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Execution of a Will by Mark-Act of 1917 and Act of 1947

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EXECUTION OF A WILL BY MARK — ACT OF 1917 AND ACT OF 1947

In a recent Pennsylvania case, *Cohen's Estate,* 356 Pa. 161 (1947), the Supreme Court held that when a will is signed by a mark and the testator is unable to write, and the testator's name is subscribed to the will, in his presence and he sees his name subscribed thereto, it satisfies Section 3 of the Wills Act of 1917, in regard to the execution of wills by mark.

Section 2, Subsection 2, of the Wills Act of 1947, which will go into effect January 1, 1948, provides: "If the testator is unable to sign his name for any reason, a Will to which he makes his mark and to which his name is subscribed in his presence before or after he makes his mark, shall be as valid as though he had signed his name thereto; provided, he makes his mark in the presence of two witnesses who sign their names to the will in his presence." Section 3 of the Wills Act of 1917 provides: "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 case the mark or cross shall not be required — shall be valid as though he had signed his name thereto; Provided, that such will shall be proved by the oaths or affirmations of two or more competent witnesses." Section 2 of the Wills Act of 1917 provides: "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; and, in all cases shall be proved by the oaths or affirmations of two or more competent witnesses; otherwise such Will shall be of no effect; Provided, that the presence of dispositive or testamentary words or direction 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."

In interpreting Section 3 of the Wills Act of 1917, the Pennsylvania Supreme Court said in *James' Estate,* 329 Pa. 273 (1938), "There must be strict compliance with these statutory provisions and a will is not valid unless executed precisely in accordance therewith. If executed by mark it is not a lawful instrument unless testator's name was subscribed in his presence and by his direction and authority." The Court said in *Novicki v. O'Mara,* 280 Pa. 411 (1924), and *Carmello's Estate,* 289 Pa. 554 (1926), "The testator's directions may be either express or implied." In *Hughes' Estate,* 286 Pa. 469 (1927), the court held; "When implied authority to sign the alleged testator's name is relied on, the implication must arise, as here, solely from the fact that the signing was in his presence, then it must appear that he saw his name placed on the document or was in a position to observe the performance of that act." In *Kelly's*

Estate, 306 Pa. 551 (1932), the court said, "A testator unable to sign — can register his assent to the paper purporting to be his will only by the method prescribed by the 3rd section of the Wills Act. That method is; 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 that is done, he or she must make his or her mark or cross at the appropriate place in the signature." It will be noted that the court held that the mark must be made after the signature has been subscribed to the instrument, but the court in a later case, *Cassell's Estate,* 334 Pa. 381 (1939), modified the holding in the *Kelly* case and said, "When the execution of a will is a unitary act and there is evidence of two competent witnesses, of direction and authority to subscribe the testator's name, the order of action, whether the signature is first or the mark is first is immaterial."

In interpreting Section 2 of the Act of 1917, the court has held that a will executed in the extremity of last illness, and signed by the mark of the testator, without his or her name being subscribed thereto, is a valid will and can be probated. In *Wilson's Estate,* 88 Pa. Super. 556 (1926), a will, executed by the testatrix in the extremity of her last sickness and signed with her mark, was ordered probated. The Court held, "The terms of Section 3 of the Act of 1917 are only applicable when the testator can't sign his name for some reason other than the extremity of last sickness." The court said, "The requirements of Section 2 of the Act of 1917 are satisfied by the signature of the testatrix who, in the extremity of last illness and in the presence of two subscribing witnesses, signs a Will by making her mark at the end therof." Section 2, of the act of 1917, requires that a Will shall be signed at the end thereof. What constitutes a signature must be determined by the intention of the testator or testatrix. In *Plate's Estate,* 148 Pa. 55 (1892), the court said, "Exactly what constitutes a signing has never been reduced to judicial formula, whatever the testator or grantor has shown to have intended as his signature, is a valid signing no matter how imperfect or unfinished." It is noted that the courts do not require the testator's or testatrix's name to be subscribed to the will when signed by the maker in the extremity of last sickness, and that the requirements of Section 3 of the Act of 1917 only apply when the testator is unable to sign his name to the will for some reason other then the extremity of last illness.

In comparing Section 2 and 3 of the Wills Act of 1917, with Section 2, Subsection 2 of the Wills Act of 1947, which relates to the execution of wills by mark, it can be said that under Section 3 of the Act of 1917, which was construed strictly, it was necessary that the testator's name be subscribed thereto, in his presence and by his direction and authority, either express or implied, and when done under his implied direction and authority it was necessary that the testator saw his name actually subscribed to the Will, and that he be unable to sign his name for reasons other than the extremity of last sickness. Under Section 2 of the Wills Act of 1917, it was possible for a testator or testatrix to sign a will

by mark without his or her name being subscribed thereto, by his or her direction and authority, if it was done in the extremity of his or her last illness. Under Section 2, Subsection 2, of the Wills Act of 1947, in all cases where a will is signed by a mark, it is required that the testator's or testatrix's name must be subscribed thereto in his or her presence, that he or she be unable to sign his or her name, and that it be done and his or her mark made in the presence of two witnesses. It would seem that the Act of 1947 returns to the position taken by Chief Justice Gibson in *Zook v. Long*, 13 Pa. 400 (1850), in which he said, "it is the marksman's touch not the subscription of the name in connection with it, which gives life to the instrument." Under the Act of 1947 more emphasis is placed on the making of the mark then is placed on the subscribing of the testator's name, by his direction and authority, to the will, as was the case under the Act of 1917.

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