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WITNESSES-DEAD MAN STATUTES-COMPETENCE OF SPOUSE OF PARTY OR INTERESTED PERSON-EFFECT OF DIVORCE

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WITNESSES—DEAD MAN STATUTES—COMPETENCE OF SPOUSE OF PARTY OR INTERESTED PERSON—EFFECT OF DIVORCE—The "Dead Man" statutes, enacted in various forms in almost every state, general-

ly forbid a party or person interested to testify in an action involving a decedent's estate.[1] As is well known, these statutes are the lone survival of the common law rule disqualifying parties and persons interested as witnesses in *all* actions,[2] a rule which has otherwise been universally repudiated because of the realization that pecuniary interest does not necessarily raise any large probability of falsehood and that, even if it did, the risks of admitting such testimony can easily be minimized and are far outweighed by the advantages to be gained.[3] In a recent Illinois decision[4] the court excluded as a witness not only a party to an action involving a decedent's estate but also the party's divorced wife. This holding raises certain questions: (1) Is it a "general rule," established in most states, that the spouse of a person disqualified by a "Dead Man" statute is likewise disqualified? (2) What are the common law or statutory bases for any such disqualification? (3) What is the effect of divorce? Answers to these questions will require (1) an inquiry into the common law as to the spouse's competency and (2) an examination of various relevant statutes.

1. *Common law as to competency of one spouse to testify for another*

There were three distinct common law rules as to competency of a spouse as a witness, somewhat related and often confused. The first was that where one spouse was interested or a party the other was not *competent* to testify *for* him. The second was that one spouse was *privileged not* to testify *against* the other in certain situations. The third was that the disclosure of marital confidential communications was prohibited.[5] We are concerned here only with the first of these rules. Various reasons for its existence have been advanced: (1) the common law unity of husband and wife, automatically disqualifying one spouse wherever the other was disqualified;[6] (2) the marital identity of property interests, the wife's or husband's interest in the other's estate making him or her "interested" within the rule barring interested persons in general;[7] (3) the bias of affection assumed from the very

[1] 2 WIGMORE, EVIDENCE, 3d ed., § 578 (1940). For valuable collection of all statutes as of 1940 see id., § 488.

[2] 5 JONES, EVIDENCE, 2d ed., § 2118 (1926); 2 WIGMORE, EVIDENCE, 3d ed., § 575 (1940).

[3] 5 JONES, EVIDENCE, 2d ed., § 2117 (1926); 2 WIGMORE, EVIDENCE, 3d ed., § 576 (1940).

[4] Hann v. Brooks, 331 Ill. App. 535, 73 N.E. (2d) 624 (1947).

[5] 2 WIGMORE, EVIDENCE, 3d ed., § 601 (1940); 8 WIGMORE, EVIDENCE, 3d ed., §§ 2228, 2332 (1940); 1 GREENLEAF, EVIDENCE, 16th ed., § 254 (1899).

[6] 5 JONES, EVIDENCE, 2d ed., § 2128 (1926); 2 WIGMORE, EVIDENCE, 3d ed., § 601 (1940); 1 Co. LITT. 6 b (1832).

[7] 2 WIGMORE, EVIDENCE, 3d ed., § 601 (1940).

existence of the marriage relation;[8] and (4) "public policy," which seems to mean a public interest in preventing the marital discord which it is feared would arise if the husband could force the wife to perjure herself in his behalf, or if on cross examination she were forced into testifying against him.[9] There is considerable conflict among the authorities as to just which of these reasons is the true basis of the rule. Wigmore, pointing out that the wife was excluded even where she had no interest in the estate of her husband, concludes that "marital bias" was the fundamental theory.[10] Jones states that the policy argument was the touchstone.[11] Expressions can be found in the cases to the effect that the rule is founded upon "the two-fold consideration of interest and policy."[12] Whichever of these views is correct, it is interesting to note Wigmore's contention that *none* of the reasons offered is very substantial. The first is a mere legal fiction and scarcely a reason at all. The second, he points out, is open to the same objections as have resulted in the repudiation of interest as a disqualification in general.[13] Similarly, the third substitutes a supposed marital bias for the supposed bias of pecuniary interest.[14] He denounces the fourth argument, based on "policy," as "a mere apprehension, not worthy of consideration as appreciable," which "deprives honest causes of upright testimony for the sake of preventing dishonest causes from using false testimony," and states further that "where the husband of the supposed unprincipled sort exists, the attempt to regulate his daily domestic tyranny by the casual application of a rule of evidence is ridiculous; and, beyond that, to build up, for all families not so afflicted, a rule of universal deprivation having this abnormal type of masculine Borgia for its basis, is to go to fantastic extremes of caution."[15] Thus at least one eminent authority[16] considers the common

