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Bob Price

Robert W. Pack Jr.

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TESTAMENTARY RIGHTS OF A BENEFICIARY-WITNESS

SINCE the time of the enactment of the English Statute of Frauds, virtually all legislation concerning wills has required that testamentary witnesses be "credible and competent."¹ At common law one who takes a direct benefit under a will is not competent because of his interest, and the will is void unless a sufficient number of other credible and competent witnesses attest.² Very commonly legislation has modified this result. A study of the legislation of Texas, Oklahoma, Arkansas, New Mexico, and Louisiana reveals that attempts have been made to discourage beneficiaries from acting as witnesses and at the same time to avoid the extreme of nullifying the will.

No one will challenge the policy against allowing persons to act as witnesses to a will under which they are to benefit. To permit them to do so would be to open the door to undue influence, fraud and duress and would subject the beneficiary-witness to the temptation to commit perjury. At the same time it seems harsh to nullify a will entirely and to disappoint innocent devisees and legatees because a necessary witness is a beneficiary. Texas, Arkansas, and perhaps Oklahoma seem to be in agreement with this view.

TEXAS

Article 8283 of the *Texas Revised Civil Statutes (Vernon, 1948)* requires that a non-holographic will "be attested by two or more credible witnesses. . . ."³ Articles 8296 and 8297 deal

¹ 29 Car. II, c.3, § 5 (1676); 1 PAGE, WILLS (3d ed. 1941) §§ 312, 320.

² REDFEARN, WILLS (1923) 121.

³ "Every last will and testament except where otherwise provided by law, shall be in writing and signed by the testator or by some other person by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two or more credible witnesses above the age of fourteen years, subscribing their names thereto in their own handwriting in the presence of the testator."

with legacies and devises made to attesting witnesses.⁴ The former Article provides that a bequest or devise to a necessary attesting witness is void, and the witness may be compelled to give his testimony in probate proceedings "as if no bequest had been made." If the witness happens to be an heir who would inherit in the absence of a will, he is allowed to take under the will or as an heir, whichever portion is the smaller. In *Nixon v. Armstrong*⁵ three witnesses appeared on a will, and all were beneficiaries. The court said that "all bequests made to attesting witnesses shall be absolutely void, unless there are the required number of witnesses attesting and to prove the will, who have received no bequests."⁶

In *Fowler v. Stagner*⁷ testator made a will that was attested by two witnesses. One of the witnesses was also the principal beneficiary under the will. The court said that the purpose of Article 8296 was to prevent frauds by providing that at least two disinterested persons should witness a will. It was said that the statute was also aimed at preventing a will from falling because of incompetency of witnesses caused by bequests or devises to them. The very fact of a beneficiary-witness' subscribing the will made the bequest to him void because there were but two attesting witnesses. Thus, the beneficiary-witness was made competent and the will could be upheld. "It was not necessary that Powers [beneficiary-witness] should be called or compelled to testify,

⁴ "Should any person be subscribing witness to a will, and be also a legatee or devisee therein, if the will cannot be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made. But, if in such case the witness would have been entitled to a share of the estate of the testator had there been no will, he shall be entitled to so much of such share as shall not exceed the value of the bequest to him in the will." Art. 8296.

"In the case provided for in the preceding article, such will may be proved by the evidence of the subscribing witnesses, corroborated by the testimony of one or more other disinterested and credible persons, to the effect that the testimony of such subscribing witnesses necessary to sustain the will is substantially true; in which event the bequest to such subscribing witnesses shall not be void." Art. 8297.

⁵ 38 Tex. 297 (1873).

⁶ *Id.* at 300.

⁷ 55 Tex. 393 (1881).

or that he should execute a release, but it was essential he should take no interest under the will, and that is effected by operation of law."⁸ The competency and credibility of the beneficiary-witness as a witness was the result of the nullity of the bequest to him.

