Chicago-Kent Law Review

Volume 44 | Issue 1 Article 9

April 1967

Wittness - Parties of Record - Competency of a Legatee, Devisee, Heir or Distributee to Testify in His Own Behalf

Michael H. Moss

WITNESSES—PARTIES OF RECORD—COMPETENCY OF A LEGATEE, DEVISEE, HEIR OR DISTRIBUTEE TO TESTIFY IN HIS OWN BEHALF.—In *In re Estate of Diak*, 70 Ill. App. 2d 1, 217 N.E.2d 106 (1st Dist. 1966), the court was confronted with the problem of whether a witness, who admittedly was an heir, was competent to testify in a proceeding to establish heirship in which he challenged the claim of other parties attempting to establish their heirship from the same decedent. In reversing the circuit court order, the court held that the witness was not competent to testify because, as a party directly involved in the dispute, he came under Section 2 of the Evidence Act,[1] more commonly known as the Dead Man's Act, which prohibits an interested party from testifying in his own behalf when an adverse party sues as an heir. On rehearing, the court affirmed its opinion.

Joseph Diak, the testator, died on February 12, 1963. On May 5, 1965, the appellants, children of decedent's alleged half-brother, George Diak, who had died in 1935, filed their petition for leave to appear and alleged that they were heirs of the decedent. On May 11, 1965, the executor filed a petition for admission of the will to probate. In the petition, the executor alleged that the decedent's sole legatee, his sister, Mary Diak Hammler, had died, and that the decedent's heirs were the appellees (children of the decedent's sister, Mary Diak Hammler, who had died before the decedent) and the appellants. On the same day that the petition for admission of the will was filed, the appellees filed a petition alleging that they were the sole heirs of Joseph Diak and that appellant's father, George Diak, was not a half-brother of Joseph Diak. The status of the appellees as heirs of Joseph Diak was conceded by the appellants.

At the proceeding to establish heirship, one of the appellees, Gustav Hammler, testified in behalf of himself and the other appellees that the appellants' father was not the decedent's brother.[2] The court overruled the

[1] Section 2 provides in part that:
No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any habitual drunkard, or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee unless when called as a witness by such adverse party so suing or defending. Ill. Rev. Stat. ch. 51, § 2 (1965).

[2] According to the testimony in the court record, Gustav Hammler testified that he never heard his mother refer to George Diak as a brother, that if she did he did not remember it, and that appellants were not heirs of the decedent. He said he saw decedent once in New York in 1918, again three or four years later, in Long Island City in 1927, and never again. He said he and the other appellees had no letters or other papers from decedent or about him and found none in their mother's papers except a photograph of decedent taken in 1917. The appellants' chief witnesses testified that they knew the decedent Joseph Diak continuously from 1910 to the date of his death in 1963, during which time the decedent referred to himself repeatedly as George Diak's brother and George Diak referred to the decedent frequently as his brother, in the decedent's presence. Further, the decedent and George Diak were always treated as brothers, and the decedent referred to the appellants as his niece and nephews.

appellants' objection that Gustav Hammler was disqualified as a witness by the Dead Man's Act and found that the appellees were the sole heirs of Joseph Diak. On appeal, the appellate court reversed the order of the circuit court and remanded the cause with directions that Gustav Hammler, as a party adverse to the one suing as an heir, was disqualified from testifying by the Dead Man's Act.

Section 1 of the Illinois Evidence Act[3] abolishes all common law rules of incompetency of witnesses testifying in litigation in which they have an interest. Section 2 of the Act, however, renders a witness incompetent who is a party or interested person seeking to testify on his own motion when an adverse party is suing or defending in one of the enumerated capacities within the protection of the statute.[4] Its purpose is to remove the temptation of the survivor to a transaction to testify falsely and to equalize the positions of the parties in regard to the giving of testimony.[5]

The issues presented to the Appellate Court in *Diak* were:

(1) In an heirship proceeding, can an admitted heir testify to contradict another person's claim of heirship:

(2) In an heirship proceeding, is an heir deemed to be testifying on his own motion or is he a court's witness; and

(3) Is an heirship proceeding a civil action, suit, or proceeding within section 2 of the Evidence Act?

