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Witnesses' Signatures Located Only after Self-Proving Affidavit Do Not Satisfy Attestation Requirements.

Michael W. McCrum

WILLS—EXECUTION—Witnesses' Signatures Located Only After Self-Proving Affidavit Do Not Satisfy Attestation Requirements.

Wich v. Fleming
652 S.W.2d 353 (Tex. 1983)

Dr. Mabel Wilkin executed a non-holographic will in the presence of two witnesses.[1] Dr. Wilkin's signature on the last page of the document was immediately followed by a self-proving affidavit on the same page.[2] The only place the two witnesses signed the will was after the self-proving clause at the bottom of the last page.[3] Marian W. Fleming, the executrix, applied for probate of the will, but Joan Wich's contest of that action resulted in the trial court's summary judgment denying probate.[4] The Houston Court of Appeals reversed and remanded, ordering admission of the will to probate on the basis that Fleming did not use the self-proving affidavit as a means of proving the will, but rather as proof of an "attested written will."[5] The Texas Supreme Court granted Wich's motion for rehearing.[6] Held—*Reversed.* Witnesses' signatures located only after self-proving affidavit do not satisfy attestation requirements.[7]

The Wills Act of 1837,[8] together with the Statute of Frauds of 1677,[9]

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1. Wich v. Fleming, 652 S.W.2d 353, 354 (Tex. 1983). Dr. Wilkin's attorney and a bank employee were the two witnesses. *See id.* at 354.

2. *See id.* at 354.

3. *See id.* at 354. Each party in this action agreed, based on testimony given in depositions, that all three who signed believed a legally binding will was being executed. *See id.* at 354.

4. Fleming v. Wich, 638 S.W.2d 31, 34 (Tex. App.—Houston [14th Dist.] 1982), *rev'd on other grounds,* 652 S.W.2d 353 (Tex. 1983).

5. *See id.* at 35-36. The appellate court also pointed out that all three signatures were on the same page of the will. *See id.* at 35.

6. Wich v. Fleming, 652 S.W.2d 353, 354 (Tex. 1983). In the original hearing, the Supreme Court reversed the judgment of the Court of Appeals without hearing oral argument. *See* Wich v. Fleming, 26 Tex. Sup. Ct. J. 48, 48-49 (Oct. 13, 1982).

7. *See* Wich v. Fleming, 652 S.W.2d 353, 354-55 (Tex. 1983).

8. Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26, § 9. This statute provides in part:

> IX . . . no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; . . . it shall be signed at the foot or end thereof by the testator, . . . and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

Id.

9. Statute of Frauds, 1677, 29 Car. 2, ch. 3, § 5. This statute provides in part:

> V . . . all devises and bequests of any lands or tenements . . . shall be in writing and

form the basis for modern day statutory requirements surrounding the execution of wills.[10] These statutes require the testator and witnesses to be present and to sign the will.[11] The primary purpose for the signature requirements is to provide some evidence after the testator's death of his genuine intent to dispose of his property according to the terms of his will.[12] Preventing fraud, substitution, and imposition are also important considerations in requiring signatures on wills as demonstrated in legislative and judicial decisions.[13] Additionally, the attestation and presence of witnesses at the execution of the will, as well as the testator's signature, often provide necessary evidence as to the deceased's testamentary capacity at the time he executed the will.[14]

The formal requirements of will execution have been lessened somewhat in order to accomplish more readily the testator's intent in disposing of his property while still preserving the will's validity.[15] An English court in

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signed by the party so devising the same, . . . 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.

Id.

10. *See* Bordwell, *Statute Law of Wills,* 14 IOWA L. REV. 1, 10-13 (1928) (different requirements derived from each act concerning signature placement and witness presence); Chafin, *Execution, Revocation, and Revalidation of Wills: A Critique of Existing Statutory Formalities,* 11 GA. L. REV. 297, 300 (1977) (every state's legislation, except Louisiana, based on acts).

11. *See* UNIF. PROBATE CODE § 2-502 (1977).

12. *See, e.g., In re* LaMont's Estate, 248 P.2d 1, 3 (Cal. 1952) (purpose of signature formality to provide means of authenticating will); Potter v. Ritchardson, 230 S.W.2d 672, 676-77 (Mo. 1950) (testator's intent to authenticate his will determined by signature); Fenton v. Davis, 47 S.E.2d 373, 375 (Va. 1948) (signature on face of will actually intended to be signature, consequently authenticating will). *See generally* Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489, 492-93 (1975) (primary purpose to show genuineness of testator's intent in drafting terms of will).

