’s Estate*, 328 Pa. 484, 196 Atl. 35 (1938) (testator in last stages of cancer); *Criscillo’s Estate*, 13 D. & C. 314 (1930) (lobar pneumonia). The Superior Court in

Reading both sections of the act together another obvious problem arises. Section 3 makes specific provision for signature by mark where testator directs or authorizes another to sign his name for him. Section 2 is silent as to signature by mark. Does this mean that testator may not sign by his mark under Section 2? For example, suppose these two cases:

CASE 3:—T is in the extremity of his last illness. He is too weak to sign his name, but not too weak expressly to direct another to sign for him. Instead of making the direction T merely signs by making his mark, "X" to his will.

CASE 4:—T is in his last illness, but not in extremity. He is able to sign his own name or expressly direct another to sign for him. T signs by a mark—"X".

The only case which has arisen under Case 3 is *Wilson's Estate*.<sup>13</sup> In that case since testatrix was in the extremity of her last sickness, Section 2 was held to apply, and since from common law a mark was the equivalent of a signature, she was held to have intended such mark as her signature.<sup>14</sup> But in Case 4 the courts have again made the sharp distinction that Section 2 only applies to cases of "in extremis", and that Section 3 is applicable in any other situation.<sup>15</sup> Under Section 3, as we shall see, testator must not only make his mark if he is able, but also have another sign testator's name. Therefore it has been uniformly held in Case 4 that such a will is invalid where testator only makes his mark.<sup>16</sup> The requirement of signature by another plus mark by the testator under Section 3 while the mark alone is sufficient under Section 2 is a difference without any apparent justification for both are based on physical incapacity.

### PROBLEMS ARISING UNDER SECTION 3

This section is the broader of the two provisions in that its function is to cover all cases involving execution of wills in writing other than where testator is in the extremity of his last illness.<sup>17</sup> Secondly, it is broader in that it specifically provides for the use of a mark where testator is unable personally to sign his name. Thirdly, because it dispenses with the necessity of a mark in cases where a testator is under a disability to make such mark. Lastly, it is more liberal in that testator need not expressly direct another to sign for him. The words "direction and author-

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a lone case in which testatrix in the extremity of her last sickness, signed by mark, indicated that T could have directed another to sign for her, but allowed the signature by mark. *Wilson's Estate*, 88 Pa. Super. 556 (1926).

13. 88 Pa. Super. 556 (1926).

14. *Id.* at 561. But see *Precott's Estate*, 20 D. & C. 232 (1933). The result in *Wilson's Estate* has been expressly approved in *Kelly's Estate*, 306 Pa. 551, 160 Atl. 454 (1932); *Carmello's Estate*, 289 Pa. 554, 137 Atl. 734 (1927).

15. See note 12 *supra*.

16. *Hunter's Estate*, 328 Pa. 484, 490, 491, 196 Atl. 35, 38 (1938). This case details the materials and decisions disallowing a mark alone since 1848. See *Stearne, The Testator and His Mark* (1939) 13 TEMP. L. Q. 461, 464. In a number of cases, however, the court has, by dicta, intimated that a mark alone may be sufficient. *Rosato's Estate*, 322 Pa. 229, 185 Atl. 197 (1936); but a mark alone signed by one not under disability calls for the closest scrutiny. *Kline's Estate*, 322 Pa. 374, 186 Atl. 364 (1936).

17. "The . . . section is intended to cover cases where a person is unable to sign his name, whether from lack of education or from physical weakness. The provision that the mark may be dispensed with if the testator be unable to make a mark is intended to cover such a case as that of a man who has lost both arms or is paralyzed." REPORT OF THE COMMISSION APPOINTED TO CODIFY AND REVISE THE LAW OF DECEDENTS' ESTATES, p. 59.

ity" have been uniformly held to mean that such direction and authority may be given expressly,<sup>18</sup> impliedly,<sup>19</sup> by adoption<sup>20</sup> or even by the slightest acquiescence thereto.<sup>21</sup>

At first glance the section would seem to present no difficulty. The first question which occurs, however, is what is meant by the words "for any reason other than the extremity of his last sickness". Does this mean for any reason sufficient in law? Or does it mean for any reason sufficient to the testator himself? For example,

CASE 5:—Suppose T is perfectly healthy, has no physical disability, and is not illiterate. T authorizes X to sign for him and makes his mark thereto.