The Appellate Court could not find any cases directly in point with *Diak* but relied on *Mires v. Laubenheimer*,[6] *Weiss v. Beck*,[7] and other cases involving the construction of Section 2 of the Evidence Act. The *Mires* case involved a partition suit brought by the son of a decedent against his sister. She challenged her brother's status as an heir, relying upon his contract with the decedent in which he allegedly waived his rights as an heir. The Illinois Supreme Court applied Section 2 of the Evidence Act and held that neither heir was a competent witness in the case.[8] The decedent's son was not competent to testify because an adverse party, his sister, was defending as an heir and he had a pecuniary interest in the controversy (when his defendant-sister alleged a release of his heirship, he denied such a release). The defendant had a pecuniary interest when she sought to claim the whole of her father's estate, and her brother was suing in the capacity of an heir; therefore, she, too, was not a competent witness.

In the *Weiss* case, the plaintiff sought specific performance of an alleged parol contract of adoption with the defendant's deceased mother. The de-

3 Ill. Rev. Stat. ch. 51, § 1 (1965).
4 *Supra* note 1.
5 Cleary, Handbook of Illinois Evidence 113 (2d ed. 1963).
6 271 Ill. 296, 111 N.E. 106 (1915).
7 1 Ill. 2d 420, 115 N.E.2d 768 (1953).
8 *Supra* note 6, at 299, 111 N.E. at 107.

fendants, who were seeking to protect an interest in their mother's estate, were allowed to testify. The court said, "It is not the heir who is disqualified from testifying under the Evidence Act, but it is the party adverse to the one suing as an heir that is disqualified."[9] The court indicated, however, that had plaintiff sued as an heir, the defendants would have been incompetent to testify.[10]

Neither the *Mires* nor the *Weiss* case involved a proceeding to establish heirship as in *Diak*. Both cases, however, involved the construction of Section 2 of the Evidence Act. Competing heirs each sought to be a witness against the contention of the opposing party that the witness was incompetent to testify under the Dead Man's Act because the witness had an interest in the outcome and was testifying on his own motion, and an adverse party was suing or defending as an heir.

In the *Diak* case, the court, relying on an earlier case, noted that ". . . the purpose of Section 2 of the Evidence Act is to protect estates of deceased persons against fraudulent claims."[11] Justice Burke said, "To allow an heir to testify in direct contradiction to another person's claim of heirship is to afford him the opportunity of acquiring a greater portion of the estate than that to which he may otherwise be entitled."[12] Thus, where death has removed the best informed witness, the statute requires the parties to present testimony of disinterested persons. If no contest arises as to who is or is not an heir, only then is a contending heir competent to testify in a proceeding to establish heirship.

Section 2 of the Evidence Act is not applicable to a case in which a witness becomes the court's witness, as in citation proceedings where all witnesses are the court's witnesses because the entire proceeding is one by the court.[13] However, in *Diak*, the court said that relative to hearing testimony by and determining the competency of witnesses, a court in proceedings to establish heirship is not entitled to as much latitude as a court in citation proceedings.[14] Consequently, the court, in *Diak*, said, in effect, that in the heirship proceeding, the Dead Man's Act could not have been circumvented by considering or calling Gustav Hammler as a court's witness.