[8] Ibid; Davis v. Dinwoody, 4 T.R. 678, 100 Eng. Rep. 1241 (1792); Johnston v. Slater, 11 Gratt. (Va.) 321 at 323 (1854); King v. Cliviger, 2 Durn. & E. 263 (1788).

[9] 2 WIGMORE, EVIDENCE, 3d ed., § 601 (1940); Snyder v. Snyder, 6 Binn. (Pa.) 483 (1814); Rice v. Keith, 63 N.C. 319 (1869); 5 JONES, EVIDENCE, 2d ed., § 2129 (1926) and numerous cases there cited; 1 BL. COMM. 443; Kelley v. Proctor, 41 N.H. 139 (1860). The exact policy objection to the *husband's* testifying for the *wife* is never clearly stated, and often seems to be confused with the reasons for the confidential communication rule. See Snyder v. Snyder, supra this note.

[10] 2 WIGMORE, EVIDENCE, 3d ed., § 603 (1940).

[11] 5 JONES, EVIDENCE, 2d ed., § 2129 (1926).

[12] 2 Bitner v. Boone, 128 Pa. 567, 18 A. 404 (1889); to the same effect see Breed v. Gove, 41 N.H. 452 (1860), and Kelley v. Proctor, 41 N.H. 139 at 142 (1860).

[13] 2 WIGMORE, EVIDENCE, 3d ed., § 601 (1940).

[14] Ibid.

[15] Ibid.

[16] Greenleaf is apparently in accord with Wigmore. He says that "the discarding of . . . [this principle] is a change demanded by all considerations of justice and

law rule barring the wife of an interested party to be of extremely doubtful validity at best. It cannot be said that more than a few cases give any very great indication that the courts have shared Dean Wigmore's antipathy,[17] but his attack will perhaps serve as an interesting background to an assessment of the present status of the rule in the situation with which we are concerned.

2. *Effect of statutes removing the disqualification for interest and statutes expressly qualifying husband and wife.*

It was indicated above that practically all states have abrogated by statute the common law disqualification for interest in general, but have retained it in the case of actions against decedents' estates. This retention has been severely criticized from all quarters,[18] but passing that point for the present, the purpose here is to determine how far the competency of the *spouse* of an interested person in an action against an estate has been affected by such statutes, either standing alone or viewed in conjunction with statutes specifically relating to the competency of husband and wife. It is probably safe to say that most courts have held that statutes simply removing interest as a disqualification in general cannot be construed to abrogate, in and of themselves, the common law disqualification of married persons.[19] The theory of most

policy and . . . the exceptions which still encumber several statutes are mere remnants of the obsolete traditions of the interest disqualifications. . . ." 1 GREENLEAF, EVIDENCE, 16th ed., § 333c, at p. 495 (1899), Jones seems to take the view that the rule is founded on sound policy considerations, but relies mainly on a quotation from Greenleaf which refers to the rule as to confidential communications rather than the rule as to incompetency in general. 5 JONES, EVIDENCE, 2d ed., § 2129 (1926).