No case has arisen on these exact facts, but the courts have indicated that the wording was meant to mean any reason sufficient to testator.<sup>22</sup> It is extremely doubtful if the Commissioners had this construction in mind.<sup>23</sup>

Nor is Section 3 without its latent ambiguity. By way of illustration, suppose:

CASE 6:—T, who is illiterate, signs his will by making his mark. He then indicates expressly that A shall sign his (T's) name.

CASE 7:—Under the same facts as above T makes his mark and A goes ahead and writes T's signature. T says nothing until after this is done, but later expresses his approval thereof.

Case 6 involves the situation of express authority to another to sign. In Case 7, T gives the authority by subsequent conduct which indicates his adoption of the signature made for him. In both cases, however, contrary to the usual practice, testator has first made his mark and the signature is made by another thereafter. The question arises whether under Section 3 the order of execution is important. Since the inception of this section, the courts of the state have been in open disagreement about the way in which Section 3 should be interpreted. The arguments of the courts during this period are an interesting commentary on the confusion which has been raised. In *Picconi's Estate*,<sup>24</sup> Judge Gest, one of the Commissioners who drafted the section in question, decided that it was immaterial in which order the execution took place, but that if testator affixed his mark after his signature was written "it might well be argued that his act amounted to a ratification of what appeared on the paper before him."<sup>25</sup> The foundation for a contrary view to this decision is found in *Girard Trust Co. v. Page*,<sup>26</sup> where it is said under Section 3 "authority may be inferred

18. James's Estate, 329 Pa. 273, 198 Atl. 4 (1938).

19. Girard Trust Co. v. Page, 282 Pa. 174, 127 Atl. 458 (1925); Novicki v. O'Mara, 280 Pa. 411, 124 Atl. 672 (1924).

20. Hughes's Estate, 286 Pa. 466, 133 Atl. 645 (1926).

21. McClure v. Redman, 263 Pa. 405, 107 Atl. 25 (1919); McAlarney v. Ziegler, 33 Luz. L. Reg. Rep. 361 (Pa. 1940). An interesting sidelight on this point is the degree to which a third person can assist testator in making his signature or mark by guiding or steadying his hand. Brehony v. Brehony, 289 Pa. 267, 137 Atl. 260 (1927) (decided under § 2). See also Faught, *Assistance or Manual Aid in Signing or Affixing Mark to Wills in Pennsylvania* (1929) 77 U. OF PA. L. REV. 741; ATKINSON, WILLS (1937) § 118.

22. Rosato's Estate, 322 Pa. 229, 185 Atl. 197 (1936); Carmello's Estate, 289 Pa. 554, 137 Atl. 734 (1927); Main v. Ryder, 84 Pa. 217 (1877).

23. *Op. cit. supra* note 17. Only substantial causes are listed.

24. 4 D. & C. 245 (1924).

25. *Id.* at 247.

26. 282 Pa. 174, 127 Atl. 458 (1925).

from the fact that testator saw the name written *and then* signified his approval of the act by placing his mark under the signature",<sup>27</sup> and in *Hughes's Estate*,<sup>28</sup> where it was asserted that "it must appear also that he [testator] knew the nature of the document signed in his name *when he* placed his mark thereon."<sup>29</sup> With this background the Supreme Court purported to lay down a procedural rule for execution of a mark in *Kelly's Estate*.<sup>30</sup> Mr. Justice Maxey asserted that testator's assent can be registered "only by the method prescribed by the . . . Act . . . : First, his or her name must be subscribed to the will in his or her presence and by his or her direction and authority. Second, after this is done, he or she must make his or her mark or cross. . . ." <sup>31</sup> Open disagreement resulted.<sup>32</sup> In *Cassell's Estate*<sup>33</sup> the issue came to a head. Judge Ladner refused to follow the "rule" of *Kelly's Estate*. The Superior Court reversed on the basis of the same decision.<sup>34</sup> The Supreme Court in turn reversed the Superior Court and held that the order was immaterial.<sup>35</sup> Thus after twenty-five years of litigation the court has, ironically enough, returned to the original view propounded by Judge Gest.

