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Wills--Formalities for Execution--Publication and Acknowledgment in Kentucky

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Notes and Comments

WILLS—FORMALITIES FOR EXECUTION—PUBLICATION AND ACKNOWLEDGMENT IN KENTUCKY

The requisites for a valid will under the Kentucky law are set forth in Kentucky Revised Statutes sec. 394.040 which provides:

> No will is valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction. If the will is not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator.

That so much confusion could have arisen from such apparently clear statutory language is not easy to explain. Nevertheless, confusion has arisen with regard to the necessary formalities prescribed by it for the execution of a valid will. In some measure it may be due to a rather careless use of terms by the Court of Appeals in cases interpreting the statute as well as to the inherent inadequacy of language as a vehicle for expression of legislative intention. The court, at times, seems to have failed to differentiate between the various methods of execution provided in the statute, nor have the methods been clearly categorized. The following discussion is an attempt to classify the cases dealing with publication and acknowledgment so that the different methods by which a testator may execute a valid will in Kentucky may be categorized and classified.

On its face, the statute seems to be clear in providing two alternative ways of execution of formal wills: (1) the testator may subscribe the will in the presence of two witnesses;[1] or (2) the will may be acknowledged by him in the presence of two witnesses. When the first alternative is used, the signing and witnessing is all that is required. Clearly, no further acknowledgment, publication, authentication or other act by the testator is required.[2] When, however, the testator does not subscribe in the presence of witnesses, the statute seems upon cursory examination to be equally clear in permitting, as a second alternative means of execution, that a will may be acknowledged in the presence of the witnesses. It is this alternative which

[1] The significance of the first sentence of the statute, stating that a will is not valid unless subscribed by the testator or by another in his presence and by his direction, will be considered *infra*.

[2] ATKINSON, WILLS 322 (2d ed. 1953).

has caused confusion in the Kentucky cases with regard to what is meant by acknowledgment of a will, and this method or alternative has actually given rise to three distinct possibilities instead of merely one, as might by supposed. Several questions arise, with respect to which answers will be attempted: (1) Does acknowledgment of a will mean that acknowledgment of the signature is sufficient? (2) Does acknowledgment mean the same as "publication," viz., must the testator acknowledge to the witnesses that the instrument they are signing is his will? (3) Does the statute mean that a request by a testator that witnesses sign an instrument which later proves to be the testator's will, with his genuine signature thereon, is enough to satisfy the requirement of acknowledgment? A fourth problem arises as incidental to the alternative meanings of acknowledgment. Does it mean, when considered in connection with the requirement that a valid will must be subscribed by the testator, that a will must first be subscribed by the testator at the time he acknowledges the will, or does it mean that the signature of the testator need not be on his will if he acknowledges to the witnesses that the instrument is his will and it is subsequently proved, at the time of probate, that his signature is genuine?

First, in answering the questions proposed, definition of the much used words "publication" and "acknowledgment" might be helpful. An orthodox definition of "publication" refers to the will and is defined as ". . . the declaration or other manifestation by the testator to the witnesses that the instrument is his will."[3] The word "acknowledgment," on the other hand, does not necessarily refer to the will, as distinguished from any other instrument, and has been defined as a formal declaration before an authorized official, by the person who executed the instrument, that it is his free act and deed."[4] A contrast of the two definitions shows that a "publication" requires a testator to inform witnesses that the instrument in question is his will, while "acknowledgment" merely requires that he apprise the witnesses of the fact that such instrument is his free act. However, "acknowledgment" may refer either to the will itself as the subject of acknowledgment[5] or to the signature of the testator as such subject.[6] In the former case

[3] *Id.* at 327. See also for similar definitions 57 AM. JUR. 219 (1948); 1 PAGE, WILLS sec. 376 (3rd (Lifetime) ed. 1941).

[4] BLACK'S LAW DICTIONARY 39 (4th ed. 1951).

[5] Barton's Adm'r v. Barton, 244 S.W. 2d 770 (Ky. 1952); Robertson v. Robertson 232 Ky. 572, 24 S.W. 2d 282 (1930) (where it is said acknowledgment of will is implied from request to witnesses attest signature); Reed v. Hendrix's Ex'r, 180 Ky. 57, 201 S.W. 482 (1918); see ATKINSON, *supra* note 2 at 321, 323, 327, footnote 2. See also 57 AM. JUR. 229 (1948).