13. *See, e.g.,* Culver v. King, 362 So. 2d 221, 222 (Ala. 1978) (purpose of statute which requires witnesses to attest and sign will is to protect against fraud and imposition); *In re* Weber's Estate, 387 P.2d 165, 170 (Kan. 1963) (testator must see witnesses sign will to prevent substitution of spurious will); *In re* Brantlinger's Estate, 210 A.2d 246, 250 (Pa. 1965) (requiring attestation by witnesses along with testator's signature guards against probate of forged instrument); *see also* 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.49, at 141 (3d ed. 1960) (to maintain validity, statute may be mandatory in specifying manner of signing).

14. *See* Wheat v. Wheat, 244 A.2d 359, 364 (Conn. 1968) (witnesses asked to give testimony concerning sufficiency of testamentary capacity); *In re* Brantlinger's Estate, 210 A.2d 246, 252-53 (Pa. 1965) (testator's signature raised presumption of testamentary capacity furthered by court's reliance on witness' testimony). *But see* Speck v. Speck, 588 S.W.2d 853, 854 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (witness cannot give opinion of decedent's testamentary capacity but can give opinion concerning testator's state of mind at time will signed).

15. *See* UNIF. PROBATE CODE § 2-502 comment (1977); T. ATKINSON, HANDBOOK ON

Lemayne v. Stanley[16] established the doctrine that a signature at a part other than "the end" of the instrument will sufficiently validate it.[17] In this country, the prevailing view in states whose statutes do not specify a location for attesting signatures is that the signatures can be placed anywhere provided they evidence the witnesses' intent to attest.[18] Furthermore, some courts have taken a liberal view in regard to the type of signature required of testators and witnesses.[19]

Self-proving affidavits eliminate the need for witnesses to testify when the will is offered for probate.[20] This method of proving wills has been

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THE LAW OF WILLS 301 (2d ed. 1953); *see also* Mechem, *The Rule in Lemayne v. Stanley,* 29 MICH. L. REV. 685, 705-07 (1931) (statute should only require two elements: that witnesses understood document was being presented by testator as his will, and that witnesses showed their understanding by signing will). *Compare* Chafin, *Execution, Revocation, and Revalidation of Wills: A Critique of Existing Statutory Formalities,* 11 GA. L. REV. 297, 301-21 (1977) (many required formalities of little value in preventing fraud and protecting testator) *with* Comment, *Statute of Fraud's Lifetime and Testamentary Provisions: Safeguarding Decedent's Estates,* 50 FORDHAM L. REV. 239, 243-44 (1981) (legislative provisions derived from Statute of Wills most important protection given testator against fraud).

16. 3 Lev. 1, 83 Eng. Rep. 545 (K.B. 1681).

17. *See id.* at 545-46; T. ATKINSON, HANDBOOK ON THE LAW OF WILLS 301 (2d ed. 1953); 9 E. BAILEY, TEXAS PRACTICE § 273, at 419-20 (1968); Mechem, *The Rule in Lemayne v. Stanley,* 29 MICH. L. REV. 685, 692-93 (1931).

18. *See, e.g.,* Plemons v. Tarpey, 78 So. 2d 385, 386 (Ala. 1955) (person must sign with intent of authenticating will regardless of location of his signature on the will); *In re* Lomineck's Estate, 155 So. 2d 561, 565 (Fla. Dist. Ct. App. 1963) (fact that witness meets statutory requirements of an attesting witness controls each case, not location of signature); French v. Beville, 62 S.E.2d 883, 886 (Va. 1951) (attestation is mental process and sufficient that will signed with intention of acting as witness); *see also In re* Lorenz's Estate, 288 P.2d 578, 581 (Cal. Dist. Ct. App. 1955) (proof that testator's and witnesses' signatures genuine although separated on will satisfied attestation requirements); Brock v. Erickson, 475 P.2d 346, 346-47 (Colo. Ct. App. 1970) (testator's and witnesses' signatures on different pages did not affect validity of instrument); *In re* Will of Kobrinsky, 273 N.Y.S.2d 156, 157 (Sur. Ct. 1966) (witnesses' signatures in margin did not affect attestation).

19. *See* Mitchell v. Mitchell, 264 S.E.2d 222, 223 (Ga. 1980) (although it was proved testator could sign his full name, court upheld will where testator only signed by marking "X"); *In re* McIntyre's Estate, 94 N.W.2d 208, 211-12 (Mich. 1959) (court allowed testimony from three witnesses verifying decedent actually signed will with "X"). The testator may sign by using a mark, or he may authorize another person to sign the testator's name on his behalf, with the condition that the person signs in the testator's presence. The witnesses need not be in the testator's presence or in the presence of each other when signing the will. The witnesses need not have seen the testator sign the will provided the testator acknowledges to them that it is his signature on the will or acknowledges to them that the will is his. The witnesses, however, must sign the will after this acknowledgment. *See* UNIF. PROBATE CODE § 2-502 comment (1977).