The illustrations already given of execution ambiguities do not purport to cover all the questions which have arisen or may arise under these two sections.<sup>36</sup> They do, however, point out the salient inconsistencies which have hampered the bench and bar in attaining a clear understanding of the necessary requisites for execution of wills where the extraordinary case arises.

#### PRACTICAL RESULTS UNDER THE PRESENT ACT

A number of observations may be made concerning the effect which the inherent difficulties of Sections 2 and 3 have had on the law of the state. Because of the vagueness of Section 2 the courts have been forced to give a rigid construction to that section, thus limiting the cases decided

27. *Id.* at 177, 127 Atl. at 459 (italics supplied).

28. 286 Pa. 466, 133 Atl. 645 (1926).

29. *Id.* at 471, 133 Atl. at 647 (italics supplied).

30. 306 Pa. 551, 160 Atl. 454 (1932).

31. *Id.* at 555, 160 Atl. at 455.

32. In *Zoltek's Estate*, 22 D. & C. 721, 723 (1935), Lamorelle, J., said, "There is nothing in the act requiring the mark to be made last, or for that matter first. The test is the acquiescence of the testator, and this may be express direction and authority, or it may be implied." In *Drew's Estate*, 32 D. & C. 297, 301 (1938), Ladner, J., distinguishes the cases on the basis of whether there has been an express direction or an implied direction in order to avoid the *Kelly's Estate* rule. However, in *Bobbitt's Estate*, 30 D. & C. 659 (1938), the rule was followed.

33. 33 D. & C. 243 (1938).

34. 133 Pa. Super. 512, 3 A. (2d) 194 (1938). The court said the words "is subscribed" in Section 3 mean "has been subscribed". *Id.* at 516, 3 A. (2d) at 195.

35. 334 Pa. 381, 6 A. (2d) 60 (1939). While the order of signing under Section 3, which was suggested in *Kelly's Estate*, is the best method of execution, the comment therein was dictum and therefore not of binding authority.

36. See Faught, *loc. cit. supra* note 21, which raises a number of other problems. Another difficulty which might be raised is the attempted reconciliation of Section 2 and Section 4 of the Wills Act, PA. STAT. ANN. (Purdon, 1930) tit. 20, §§ 191, 193. So-called nuncupative or oral wills under this latter section can only be made in the extremity of testator's last sickness where no written will was prepared. From the reported decisions apparently the courts will refuse to permit testator an oral will where a written will is prepared but testator becomes suddenly incapable of affixing his signature, provided he is still able to direct another to sign for him under Section 2. But where no will is prepared testator in the same situation has been permitted to make a nuncupative will under Section 4. *McClellan's Estate*, 325 Pa. 257, 189 Atl. 315 (1937).

under it to those involving only the extremity of the last sickness.<sup>37</sup> As a result, cases which are borderline examples of last illness are shunted into the broader confines of Section 3.<sup>38</sup> Indicative of the uncertainty of the courts as to which section to apply is aptly illustrated by their frequent citation of both sections and careful discussion of the immediate problem, while evading the reason for their choice of Section 3.<sup>39</sup>

In all fairness to the Pennsylvania courts it must be said, however, that they have made the best use of their available statute. But there is no reason why the courts and their attorneys should be forced to continue in this vein. A new statute should be drafted which will eradicate the ambiguities of the old sections. If possible, the statute should make the requirements uniform for cases involving last sickness and other causes of incapacity. No sound reason has ever been advanced why the old provisions made this distinction. In as much as the use of the mark in Pennsylvania is well established specific provision should be made for it. In keeping with present construction the statute should make it incumbent on testator to sign the will unless physically or mentally incapable of doing so,<sup>40</sup> while at the same time making it definite that testator can direct or authorize another to sign for him in the event of his own incapacity.

The following statute is suggested in lieu of Wills Act, Sections 2 and 3:

No. ....