[6] See Robertson v. Robertson, *supra* note 5, at 574, 24 S.W. 2d at 283 to the effect that acknowledgment is implied from a request to the witnesses to attest

"acknowledgment" may be substantially the same as publication,[7] depending upon whether it is acknowledged as being the testator's will or merely as his act and deed.

The first possible meaning of the statutory requirement of acknowledgment to be considered is that acknowledgment of the signature as the testator's signature is sufficient. If the plain meaning of Kentucky Revised Statute sec. 394.040 and a certain line of cases[8] are considered, it seems that the statute can only refer to the *will* as the subject of acknowledgment. However, dictum in some Kentucky cases indicates that acknowledgment by the testator of his *signature* on the instrument before competent witnesses would be a sufficient compliance with the statute and would be equivalent to "acknowledgment of a will."[9] The case of *Robertson* v. *Robertson*[10] seems to state that "acknowledgment of a will" is implied from a request to the witnesses to attest the signature. In the relatively recent case of *Lowrance* v. *Moreland*[11] the testator acknowledged his signature to only one of the witnesses and both witnesses subscribed the will out of his presence. The court held that the testator's will was not properly executed, seemingly because his signature had not been acknowledged to one of the witnesses, whom the testator had not requested to sign, and because the witnesses did not subscribe in the presence of the testator. The implication from the opinion is that the will would have been properly executed if instead the testator had acknowledged his signature to both witnesses and if they had then subscribed the will in his presence. It is submitted that this type of acknowledgment is sound because it is a reasonable substitute for the testator's signing the will in the presence of the witnesses, which the statute allows. The fact remains, nevertheless, that acknowledgment of the signature is different from the plain meaning of the phrase in the statute stating that the *will* must be acknowledged. The legislative intention seems to be in accord with the idea that the purpose of the acknowledgment required is to assure that there will be proof that a will is the testator's

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the signature. See also Limbach v. Bolin (dictum to same effect) 169 Ky. 204, 183 S.W. 495 (1916); Flood v. Pragoff, 79 Ky. 607, 3 Ky. Law Rep. 372 (1881), where it is said that witnesses to a will need not know its contents nor that the instrument is a will, but they attest the genuineness of the signature merely. ATKINSON, *supra* note 2, 321; Evans, *Incidents of Testamentary Execution*, 16 KY. L. J. 199 at 204, 218-219 (1928); 57 AM. JUR. 229 (1948).

[7] See *supra* note 2 at 327, footnote 2, where Professor Atkinson says that in Kansas, Kentucky, Virginia, and West Virginia statutes provide for acknowledgment of the will as distinguished from the signature. He states that acknowledgment of the will is substantially the same as publication and thus says it would seem that in these jurisdictions, if the witness did not see the testator sign, there must be a publication.

[8] *Supra* note 5.

[9] *Supra* note 6.

[10] *Supra* note 5.

[11] 310 Ky. 533, 221 S.W. 2d 62 (1949).

act. It thus is tenable that when the signature of a testator on a will is acknowledged as genuine by him, there is a strong indication that the will is his act. It may therefore be stated, despite some authority to the contrary, that in Kentucky a testator's acknowledgment of his previously subscribed signature on a will in the presence of two subscribing witnesses satisfies the requirement of the Kentucky statute.

A second possible meaning of the requirement that a testator must acknowledge his *will* (when he does not sign in the presence of witnesses) is that a "publication" of his will is thereby required. Under this view acknowledgment of a will is substantially the same as publication. Although one group of Kentucky cases clearly indicates that a publication by the testator will satisfy the statutory requirement of acknowledgment,[12] it does not follow that this is the only available method. It is believed unnecessary to make known to the witnesses that the instrument they are attesting is a will.