20. *See* UNIF. PROBATE CODE § 2-504 comment (1977) (will may still be challenged on other grounds just as non-self-proving will can); *see also* 9 E. BAILEY, TEXAS PRACTICE § 295, at 471 (1968) (self-proved instrument will eliminate problem experienced when subscribing witness is dead or unable to be located at time will offered for probate); 17 M.

adopted in at least twenty-nine states by the enactment of statutes specifically providing for self-proved wills.[21] A typical probate statute first requires that the witnesses sign the will,[22] and secondly, that the testator have the option of making the will self-proving through acknowledgment by affidavit.[23] In signing the self-proving affidavit, the testator and the witnesses acknowledge that the will has been validly executed as prescribed by statute.[24] A curious situation arises, however, when witnesses do not sign after the last article of the will but sign only after the self-proving affidavit.[25] This predicament forces the courts to interpret the applicable statute in determining if there has been substantial compliance with the attestation requirements.[26] Most of the relatively small number of states which have addressed the issue apply a liberal interpretation to find that witnesses' signatures placed after the self-proving affidavit satisfy attestation requirements.[27] Only one state other than Texas[28] has taken the oppo-

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WOODWARD & E. SMITH, TEXAS PRACTICE § 311, at 249 (1971) (probate statute provides form of affidavit which lists facts necessary to execute valid will).

21. *See* ALA. CODE § 43-8-132 (1982); ALASKA STAT. § 13.11.165 (1962); ARIZ. REV. STAT. ANN. § 14-2504 (Supp. 1982-1983); COLO. REV. STAT. § 15-11-504 (Supp. 1982); DEL. CODE ANN. tit. 12, § 1305 (1979); FLA. STAT. ANN. § 732.503 (West Supp. 1983); HAWAII REV. STAT. § 560-2-504 (Supp. 1982); IDAHO CODE § 15-2-504 (1979); IND. CODE ANN. § 29-1-5-3 (Burns Supp. 1982); IOWA CODE ANN. § 633.279 (West Supp. 1983-1984); KAN. STAT. ANN. § 59-606 (1976); KY. REV. STAT. § 394.225 (Supp. 1980); ME. REV. STAT. ANN. tit. 18-A, § 2-504 (1964); MASS. ANN. LAWS ch. 192, § 2 (Michie/Law. Coop. 1981); MINN. STAT. ANN. § 524.2-504 (Supp. 1983); MO. ANN. STAT. § 474.337 (Vernon Supp. 1983); NEB. REV. STAT. § 30-2329 (1979); N.H. REV. STAT. ANN. § 552:6-a (Supp. 1981); N.J. STAT. ANN. (Supp. 1983-1984); N.M. STAT. ANN. § 45-2-504 (1978); N.C. GEN. STAT. § 31-11.6 (Supp. 1981); N.D. CENT. CODE § 30.1-08-04 (Supp. 1981); OKLA. STAT. ANN. tit. 84, § 55 (Supp. 1982-1983); 20 PA. CONS. STAT. § 3132.1 (Supp. 1983-1984); S.D. CODIFIED LAWS ANN. § 29-2-6.1 (1976); TEX. PROB. CODE ANN. § 59 (Vernon 1980); UTAH CODE ANN. § 75-2-504 (1978); VA. CODE § 64.1-87.1 (Supp. 1983); WYO. STAT. § 2-6-114 (1980).

22. *See* UNIF. PROBATE CODE § 2-502 (1977) ("every will shall be in writing signed by the testator . . . and shall be signed by at least 2 persons").

23. *See id.* § 2-504 ("any will may be simultaneously executed, attested, and made self-proved, by acknowledgement thereof by the testator and affidavits of the witnesses").

24. *See id.* § 2-504. These acknowledgments are to be made before an officer of the state who is authorized in taking oaths. *See id.* § 2-504; *see also* 9 E. BAILEY, TEXAS PRACTICE § 295, at 471 (1971) (essential facts required by statute must be established by affidavits).

25. *See In re* Estate of Petty, 608 P.2d 987, 992 (Kan. 1980). The witnesses signed only below the self-proving affidavit where the Kansas statute requires witnesses sign at the end of the will. *See id.* at 992.

26. *See id.* at 992-93. The court held the will was sufficiently signed at the end because the affidavit was incorporated into the will by words of reference. *See id.* at 992-93.

