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Wills-Competency to Attest-Competency of Spouses

WILLS—COMPETENCY TO ATTEST—COMPETENCY OF SPOUSES—Testatrix, Nancy T. Pritchard, executed a will in which her husband was beneficiary to the amount of $1,000 and also one of the two attesting witnesses. There were other beneficiaries, some of whom were heirs. The heirs attempt to have the will set aside because of improper execution in that the husband

attested the wife's will. *Held,* that the gift to the husband is void by statute and he then is competent under the general statutory rule abolishing the incompetency of the husband and wife to testify for and against each other. *Pritchard v. Pritchard,* 177 N. E. 502, Ind. App. (1931).

The statutes on wills require "competent" or "credible" witnesses. It is uniformly agreed that "competency" or "credibility" is to be determined by reference to the common law and code rules of evidence. Three principal incompetencies arise here. The first is the one arising out of a legal interest in the subject matter of the action the witness is called to support; the second is the collateral incompetency of the husband or wife, that is, if the one is incompetent on the ground of interest the other is also disqualified; the third is the privilege, as between husband and wife, against the disclosure of confidential communications. All three situations turn upon the statute law of Indiana at the present time, and the principal case completes the cycle of judicial interpretation of those statutes, because it is the first case discussing the third situation.

I. Unless the common law incompetency for interest is removed one who takes an interest under a will is incompetent to attest that will. Sec. 552 Burns (1926) retains the common law incompetency of interest in an action affecting the estate of an ancestor which necessarily includes an action to contest a will. *Pfaffenberger v. Pfaffenberger,* 189 Ind. 507, 127 N. E. 766; *Willey v. Gordon,* 181 Ind. 252, 104 N. E. 500. So it is a general rule, either at common law in some jurisdictions or by statutory enactment in others, that a beneficiary under a will is an incompetent attesting witness to the will. *Willey v. Gordon, supra; In re Kessler's Estate,* 221 Pa. St. 314, 70 A. 770; *Hottenstein v. Hottenstein,* 191 Ind. 460, 133 N. E. 489. But if the interest were removed, the witness, who would no longer be benefited, ought to be competent to prove the will. This end was obtained in England under the statute of 25 Geo. II, and in Indiana by section 3472 Burns (1926), both of which make the will void as to a benefited witness, thus removing the previous disqualifying interest, and making the witness competent to prove the will as to the other beneficiaries. *Willey v. Gordon, supra; Kaufman v. Murray,* 182 Ind. 272, 105 N. E. 466. The fact then that in the principal case the witness was a beneficiary did not render him incompetent as to the balance of the will.

II. A more difficult situation, which was not present in the principal case, arises wherever a wife or husband attests a will under which the spouse is beneficiary. The cases generally say that the interest of the wife in the bequest to the husband is contingent, and therefore will not render the wife incompetent on the ground of interest, since the wife might predecease the husband, or might be divorced, or the property might be consumed or taken in execution levied upon the property of the husband. *Evans, The Competency of Testamentary Witnesses,* 25 Mich. L. Rev. 250; *Hawkins v. Hawkins,* 54 Ia. 443, 6 N. W. 699; *Bates v. Officer,* 70 Ia. 343, 30 N. W. 608; *In re Hatfield,* 21 Colo. App. 443, 122 Pac. 63; *Davis v. Davis,* 43 W. Va. 300, 27 S. E. 323. In spite of the fact that the wife is not disqualified on account of interest in the husband's legacy, it is true that the marital relation to one taking an interest under the will is itself made the disqualifying feature in some states. *Smith v. Jones,* 68 Vt. 132, 34 A. 424; *Page on Wills,* No. 324. So in Indiana "when the husband or wife is a *party* to the suit, and incompetent as a witness in his or her own