[17] It should be noted however that many courts either speak loosely of "public policy" without any careful examination of the alleged bases of such policy, [see, e.g., Pringle v. Pringle, 59 Pa. 281 (1868); Re Valentine, 93 Wis. 45, 67 N.W. 12 (1896)], or adhere blindly to the fiction of marital unity [see, e.g., Lucas v. State, 23 Conn. 18 (1854); State v. Smith, 21 Del. 1 (1904)], or confuse the competency rule with the confidential communication rule [see, e.g., Snyder v. Snyder, 6 Binn. (Pa.) 483 (1814); Heinemann v. Hermann, 385 Ill. 191, 52 N.E. (2d) 263 (1943)]. The widespread enactment of statutes materially modifying the rules as to competency of husband and wife of course indicates that the validity of Dean Wigmore's objections has not gone unrecognized, but, as is pointed out infra, most courts have not seemed particularly desirous of extending the application of such statutes any further than their letter dictates. For strong support of Dean Wigmore's position from a federal court of appeals, see Tinsley v. United States, (C.C.A. 8th, 1930) 43 F. (2d) 890.

[18] See St. John v. Lofland, 5 N.D. 140, 64 N.W. 930 (1895); 2 WIGMORE, EVIDENCE, 3d ed., §§ 578, 578a, setting forth the Commonwealth Fund Committee model statute as well as excerpts from the report of the American Bar Association's Committee on the Improvement of the Law of Evidence, which recommended substantial modification of the Dead Man Statutes by a vote of 46 to 3; 5 JONES, EVIDENCE, 2d ed., § 2225 (1926); 1 GREENLEAF, EVIDENCE, 16th ed., § 333b (1899).

[19] Cases from thirteen states and the District of Columbia are cited at 2 WIGMORE, EVIDENCE, 3d ed., § 619 (1940).

of these holdings is that since the wife is disqualified because of her bias or because of "public policy" as well as because of her interest, the removal of the latter disqualification alone is ineffective to make her competent. There are decisions, however, that such statutes *do* abrogate the common law rule,[20] and there are others which, from the fact that they deem it necessary to find some statutory disqualification, can be assumed to consider the common law rule as abrogated.[21] At least one of these cases has recognized the necessity of eliminating the "public policy" ground of exclusion,[22] but others express no very clear theory on this point. Once the majority position is taken, and whatever may be the result where the husband himself is rendered competent by such a statute, it would seem to follow logically that in the one case where the husband remains incompetent, namely, the "dead man" case, the common law rule excluding the wife remains in full force. Most courts have so held.[23]

Where the statute not only removes the disqualification for interest but also makes all persons competent except as specifically provided, there is, of course, an almost unavoidable implication that the common law rule has been abrogated, and this result has been reached by several courts.[24] Similarly, an express declaration that husband or wife shall be competent usually eliminates all question,[25] though in the

[20] Merriam v. Hartford & New Haven R. R. Co., 20 Conn. 354 (1850); Bentley v. Jun, (Neb. 1906) 107 N.W. 865.

[21] Howe v. Howe, 99 Mass. 88 (1868) (husband held competent); Cotherman v. Cotherman, 58 Mich. 465, 25 N.W. 467 (1885) (wife held competent); Foley v. Loughran, 60 N.J.L. 464, 38 A. 960, 39 A. 358 (1897); Chase v. Pitman, 69 N.H. 423, 43 A. 617 (1898); Marx v. Marx, 127 Md. 373, 96 A. 544 (1916); White v. Poole, 74 N.H. 71, 65 A. 255 (1906); Graham v. Alexander, 123 Mich. 168, 81 N.W. 1084 (1900); Saffold v. Horne, 72 Miss. 470, 18 S. 433 (1894).

[22] Merriam v. Hartford & New Haven R. R. Co., 20 Conn. 354 (1850). See also Butler v. Phillips, 38 Colo. 378, 88 P. 480, (1906), discussed in note 24, infra.

[23] Treleaven v. Dixon, 119 Ill. 548, 9 N.E. 189 (1886); Hiskett v. Bozarth, 75 Neb. 70, 105 N.W. 990 (1905); Kilgore v. Hanley, 27 W. Va. 451 (1886); Re Valentine, 93 Wis, 45, 67 N.W. 12 (1896).

