

EXTENSION OF THE IMPLIED ACKNOWLEDGMENT DOCTRINE AS PRIMA FACIE EVIDENCE FOR PROBATE OF A WILL

In Re Kail's Will

16 Ohio Op. 2d 93, 176 N.E.2d 850 (1960)

The Coshocton County Probate Court refused to admit the purported will of Charles W. Kail to probate. The will consisted of three sheets of tablet paper each bearing the date of *August 11, 1958*. At the bottom of the third sheet appeared the signatures of the three attesting witnesses and the date of *September 18, 1958* adjoining each name. The probate court found that the witnesses had not seen the decedent sign the will, and had neither seen his signature nor heard a spoken acknowledgment of the signature, but each understood he was subscribing a will. The court of appeals reversed¹ and held that there was an *implied* acknowledgment of the will, because the date of the will and the date of attestation by the three witnesses was different and the testimony of the witnesses, with the exception of one, proved the existence of the will on the date of their subscription. The implied acknowledgment was held to constitute a prima facie case of due execution of the instrument.² The application of the doctrine of implied acknowledgment in this case illustrates the general policy of the courts toward liberality in admitting wills to probate,³ but the case also represents an extension of that doctrine.

It is generally agreed in Ohio that a hearing held for the purpose of admitting a will to probate is not an adversary proceeding, and a probate court need only find substantial evidence of due execution of the will to admit it to probate. When there is insufficient evidence to meet this requirement, an interlocutory order denying probate is issued and a final hearing follows.⁴ In the final hearing the court is not authorized to weigh

¹ *In re Will of Charles Westley Kail*, 16 Ohio Op. 2d 93, 176 N.E.2d 850 (1960), the dissenting opinion cites earlier cases dealing with implied acknowledgment and urges appeal to the Ohio Supreme Court.

² Ohio Rev. Code § 2107.03 (1953): "Except oral wills, every last will and testament shall be in writing, but may be handwritten or typewritten. Such will shall be signed at the end by the party making it or by some person in such party's presence and at his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge his signature."

³ "Were a contest permitted on the hearing of such an application [to enter a will to probate] proponents and opponents would be affected dissimilarly by the final outcome. Proponents, aggrieved by an adjudication and final determination refusing probate, would have no remedy by civil action and would be deprived of a jury trial; opponents aggrieved by the admission of the will to probate, could contest again by civil action and would have a right to a jury trial in the second contest." *In re Elvin*, 146 Ohio St. 448, 66 N.E.2d 629 (1946).

⁴ Ohio Rev. Code § 2107.181 (1953): "If it appears that the instrument purporting to be a will is not entitled to admission to probate, the court shall enter an interlocutory

the evidence for or against the validity of the will.⁵ It is also well established that in the absence of direct testimony showing due execution of the will there must be some other evidence upon which to base an *implied* acknowledgment.⁶

In *Raudebaugh v. Shelley*,⁷ an early case supporting the doctrine of implied acknowledgment, the Ohio Supreme Court held that where the witnesses did not see the decedent sign the will, there must be an acknowledgment that he did sign. The court then said there was no specified manner for such an acknowledgment and that it is sufficient ". . . if by signs, motions, conduct or attending circumstances . . ." the witnesses understood that the testator had already subscribed the will. However, in *Raudebaugh* the signature of the testator could be seen by the witnesses, and the question was whether a *spoken* acknowledgment was necessary under those circumstances.⁸ Since *Raudebaugh*, many various fact patterns have been held to constitute an implied acknowledgment by the testator,⁹ and the doctrine has been considerably altered. It has been held that an acknowledgment of the *will* is, by itself, sufficient to constitute an implied acknowledgment of the testator's signature which was not seen by the attesting witnesses.¹⁰ Other cases have applied the doctrine where a witness has seen only "some writing"¹¹ or where the signature was not in view of the only witness who testified.¹²

order denying probate. . . . Upon . . . further hearing witnesses may be called . . . examined and cross-examined . . . in the same manner as in hearings for the admission of wills to probate. Thereupon the court shall revoke its interlocutory order denying probate . . . and admit the same to probate or enter a final order refusing to probate such instrument. A final order refusing to probate such instrument may be reviewed on appeal."

⁵ *McWilliams v. Central Trust Co.*, 51 Ohio App. 246, 200 N.E. 532 (1935). The probate court is not authorized to determine as a fact whether such will has been attested and executed according to law, but is merely required to determine whether there is substantial evidence tending to prove that fact, *i.e.*, evidence which will enable a finding of that fact by reasonable minds. *In re Lyons*, 166 Ohio St. 207, 141 N.E.2d 151 (1957); ". . . the probate court does not weigh the evidence but merely considers the evidence favorable to the will's validity to determine as a matter of law whether a prima facie case has been made." *In re Elvin*, 146 Ohio St. 448, 66 N.E.2d 629 (1946).

⁶ *In re Borgman*, 61 Ohio L. Abs. 429, 105 N.E.2d 69 (Ct. of App. 1951); see *infra* note 18.