The *Fowler* case has dictum to the effect that even if a disinterested witness alone proves up the will in court, the beneficiary-witness will not be allowed his gift.⁹ In other words, it appears that an interested party cannot save his gift by leaving the state and letting the disinterested witness prove the will.¹⁰ The dictum in the *Fowler* case is quoted with approval in *Scandurro v. Beto*.¹¹

An interesting question arises when all of several witnesses are beneficiaries and one or more witnesses renounce their interests in an attempt to sustain the will. In the *Nixon* case one of three beneficiary-witnesses renounced his interest in the estate. The court held that the beneficiary-witness who renounced his interest was the only competent or credible witness and that at least one other attesting witness would have to give up his bequest in order to sustain the will under Article 8296. The court would not undertake to decide which other witness should forfeit his interest, and all bequests were declared void. The court added that "if the will cannot be otherwise proven, the bequests to attesting witnesses shall be void; and if void, then its nullity must relate

⁸ *Id.* at 398.

⁹ *Id.* at 398, 399.

¹⁰ *In re Walter's Estate*, 285 N. Y. 158, 33 N. E. 2d 72 (1941), points up the problem as to what happens when a beneficiary-witness leaves the state. In this case there were two attesting witnesses to a will, and both received bequests under it. After the testator's death, one beneficiary-witness left the state to avoid testifying. The testimony of the remaining witness was sufficient to probate the will. The beneficiary-witness who had fled the state now claimed her bequest. The court held that the beneficiary-witness who left the state should receive her bequest. A statute said that a bequest would be void only if the will could "not be proved without the testimony" of the beneficiary-witness. The judge was allowed to dispense with the testimony of a witness who was absent from the state. Since the beneficiary-witness was out of the state and no person sought an order to compel the witness to give the testimony by commission, the will in fact was proved without the testimony of the beneficiary-witness. The court felt that the letter of the statute had been met and that the intent of the testator would be defeated if the beneficiary-witness were denied her bequest.

¹¹ 234 S. W. 2d 695, 697 (Tex. Civ. App. 1950).

back to the time when the pretended bequest was made, and not to the relinquishment by Johnson [beneficiary-witness]."¹² It seems that the words "otherwise proven" (and "otherwise established" in Article 8296) refer to the time of execution of the will and not to the time of probate.

In the course of its opinion the court said that if the renouncer had been the only beneficiary-witness, he might have kept his bequest, since there would have been two competent witnesses attesting the will. It was stated by way of dictum that if the will had had two disinterested witnesses and they had died or had left the country, then under Article 8296 the bequest to the beneficiary-witness would have been void because of the necessity that he prove the will. One may question that the dictum is correct because the will would be upheld without the signature of the beneficiary-witness.

Article 8297 declares that in the case provided for in Article 8296, a will may be proved by the evidence of subscribing beneficiary-witnesses if the evidence is corroborated by one or more disinterested and credible persons. These persons must testify to the effect that the testimony of the "subscribing witnesses necessary to sustain the will is substantially true." The language of the statute requires that the testimony of the "subscribing witnesses" be corroborated; evidently the corroboration of only one of these witnesses would not meet the requirements of the statute. None of the other four states dealt with in this Comment has a statute like Article 8297.

In *Scandurro v. Beto* the court took occasion to explain the meaning and operation of this statute. The facts were that a will was attested by two witnesses, one of whom was a beneficiary. The court remarked that the policy of the law was to uphold the will if it were reasonably possible to do so. The court said that the will could stand only if the beneficiary-witness became a compe-

¹² 38 Tex. at 300. Emphasis added.

tent witness. Competency was accomplished by the declaration that the bequest to the beneficiary-witness was void. The court's attention was drawn to Article 8297, and comment was made that the decisions in *Fowler v. Stagner* and *Brown v. Pridgen*¹³ had been written some six and seven years after the enactment of the statute. Those cases were cited for the proposition that for a will to be valid "the same should be attested by at least two competent witnesses, two that received no pecuniary benefit under its terms, and [where] . . . a will [is] attested by only one competent witness together with another who was rendered incompetent by reason of being a devisee or legatee, the bequest to the latter should be void."¹⁴ The court continued: "We can reasonably assume that the court had in mind Article 8297 as well as all the laws relating to the execution and establishment of wills when such statements were made. . . . The legislature, in the enactment of the above article [8297], did not modify, amend or repeal Article 8283 . . . but only amended Section 10 of the probate laws then existing, which was in effect the same as Article 8296."¹⁵