#### AN ACT

to repeal sections two and three of the act approved the seventh day of June, one thousand nine hundred and seventeen (P. L. 403) entitled "An act relating to the form, execution, revocation, and interpretation of wills; to nuncupative wills; to the appointment of testamentary guardians; to spendthrift trusts; to forfeiture of devise or legacy in case of murder of testator; to elections to take under or against wills, and to the recording and registry of such elections and of decrees relative thereto, and to the fees therefor", and to provide uniform requirements for signature and execution of a will; to provide for signature by another accompanied by mark or cross in cases of the mental or physical disability of testator; to dispense with mark or cross in the event of like disability.

"Except as limited by Sections 4 and 5 (Act of June 7, 1917, P. L. 403) of this Act, every will shall be in writing and signed by the testator at the end thereof. *Provided*, however, that if the testator be unable to sign the will by reason of his mental or physical disability, a will to which his name is subscribed in his presence, by his direction and authority, and to which he subscribes his mark or cross, shall be as valid as though he had signed his name thereto; and *provided further*, that if the testator be unable to make his mark or cross by reason of like disability, a will to which his name is subscribed as aforesaid shall be as valid as aforesaid.

*Provided*, that such will shall be proved by the oaths or affirmations of two or more competent witnesses.

37. Kelly's Estate, 306 Pa. 551, 160 Atl. 454 (1932); Wilson's Estate, 88 Pa. Super. 556 (1926).

38. Hunter's Estate, 328 Pa. 484, 196 Atl. 35 (1938) (last stages of cancer); Criscillo's Estate, 13 D. & C. 314 (1930) (lobar pneumonia).

39. The decision in Hunter's Estate, 328 Pa. 484, 196 Atl. 35 (1938), is a striking example of this practice.

40. It is a generally recognized requirement. See THOMPSON, WILLS (2d ed. 1936) § 110.

Provided, that the presence of dispositive or testamentary words or directions, or the appointment of an executor, or the like, after the signature to a will, whether written before or after the execution thereof, shall not invalidate that which precedes the signature.

Sections 2 and 3 of the above entitled act (June 7, 1917, P. L. 403) are hereby repealed. All other acts of Assembly, or parts thereof that are in any way in conflict or inconsistent with this act, or any part thereof, are hereby repealed, so far as relates to the estates, real and personal, of any person or persons dying on or after the

day of 19...  
Approved day of 19...  
.....” 41

CONCLUSION

Such a statute will have many advantages over the former provisions:

(1) It will unify the requirements of execution for all classes of cases. The term “physical disability” will cover all cases of last sickness, whether in extremity or not, as well as nervous conditions and blindness. “Mental disability” will provide for illiteracy.

(2) The act will firmly establish the rule that testator should in the ordinary case sign the will himself.<sup>42</sup>

(3) It, nevertheless, permits testator to have another sign for him in cases of physical or mental disability. In addition testator will have the advantage of the old rule in this state to assist in the authentication of the will by making his mark. At the same time the mark requirement is made unnecessary where testator has lost the use of his arms.

(4) It will remove the objectionable power of testator to have another sign for him “for any reason”.

(5) It will obviate the unnecessary requirement for express direction under old Section 2 and permits either express or implied direction uniformly.

(6) The language of old Section 3 is retained in part to obtain the advantage of *Cassell’s Estate*.<sup>43</sup>

(7) It eliminates entirely the possibility that a will may go unsigned as was permissible under early decisions of old Section 2.<sup>44</sup> At the same time it does not alter testator’s right to comply with the requirements of Section 4 of the Wills Act in making a nuncupative will.<sup>45</sup>

(8) Finally, in the course of a short time without great alteration of existing court decisions, it should bring a common understanding of its requirements to bench and bar.

W. N. C.

41. The provision for proof of the will is included in the present Wills Act under both Sections 2 and 3; the proviso concerning dispositive words after the signature is part of present Section 2. Both are retained intact in the proposed statute.

42. See note 40 *supra*. The Pennsylvania courts have read such a construction into Section 2 of the present Act. Cf. Case 2, *supra*.

43. Note 35 *supra*.

44. Note 8 *supra*. Cf. Case 1, *supra*.

45. Note 36 *supra*.