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WILLS, TRUSTS, AND ADMINISTATION OF ESTATES Wills: Effect of Gifts to Subscribing Witnesses

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WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

Wills: Effect of Gifts to Subscribing Witnesses

CODE SECTION:	O.C.G.A. § 53-2-45(a) (amended)
BILL NUMBER:	HB 1352
ACT NUMBER:	1094
SUMMARY:	The Act amends Georgia law regarding whether witnesses to a will may take under the will by adopting a supernumerary rule.
EFFECTIVE DATE:	July 1, 1990

History

Typically, jurisdictions adopt one of four approaches to dealing with an attesting witness to a will who has an interest under that will. First, a jurisdiction may hold a will attested to by an interested witness entirely invalid.[1] Second, a jurisdiction may hold the will valid, but the disposition to the interested witness invalid.[2] Third, if the total number of witnesses exceeds the statutory minimum, and the number of disinterested witnesses meets the statutory minimum, a jurisdiction may hold that both the will and the disposition to the interested witness are valid.[3] This approach is known as the supernumerary rule. The Uniform Probate Code provides a fourth approach in which a will and all its provisions are valid even if the will has been signed by an interested witness.[4]

Georgia statutory law has long provided that the attestation of a witness to a will who has an interest under the will does not invalidate the will.[5] Furthermore, a person's attesting to a will under which his

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1. *See* J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 200 (3d ed. 1984).
2. *Id.*
3. *Id.* at 201.
4. UNIF. PROB. CODE § 2-505, 8 U.L.A. 115 (1983).
5. *See* Code of Ga. § 2386 (1863) providing that

> [i]f a subscribing witness is also a legatee or a devisee under the will, the witness is competent, but the legacy or devise is void; but a husband may be a witness to a will by which a legacy creating a separate estate is given to his wife, the fact going only to his credit.

See also Jones v. Habersham, 63 Ga. 146 (1879).

The *Jones* court was influenced in its decision to allow an interested witness' attestation to validate a will by the Witness Act of 1866, providing that a witness is not rendered incompetent because of interest. *Jones*, 63 Ga. at 153 (citing 1866 Ga. Laws 189).

or her spouse is a beneficiary does not invalidate the spouse's interest.[6] However, the Supreme Court of Georgia has held that if an interested witness's attestation is essential to the validity of the will, the witness' interest is invalid.[7] This holding left open the possibility that the interest of a "nonessential" interested witness might be valid. This possibility was eliminated with the Supreme Court of Georgia's decision in *Ward v. Moon*.[8] In *Ward*, the court refused to recognize the interest of a witness whose signature was not necessary to validate a will, because the witness had attested to the testator's signature.[9]

The *Ward* decision prompted the Fiduciary Section of the Georgia Bar to draft suggested legislation that would amend O.C.G.A. § 53-2-45.[10] The goal of the suggested legislation was to strike a balance between two competing interests: first, to further the testator's interest by allowing subscribing interested witnesses to take under a will; second, to further the state's interest in minimizing the opportunity for undue influence or fraud by requiring that at least two of the attesting witnesses be disinterested.[11] *Ward* sacrificed the testator's interest in having a named beneficiary take under a will; the Act takes a more intermediate position and attempts to accommodate both the testator and the state.

HB 1352

HB 1352 amends Code section 53-2-45 by striking subsection (a) of the statute and adding new language in its place.[12] The new subsection

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6. Bryant v. Bryant, 204 Ga. 747, 51 S.E.2d 797 (1949). In *Bryant*, a legatee's wife witnessed the will under which her spouse was a beneficiary. *Id.* The court held that, under the Witness Act of 1866 and the provisions of the Code regarding attesting witnesses, the legacy to the husband was valid. *Id. See also Jones, supra* note 5.

7. Denmark v. Rushing, 208 Ga. 557, 67 S.E.2d 766 (1951). In *Denmark*, one of three witnesses to a nuncupative (oral) will was an interested party under the will. *Id.* at 557, 67 S.E.2d at 766. At that time, Georgia law required that a nuncupative will be witnessed by three people. *Id.* at 558, 67 S.E.2d at 767. The court held that the devise to such an "essential" witness was invalid. *Id.*

Thus, by "essential," the court apparently meant that the total number of witnesses did not exceed the number required by statute to hold a will valid; consequently, each witness' attestation was required to meet the minimum number of witnesses required by statute. *Id.*

8. 259 Ga. 293, 380 S.E.2d 263 (1989). In *Ward*, four people attested to the decedent's will. *Id.* at 293, 380 S.E.2d at 263. At that time, Georgia law required that a will be attested to by two witnesses. *See* 1851—52 Ga. Laws 104 (formerly found at O.C.G.A. § 53-2-40 (1982)). Two of the attesting witnesses were beneficiaries under the will, leaving two disinterested attesting witnesses. *Ward*, 259 Ga. at 293—94, 380 S.E. 2d at 263.

9. *Id.*

10. O.C.G.A. § 53-2-45 (Supp. 1990).

11. Telephone interview with Representative J. Max Davis, House District No. 45 (Mar. 16, 1990). The amendment requires two disinterested witnesses. This requirement meets the Georgia statutory minimum for the number of witnesses necessary for a valid will. 1851—52 Ga. Laws 104 (formerly found at O.C.G.A. § 53-2-40 (1982)).

12. HB 1352, 1990 Ga. Gen. Assem. The new subsection (a) provides as follows:

adds a supernumerary provision.[13] Georgia law requires that a will be attested to by two or more witnesses.[14] The effect of the bill is to overrule *Ward* by providing that if at least two disinterested witnesses subscribe to a will, the interests of any interested subscribing witnesses are valid.

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(a) If a subscribing witness is also a legatee or a devisee under the will, the witness shall be competent; but the legacy or devise to him shall be void *unless there are at least two other subscribing witnesses to such will who are not legatees or devisees under such will.*

O.C.G.A. § 53-2-45 (Supp. 1990) (emphasis added).

13. *Id.*

14. 1851-52 Ga. Laws 104 (formerly found at O.C.G.A. § 53-2-40 (1982)).