⁷ 6 Ohio St. 307 (1856).

⁸ See also *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579 (1878).

⁹ *In re Will of LaMar*, 77 Ohio L. Abs. 140, 147 N.E.2d 472 (Prob. Ct. 1957).

¹⁰ *Roosa v. Wickward*, 90 Ohio App. 213, 105 N.E.2d 454 (1950). This will was admitted to probate on the basis of a presumption of acknowledgment due to proof of a deceased witness's signature and weight given to the attestation clause.

¹¹ *In re Fischer*, 67 Ohio App. 6, 35 N.E.2d 784 (1941). The instrument was entirely typewritten except for the signature of the testator. In handling this will one witness saw "some writing." This was sufficient for an implied acknowledgment when the witnesses knew it was a will.

¹² *Roosa v. Wickward*, *supra* note 10. One living witness did not see the signature,

It is obvious that acknowledgment refers to the recognition of a past event by the testator, *i.e.*, the signing of the will. Further, a testator clearly cannot acknowledge a future event.¹³ Without some proof of the existence of the will and proof that the testator signed the will before the witnesses subscribed, there cannot be an implied acknowledgment. The court in the principal case thus limits itself to considering whether there is such proof and finds this proof in the fact that the date of the will differs from that of the witnesses' attestations. This, by implication, established the existence of the *instrument* before the witnesses subscribed. The court holds this difference in dates sufficient to constitute an implied acknowledgment of the *signature* and, thus, a *prima facie* case requiring admission of the will to probate.

In *In re Borgman*¹⁴ there was an attestation clause on the reverse side of the will, and the witnesses did not see the testator's signature. Probate of that will was refused and the order upheld on appeal. The witnesses had not seen the testator's signature and the court held that under these circumstances there could be no presumption that the testator signed prior to the witnesses. *Rossa v. Wickward*¹⁵ is very similar to the principal case, but the implied acknowledgment in that case is based on proof of a deceased witness's signature¹⁶ which raises a presumption that he saw the testator sign the will, and the weight given the formal attestation clause.¹⁷ Many Ohio cases support the doctrine of implied acknowledgment, but they all contain some fact raising an inference that the testator did subscribe prior to the witnesses.¹⁸

Considered in light of the previous decisions invoking the doctrine, this case is a clear extension of the principal of implied acknowledgment. All previous cases required some evidence of due execution and attestation, and not merely the existence of the instrument when the witnesses sub-

but the testator acknowledged the will. A deceased witness's signature was proven and held to raise a presumption of acknowledgment without or even against the other witness's testimony.

¹³ *In re LaMar*, *supra* note 11.

¹⁴ *In re Borgman*, *supra* note 6.

¹⁵ See note 12, *supra*.

¹⁶ But see *Kays v. Feuchter*, 56 Ohio St. 424 (1897).

¹⁷ But see *In re Borgman*, *supra* note 6. This case gives not weight to the attestation clause where the witness did not see the signature of the testator.

¹⁸ *In re Schulz*, 102 Ohio App. 486, 136 N.E.2d 730 (1956). One witness did not see the testator sign or know that it was a will. The court gave weight to the attestation clause upon proof of signatures and experience of one witness in attesting wills for clients of her attorney husband; *In re Fischer*, *supra* note 11; *Blagg v. Blagg*, 55 Ohio App. 518, 9 N.E.2d 991 (1936). One of the two witnesses did not know it was a will but saw the testator's signature on the paper. The other witness knew it was a will and saw the testator's signature. The court held this to be an implied acknowledgment; *Eggleston v. Gardner*, 16 Ohio C.C.R. (n.s.) 455 (1907). Here the witnesses saw the testator's signature but there was no spoken acknowledgment of the signature by the testatrix.

scribed. The court found an implication that the instrument existed at the time of the subscriptions by the witnesses, but it does not necessarily follow that an implied acknowledgment by the testator of his signature is thus established. It would seem that the court has moved from one implication to another implication without supporting facts.

The policy of the courts in liberally admitting wills to probate is desirable and cannot be sensibly denied,¹⁹ but the purposes and necessities for meeting the statutory requirements of due execution are equally important and desirable.²⁰ The doctrine of implied acknowledgment, as originally applied, strikes an adequate balance between the two, but the result of the principal case destroys this balance by circumventing the requirement of substantial evidence to show due execution and attestation. While the proponent was formerly required to prove the existence of the will and to prove that the testator had signed the will in the presence of the witness or had in some manner acknowledged his signature to the witnesses, it is now necessary, following the principal case, to prove only the existence of the instrument. The doctrine of implied acknowledgment if consistently applied in this extreme manner erodes both Ohio statutory law and the common law purposes supporting it.

¹⁹ See note 4, *supra*.

²⁰ *Sherman v. Johnson*, 159 Ohio St. 209, 112 N.E.2d 336 (1953). These formalities are necessary to prevent the diversion of the decedent's estate from those who would take it under the statute of descent and distribution except where the decedent has clearly intended to do so.