27. *See, e.g., In re* Estate of Charry, 359 So. 2d 544, 544-45 (Fla. Dist. Ct. App. 1978) (better view is not to place form over substance and to allow incorporation of affidavit and signatures following it into will); *In re* Leitstein's Will, 260 N.Y.S.2d 406, 408 (1965) (past tense language in affidavit describing witnesses' attestation does not affect compliance with

site view that the will be denied probate for not meeting attestation requirements.[29]

In 1955, the self-proof provision was added to the Texas Probate Code;[30] the statute retained the traditional requirement that witnesses subscribe the will.[31] The Supreme Court of Texas in 1964 stated that the sole purpose of the self-proving affidavit is to circumvent the need for witness testimony when offering a will for probate.[32] The court of civil appeals relied on this reasoning in *McGrew v. Bartlett*[33] and denied probate of a will in which the signatures of the testatrix and witnesses appeared only after the self-proving affidavit; the court would not allow the signatures to satisfy attestation requirements.[34] In 1966 the Supreme Court of Texas affirmed this view in *Boren v. Boren*[35] by denying probate of a one-page will because the witnesses only signed after a self-proving affidavit on a separate page.[36]

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statute); *In re* Estate of Cutsinger, 445 P.2d 778, 780-82 (Okla. 1968) (where testimony by witnesses indicated intent to be subscribing witnesses, affidavit construed as form of attestation clause).

28. *See* Boren v. Boren, 402 S.W.2d 728, 728 (Tex. 1966).

29. *See In re* Estate of Sample, 572 P.2d 1232, 1233 (Mont. 1977). The court stated that before the self-proving affidavit can have any effect, the actual will must be signed and attested to properly. *See id.* at 1233-34.

30. *See* TEX. PROB. CODE ANN. § 59 (Vernon 1980). The statute provides in part that "[s]uch a will or testament may, at the time of its execution or at any subsequent date during the lifetimes of the testator and the witnesses, be made self-proved, and the testimony of the witnesses in the probate thereof may be made unnecessary. . . ." *Id.*

31. *Compare* Law of Jan. 28, 1840, § 1, 2 H. GAMMEL, LAWS OF TEXAS 167 (1898) (requirements with regard to attestation: "be attested by two or more credible witnesses, above the age of fourteen years, subscribing their names in his or her presence.") *with* TEX. PROB. CODE ANN. § 59 (Vernon 1980) (requirements with regard to attestation: "[B]e attested to by two [2] or more credible witnesses above the age of fourteen [14] years who shall subscribe their names thereto in their own handwriting in the presence of the testator.").

32. *See In re* Price's Estate, 375 S.W.2d 900, 903 (Tex. 1964).

33. 387 S.W.2d 702 (Tex. Civ. App.—Houston 1965, writ ref'd).

34. *See id.* at 705. The court did not allow the affidavit, which was on a separate page of the will, to be incorporated into the will despite testimony given by a subscribing witness that the testatrix intended the will to be executed validly. *See id.* at 702-04. The court stated that: "the will must be duly signed by the testator, and subscribed by the two attesting witnesses before the self-proving affidavit can be executed." *Id.* at 705; *accord* Tucker v. Hill, 577 S.W.2d 321, 323 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (will and self-proving affidavit have completely different legal effects); *In re* Estate of McDougal, 552 S.W.2d 587, 588 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.) (self-proving affidavit found incapable of being merged in will); *In re* Estate of Pettengill, 508 S.W.2d 463, 465 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.) (self-proving affidavit held not effective until will first properly witnessed).

35. 402 S.W.2d 728 (Tex. 1966).

36. *See id.* at 729. The court declared: "Section 59 expressly states that a self-proved will, except for the manner of proof, shall be treated no differently than a will which is not self-proved." *Id.* at 729; *see also* Shriner's Hosps. for Crippled Children v. St. Jude Chil-

The court ruled that even though section 59 of the Texas Probate Code had been amended to add the self-proving provision, the attestation requirement must still be satisfied.[37] Texas courts have continued to apply a strict interpretation of the probate statute even though in some cases the self-proving affidavit or the witnesses' signatures appeared on the same page of the will.[38]

In *Wich v. Fleming,*[39] the Texas Supreme Court denied probate of a will in which the signature of the testatrix was immediately followed on the same page by a self-proving affidavit and the signatures of the two witnesses.[40] Writing for the majority, Justice Campbell noted that there is a difference between the functions of the will and of the self-proving clause,[41] as well as between a person's intent in attesting the will and in witnessing a self-proving affidavit.[42] The majority rejected the argument that the witnesses' signatures on the same page as the last article of the will made the case distinguishable from *Boren.*[43] The court also rejected the effect of available witness testimony establishing the testatrix' and the witnesses' intent and belief that they were validly executing the will.[44] The

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dren's Research Hosp., Inc., 629 S.W.2d 767, 767 (Tex. Civ. App.—Dallas 1981, writ ref'd) (signatures on self-proving clause held insufficient to satisfy statutory signature requirements even though affidavit annexed to will).

