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Competency of Attesting Witnesses

by Judith Ann Cross

The revelation of someone's final disposition of his earthly goods after death is inherently dramatic. The reading of a will is a standard scene in many a novel or theatrical piece, and it is never a scene which readers or observers find boring.

Prior to the Statute of Frauds, ancient English wills held no secrets for revelation after death. Each will was a transcript of an oral public presentation given by the testator before witnesses. The will was recorded in the hand of a scribe, presumably an ecclesiastic; the names of the witnesses and the date recorded were in the same hand, and not by signatures. The witnesses were occasionally numerous, over twenty, and it is likely that most of them were illiterate.

We can trace the formalities of modern wills to the Statute of Frauds, which required that a testamentary instrument be subscribed to by attesting witnesses. The standard of competency for an attesting witness is a requirement of substantive law and is not directly affected by the laws of evidence. Recently, in *McGarvey v. McGarvey*, 286 Md. 19, 405 A.2d 250 (1979), the Maryland Court of Appeals relaxed the standard of competency for attesting witnesses in Maryland.

In *McGarvey* the appellant, Raymond C. McGarvey, Jr., offered for probate a document, purporting to be the last will and testament of Helen McGarvey Saul, executed in 1969. The appellee, Joseph J. McGarvey, filed a caveat contesting the validity of the alleged will on multiple grounds—one being that of the two subscribing witnesses, one was convicted of attempted subornation of perjury and was therefore not competent or credible to act as an attesting witness. The caveator's challenge was two-fold. He correctly relied on MD. EST. & TRUSTS CODE ANN. § 4-102 (1974) (hereinafter cited as the *Testamentary Acts*) which provides that every will shall be attested and signed by two or more credible witnesses. However, his reliance on MD. EST. & TRUSTS CODE ANN. § 9-101 *et sq.* (1980) (hereinafter cited as the *Evidence Acts*), which provides that no person who has been convicted of a crime of perjury shall be permitted to testify in any case or proceeding whatsoever, was misplaced.

In interpreting the *Testamentary Acts*, the court found that the statute requires every will to be attested to and signed by two or more credible witnesses. Relying on *Shaffer et al. v. Corbett*, 3 H. & McH. 513 (1797), and drawing an analogy between the Statute of Frauds and Maryland's *Testamentary Acts*, the court observed that the word "credible" in the statute means "competent." The *Shaffer* Court first considered the Statute of Frauds requirement that an attesting witness be credible. The court noted that a requirement attesting witness be credible would necessitate a factual finding by a jury of every witness to a will before the court could admit the will to probate. *Id.* at 285. This would, ". . .frustrate the provision of the statute, by putting it out of the power of the testator, let his understanding or caution be ever so great. . .and upon this ground the meaning ought to be rejected." *Id.* looking to the common law interpretation of the Statute of Frauds, the *Shaffer* Court cited both Lord Mansfield as finding the word credible to mean competent and Lord Camden as rejecting the word credible as, "superflous and nugatory." *Id.* The *Shaffer* Court held that, ". . .competence is included in the term witness, so the cause must be considered as if it stood without the word credible." *Id.* at 286.

The *McGarvey* Court next considered the proper criteria for determining the competency of attesting witnesses. It rejected the proposition that the statutory rules of evidence apply. That is, if the witness is incompetent to testify in a proceeding as set forth by the *Evidence Acts*, it does not follow that he is incompetent to attest to a will. The court found that there has always been a difference between proving a will and attesting to a will; otherwise, the lengthy and repeated discussions between competency to attest to a will and competency to prove a will in earlier Maryland case law would be rendered mere surplusage.

The court turned to the common law, having determined that the statutory rules of evidence never addressed the issue of attesting witness competency. At common law a witness could not validly attest to a will if at the time of attestation he was insane, so young as to want discretion or guilty of an infamous crime. *McGarvey*, at 25, 405 A.2d at 253 citing *Blackstone's Commentaries*. The court considered the last of these disabilities in finding that "the dead hand of the common law rule. . .should no longer be applied" to disqualify an attesting witness to a will who has been convicted of an infamous crime. *Id.* at 26, 405 A.2d at 254. The court has frequently stated: "(I)t is our duty to determine the common law as it exists in this state... (T)he doctrine of *stare decisis* is not to be construed as preventing us from changing a rule of law if we are con-

vinced that the rule has become unsound in the circumstances of modern life." *Id.* at 27, 405 A.2d at 254.