[24] Butler v. Phillips, 38 Colo. 378, 88 P. 480 (1906). Here a statute rendering husband and wife incompetent was repealed by a statute making all persons competent as witnesses. The court concludes at p. 391 that " . . . it was the intention of the legislature . . . to entirely remove the disqualification theretofore resting upon husband and wife on account of the marriage relation or . . . on account of public policy." In Bitner v. Boone, 128 Pa. 567, 18 A. 504 (1889), it was held that the common law rule was removed by such a statute so as to allow married persons to testify in favor of each other (but not against each other) except as stated in the statute. See also Shafer v. Dean, 29 Iowa 144 (1870), treating the common law disqualification as removed under a statute which made all persons competent witnesses, including parties.

[25] Miller v. Miller, 7 Ariz. 316, 64 P. 415 (1901) [Ariz. Rev. Stat. (1887) § 1864: "The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried shall not be incompetent to testify therein, except as to confi-

Illinois case referred to in the opening paragraph[26] the court adhered unswervingly to its earlier position that an express provision that husband and wife may testify for or against each other "in all civil actions" does not apply to actions against decedents' estates, and that in such actions the wife remains disqualified. It should be pointed out also that some statutes explicitly state either that the provision rendering husband or wife competent shall not apply to actions against decedents' estates, or that the husband or wife of a person disqualified in such an action is likewise disqualified, and under such provisions, of course, there is not much room for dispute; under the first type the spouse is disqualified by the common law rule,[27] and under the second by the statute.[28]

Where the common law rule is treated as abrogated and there is no express provision either qualifying or disqualifying married persons, certain further problems arise. These are problems purely of statutory construction, with substantive results depending wholly on the terms of the provision involved; therefore, no attempt will be made here to do more than point out their general nature and some typical solutions. Some statutes disqualify only "parties," some only "persons interested," and some both parties and persons interested. Under the first type the usual rule is that the husband or wife of a party is competent.[29] The second and third types present, of course, the problem whether the spouse is "interested" within the meaning of the

dential communications . . ."] (common law rule held abrogated). Foley v. Loughran, 60 N.J.L. 464, 38 A. 960, 39 A. 358 (1897), (husband or wife of a party interested made competent and compellable to give evidence just as any other witnesses, except in certain specified cases, by § 5 of N.J. Statutes of 1874); N.Y. Code of Civ. Proc. (1877) § 828: "Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness . . . [because of interest]; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action is brought, prosecuted, opposed, or defended"; Saffold v. Horne, 72 Miss. 470, 18 S. 433 (1894) (common law rule treated as abrogated under statute admitting husband and wife as witnesses for each other "in all civil cases"); see also Clements v. Marston, 52 N.H. 31 (1872), Howe v. Howe, 99 Mass. 88 (1868), and Guillaume v. Flannery, 21 S.D. 1, 108 N.W. 255 (1906), all involving similar statutes.

[26] Hann v. Brooks, 331 Ill. App. 535, 73 N.E. (2d) 624 (1947).

[27] Hunter v. Lowell, 64 Me. 572 (1873) (husband held incompetent in action by executor on note of wife); Taylor v. Kelley, 80 Pa. 95 (1875) (early Pennsylvania statute); Bitner v. Boone, 128 Pa. 567, 18 A. 404 (1889) (later Pennsylvania statute); Kilgore v. Hanley, 27 W. Va. 451 (1886).

[28] Terry v. Davenport, 185 Ind. 561, 112 N.E. 998 (1916); Walker v. Steele, 121 Ind. 436, 22 N.E. 142, 23 N.E. 271 (1889).