37. *See* Boren v. Boren, 402 S.W.2d 728, 729 (Tex. 1966). The court noted inconsistency in the self-proving clause since it refers to the will preceding it as being subscribed by the witnesses, where in fact the instrument was not subscribed to. *See id.* at 729-30.

38. *See* Jones v. Jones, 630 S.W.2d 645, 646-47 (Tex. Civ. App.—Dallas 1980, writ ref'd) (set of witnesses' signatures on self-proving affidavit on same page as will did not satisfy attestation requirements); Cherry v. Reed, 512 S.W.2d 705, 707-08 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (testatrix' and witnesses' signatures following affidavit on same page as last lines of will did not satisfy attestation requirements). *But see* McLeroy v. Douthit, 535 S.W.2d 771, 774 (Tex. Civ. App.—Ft. Worth) (if signatures on face of will, courts more at liberty to hold attestation requirements satisfied), *writ ref'd n.r.e. per curiam*, 539 S.W.2d 351 (Tex. 1976).

39. 652 S.W.2d 353 (Tex. 1983).

40. *See id.* at 354-55.

41. *See id.* at 354. The court restated its view set forth in Boren v. Boren, 402 S.W.2d 728, 729 (Tex. 1966) that the execution of a will requires two witnesses' attestation in order to meet statutory requirements, and that circumventing the need for witness testimony during probate is the sole reason for a self-proof provision. *See* Wich v. Fleming, 652 S.W.2d 353, 354 (Tex. 1983).

42. Wich v. Fleming, 652 S.W.2d 353, 354 (Tex. 1983). The court indicated that the person who attests the will has the intent of acting as a witness, and the person who witnesses a self-proving affidavit has the intent of acknowledging the validity of the execution of the will. *See id.* at 354.

43. *See id.* at 355. The reasoning given by the majority was that the self-proving affidavit is a "separate and distinct" document from the will regardless of the location of each. *See id.* at 355.

44. *See id.* at 354-55. The court restated the principle that, "even clear evidence of intent cannot abrogate the mandatory provisions of the Probate Code." *See id.* at 355.

court expressed its unwillingness to alter attestation requirements, stating that any changes are within the province of the Texas legislature.[45]

Justice Robertson, writing for the dissent, vigorously argued that the majority's decision only furthers the technical and harsh interpretation of the Probate Code established in *Boren.*[46] Initially, the dissent identified three requirements prescribed by the Probate Code and asserted that each were satisfied by Dr. Wilkin.[47] Further, the dissent advocated that a self-proving clause can be interpreted as an attestation clause thereby meeting attestation requirements set by the Probate Code.[48] The dissent found no fraud present at the execution of the will since the witnesses signed on the same page as the conclusion of the will and testified as to their honest intent to attest.[49] Justice Robertson also showed that, among the states that have ruled on this issue, the trend is contrary to the position which Texas courts have taken, with several states specifically stating that *Boren* will not be followed.[50]

The Supreme Court in *Wich* again demonstrated its strict interpretation of section 59 of the Probate Code and its concern for preventing fraud by denying probate of a will containing witness signatures only after the self-proving affidavit.[51] A harsh stand was taken by the court in refusing to rely on evidence other than the will that proved the main statutory objectives of

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45. *See id.* at 355. The majority gave weight to the fact that the probate statute in Texas had been repeatedly amended since the court decided *Boren,* and since there had not been any modifications regarding this issue, the legislature had apparently approved of the court's interpretation of the signature requirements and self-proof clauses. *See id.* at 355.

46. *See id.* at 356 (Robertson, J., dissenting).

47. *See id.* at 356 (Robertson, J., dissenting). The three requirements of the Probate Code listed by the dissent are:

1. The will must be in writing;
2. it must be signed by the testator in person; and
3. two credible witnesses over the age of 14 must attest the will by signing their names to it in the presence of the testator.

Id. at 356 (Robertson, J., dissenting).

48. *See id.* at 357 (Robertson, J., dissenting). The dissent explained that an attestation clause involves witnesses signing with the intent of attesting the will, and as long as this intent is present, it is immaterial where a witness signs. *See id.* at 357 (Robertson, J., dissenting). The Texas Probate Code does not prohibit this interpretation nor does it specify where a signature should be placed. *See id.* at 357 (Robertson, J., dissenting).

49. *See id.* at 357-58 (Robertson, J., dissenting).

50. *See id.* at 357 (Robertson, J., dissenting). The dissent cited Jones v. Jones, 630 S.W.2d 645, 648 (Tex. Civ. App.—Dallas 1980, writ ref'd) showing the lower court's disagreement with the *Boren* decision. *See* Wich v. Fleming, 652 S.W.2d 353, 357 (Tex. 1983) (Robertson, J., dissenting).

