

# Wills - Direction to Executor to Appoint Attorney Held Beneficial Interest

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The violation of the 14th Amendment is also frequently cited as ground for reversal. The decision in *Norris v. Alabama*<sup>24</sup> is invariably alluded to for authority. The court held there that the trial was unfair because of the intentional and systematic exclusion of Negroes. Two main features distinguish that decision from the facts in the *Winfield* case. The first is that the defendant was a Negro, a member of the class discriminated against, and second, the discrimination resulted in the denial to defendant of a fair trial. In the *Winfield* case the defendant was not a woman and it was not shown that he was denied a fair trial. No mention is made of the "cross-section of the community" concept in *Norris v. Alabama*. The court did not indicate either by holding or dictum that a jury must be a representative group from the community. But the cross-section requirement has subsequently found its way into the federal courts<sup>25</sup> and it should prove interesting to observe what progress, if any, it makes in the state courts.

The courts have refused as of now to find a constitutional violation without a showing that: (1) qualified members of defendant's class were excluded;<sup>26</sup> (2) the exclusion was intentional, arbitrary, and systematic;<sup>27</sup> (3) the exclusion was made in order to deny defendant a fair trial;<sup>28</sup> or, (4) defendant, in fact, did not have a fair trial.<sup>29</sup> It is not enough to show that no members of the class were on the jury, nor is it enough to show that they were intentionally excluded; but rather, it is essential to show that the action of the jury commissioners resulted in depriving the defendant of a fair trial.

<sup>24</sup> 294 U.S. 587 (1935).

<sup>25</sup> Authorities cited note 11 supra.

<sup>26</sup> *Alexander v. State*, 160 Tex. Cr. 460, 274 S.W. 2d 81 (1954).

<sup>27</sup> *Ibid*; *People v. Fognini*, 374 Ill. 161, 28 N.E. 2d 95 (1940); *People v. Peters*, 382 Ill. 549, 48 N.E. 2d 352 (1943).

<sup>28</sup> *State v. Taylor*, 356 Mo. 1216, 205 S.W. 2d 734 (1947).

<sup>29</sup> Cases cited notes 26-28 supra.

#### WILLS—DIRECTION TO EXECUTOR TO APPOINT ATTORNEY HELD BENEFICIAL INTEREST

Luella George, deceased, appointed one Haines to be the executor of her will. The instrument, which was witnessed by Homer D. McLaren, an attorney, and two other persons, contained the following provision: "It is my will that Homer D. McLaren, an attorney, be the attorney for said executor." The executor did appoint McLaren attorney. The will was admitted to probate upon a hearing at which McLaren and one of the other attesting witnesses testified. Plaintiff, the executor, asked to be credited in the amount of \$1,500 for fees he paid to McLaren as attorney. The beneficiaries under the will objected, contending that under the Probate

Act, Section 44,<sup>1</sup> McLaren was not entitled to a fee. This contention was sustained by the County court, but on appeal to the Circuit court, the report of the executor was approved, allowing the credit. The beneficiaries appealed to the Appellate court and the decision of the County court, in their favor, was reinstated. The court held that the above clause gave the attorney a beneficial interest under the will, and because the attorney testified as to the execution of the will, his fee was not allowed. *In re Estate of George*, 11 Ill. App. 2d 359, 137 N. E. 2d 555 (1956).

The substance of the section of the Probate Act in question was derived from Section 8 of the Statute of Wills.<sup>2</sup> An interpretation of the meaning and effect of this section was rendered in *Jones v. Grieser*,<sup>3</sup> wherein the executors named in the will were the attesting witnesses. The question arose as to whether or not they were competent witnesses to the will, so as to admit the will to probate. The Supreme court said that because they took an interest under the will they were not competent to establish the will, unless they were rendered so by Section 8 of the Wills Act. The court rendered them competent witnesses by barring them from acting as executors of the will.

In the case of *Scott v. O'Connor-Couch*,<sup>4</sup> the Supreme court extended the rule laid down in the *Jones* case by holding that a witness to a will who was a shareholder of the corporate executor of the will took an interest under the will. The court held the witness to be competent but declared the provision giving an interest to the corporate executor null and void. In construing the word "interest" as applied to a witness to a will the court cited *O'Brien v. Bonfield*<sup>5</sup> wherein it was stated:

The true test of the interest of a witness is that the witness will either gain or lose financially as the direct result of the proceeding.<sup>6</sup>

The court also cited *Smith v. Goodell* wherein it was said that "[t]he interest must be a present, certain, legal interest of a pecuniary nature."<sup>7</sup>

<sup>1</sup> Ill. Rev. Stat. (1955) c. 3, § 195. "If any beneficial devise, legacy, or interest is given in a will to a person attesting its execution or to his spouse, the devise, legacy, or interest is void as to that beneficiary and all persons claiming under him, unless the will is otherwise duly attested by a sufficient number of witnesses as provided by this Article exclusive of that person; and he may be compelled to testify as if the devise, legacy, or interest had not been given. But the beneficiary is entitled to receive so much of the devise, legacy, or interest given to him by the will as does not exceed the value of the share of the testator's estate to which he would be entitled were the will not established."

