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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 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, “superfluous 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: “(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 un-
sound in the circumstances of mod-
ern life.” Id. at 27, 405 A.2d at 254.

The practical effect of McGarvey is
that an attesting witness with a crim-
inal conviction will not render a will
void ab initio. If such a will is contested,
the administrator will have an oppor-
tunity to prove the will in court. “Any
other result would be a needless trap
for the unwary testator who, by fail-
ing 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 Mary-
land Evidence Acts, an attesting witness
with a conviction of perjury is incom-
petent to testify to prove the will.
McGarvey, MD. CTS & JUD. PROC.
CODE ANN. §9-104 (1980). The ad-
ministrator 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 prop-
erly 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 subscrib-
ing witness cannot be procured by
reason of absence, death, interest or
other disqualification.

An administrator proving a will
should try to keep the absent attest-
ing witness' perjury conviction from
the jury. It is well settled in a civil case
that failure of a party to produce a 
material issue gives rise to an inference
that the testimony would be unfavor-
able. 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), (oppos-
ing counsel’s right to comment to the
jury during argument). Therefore,
the administrator should file a pre-
trial motion in limine based on two
grounds: that reference to an attest-
ing 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 incom-
petent witness to the stand; thus his
failure to produce the attesting wit-
ness 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 fol-
low stricter standards so that the
wills for which they are responsible
would be sufficient under the strict-
est 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 att-
esting witness is also an executor,
guardian named in the will or a bene-
ficiary does not affect his compet-
ency. 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. Pie,
29 Md. 535 (1874).

Recent Developments

The Right to Die
by Lynn K. Caudle

The right to die, the constitutional
right to privacy, voluntary euthana-
sia, rational suicide, terminal care,
natural death acts, self deliverance,
sel determination, ...are all terms
which courts are increasingly con-
fronting 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 treat-
ment. This issue arises in two con-
texts. 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 deci-
sions. 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