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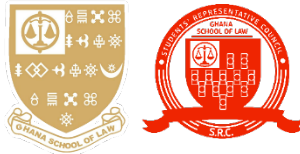

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PRESUMPTION OR PROOF: EXAMINING THE ROLE OF A JURAT IN ESTABLISHING THE VALIDITY OF WILLS

Vanessa Naa Koshie Thompson*

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ARTICLES

Page

FULL-LENGTH ARTICLES

"NOT TOO YOUNG TO RUN, BUT CAN BE TOO OLD TO PLAY": A CASE FOR RETHINKING THE MINIMUM AND MAXIMUM AGE LIMITS FOR THE OFFICE OF GHANA'S PRESIDENCY — 1
Nana Nti Ofori-Debrah

WHERE HEARTSTRINGS TUG AT LEGALITIES: GHANA'S CONSTITUTIONAL STANCE ON LGBTQ+ — 21
David-Kratos Ampofo

UNRAVELLING THE SNARE: DISSECTING THE INTERPLAY OF ENTRAPMENT IN INVESTIGATIVE JOURNALISM AND ITS REPERCUSSIONS IN GHANA'S CRIMINAL JUSTICE SYSTEM — 36
Joel Telfer

COMMON SENSE, BOLAM OR MONTGOMERY? IN SEARCH OF AN "APPROPRIATE" STANDARD FOR ASSESSING CONSENT-RELATED MEDICAL NEGLIGENCE IN GHANA — 53
Samuel Kwame Kumi and *Joel Tetteh*

PLEA BARGAINING, PLEA OF GUILTY AND CONFESSIONS – INVESTIGATING THE TRIANGULAR RELATIONSHIP — 66
Daniel Arthur Ohene-Bekoe and *Emmanuella Okantey*

LEGISLATIVE NOTES

IS AN ARBITRATION MANAGEMENT CONFERENCE MANDATORY OR DIRECTORY? AN ANALYSIS OF SECTION 29 OF GHANA'S ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 (ACT 798) — 85
Prince Kanokanga and *Regina Apaloo*

THE CURRENT LEGAL FRAMEWORK FOR SURROGACY IN GHANA AND THE INHERENT NEED FOR COMPREHENSIVE LEGISLATION ON SAME — 95
Benedicta Fosuhene Agyen

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CASE NOTES

WHISPERS OF AN ERRANT GAVEL: UNRAVELLING THE DENIAL OF JUSTICE IN EDMUND ADDO V THE REPUBLIC 103
Frederick Agaaya Adongo

FAILURE TO AMEND AFTER GRANT OF LEAVE: A MERE OR A FUNDAMENTAL IRREGULARITY? THE CASE OF AKUFO V CATHELINE 119
Richmond Agbelengor

COMMENTARIES

THE RESILIENT MINORITY: THE EVOLUTION OF GHANA'S COMPANY LAW FROM FOSS V HARBOTTLE ONWARDS 129
David-Kratos Ampofo

PRESUMPTION OR PROOF: EXAMINING THE ROLE OF A JURAT IN ESTABLISHING THE VALIDITY OF WILLS 137
Vanessa Naa Koshie Thompson

UNMASKING THE PARADOX OF UNIVERSAL VALUES: REVISITING THE UNIVERSALITY DEBATE IN HUMAN RIGHTS 144
Diane E. Kaye

TRACING THE DEVELOPMENT OF SPOUSAL PROPERTY RIGHTS IN GHANA: AN EXAMINATION OF GHANAIAN JUDICIAL DECISIONS AND A PROPOSAL FOR LEGISLATION IN THAT REGARD 150
Juliet Buntuguh

PRESUMPTION OR PROOF: EXAMINING THE ROLE OF A JURAT IN ESTABLISHING THE VALIDITY OF WILLS

Vanessa Naa Koshie Thompson*

ABSTRACT

The validity of wills is essential for ensuring the proper execution of a testator's intentions. This article explores the significance of a jurat in determining the validity of wills and its evidential value within the legal framework of Ghana.

Notably, the Wills Act allows for the use of a jurat as certification when a will is executed for a blind or illiterate testator. However, a crucial debate arises regarding whether the absence of a jurat invalidates the will or if a jurat holds presumptive value. This article delves into the evolving legal perspective on the use of a jurat and the implications of non-compliance with the Act.