<sup>2</sup> Ill. Rev. Stat. (1933) c. 148, § 8. (Enacted in 1911).

<sup>3</sup> 238 Ill. 183, 87 N.E. 295 (1909).

<sup>4</sup> 271 Ill. 395, 111 N.E. 272 (1916).

<sup>5</sup> 213 Ill. 428, 72 N.E. 1090 (1905).

<sup>6</sup> *Ibid.*, at 434 and 1091. This language originally appeared in *Boyd v. McConnell*, 209 Ill. 396, 400, 70 N.E. 649, 650 (1904).

<sup>7</sup> 258 Ill. 145, 148, 101 N.E. 255, 256 (1913). Accord: *Ackman v. Potter*, 239 Ill. 578, 88 N.E. 231 (1909); *Jones v. Abbott*, 235 Ill. 220, 85 N.E. 279 (1908).

In the above cases, either an executor,<sup>8</sup> a shareholder of a corporate executor,<sup>9</sup> or a devisee or legatee given an interest under the will acted as a witness to the will, and testified at its admission to probate. In the instant case, the person whom the will designated as attorney for the executor was a witness and testified at the hearing to admit the will to probate.

The question of the competency of such a witness was raised in *In re Estate of Cohen*.<sup>10</sup> In that case the facts were identical to those of the instant case. The court observed:

Under the Statute as it was originally enacted, it may be that he [the attorney] would have been incompetent in as much as he would have gained or lost financially as a direct result of the establishing of the instrument as a will.<sup>11</sup>

The same result was reached in an identical factual situation in *In re Estate of Garner*,<sup>12</sup> wherein an Appellate court found it sufficient to rest its decision upon the sole authority of the *Cohen* decision. Neither the court in *Garner* nor the court in *Cohen* was able to muster authority to bolster the proposition that an attorney who acts as a witness has "a present, certain, direct interest," which was the criterion established by the Illinois Supreme Court in *Smith v. Goodell*<sup>13</sup> for determining whether a person takes a beneficial interest under a will. The court in the instant case said:

The word "interest" as employed in the above Section has been construed to include a contingent and uncertain interest which might accrue by virtue of compliance with a direction in the will. *Jones v. Grieser*, supra. We think the will in this case leaves no doubt as to the fact that an interest thereunder would accrue to McLaren if the testator's wishes were followed.<sup>14</sup>

The language in the *Jones* case upon which the court relied is as follows:

The word interest may be fairly held to cover such a contingent and uncertain interest as that which would accrue to an *executor* by virtue of his appointment.<sup>15</sup>

The court in *Conlan v. Sullivan*<sup>16</sup> ruled on a similar provision in a will wherein a direction was placed in the will as to the employment of a named attorney as attorney for the executors or trustees. The provision in that case requested the employment of the attorney. The court denied

<sup>8</sup> *Jones v. Grieser*, 238 Ill. 183, 87 N.E. 295 (1909).

<sup>9</sup> *Scott v. O'Connor-Couch*, 271 Ill. 395, 111 N.E. 272 (1916).

<sup>10</sup> 279 Ill. App. 605 (1935).

<sup>11</sup> *Ibid.*, at 606.

<sup>12</sup> 8 Ill. App. 2d 41, 130 N.E. 2d 219 (1955).

<sup>13</sup> 258 Ill. 145, 101 N.E. 255 (1913).

<sup>14</sup> *In re Estate of George*, 11 Ill. App. 2d 359, 364, 137 N.E. 2d 555, 558 (1956).

<sup>15</sup> *Jones v. Grieser*, 238 Ill. 183, 189, 87 N.E. 295, 296, 297 (1909) (italics added).