[29] Chase v. Pitman, 69 N.H. 423, 43 A. 617 (1898); Marx v. Marx, 127 Md. 373, 96 A. 544 (1916); Graham v. Alexander, 123 Mich. 168, 81 N.W. 1084 (1900); Howe v. Howe, 99 Mass. 88 (1868); Foley v. Loughran, 60 N.J.L. 464, 39 A. 358, 960 (1897); Shafer v. Dean, 29 Iowa 144 (1870).

statute, which is the same problem that confronted courts concerning witnesses in general under the common law rule. It is usually stated, just as it was at common law, that the interest must be "pecuniary, direct, immediate, and not uncertain, contingent, remote or merely a possible interest."[30] This means of course that a mere personal interest does not disqualify,[31] and the mere fact of the relationship is not a bar.[32] In most cases, however, the courts seem to be guided entirely by the nature of the estate which the spouse offered as a witness would acquire under applicable law if the other spouse is successful. There are decisions both ways concerning the wife's dower and the husband's curtesy as constituting an interest, turning exclusively on whether such interest was "direct and immediate" or "remote and contingent" under the statute governing married persons' estates,[33] with policy considerations playing little or no part. Finally, attention should be called to the fact that some statutes make an interested person incompetent only as to certain testimony, so that a spouse may still be competent, even though held to be interested, if the testimony offered is not within the prohibited class.[34]

It will be obvious from this brief survey that the rule as to competency of a spouse in an action against an estate varies widely from state to state and depends primarily on the particular statute. A few generalizations may, however, be possible. Despite Dean Wigmore's withering attack, despite the repudiation of interest in general as a disqualification,[35] and despite the wide criticism of the retention of the interest disqualification in the "dead man" case,[36] it seems apparent that most courts have shown no particular tendency to minimize the effects of the rule barring a party or interested person in a "dead man"

[30] Madson v. Madson, 69 Minn. 37, 71 N.W. 824 (1897).

[31] Dean v. Dean, 13 Ga. App. 798, 80 S.E. 25 (1913).

[32] Meyers v. Meyers, 141 Ala. 343, 37 S. 451 (1904).

[33] Where statute gives husband no rights in wife's lands and empowers her to devise them so as to prevent descent to him at her death, the husband has no such direct interest as will disqualify him. Henderson v. Brunson, 141 Ala. 674, 37 S. 549; Spindler v. Gibson, 75 App. Div. 444, 78 N.Y.S. 320 (1902). But if husband acquires a present interest in the property, he is incompetent. Lowe v. Lowe, 83 Minn. 206, 86 N.W. 11 (1901); Holladay v. Rich, 93 Neb. 491, 140 N.W. 794 (1913); Hollingsworth v. Barrett, 28 Ky. L. Rep. 280, 89 S.W. 107 (1905). Wife held an interested party because of her dower rights in any lands acquired by the husband: Wylie v. Charlton, 43 Neb. 840, 62 N.W. 220 (1895); Steele v. Ward, 30 Hun (N.Y.) 555 (1883); Linebarger v. Linebarger, 143 N.C. 229, 55 S.E. 709 (1906); Laird v. Laird, 115 Mich. 352, 73 N.W. 382 (1897) (wife's homestead rights also emphasized). Contra, Madson v. Madson, 69 Minn. 37, 71 N.W. 824 (1897).

[34] See L.R.A. 1917 (A) 25.

[35] See note 3, supra.

[36] See note 18, supra.

case by admitting his or her spouse wherever possible. Given the rather vague and contradictory state of the common law at the time the statutes abolishing the interest disqualification were adopted, it would not have been too difficult to work out a theory that such statutes also abolished the incompetency of the spouse.[37] As indicated, most courts did not do so. Nor can it be said that they have been especially astute to construe liberally the statutes expressly qualifying husband and wife, either in their general application or in their application to the dead man case. In fact, expressions are frequently found that such statutes are in derogation of the common law and must be construed strictly.[38] Further, there has been no great effort to find the spouse not "interested" within the dead man statute even in states where the common law rule is treated as abolished, though this might easily have been possible.[39] If the survival of the interest disqualification in this one case is as deplorable as most writers think it is, and if the common law rule barring the spouse is as lacking in sound foundation as Dean Wigmore, at least, thinks it is, the approach taken by most courts to all of these problems is surprising. It would seem to indicate that they consider either the Dead Man statutes themselves or the spouse's incompetency, or both, to be based on firm foundations of policy and logic, or else that though they actually disapprove of one or the other or both rules they have simply failed to realize and take advantage of the opportunities which have been presented to minimize their effects. In any event, it can be said that in many states the spouse of a party or person interested in an action involving a decedent's estate remains disqualified by the common law rule, and that in the