Some argue that the absence of a jurat renders the will null and void, as it fails to provide conclusive evidence that the contents were read and understood by the testator. On the other hand, a counterargument maintains that the presence of a jurat only creates a rebuttable presumption that the testator comprehended the will, and its absence should not invalidate the document if other evidence proves understanding.

Recent court decisions favour the latter viewpoint, emphasising the need to consider all available evidence when determining the validity of a will. While the Illiterates' Protection Ordinance safeguards the interests of illiterates and blind persons, it remains silent on the status of deaf or dumb individuals. The question arises as to whether proficient users of sign language should be considered literate under the law. An amendment to include deaf and dumb individuals in the protected class could be a beneficial step.

In conclusion, the article advocates for a pragmatic approach, focusing on the overarching goal of preserving the testator's true intentions.

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1.0 INTRODUCTION

This article delves into the role of a jurat in establishing the validity of wills, particularly in the context of blind or illiterate testators. Wills are intentional documents reflecting a testator's intent, and their interpretation must adhere to established rules of construction. The Wills Act of 1971 sets out the formal requisites for drafting a valid will, including the provision for a jurat to be used in cases involving illiterate or blind individuals.[1] The article analyses the evolution of the law regarding the evidential value of a jurat on wills, exploring two contrasting viewpoints: one advocating strict adherence to the presence of a jurat, and the other considering it as merely presumptive evidence. Recent court decisions seem to lean towards the latter stance, emphasising the need to establish that the testator understood the will's contents, regardless of the presence or absence of a jurat. The article also highlights the need for possible amendments to address the protection of deaf or dumb persons under the law.

2.0 THE LEGAL MECHANICS OF DRAFTING WILLS AND FORMAL REQUISITES FOR A VALID WILL

The courts have a duty to interpret wills in accordance with well-established rules of construction, as far as is reasonably practicable. As per Aharon Barak, a will is an intentional document that reflects the testator's intent, which may be expressed in any lexicon, sign, or language they choose.[2] As long as a will conforms to the necessary formalities, effect will be given to the dispositions made.

According to the Wills Act, a valid will requires that the testator must be at least 18 years old and should not be suffering from insanity or infirmity of mind that prevents them from understanding the nature of the contents.[3] Additionally, section 2 sets out the formal requisites for drafting a valid will:[4]

1. The will must be in writing and signed by the testator or another person at his direction;
2. All dispositions made beneath the signature are void;
3. The signature of the testator must be acknowledged in the presence of at least two witnesses at the same time;
4. Where a party appends their signature at the direction of the testator, the signature by such a person must be made in the presence of the testator and at least two witnesses;
5. The witnesses must attest and sign the will in the presence of the testator though a form of attestation is not necessary; and

[1] Wills Act, 1971 (Act 360), s 2.

[2] Aharon Barak, *Purposive Interpretation in Law* (2005, Princeton University Press) 307

[3] Act 360 (n 1), s 1.

[4] Ibid, s 2.

6. Where the testator is blind or illiterate, a competent person shall carefully read over and explain the contents of the will before it is executed, and that competent person shall declare in writing upon the will that the will had been read over and its contents explained to the testator and that the testator appeared to perfectly understand the will before its execution.

The certification mentioned in the Act could be provided by the use of a jurat.[5] However, the question arises as to whether the absence of a jurat declared upon the will of a blind or illiterate person invalidates the will, or the jurat is merely of presumptive value. This article discusses the progression of the law on the value of a jurat declared upon the face of a will and its evidential value. Further discussion touches on whether non-compliance with the Act renders a will null and void by discussing applicable case law and relevant statutes in the Ghanaian context. [6]

2.1 Legal Interpretations Surrounding the Role of Jurats

The High Court (Civil Procedure) Rules states that a will made for an illiterate or blind person without a jurat shall not be admitted into probate or letters of administration shall not be granted unless the court is satisfied by proof or it appears from the face of the will that it was read over to the testator by a competent person before it was executed, or that the deceased was aware of the contents at the time.[7] The High Court (Civil Procedure) Rules is silent on the definition of an illiterate person.[8] The case of *Brown v Ansah* provides a workable definition of an illiterate.[9] The court stated that whether a person is to be considered illiterate or not depends on the language in which the document is prepared and the ability to read and write such language.[10] Since the testator could neither read nor write English, he was illiterate within the context of the law.[11] Another case, In Re Will of Bremansu held that whether a person was to be considered literate or illiterate in a particular context must be related to the ability to read and write the language in which the document had been prepared.[12] It is such ability that is relevant, not whether a person could be classified as literate or illiterate.[13]

The Illiterates' Protection Ordinance states that if a person of full age and contracting capacity signs a document written in a language they cannot read or understand, it is essential to prove

[5] Ibid, s 2(6).
[6] Ibid.
[7] High Court (Civil Procedure) Rules, 2004 (CI 47), Or. 66 r 19.
[8] Ibid.
[9] *Brown v Ansah* [1992] 2 GLR 22.
[10] Ibid.
[11] *Brown* (n 9).
[12] In Re Will of Bremansu [2012] GHASC 53.
[13] Ibid.