<sup>16</sup> 280 Ill. App. 332 (1935).

relief to the attorney who sought to compel the executor to utilize his services. It was stated:

The law appears to be that a trustee or executor is not bound to employ an attorney even though the will uses such words as "direct," "command," or "appoint."<sup>17</sup>

In addition, the court stated that the clause requesting the appointment did not create a trust in favor of the attorney providing for some payment in the event of non-employment, but that it was merely an *advisory* provision which could be disregarded.

In view of the *Conlan* decision, it appears that if it can be said that such an attorney takes an interest under the will, the interest is an extremely remote and contingent one, subject completely to the will of the executor. Certainly the interest is unenforceable by its recipient.

The court in *In re Estate of George*,<sup>18</sup> the instant case, by referring to and basing their opinion upon the language in the *Jones* case, has widened the scope of the word "interest" and extended it beyond the previous definition that it be "a financial gain or loss as the *direct result* of the proceeding."<sup>19</sup>

As is demonstrated by the decision in *Conlan*,<sup>20</sup> the appointment of the attorney is not the result of the admission of the will to probate but is the result of a decision on the part of the executor to make the appointment.

In a relatively recent decision, the Supreme Court of Illinois set forth the purpose of Section 44 of the Probate Act as being ". . . designed to prevent attesting witnesses from taking *gifts* under a will, for the establishment of which their attestation is necessary."<sup>21</sup> It could hardly be contended that the attorney received a gift under the will in the instant case since he rendered legal services for his fee. And of course, if the clause requesting the employment of the attorney was not in the will, there would be no question but that he could recover his fee since he could not be said to take directly under the will.

It is submitted that the court in the instant case did not give sufficient weight to the following factors: (1) the "interest" given the attorney under the will was at best remote in that it was not dependent upon the will. McLaren could have been selected as easily without the will; (2) the "interest" was not a gift in that McLaren performed services; (3) the "interest" was unenforceable by its recipient.

<sup>17</sup> *Ibid.*, at 342.

<sup>18</sup> 11 Ill. App. 2d 359, 137 N.E. 2d 555 (1956).

<sup>19</sup> Authorities cited note 6 *supra* (italics added).

<sup>20</sup> 280 Ill. App. 332 (1935).

<sup>21</sup> *In re Estate of Reeve*, 393 Ill. 272, 293, 65 N.E. 2d 815, 824 (1946) (italics added).

By way of a caveat, Illinois attorneys should pay heed to this extension of the word "interest." If it is the wish of the client that the attorney drafting the instrument be named executor, or the executor's attorney, and such a direction is included in the instrument, it should be witnessed by others not so named. Where there are two competent witnesses in addition to the attorney, and such a direction is made, the attorney should not testify as a witness.

### WORKMEN'S COMPENSATION—INJURY NOT SPECIFICALLY PROVIDED FOR COMPENSABLE UNDER OTHER PROVISIONS OF ILLINOIS ACTS

Plaintiff was injured while in the course of his employment for defendant when a safety device on the "man-lift" elevator he was riding failed to operate. The resulting injuries included a ruptured urethra<sup>1</sup> which rendered him impotent. The defendant provided a compensation for medical expenses and for the time of disability in accordance with provisions of the Workmen's Compensation Act. Subsequently, plaintiff initiated an action in common law negligence on the ground that his particular damage did not fit a category of specific injuries and thus was not covered by the Act. The Circuit Court of Peoria County dismissed the action on the basis that it was barred by section 5(a) of the Act.<sup>2</sup> On direct appeal to the Supreme Court of Illinois the judgment to dismiss was affirmed on the grounds that the injury was compensable under a provision providing compensation for the loss of testicles. *Moushon v. National Garages, Inc.*, 9 Ill. 2d. 407, 137 N.E. 2d 842 (1956).

The underlying theory of Workmen's Compensation legislation "is to make the risk of the accident one of the industry itself . . . and hence that compensation on account thereof should be treated as an element in the cost of production added to the cost of the article and borne by the community in general."<sup>3</sup> The mechanics of this theory may be likened to a contract where, in return for an extension of the employer's liability to the coverage of injuries not compensable at common law, the employee

<sup>1</sup> "Urethra, a membranous canal which carries off the urine from the bladder, and in the male it also conveys the seminal fluid. The male urethra extends from the neck of the bladder to the urinary meatus (the opening in the end of the penis)." Maloy, *Simplified Medical Dictionary for Lawyers*, 438.

<sup>2</sup> Ill. Rev. Stat., (1955) c. 48, § 138.5(a). "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided shall be available to any employee who is covered by the provisions of this act. . . ."

<sup>3</sup> 1 Schneider *Workmen's Compensation Law* 2 (2d ed., 1932).