A third possible view is that a request by a testator that witnesses sign an instrument which later proves to be his will, with his genuine signature subscribed thereon, will satisfy the requirement that the will must be acknowledged.[13] Although the language in the relatively recent case of *Barton's Adm'r* v. *Barton*[14] *might* indicate that a testator must declare to witnesses that the instrument is the testator's will which they are requested to sign, it seems that this position would place too technical an interpretation on the requirement that the testator must acknowledge his will. The language in this case (in which there was a publication) would just as logically mean that all that is required of the testator is that he acknowledge the instrument in question as his act or deed. In the *Barton* case the court takes a liberal attitude and reiterates the proposition that the Kentucky statute shall be liberally construed. This third possibility available to a testator does not necessarily require even that his signature must be on the will at the time the witnesses sign.

The greatest confusion in the Kentucky decisions concerning acknowledgment of a will or publication thereof occurs in cases involving the question whether the signature of the testator must be

[12] *Supra* note 5. See also the following older cases, under a Kentucky statute requiring that a will be "attested" by witnesses: Allen v. Everett, 51 Ky. 371, 12 B. Mon. 371 (1851); Swift and Wife v. Wiley, 40 Ky. 114 (1840); Shanks v. Christopher, 10 Ky. 144 (1820); Cochran's Will, 6 Ky. 491 (1814).

[13] Robertson v. Robertson, *supra* note 5. See also PAGE, *supra* note 3 at sec. 379 where it is said: "If the Wills Act does not provide for publication in express terms, and merely provides that the attesting witnesses shall sign the will, it is held, by the great weight of authority, that publication is not necessary; and that the witnesses need not be informed that the instrument which they are attesting and signing is a will."

[14] *Supra* note 5.

first subscribed by him (or by someone at his direction) on the will at the time the instrument is acknowledged by him to be his will. A large number of the cases indicate that a will is not valid as a will and cannot be validly acknowledged unless and until the signature of the testator appears thereon.[15] In contrast, another group of cases supports the more liberal proposition that a will is validly executed if the testator indicates to the subscribing witnesses, who do not see the testator sign and who do not see his signature on the will, that the instrument in question is his will and his signature on it is later proved to be genuine.[16] Under this rule it is possible that a will which has not yet been subscribed by the testator, at the time the witnesses subscribe the will as witnesses, will be considered validly executed. The liberal attitude of the Court of Appeals, in connection with a presumption in favor of the idea that a will which the testator acknowledges has first been signed by him, is manifested in the *Barton* case. There the court states: "It is admitted that the signature of the testator to the will in question is genuine, and that the two subscribing witnesses signed the instrument in his presence. Under such conceded facts, a prima facie case is made in favor of the due execution of the will."[17] This statement can mean that the requirement that a valid will must first be subscribed is not completely abandoned, but in practical effect, such a requirement carries little weight because of the presumption that when all other formalities of execution are proved, the prior subscription of the testator is presumed.

The Court of Appeals has been very reluctant to abandon the idea

[15] See Barton's Adm'r v. Barton, *supra* note 5 at 772. Although the opinion in this case states that the will, and not the signature is the subject of acknowledgment, it quotes from Robertson v. Robertson, cited *supra* note 5 at 574, 24 S.W. 2d at 283 which states that: "Until the document has been signed by the testator it is no will and is not the complete expression of his testamentary intention. Hence, it is generally held that the signing by the maker must precede his acknowledgment and the signing by the witnesses. . . ." In the Barton case the signature of the testator appeared on the will before the witnesses subscribed their names. The case, however, manifested a liberal attitude. The opinion stated that if it is admitted that the signature of the testator to the will in question is genuine, and that the two subscribing witnesses signed the instrument in his presence, under such conceded facts, a prima facie case is made in favor of due execution of the will. Thus the case sets up a liberal presumption in favor of the idea that a will has been first subscribed by a testator who acknowledges his will to the witnesses. Other cases indicating that the testator's signature must be on his will at the time the witnesses sign are Limbach v. Bolin, *supra* note 6, Shanks v. Christopher and Cochran's Will, *supra* note 12.

[16] Strong dictum in Barton's Adm'r v. Barton, *supra* note 5, supports this proposition. See also: Robertson v. Robertson, *supra* note 5 (in which case both witnesses thoroughly understood that the instrument they signed as witnesses was the testator's will, which she had requested them to witness, but they could not say that the testator's signature was on the will at the time they signed); Reed v. Hendrix's Ex'r, *supra* note 5.