51. *See* Wich v. Fleming, 652 S.W.2d 353, 356-7 (Tex. 1983) (Robertson, J., dissenting). *Compare In re* Will of Kobrinsky, 273 N.Y.S.2d 156, 157 (1966) (where evident that no fraud has been committed, purpose of statute to prevent fraud thwarted by unreasonable strict interpretation) *with In re* Estate of Weber, 387 P.2d 165, 169 (Kan. 1963) (more impor-

absence of fraud and a valid testator intent were satisfied by the parties signing.[52] This is directly contrary to the approach taken by Texas and other jurisdictions concerning different aspects of wills where evidence other than the actual will has been relied on to determine if statutory objectives were satisified.[53] Regarding execution of wills, courts have required witnesses to ensure that fraud has not been committed and to sign with the intent of attesting to the authenticity of the will.[54] Where there has been a concern with strict adherence to statute formalities, courts at the same time have held that literal compliance may not be necessary[55] and allow probate if possible, conditioned on proof of the testator's intent to execute a valid will and of the witnesses' sufficient attestation to that fact.[56]

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tant testator's intention is defeated by strict interpretation than weaken formalities prescribed by legislature).

52. *See* Wich v. Fleming, 652 S.W.2d 353, 357-58 (Tex. 1983) (Robertson, J., dissenting); *cf. In re* Estate of Lomineck, 155 So. 2d 561, 565 (Fla. Dist. Ct. App. 1963) (circumstances proving person complies with statute requirements for an attesting witness control, not location of signature); Love v. Gibbs, 117 S.W.2d 987, 989 (Ky. Ct. App. 1938) (court considers facts and circumstances to show witness signed with purpose of subscribing); Tucker v. Hill, 577 S.W.2d 321, 323 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (court considered surrounding facts and circumstances to prove witness signed with purpose of attesting).

53. *See, e.g.,* Clark v. Turner, 183 F.2d 141, 142 (D.C. Cir. 1950) (attesting witnesses and notary public provide evidence proving execution of a will); Dillow v. Campbell, 453 P.2d 710, 712 (Okla. 1969) (testimony sufficient to prove valid execution of will); Saathoff v. Saathoff, 101 S.W.2d 910, 911 (Tex. Civ. App.—San Antonio 1937, writ ref'd) (undisputed evidence established proof of testator's intent). The fact that the decedent is unavailable to verify the will does not force literal interpretation of the statute; valid execution of a will may be shown by standard rules of proof. *See* Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489, 501-02 (1975); *see also* Comment, *Attestation of Wills—An Examination of Some Problem Areas,* 11 S. TEX. L.J. 125, 138-39 (1969) (intention of testator may be established by testimony of attesting witnesses and any others offering proof of valid execution).

54. *See, e.g., In re* LaMont's Estate, 248 P.2d 1, 3 (Cal. 1952) (purpose of formalities to prevent fraud and authenticate wills); *In re* McGary's Estate, 258 P.2d 770, 774 (Colo. 1953) (no evidence was present to prove authenticity); Ragsdale v. Hill, 269 S.W.2d 911, 919 (Tenn. Ct. App. 1954) (purpose of statute to prevent fraud, not restrict testator's power to devise). It is undisputed in *Wich* that all parties believed a valid will was being executed. *See* Wich v. Fleming, 652 S.W.2d 353, 354 (Tex. 1983).

55. *See, e.g.,* Conway v. Conway, 153 N.E.2d 11, 14-15 (Ill. 1958) (instrument must meet statutory formalities; if doubt exists, presumption of proper execution supplied by attestation clause); Miller's Ex'r v. Shannon, 299 S.W.2d 103, 105 (Ky. Ct. App. 1957) (literal compliance not necessary since testator's intent to devise and will's lack of possible fraud proven); *In re* Connelly's Estate, 355 P.2d 145, 149 (Mont. 1960) (substantial rather than literal compliance is sufficient even though right to devise is statutory right); *see also* Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489, 499 (1975) (not necessary to comply literally with statute if purposes for those statutes satisfied).

56. *See, e.g.,* Plemons v. Tarpey, 78 So. 2d 385, 387 (Ala. 1955) (essential purpose of statute is intent with which signature placed, not location); *In re* Estate of Perkins, 504 P.2d

As a result, it is the substance of the instrument which is given primary consideration over the form.[57] In *Wich,* however, the absence of any evidence of fraud and the signatures on the same page of the last article of the will, together with testimony establishing the parties' good faith intent, were insufficient to satisfy the court that proper execution was present.[58] The court, therefore, chose form over substance.[59]

Even though statutory formalities are sometimes strictly adhered to in protecting against fraud and other defects, many courts have adopted the "substantial compliance" doctrine by upholding wills in the absence of these defects.[60] By applying this doctrine, courts are better able to protect the decedent's right of testamentary disposition from being destroyed by technicalities, while still safeguarding the validity of the will.[61] Several

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564, 568 (Kan. 1972) (substantial compliance with formalities enough; will upheld if reasonably possible); *In re* Estate of Giles, 228 So. 2d 594, 596 (Miss. 1969) (substantial compliance with formalities sufficient if no fraud present; courts tend to uphold execution of wills if possible). Courts take a purposive approach in other areas of law containing formalities, such as the main purpose and part performance doctrines in contract law. *See* Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489, 498 (1975).