The tenor of the *Scandurro* decision is that Article 8297 will not save a gift to a beneficiary if he is a necessary attesting witness. It is submitted that the clear language and purpose of the Article are to the contrary and that the *Fowler* and *Brown* cases do not support the interpretation in the *Scandurro* opinion. Article 8297 was not in issue or mentioned in the *Fowler* and *Brown* cases.

Difficult problems arise under Articles 8296 and 8297 when one of the witnesses to a will is the spouse of a beneficiary. Consider the following hypothetical situation. *A* executes a will, and *B* and *C* are witnesses. *C*'s husband, *H*, is a beneficiary under the will. Does the marital relationship between *C* and *H* prevent the

¹³ 56 Tex. 124 (1882). This case says that a "competent" witness is substantially the same thing as a "credible" witness.

¹⁴ 234 S. W. 2d 695, 697, 698.

¹⁵ 234 S. W. 2d at 698.

former from being the competent witness required by statute to sustain the will? Suppose the positions of *C* and *H* are reversed so that *H* is the witness and *C* is the beneficiary?

The first situation occurred in *Gamble v. Butchee*.¹⁶ The court held that the wife was a competent attesting witness even though her husband was a beneficiary under the will. "The fact that the husband is a legatee does not constitute the wife a legatee, nor impose upon the husband who is such legatee the forfeiture of the legacy under a will witnessed by her, which would be consequent upon his being such witness and legatee."¹⁷ It appeared from this case that the wife was competent and credible because she had no legal interest in the gift, which became her husband's separate property.

In *Davis v. Roach*¹⁸ the wife-beneficiary sought to establish a lost will and offered her husband as a witness to its execution. The court held that the Dead Man's Statute¹⁹ prevented the husband from testifying, whether or not he was a party to his wife's action. The wife-beneficiary cited cases to the effect that the Dead Man's Statute did not extend to the wife-witness when the husband-beneficiary was a party. The court proceeded to distinguish this holding by saying that the "decision is rested solely upon the facts that the suit is for the recovery of the husband's separate property, in which the wife has at best only a potential interest, and in which suit the wife is not a 'necessary, actual or proper party'."²⁰ The *Davis* case held that the "status of the wife with respect to

¹⁶ 87 Tex. 643, 30 S. W. 861 (1895).

¹⁷ *Id.* at 647, 30 S. W. at 863.

¹⁸ 138 S. W. 2d 268 (Tex. Civ. App. 1940) *er. dism. judgt cor.*

¹⁹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 3716: "In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

²⁰ 138 S. W. 2d at 272.

the husband's separate property is different from the status of the husband with respect to the wife's separate property. The statutes authorize the husband to manage and control the wife's separate estate. . . . It is the general rule that the wife may sue for her separate property in her own name only where her husband refuses to join her, or has abandoned her, or is insane. *Newell v. State*, 103 S.W. 2d 194."²¹

In *Ridgeway v. Keene*²² two of three witnesses were legatees. The wife of one of the beneficiary-witnesses was present at the execution of the will. The court declared that the wife of a beneficiary-witness could give testimony to corroborate the attestation of her husband and the other witnesses under Article 8297. The court said "it is well settled that where the interest involved is [the] separate property of the husband, the wife is not disqualified under . . . [the Dead Man's Statute]."²³

If the husband of a beneficiary under a will is to be regarded as incompetent because of the Dead Man's Statute, then possibly the will fails entirely because of the insufficiency of credible and competent witnesses. Article 8296 does not seem applicable because the husband is not a beneficiary under the will; he is merely a proper party to his wife's claim or suit. Nevertheless, one may guess that Article 8296 will be applied by analogy. That is to say, it may be speculated that the wife's interest will be nullified (or she will be permitted to take her share as an heir but not exceeding the amount of the testamentary gift) with the result that the husband will not be disqualified to testify under the Dead Man's Statute. Under this theory the husband would clearly have no "interest" in the will because his wife would have none, and he would be a fully competent witness.