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that it was clearly read over and explained to them before it can be enforced.[14] Section 4 also stipulates that anyone writing a letter or document for an illiterate person, for free or reward, must read over and explain the document, and cause the illiterate person to write their signature or make their mark.[15]

3.0 COMPARATIVE VIEWPOINTS: STRICT ADHERENCE V PRESUMPTIVE EVIDENCE

One school of thought holds the view that the absence of a jurat on a will necessarily invalidates it because such noncompliance offends the requisite procedure for proof that the blind or illiterate testator had knowledge of the contents of the will. *Waya v Byrouthy* explained that the burden of proof lay on the party relying on the document to show that it was read over and if necessary, interpreted to the illiterate person in a manner in which he understood, failing which the contents of the document could not be relied upon in court.[16] This position slightly differs from the Nigerian position in the case of *Ezeigwe v Awudu* which established that the burden of proof lay on he who asserts to prove that he is illiterate.[17] *Atta Kwamin v Kufuor*, explained that when a person of full age and capacity signs a contract in his own language, his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments in order to subvert it.[18] However, there was no presumption that a native of Ashanti who did not understand English and could neither read nor write appreciates the meaning and effect of an English instrument because he is alleged to have set his mark to it by way of signature.[19] The case of *Otoo(No. 2) v Otoo(No. 2)*, held that because the Illiterates' Protection Ordinance imposes the condition of a jurat, its absence invalidates the document.[20] The learned judge further stated that this position was particularly important in the context of wills since effect is given after the death of the testator who would not be available to say that it was his deed.[21] It is worth noting that this decision departed from the position of the supreme court at the time, enunciated in the case of *Duodu v Adomako and Adomako*.[22] This departure created an unsettled position of the law which was resolved by the case of *Akuteye v Adjoa Nyakoah*.[23]

Another school of thought holds the view that the presence of a jurat on the face of a will or other document is merely presumptive of the fact that the content was read over and

[14] Illiterates Protection Ordinance, 1912 (Cap 262) s 3.
[15] Ibid, s 4.
[16] *Waya v Byrouthy* [1958] 3 WALR 413.
[17] *Ezeigwe v Awudu* [2008] 11 NWLR 158.
[18] *Atta Kwamin v Kufuor* [1914] UKPC 67.
[19] Ibid.
[20] *Otoo (No. 2) v Otoo (No. 2)* [2013-2014] 2 SCGLR 810.
[21] Ibid.
[22] *Duodu v Adomako and Adomako* [2012] 1 SCGLR 198.
[23] *Akuteye v Adjoa Nyakoa* [2018] GHASC 31.

explained to the understanding of the testator. Hence, its absence does not per se invalidate the document and it would suffice if evidence could be adduced in proof that the contents were read over and explained to the illiterate/blind person. In *Fori v Ayirebi*, the court acknowledged that oral testimony by persons who prepared a receipt could establish that the illiterate parties understood the agreement.[24] The learned judge held that failure to endorse a jurat on the will could be remedied by oral testimony that the requirements of the Illiterates' Protection Ordinance had been satisfied.[25] Thus, if a jurat is absent, but it could be proven through the testimony of a witness that the will was the deed of the testator, there is no reason for the court to invalidate the will. *In Re Mensah (Dec'd): Barnieh v Mensah*, the court held that any available proof that the will was read over to the testator would suffice.[26]

Nigerian law seems to subscribe to this school of thought. The court in *Itauma v Akpe-Ime* held that the object of the Illiterates' Protection Law was to protect illiterates from fraud and strict compliance was therefore obligatory.[27] In *Fatunbi v Olanloye*, the court held that the object of the law is to protect the interests of illiterates and a jurat helps to trace the whereabouts of the maker, in order to ensure that the contents of the document reflects the true intention of the illiterate.[28] This proves that the essence of a jurat is to afford the illiterate the opportunity to confirm whether the document reflects his true intentions and since a will takes effect upon the death of a testator, any evidence to prove that the will reflects the true intentions of the illiterate testator would suffice.

