

Questionable Will Executions: Should 'Substantial Compliance' Suffice?

"The life of the law has not been logic but experience."

— Justice Oliver Wendell Holmes Jr.

The law of wills is notoriously rigid. Comply completely with the statute[1] or the will fails, regardless of intent.[2] Bar examinations routinely test on this point.

"There is no equitable remedy when a will fails, no shade of gray, only black or white."

Too often wills are invalidated on account of a failure to meet all the statutory requirements, thwarting what seems clearly the testator's intent. There is no equitable remedy when a will fails, no shade of gray, only black or white. The effect on a testator's estate plan may be dramatic.

A recent Tennessee Court of Appeals case (currently on appeal to the Supreme Court) illustrates this dilemma. In *Estate of Chastain*,[3] the testator executed what appeared to be a two-page "fill-in-the-blanks" form will, with a third page attached as a "self-proving affidavit,"[4] leaving almost everything to one beneficiary. The second page of the will was signed by the required two witnesses but not by the testator. The self-proving affidavit, by contrast, was signed by both the testator and the witnesses. The trial court ruled that the will was not valid because the testator had not signed the will, as required by the statute.

The Court of Appeals majority opinion reversed and validated the will. Noting that there was no signature line for the testator on either page of the will form, they held that (1) the testator signed the affidavit in the presence of the witnesses; (2) "… we should sustain the execution as valid if we can do so consistent with the statute …";[5] (3) the statute of wills gives more "latitude" to testators than to witnesses as to the signing; (4) it was "clear" that the testator intended his signature on the affidavit to be his signature on the will; and therefore (5) the signature on the affidavit satisfied the statute.

The dissenting opinion made the obvious point that the statute of wills is quite different from the statute authorizing a self-proving affidavit, and executing one of the two documents correctly does not validate the other.

The dilemma in *Chastain* is how to reconcile a testator's "clear" intent to execute a valid will with an unintended failure of execution. As Justice Holmes implied, logic and experience may compete. The majority relied on human experience to honor the testator's clear intent. The dissent stressed that statutory logic dictates invalidity regardless of intent, and that if the law is faulty, it is the state legislature that must provide the remedy, not the courts.

Although *Chastain* offers some hope when a will form is deficient,[6] should Tennessee law offer broader relief? More specifically, should "substantial compliance" suffice?

The doctrine of "substantial compliance" for a will execution was proposed as far back as 1975[7] and has numerous advocates.[8]

At least one state has adopted "substantial compliance" by judicial fiat. In *In re Will of Ranney*,[9] the New Jersey Supreme Court in 1991 validated a will

in which the lawyer mistakenly had the witnesses sign only the affidavit rather than the attestation clause. The court said that insisting on strict compliance in that case "would frustrate rather than further the purpose of the formalities," since the purpose of the Wills Act is to implement the testator's intent. The court reasoned that "when formal defects occur, proponents [of the defectively executed will should be allowed to] prove by clear and convincing evidence that the will substantially complies with the statutory requirements."

More broadly, several states[10] have adopted Section 2-503 of the revised Uniform Probate Code (UPC), promulgated in 1990, which treats a non-complying will as if it had been executed in compliance with the statutory formalities, so long as the proponent establishes by clear and convincing evidence that the decedent intended the document to be his or her will. Reinforcing the trend is Section 3.3 of the American Law Institute's *Restatement (Third) of Property: Wills and Other Donative Transfers*, which reads: "A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will."

The majority opinion in *Chastain* in effect reached the same result as the *Ranney* court in New Jersey, but without explicitly adopting a "substantial compliance" standard. It would likely take a state Supreme Court rather than a Court of Appeals to adopt judicially such a radical reformation of long-standing law. More preferable, as the dissenting opinion suggested, would be for the General Assembly to re-examine the purposes of the state statute of wills and consider as a matter of policy whether or not it is time for Tennessee to adopt the UPC rule, a framework for determining whether a technical failure of execution should thwart a clear testamentary intent.

DAN W. HOLBROOK practices estate law with Holbrook Peterson Smith PLLC in Knoxville. He is certified as an estate planning specialist by the Tennessee Commission on Continuing Legal Education and Specialization and is a Fellow and past state chair of the American College of Trust and Estate Counsel. He can be reached at dholbrook@hpestatelaw.com.

Notes

1. Tennessee's statute of wills, *Tenn. Code Ann.* §32-1-104, reads as follows:

> The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:
>
> (1) The testator shall signify to the attesting witnesses that the instrument is the testator's will and either (A) the testator sign; (B) Acknowledge the testator's signature already made; or (C) At the testator's direction and in the testator's presence have someone else sign the testator's name; and (D) In any of the above cases the act must be done in the presence of two (2) or more attesting witnesses.
>
> (2) The attesting witnesses must sign: (A) In the presence of the testator; and (B) In the presence of each other.