57. *See, e.g., In re* Estate of Charry, 359 So. 2d 544, 545 (Fla. Dist. Ct. App. 1978) (court refused to follow Texas view of choosing form over substance); Hopson v. Ewing, 353 S.W.2d 203, 205 (Ky. Ct. App. 1961) (of all legal instruments, form governs will the least); *In re* Will of Kobrinsky, 273 N.Y.S.2d 156, 157 (1966) (will should not be destroyed by placing form above substance) (quoting *In re* Field's Will, 97 N.E. 881, 884 (N.Y. Ct. App. 1912)); *see also* Comment, *Attestation of Wills—An Examination of Some Problem Areas,* 11 S. TEX. L.J. 125, 148 (1969) (will should not be destroyed by raising form above substance).

58. *See* Wich v. Fleming, 652 S.W.2d 353, 357-58 (Tex. 1983) (Robertson, J., dissenting). Where the testator's good faith effort to properly execute the will is proven, "there should be no technical and hard rules of construction." *See* Ragsdale v. Hill, 269 S.W.2d 911, 919 (Tenn. Ct. App. 1954) (quoting Better v. Hirsch, 76 So. 555, 556 (Miss. 1917)).

59. *See* Wich v. Fleming, 652 S.W.2d 353, 356-57 (Tex. 1983) (Robertson, J., dissenting).

60. *See, e.g.,* Succession of Babin, 215 So. 2d 649, 653-54 (La. Ct. App. 1968) (if mischief against which formalities were made is absent, substantial compliance sufficient); *In re* Estate of Giles, 228 So. 2d 594, 596 (Miss. 1969) (if fraud and other defects are absent, substantial compliance with formalities sufficient); Hobbs v. Mahoney, 478 P.2d 956, 958 (Okla. 1970) (literal compliance not necessary with formalities, "substantial compliance" doctrine will be followed). If there is a defect in the will a further inquiry should be made: Are the purposes of the Wills Act substantially served by the form of the will and is the testator's intent proven? *See* Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489, 489 (1975).

61. *See, e.g.,* Hanel v. Springle, 372 S.W.2d 822, 824 (Ark. 1963) (courts should protect wills from fraud and deception, not destroy them by technicalities); *In re* Cox's Will, 29 A.2d 281, 283 (Me. 1942) (formalities are safeguards for wills but validity of document not destroyed by specious requirements); *In re* Will of Kobrinsky, 273 N.Y.S.2d 156, 157 (1966) (where no evidence of fraud, unreasonably strict interpretation should not destroy will); *see also In re* LaMont's Estate, 248 P.2d 1, 2-3 (Cal. 1952) (interpretation other than substantial compliance will make formality a trap instead of a safeguard); *cf.* Berndtson v. Heuberger,

courts have also specifically stated that a liberal interpretation is preferred in determining if the purposes of the attestation requirements have been satisfied.[62] Attestation requirements are satisfied by clauses which state that the testator signed the will in the presence of two witnesses with the intent that it would be a valid will, and that the witnesses each signed the will in the presence of the testator, thereby giving it authenticity.[63] Self-proving affidavits have been held to be a form of attestation clause since words in the affidavit recite the same statements that a conventional attestation clause recites.[64] As the dissent in *Wich* points out, the witnesses signed with the intent to attest to the will at the testator's request, and thus their signatures following the self-proving affidavit should satisfy attestation requirements.[65] Additionally, it has been held that affidavits, like attestation clauses, are incorporated by reference[66] into the will, thereby construing the two instruments as one document.[67] As a result, courts have

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173 N.E.2d 460, 463 (Ill. 1961) (executing will should not be prevented by occurrence unexpected by or beyond control of testator).

62. *See, e.g.,* Barton's Adm'r v. Barton, 244 S.W.2d 770, 772 (Ky. Ct. App. 1951) (formalities regarding attestation liberally construed); Gordon v. Parker, 104 So. 77, 77 (Miss. 1925) (formalities regarding execution liberally construed); Ragsdale v. Hill, 269 S.W.2d 911, 919 (Tenn. Ct. App. 1954) (statute of wills liberally construed as long as purpose of preventing fraud served); *see also* T. ATKINSON, HANDBOOK ON THE LAW OF WILLS 335 (2d ed. 1953) (since location of testator's signature has more effect on possibility of fraud, courts should construe attestation requirements more liberally in regard to witness' signature than testator's signature).