Recent decisions of the Ghanaian supreme court also subscribe to this school. In *Duodu v Adomako & Adomako*, it was held that the courts must not make a fetish of the presence or otherwise of a jurat.[29] The presence of a jurat is presumptive of the facts alleged in the document, (which presumption is rebuttable or not conclusive). Therefore any evidence which demonstrates knowledge and understanding by the illiterate settles the issue.[30] In the case of *Akuteye v Adjoa Nyakoah*, the court held that there is no requirement that there be a jurat clause certifying that the document was read over and explained to the illiterate person.[31] Its presence only creates a rebuttable presumption that the document was indeed the deed of the testator.[32] Therefore, mere absence of a jurat does not invalidate the document without any tangible proof that he did not understand the contents of the document.[33]

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[24] *Fori v Ayirebi* [1966] GLR 627.
[25] Ibid.
[26] *Re Mensah(Dec'd): Barnieh v Mensah* [1978] GLR 225.
[27] *Itauma v Akpe-Ime* [2000] NWLR 156.
[28] *Fatunbi v Olanloye* [2004] 6-7 SC 68.
[29] *Duodu* (n 22).
[30] Ibid.
[31] *Akuteye* (n 23).
[32] *Ibid.*
[33] *Ibid.*

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Given this context, it is reasonable to endorse the current position of the law, as upheld by recent court decisions. If it can be proven that a will is the testator's deed, even without a jurat, why should the court invalidate it? The High Court (Civil Procedure) Rules indicates that probate or letters of administration may be granted if the court is satisfied that the will was read over to the testator or that the deceased knew its contents at the time of execution.[34] Therefore, it would be erroneous to hold that a will is null and void simply because it lacks a jurat.

The law requires that the contents of a will be read and explained to a blind or illiterate person in a language they understand before they sign it. This fact must also be endorsed on the will. Earlier court decisions suggested that noncompliance with these requirements would invalidate the will. However, recent rulings suggest that the presence of a jurat on a will merely creates a presumption that the testator knew its contents and signed it. This presumption is rebuttable, so that the contents of the will can still be challenged, regardless of the presence of a jurat. Similarly, the absence of a jurat does not necessarily invalidate a will, provided the standard of proof that the testator knew the contents has been met. Its presence is not conclusive of the contents in the document neither is it a sine qua non. While its presence may lighten the burden of proof on its proponent, its absence should not be fatal either. This position is consistent with the Mischief Rule, which requires that statutes be interpreted in light of the remedies they introduce to address specific defects.[35] The Illiterates' Protection Ordinance was introduced to protect the interests of illiterates and blind persons and not to introduce stringent requirements.[36]

4.0 THE NEED FOR FURTHER CLARITY AND INCLUSION IN LEGISLATION.

However, the law is silent on the status of deaf or dumb persons. Does the law regard a deaf or dumb person who is proficient in sign language as literate? This raises questions concerning the definition of language and whether sign language constitutes "language" in this sense. No case law has been pronounced on the matter, but arguments may arise. Perhaps, an amendment of the law to include deaf and dumb persons in the class of persons afforded protection under the Illiterates' Protection Ordinance may be helpful. [37]

5.0 CONCLUSION

In conclusion, this article explores the role of jurats in validating wills, specifically focusing on the legal intricacies faced by blind or illiterate testators, highlighting a legal shift towards prioritising the testator's understanding over strict procedural compliance. It discusses the evolution of jurat-related laws, contrasting views on jurats as either essential or presumptive

[34] CI 47 (n 7), Or. 66 r 19.
[35] *Heydon's case* [1584] 76 ER 637.
[36] Cap 262 (n 14).

[37] Ibid.

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evidence, and an examination of contrasting judicial viewpoints and recent court decisions highlighting a shift towards recognising the substantial rather than procedural compliance in the verification of a testator's understanding of the will's contents. The need for further clarity and inclusion in legislation, especially concerning deaf and dumb persons reinforces the argument for a legal system that is responsive and adaptable to the diverse needs of society. In essence, the legal discourse on the role of jurats in establishing the validity of wills encapsulates a broader conversation on the balance between procedural formality and substantive justice. This article contributes to this ongoing dialogue by providing a comprehensive analysis on current practices and calls for legal reforms that accommodate the diverse needs of society, ensuring fairness and equity, especially for the most vulnerable.

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