The appellees, relying on *Sebree v. Sebree*,[15] maintained that a proceeding to establish heirship was not a lawsuit between the representative of a decedent and claimants or heirs; it is neither a proceeding at law nor in chancery, but a purely statutory proceeding wherein the legislature has provided a summary method of determining heirship. They contended,

9 *Supra* note 7, at 430, 115 N.E.2d at 774.
10 *Supra* note 7, at 430, 115 N.E.2d at 773.
11 Fredrich v. Wolf, 383 Ill. 638, 642, 50 N.E.2d 755, 757 (1943).
12 *In re* Estate of Diak, 70 Ill. App. 2d 1, 4, 217 N.E.2d 106, 109 (1966).
13 Storr v. Storr, 329 Ill. App. 537, 69 N.E.2d 916 (1946).
14 *Supra* note 12, at 7, 217 N.E.2d at 110.
15 293 Ill. 228, 127 N.E. 392 (1920).

therefore, that this proceeding was not a ". . . civil action, suit or proceeding"[16] within Section 2 of the Evidence Act.

In *Sebree*, however, no question apparently arose as to whether a proceeding to establish heirship fell within the language of Section 2 of the Evidence Act. The court there held that a proceeding to establish heirship was not a suit or proceeding at law or in chancery within the terms of Section 8 of the Appellate Court Act,[17] and was therefore appealable to the Circuit Court.

Sebree was expressly distinguished and overruled by the Illinois Supreme Court in *Welch v. Worsley*,[18] which held that a proceeding to establish heirship is "distinctly a chancery proceeding"[19] in which the Probate Court exercises chancery powers and the procedure is as in chancery.[20] Noting this case, the Appellate Court, in *Diak*, concluded that ". . . a proceeding to establish heirship is a civil proceeding within the broad language of Section 2 of the Evidence Act."[21]

Thus, the Illinois Appellate Court, by its holding in the *Diak* case, established that a proceeding to establish heirship is an adversary proceeding among contending heirs, Section 2 of the Evidence Act is applicable to such a proceeding, and court witnesses cannot be used to circumvent Section 2 of the Evidence Act in an heirship proceeding.

The Dead Man's Statute is the last vestige of the common law rule of witness incompetency because of interest. Despite the fact that it has been severely criticized by courts and writers,[22] it is still an important rule to protect estates against the assaults of strangers. Disqualification is placed squarely on the basis of interest in the result. The interest must be immediate, certain, and legal.[23] Mr. Justice Carter aptly stated the test of the statute as:

> Under Section 2 of Chapter 51, the test of interest that disqualifies when an heir is a party to the suit is whether the witness would immediately gain or lose by the event of the suit, or whether the verdict could be given in evidence, either for or against him, in another suit.[24]

In *Diak*, upon a favorable decision by the Probate Court on the appellee's petition that they were the sole heirs of the decedent, the appellants would

16 Ill. Rev. Stat. ch. 51, § 2 (1965).
17 Ill. Rev. Stat. ch. 37, § 32 (1923).
18 330 Ill. 172, 161 N.E. 493 (1928).
19 *Id.* at 178, 161 N.E. at 495.
20 *Id.* at 180, 161 N.E. at 496.
21 *Supra* note 16.
22 McCormick, Evidence § 65, at 142 (1954); 2 Wigmore, Evidence § 578, at 695 (3d ed. 1940).
23 1 Gard, Illinois Evidence Manual 501 (1963).
24 Jones v. Abbott, 235 Ill. 220, 222, 85 N.E. 279, 280 (1908). See also 97 C.J.S., *Witnesses* § 170(a) (1952).

have lost a material share in the decedent's estate to the appellees. Consequently, they had a substantial and legal interest in the outcome.

Finally, it would be difficult to find a case in which abandoning the rule of the Dead Man's Statute might be more harmful than in the *Diak* case. Gustav Hammler testified that in his entire life he saw the decedent twice and that neither the decedent nor his mother ever mentioned George Diak.[25] From this he concluded that the appellants were not the heirs of the decedent. This is the very kind of biased and unsupported oral conclusion which the legislature intended to prevent by enacting the Dead Man's Act. In contrast, the appellants presented evidence from disinterested witnesses who had intimately known the decedent for more than fifty years. The temptation of survivors to fabricate claims or actions against the decedent's estate must, of necessity, outweigh the additional burden to present disinterested testimony in heirship proceedings.

MICHAEL H. MOSS

[25] See note 2, *supra*.