63. *See, e.g.,* Bloodworth v. McCook, 17 S.E.2d 73, 74 (Ga. 1941) (attestation is witnessing valid execution of will and authenticating that by signing); Conway v. Conway, 153 N.E.2d 11, 14 (Ill. 1958) (clause contained proof testator signed in presence of witnesses who signed as attesting witnesses); *In re* Estate of Petty, 608 P.2d 987, 992 (Kan. 1980) (clause satisfied attestation requirements since witnesses signed in presence of testator who executed will in witnesses' presence).

64. *See In re* Estate of Petty, 608 P.2d 987, 992 (Kan. 1980) (affidavit which stated witnesses signed in presence of testator who executed will in presence of same witnesses is form of attestation statement); *In re* Estate of Cutsinger, 445 P.2d 778, 781-82 (Okla. 1968) (attestation statement can be in form of self-proving affidavit and still maintain its validity).

65. *See* Wich v. Fleming, 652 S.W.2d 353, 358 (Tex. 1983) (Robertson, J., dissenting).

66. *See* 2 W. BOWE & D. PARKER, PAGE ON THE LAWS OF WILLS § 19.9, at 74-77 (3d ed. 1960). Incorporation by reference involves situations where separate writings are construed as parts of the will due to the language, even though the separate writing alone is not construed a part of the will. *See id.* at 76-77.

67. *See, e.g., In re* Estate of Charry, 359 So. 2d 544, 544-45 (Fla. Dist. Ct. App. 1978) (better view allows attestation clauses and self-proving affidavits to be incorporated into will); *In re* Estate of Petty, 608 P.2d 987, 992 (Kan. 1980) (affidavit incorporated into will since on same page of will and contained words of reference); *In re* Estate of Cutsinger, 445 P.2d 778, 781 (Okla. 1968) (affidavit incorporated into will since on same page as will and contained words of reference). *Compare* 9 E. BAILEY, TEXAS PRACTICE § 273, at 423 (1971) (affidavit is part of "will" since parties swear statutory formalities have been satified; will cannot be "self-proved" unless part of itself contains that reflexive capability) *with* McGrew

considered the reflexive language in the affidavit, the fact that the affidavit is on the same page as the will, along with the witnesses' testimony authenticating the execution, to reach a just result in sustaining the testator's right to dispose of his property.[68] Although the same conditions were present in *Wich,* the court maintained that the Probate Code must be literally construed.[69]

The approach taken by the *Wich* majority exemplifies an extreme care not to lessen statutory requirements with regard to wills utilizing self-proving affidavits.[70] The basis for adhering to formalities is well-founded in that preventing fraud is a main concern, yet when the evidence unquestionably proves a proper execution, the main purpose for the legislature's enacting the formalities is unfortunately overlooked. Such an approach will inevitably undermine the provable good faith efforts of testators and witnesses by technicalities rather than protect wills from fraud and other significant defects.[71]

Michael W. McCrum

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v. Bartlett, 387 S.W.2d 702, 705 (Tex. Civ. App. — Houston 1965, writ ref'd) *and* 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.137, at 257 (3d ed. 1960) (signature on one instrument cannot be construed as signature on different instrument if each intended to have independent operations).

68. *See, e.g., In re* Estate of Charry, 359 So. 2d 544, 544-45 (Fla. Dist. Ct. App. 1978) (court places substance over form by incorporating affidavit into will); *In re* Estate of Petty, 608 P.2d 987, 992-93 (Kan. 1980) (court considers totality of circumstances to determine if statute substantially complied with); *In re* Estate of Cutsinger, 445 P.2d 778, 781-82 (Okla. 1968) (testimony and signed affidavit prove compliance with statute).

69. *See* Wich v. Fleming, 652 S.W.2d 353, 354-55 (Tex. 1983).

70. *See id.* at 355. This approach mirrors that of a minority of other jurisdictions that strictly construe statutory requirements in the area of wills. *See, e.g., In re* Lee's Estate, 80 F.Supp. 293, 294 (D.D.C. 1948) (more care should be taken to lessen formalities in wills than any other field of law); Walsh v. St. Joseph's Home for the Aged, 303 A.2d 691, 694 (Del. Ch. 1973) (testator's intent cannot force court to lessen formalities); *In re* Brown's Estate, 214 A.2d 229, 231 (Pa. 1965) (court will not lessen formalities in order to use imagination).

71. *See* Hanel v. Springle, 372 S.W.2d 822, 824 (Ark. 1963); Wich v. Fleming, 652 S.W.2d 353, 356-57 (Tex. 1983) (Robertson, J., dissenting).