Where a husband is a corroborating witness to a will in which his wife is a beneficiary-witness, the situation is more certain

²¹ *Ibid.*

²² 225 S. W. 2d 647 (Tex. Civ. App. 1950) *er. ref. n.r.e.*

²³ *Id.* at 649.

under Article 8297. The *Ridgeway* case says that the husband is not competent and credible for reasons set out in the *Davis* decision, which in turn are based on the Dead Man's Statute. Thus, the wife is a necessary witness, her attesting is uncorroborated, and her gift is nullified under Article 8296. No difference in result would be reached by statutory interpretation making the husband a credible and competent witness by nullifying the gift to his wife.

It is unfortunate that a difference has developed in the competency of a husband and wife to attest or corroborate the execution of a will where his or her spouse is a beneficiary. If a wife is fully credible and competent to attest a will in which her husband is a beneficiary, the converse should be true. The wife is said to be credible and competent because she has no interest in the gift (separate property) made to her husband. The same should be true of an attesting husband despite the fact that he is a "proper party" to her suit or claim. Remedial legislation putting the husband and wife on an equal basis would seem desirable. Perhaps both should be disqualified as witnesses. While a husband or wife has no "legal interest" in a testamentary gift to the spouse, realistically he or she stands to gain or benefit from it. It is suggested that gifts to a husband or wife should be nullified if his or her spouse is a necessary attesting witness.

OKLAHOMA

In Oklahoma two attesting witnesses are needed for a will not wholly in the testator's own handwriting. A bequest made to an attesting witness is void unless he be a supernumerary. The wording of the Oklahoma statute indicates that only the bequest to the attesting witness would be void and that the remainder of the will

would be upheld.²⁴ However, a federal case, *Caesar v. Burgess*,²⁵ has pointed to a contrary conclusion. In this case testatrix bequeathed property to her eight living children, her husband, and her stepson. The three witnesses to the will were the husband of one of the beneficiaries, the wife of the testatrix' stepson, and a disinterested third party. Oklahoma adheres to the common law rule that the spouse of a beneficiary under a will is not a competent witness, and so the beneficiary-stepson renounced his bequest in an attempt to make his wife competent as an attesting witness. The court said that the competency of a witness was tested as of the time the will was executed. If a witness is incompetent because of a gift to her husband in the will, subsequent renunciation of the bequest does not make the witness competent. The conclusion was that the will did not have two competent witnesses and should be rejected as void. The court indicated that the statute was not intended to govern "where the spouse of a legatee acts as an attesting witness."²⁶

ARKANSAS

Arkansas, like Texas, adheres to the policy of disallowing bequests made to beneficiary-witnesses. An Arkansas statute²⁷ says that no will is invalidated because it is attested by a beneficiary-witness, but unless the will is signed by two additional competent witnesses, the beneficiary-witness forfeits so much of the bequest

²⁴ 84 OKLA. STAT. ANN. (Perm. ed.) § 143: "All beneficial devises, legacies or gifts whatever, made or given in any will to a subscribing witness thereto, are void unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to the will."

²⁵ 103 F. 2d 503 (10th Cir. 1939). The petition for probate of a will was removed to the federal court under a statute authorizing removal of cases dealing with Indian matters.

²⁶ *Id.* at 508.