The practical effect of *McGarvey* is that an attesting witness with a criminal conviction will not render a will void *ab initio*. If such a will is contested, the administrator will have an opportunity to prove the will in court. "Any other result would be a needless trap for the unwary testator who, by failing to discover an attesting witness' prior criminal record, risks having his will declared void." *Id.* at 28, 405 A.2d at 255.

However, pursuant to the Maryland *Evidence Acts*, an attesting witness with a conviction of perjury is incompetent to testify to prove the will. *McGarvey;* MD. CTS. & JUD. PROC. CODE ANN. §9-104 (1980). The administrator must rely on secondary evidence. Maryland case law provides two alternatives regarding the next best evidence in such a case. In *Greenhawk v. Quimby,* 170 Md. 280, 184 A. 485 (1936), the court held that an attesting witness' signature was properly proved, in his absence, by the other subscribing witnesses, and by others, testifying that they each saw the absent witness sign the document in the decedent's presence. In *Keefer v. Zimmerman,* 22 Md. 274 (1864), the court held that proof of an attesting witness' handwriting is admissible where the testimony of the subscribing witness cannot be procured by reason of absence, death, interest or other disqualification.

An administrator proving a will should try to keep the absent attesting witness' perjury conviction from the jury. It is well settled in a civil case that failure of a party to produce a witness who could testify on a material issue gives rise to an inference that the testimony would be unfavorable. *Hitch v. Hall,* 42 Md. App. 260, 399 A.2d 953 (1979); *Critzer v. Shegogue,* 236 Md. 411, 204 A.2d 180 (1964); (opposing counsel's right to a jury instruction); *Hoverter v. Patuxent,* 231 Md. 608, 188 A.2d 696 (1963), (opposing counsel's right to comment to the jury during argument). Therefore, the administrator should file a pretrial motion *in limine* based on two grounds: that reference to an attesting witness' perjury conviction would serve no other purpose except to arouse the prejudice of the jury, and that such a comment is not allowed when the reasons for not calling a witness are reasonable and proper. In this situation it would be unethical for the administrator to call an incompetent witness to the stand; thus his failure to produce the attesting witness is both proper and reasonable.

Even though the *McGarvey* Court relaxed the standard of competency for attesting witnesses in Maryland, most attorneys would prefer to follow stricter standards so that the wills for which they are responsible would be sufficient under the strictest standards of all states. Attorneys should keep in mind that it is very dangerous for the testator to call upon subscribing witnesses who are not acquainted with him. Certainly, attesting witnesses with criminal records, who are minors or who have a psychiatric disability should be avoided. Finally, the fact that an attesting witness is also an executor, guardian named in the will or a beneficiary does not affect his competency. *Estep v. Morris,* 38 Md. 417 (1873); *Leitch v. Leitch,* 114 Md. 336, 79 A. 600 (1911). Nonetheless, when choosing attesting witnesses, common sense should direct the wise attorney to also avoid interested parties. *Harris v. Pue,* 29 Md. 535 (1874).

Recent Developments

The Right to Die

by Lynn K. Caudle

The right to die, the constitutional right to privacy, voluntary euthanasia, rational suicide, terminal care, natural death acts, self deliverance, self determination. . .are all terms which courts are increasingly confronting as people seek to have a voice in determining whether their lives must be artificially prolonged where there is no hope for cure and death is imminent. In recent years, courts have been called upon to determine if a terminally ill person has the right to refuse or discontinue medical treatment. This issue arises in two contexts. The most frequent situation involves an incompetent patient for whom a third party is seeking to be appointed guardian for the purpose of making the patient's medical decisions. The question has also been raised in instances where the patient is competent to make his own decisions.

A competent individual has the right to refuse medical treatment unless the state can demonstrate a compelling interest that would justify