[17] Barton's Adm'r v. Barton, *supra* note 5 at 772.

that a valid will must first be signed by the testator before he acknowledges it and before the witnesses subscribe. Clearly, this attitude of the court is understandable when the first sentence of Kentucky Revised Statute sec. 394.040 is considered, which plainly states that no will is valid unless the name of the testator is subscribed thereto. The court, nevertheless, has recognized this technicality for what it is—a mere technicality—and has made use of a liberal presumption that the testator has signed his will before he presented it to the witnesses to attest. It is believed that this attitude is sound and that so long as it can be proved that the testator signs his will and acknowledges it as his will, the purpose of the statute is fulfilled and there has been at least a substantial compliance with it. Further, the statute merely says that the will must be signed by the testator, but it does not specify when it must be signed.[18] In *Allen* v. *Everett*[19] the court went to the extent of holding that where a testator published his will and caused it to be witnessed by one person in his presence, and afterwards signed it in the presence of another witness, it was a good execution and publication. Dictum in other cases supports the idea that a testator's will does not have to be subscribed by him at the time the witnesses subscribe if it can be proved that the testator actually signed later.[20]

An examination of the statute and cases results in the following conclusions. First, publication is not required in order that a will may be validly executed, although it is one available method. This is true because a testator may, as a second possibility, sign in the presence of the witnesses and thus avoid question concerning publication, and because "acknowledgment of a will," provided for as a step in execution, is not the equivalent of "publication" in all circumstances within the meaning of the statute. It is evident, nevertheless, that "acknowledgment of a will" actually does involve a publication in most of the Kentucky cases concerning this part of the statute. However, a request by a testator that the witnesses attest and sign an instrument which the witnesses do not know is a will seems to be the equivalent of acknowledgment of the will within Kentucky Revised Statute sec. 394.040 and is a third possibility. This seems sound because in such a case the testator acknowledges that the instrument in question is his act. A fourth possibility, indicated in some of the Kentucky cases, is

[18] In cases where the testator has signed in the presence of the witnesses, after they have signed previously at his request, the Court has held that the order of signing is not material and that attestation was in substantial conformity with the statute. Examples are Singleton v. Singleton, 269 Ky. 330, 107 S.W. 2d 273 (1937) and Swift and Wife v. Wiley, 40 Ky. 114 (1840).

[19] 51 Ky. 371 (1851).

[20] *Supra* note 14.

that acknowledgment by the testator of his signature will be a sufficient compliance with the statute and will be the equivalent of "acknowledgment of the will," although the statute states that the will must be acknowledged and in spite of the fact that a number of cases also state that the will, and not the signature, is the subject of acknowledgment. Kentucky Revised Statutes sec. 394.040, dealing with proof of a will when witnesses thereto are unavailable, indicates that the purpose of the statute is fulfilled when a testator's signature on a will is proved to be genuine and seems to suggest that appearance of a testator's genuine signature on a will indicates that the instrument was intended to be his will.

As a practical matter, when a will is published or acknowledged as the testator's will, his signature must almost always by subscribed thereon at that time, although in some cases a liberal presumption operates in favor of the conclusion that the testator's signature was already on the will at the time it was acknowledged. Of course, if the testator acknowledges his will to the witnesses and then signs in their presence this problem concerning the testator's signature is unimportant. The liberal presumption in favor of the prior signing of the testator in cases where his signature on a will is proved to be genuine is believed to be sound. Proof of one's genuine signature on a will is a good indication that the testator intended that the will should take effect as such.

It is submitted that the meaning of "acknowledgment of a will" should be clarified in future Kentucky cases. The Court of Appeals should clearly state that "acknowledgment of a will" does not mean that a testator must inform witnesses that the instrument in question is his will (publish the will), but merely that he must indicate to them that it is his act and deed. The mere request to sign or witness an instrument, the identity of which is unknown to the witnesses, should be sufficient.

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A COMPARATIVE ANALYSIS OF KENTUCKY WATER LAW

The 1954 Kentucky General Assembly substantially clarified the rights of landowners to use the water resources on and contiguous to their land by the enactment of sections 262.670 through 262.690 of the Kentucky Revised Statutes.[1] The legislature did not intend these

[1] For a complete analysis of sections 262.670 through 262.690 of the KY. REV. STAT., see 44 Ky. L. J. 407 (1955).