behalf, the other is incompetent." 556 Burns (1926). The beneficiary is a necessary party to the probate proceedings and, in applying this section, it was held in *Belledine v. Golley*, 157 Ind. 49, 60 N. E. 706, where the wife witnessed a will to which there were insufficient competent witnesses and in which the husband was the *sole* legatee, that the will failed. The reason would seem to be that the husband, on account of his interest under the will, would not be a competent witness in his own behalf to a will under which he was *sole* legatee; therefore it follows under section 556 that the wife would also not be competent. This would disqualify the wife as witness because of the marital relation and not on account of interest. Sec. 3472 Burns was not discussed in this case. On its face it is not applicable, for it applies only where the witness is also a beneficiary. But in a later case the statute was extended to take care of the situation. A wife attested a will under which the husband was one of numerous beneficiaries and the Indiana court held that although there exists the observed disability under sections 552 and 556, and the rule in the Belledine case, yet under the statute which not only avoids the gift to the attesting witness but also gives the other beneficiaries the right to the incompetent witnesses' testimony in proof of the will, the will is established, but it is void as to the benefited husband (who, however, is not a witness). 3472 Burns (1926); *Kaufman v. Murray*, 182 Ind. 372, 105 N. E. 466. See also *Laming v. Gay*, 70 Kan. 353, 85 Pac. 407; *Hayden v. Hayden*, 107 Neb. 806, 186 N. W. 972. The Kaufman case, in commenting upon the Belledine case and the effect of section 3472, stated: "In the Belledine case it was correctly decided that the wife of the sole beneficiary of a will was not a competent witness, but it was because 3472 does not apply to such a case, for by the terms of that section the named beneficiary could not take under the will (it being made void as to him), and as a result there would be no person to which the devise or legacy could apply." It has been urged, however, that where the husband is sole legatee and the wife a necessary witness, the result of the Belledine case would still follow, for it makes no difference in result whether we say the will fails because the witness is incompetent or because the lone beneficiary can not take under the will. *Page on Wills*, No. 294. In theory the Belledine and the Kaufman cases seem to be at odds, although the results of both are consistent. It must, however, be taken to be settled by the Kaufman case that Sec. 3472 Burns operates to deprive the spouse of a witness of any benefit conferred upon the spouse (rather than the witness) by the will, and that the witness is competent as to the balance of the will.

III. When a witness is spouse of the maker, the common law rule was, for no good reason at all, that the attesting consort was incompetent, even when she took no interest under the will. *Gump v. Gowans*, 226 Ill. 653, 80 N. E. 1086; *Page on Wills*, No. 324. The chief reasons for not allowing the husband or wife to attest the will to which the other was a party were often stated as follows: (1) The unity of husband and wife is such that to allow it would amount to permitting a person to attest his own will; (2) the domestic tranquility would be jeopardized by the disclosure of confidential communications. *Rood on Wills*, Ed. 2, No. 318.

The latter is of course inapplicable in will cases because it refers only to not allowing the spouses to give testimony "in reference to each other personally." Evans, *The Competency of Testamentary Witnesses*, 25 Mich.

L. Rev. 247. When one spouse attests a will made by the other the attester would not be a witness for or against the other to establish the will, for the testator, of necessity, is dead and would not be a party to such a proceeding; and in view of the fact that the incompetency of the husband and wife ceased at common law upon the death of either and also that the oneness of husband and wife is largely dissipated by statute, there appears no reason for the common law rule. *Page on Wills*, No. 324. In connection with the unfounded common law reasons it must be considered whether section 552 Burns (1926), which disqualifies a witness taking an interest under the will, and section 556 Burns (1926), declaring that "whenever the husband or wife is incompetent as a witness in his or her own behalf, the other is incompetent," have the effect of making us adopt the common law rule. At the outset it is hard to conceive of any disqualifying interest which the attesting spouse would take from the will of the consort; and likewise the relational statute, section 556 Burns (1926) should not apply to make the attesting spouse incompetent because it is, by its express wording, applicable only when the husband and wife are *parties;* and, as it has been pointed out before, the deceased spouse is never a party to any proceeding concerning his will. Hence, since there appears no reason as far as our interest and relational statutes are concerned for not allowing one spouse to attest the consort's will, it then follows, as it was concluded in the principal case, that the general statute removing the common law incapacity of witnesses ought to allow it. 549-550 Burns (1926).

J. B. E.