2. Compliance with the statute is mandatory. *Eslick v. Wodicka,* 31 Tenn. App. 333, 215 S.W.2d 12, 15 (Tenn. Ct. App. 1948).

3. In re *Estate of Thomas Grady Chastain*, No. E2011-01442-COA-R9-CV, 2011 Tenn. App. LEXIS, at *1 (Dec. 28, 2011).

4. A self-proving affidavit is authorized by statute as a procedural aid to prove a will after a testator's death, by preserving witnesses' testimony at (or after) the will signing, to avoid having to locate and obtain witnesses' testimony after death. *Tenn. Code Ann.* §32-2-110 reads as follows:

> Any or all of the attesting witnesses to any will may, at the request of the testator or, after the testator's death, at the request of the executor or any person interested under the will, make and sign an affidavit before any officer authorized to administer oaths in or out of this state, stating the facts to which they would be required to testify in court to prove the will, which affidavit shall be written on the will or, if that is impracticable, on some paper attached to the will, and the sworn statement of any such witness so taken shall be accepted by the court of probate when the will is not contested as if it had been taken before the court.

5. The court cited for this proposition *Leathers v. Binkley*, 196 Tenn. 80, 264 S.W.2d 561 (Tenn. 1954), and *Sunderland v. Bailey* (*In re Wait's Estate*), 43 Tenn. App. 217, 306 S.W. 2d 345 (Tenn. Ct. App. 1957).

6. In *Chastain*, the problem was that the will form did not include a signature line for the testator, so he signed in the only place on the form where there was a signature line, namely on the affidavit rather than the will. What if the opposite occurs? What if the will itself provides a signature line for the testator but no signature lines for the witnesses, but the witnesses do in fact sign twice on the affidavit, once to sign their names in the blanks on the affidavit, and again at the bottom of the affidavit? This is not a hypothetical. Some Tennessee lawyers have used just such a form for many years, and those wills have been routinely accepted for probate. Recently, however, a prominent Knoxville attorney, when presented with such a will, took the position that there simply was no valid will and filed for intestacy instead. No doubt the attorney who wrote and supervised the execution of the will would disagree. The point is that even when attorneys are involved and the intent of the testator is unquestionable,

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Relation Back: Amending Plaintiff's Name in Complaint

We usually consult Civil Procedure Rule 15.03 when we have sued the wrong defendant. As I wrote back in April 2006, we should act fast to remedy the situation. Amend to substitute the correct defendant and serve a new summons and complaint within 120 days after commencement. That's conclusive proof that the correct defendant knew of the mistake.

"An amendment changing the plaintiff's name is a matter of right."

But what if we sue using the wrong name for our plaintiff? As I suggested in my recent January column, this may become more common with the influx of illegal aliens, who may use false names. Is the man sitting across the desk Señor Carrion-Casillas or Señor Urtuzuastegui?

Once we learn the truth, an amendment correcting the plaintiff's name is a matter of right and relates back to the filing date of the original complaint. Here is pertinent language in Rule 15.03, rearranged slightly to fit plaintiffs rather than defendants:

> An amendment changing … the naming of the party by … whom a claim is asserted relates back if * * * the claim … asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

To make legal life easier and sleep more peaceful, try to get the plaintiff to tell the truth. But if truth is delayed, the quoted relation back language is welcome medicine.

DONALD F. PAINE is a past president of the Tennessee Bar Association and is of counsel to the Knoxville firm of Paine, Tarwater, and Bickers LLP. He lectures for the Tennessee Law Institute, BAR/BRI Bar Review, and the Tennessee Judicial Conference.

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there may be grounds for concern about the validity of will executions.

7. John H. Langbein, "Substantial Compliance with the Wills Act," 88 *Harvard Law Review* 489 (1975).

8. The official comments to Section 3.3 of the American Law Institute's *Restatement (Third) of Property: Wills and Other Donative Transfers* outline the various reasons in favor of a "substantial compliance" or "harmless error" approach. See also Stephanie Lester, "Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Introduction of the Harmless Error Rule," 42 *Real Property, Probate, and Trust Journal* 577 (2007-2008).

9. In Re *Will of Ranney*, 589 A.2d 1339 (N.J. 1991).

10. The UPC commentary states that Section 2-503 has been adopted in Alaska, Arizona, Colorado, Hawaii, Minnesota, Montana, New Mexico and North Dakota. Comments to Restatement Section 3.3 state that UPC Section 2-503 has been adopted in Colorado, Hawaii, Michigan, Montana, South Dakota and Utah.