²⁷ ARK. STAT. 1947 ANN. (1951 Cum. Pocket Supp.) § 60-402(b): "No will is invalidated because attested by an interested witness; but an interested witness shall, unless the will is also attested by two qualified disinterested witnesses, forfeit so much of the provision therein made for him as in the aggregate exceeds in value, as of the date of the testator's death, what he would have received had the testator died intestate."

as exceeds the amount which he would have received if the testator had died intestate. The case of *Rockafellow v. Rockafellow*²⁸ discusses the operation of a predecessor statute.²⁹ The will in question was attested by two witnesses, *A* and *B*. Under the will *A* and his wife were to receive certain bequests. Both executed renunciations of their respective interests, and the proponents contended that *A* was now a competent witness and could sustain the validity of the will. The court upheld this contention and said that *A*'s renunciation had rendered him competent. The court added that the fact that *A* was the husband of a beneficiary under the will did not affect *A*'s competency and credibility as a subscribing witness.

The Arkansas court evolved a rather ingenious syllogism to prove that the husband could testify in support of the will, even though his wife was to receive a benefit under it. Section 4146 of *Crawford & Moses' Digest (1921)*³⁰ provides in effect that a husband and wife may not testify for or against each other in a civil action. Section 1028 states the Arkansas definition of a civil action.³¹ Section 1029 declares that all remedies not mentioned in Section 1028 are special proceedings in which the prohibition against spouses testifying for or against each other does not apply. Since probate proceedings are special proceedings, the testimony of the husband, *A*, for the benefit of his wife in establishing the will, could not be excluded.

²⁸ 192 Ark. 563, 93 S. W. 2d 321 (1936).

²⁹ ARK. STAT. 1947 ANN. § 60-106: "If any person shall be a subscribing witness to the execution of any will wherein any beneficial devise, legacy, interest or appointment of real or personal estate shall be made to such witness, and such will can not be proved without the testimony of such witness, such devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any person claiming under him, and such person shall be a competent witness, and may be compelled to testify respecting the execution of such will, in like manner as if no devise or bequest had been made to him."

³⁰ As amended by Acts 1931, § 1, p. 712.

³¹ "A civil action is an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or the redress or prevention of a private wrong."

NEW MEXICO

Scant space has been devoted to the beneficiary-witness in the New Mexico statutes, and there is no case authority. Section 32-105 of the *New Mexico Statutes Annotated (1941)* reads as follows: "Persons becoming heirs and those receiving benefits or legacies, by will, can not be witnesses to the will in which they are interested." Under this wording a beneficiary is completely disqualified to attest the will. If a beneficiary signs as a witness, the result, presumably, is that the will is void and the estate passes by intestacy, unless two other qualified witnesses subscribe.

LOUISIANA

The comment made concerning the New Mexico situation appears applicable to Louisiana. A civil code provision reads as follows: "Neither can testaments be witnessed by those who are constituted heirs or named legatees, under whatsoever title it may be."³² This language seems to say that if a beneficiary or heir signs as a witness and there is an insufficiency of other qualified witnesses, the entire will must fail.

SUMMARY

This survey of statutes and cases in the Southwest is at least basis for the following advice to a testator: he should avoid asking any beneficiary or the spouse of any beneficiary or any heir to act as an attesting witness. If a beneficiary acts as an attesting witness and he is not a supernumerary, the gift to him will be nullified in Texas, Arkansas, and Oklahoma. In these states the rest of the will will be allowed to stand (query as to Oklahoma), while in New Mexico and Louisiana the will probably is null and void. If the spouse of a beneficiary acts as a witness, complications are invited. In Arkansas the spouse is a competent witness,

³² LA. CIV. CODE (West, 1952) art. 1592.

but the contrary is true in Oklahoma; and in Texas the husband of a beneficiary is disqualified. Heirs should be avoided as attesting witnesses for the practical reason that at the time of probate they may have an interest in defeating the will. In Texas, because of the unique provisions of Article 8297 of the *Texas Revised Civil Statutes* (Vernon, 1948), a gift to a beneficiary-witness may be saved if a credible and competent third person is able to testify about the execution of the will.

Bob Price.

*Robert W. Pack, Jr.**

*Member of the Texas Bar; member of Student Editorial Board, 1951-1953.