[37] One court experienced no difficulty in declaring that a conclusion that such statutes did not abolish the marital disqualification "would be too narrow a view of the statute and of the intention of the legislature in making it," and in stating further: "Its language is substantially like that of the statute making all interested persons competent as witnesses in the action of book-debt; and its object, although broader, is the same. . . . the wife, in that action, has always been admitted as a witness for the husband. . . . The law now in question should receive a similar construction." Merriam v. Hartford & New Haven R. R. Co., 20 Conn. 354 at 362 (1850).

[38] An extreme example of this attitude is found in Heinemann v. Hermann, 385 Ill. 191, 52 N.E. (2d) 263 (1943) where it was held that a statute expressly qualifying husband and wife "in all civil actions" did not apply to actions against estates.

[39] In Madson v. Madson, 69 Minn. 37, 71 N.W. 824 (1897), the Minnesota court held that a wife's dower did not disqualify her as a witness for her husband in a "dead man" case, such an interest being contingent and uncertain, not direct and certain, because it is only in the event she survives her husband that she acquires any direct and certain interest. In McCall v. Hall, 182 Ala. 191, 62 S. 68 (1913), the wife was held competent after being shown to have had no pecuniary interest in the transaction between her husband and the decedent concerning certain land, nothing being said about dower.

remainder of the states he or she will be qualified only so far as authorized by a fairly strict construction of the statute dealing with competency of witnesses in actions against estates, and no farther.

3. *Effect of divorce*

A survey of the reasons advanced for the spouse's incompetency at common law readily reveals that a divorce occurring before the spouse is offered as a witness logically should have the effect of removing all disqualification. The unity of husband and wife no longer exists even in legal fiction. In most cases the spouse will no longer have a property interest in the other spouse's estate. The bias of marital affection will very probably have disappeared. The policy argument vanishes the minute the divorce decree is rendered. Accordingly, it is well established that divorce does remove the disqualification, the courts usually emphasizing the dissolution of the marital unity.[40] In the light of these holdings, it is difficult to understand the recent Illinois decision referred to above,[41] which barred the divorced wife of a defendant from testifying as an eyewitness in a wrongful death action brought by the administratrix of a person killed in an automobile accident. The court contents itself with a flat statement that the wife's incompetency "continues after the marriage relation is dissolved, either by death or divorce," and a citation of Illinois cases so holding.[42] However, an examination of these cases reveals that with one exception[43] they involve the rule that confidential communications cannot be revealed either during the marriage or after its dissolution, which rule it was earlier pointed out is entirely distinct from the rule considered here. The rule as to confidential communications is expressly incorporated into the present and earlier versions of the Illinois statute, but it would seem to have no application to a case such as that before the court.

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[40] Merritt v. Cravens, 168 Ky. 155, 181 S.W. 970 (1916); Dickerman v. Graves, 6 Cush. (Mass.) 308 (1850); Wottrich v. Freeman, 71 N.Y. 601 (1877). See Anno, Ann. Cas. 1912 B, 1200. With a few qualifications the rule is the same as to death. Wigmore collects cases from 15 states at 2 WIGMORE, EVIDENCE, 3d ed., § 610 (1940).

[41] Hann v. Brooks, 331 Ill. App. 535, 73 N.E. (2d) 624 (1947).

[42] Heineman v. Hermann, 385 Ill. 191, 52 N.E. (2d) 263 (1944); Zimmer v. Zimmer, 298 Ill. 586, 132 N.E. 216 (1921); Monaghan v. Green, 265 Ill. 233, 106 N.E. 792 (1914); Greer v. Goudy, 174 Ill. 514, 51 N.E. 623 (1898).

[43] Heineman v. Hermann, ibid. This case did hold a divorced wife to be incompetent as to matters not coming within the confidential communication rule, but it in turn simply recites the "rule" as to effect of divorce categorically, and cites only cases involving the confidential communication rule.