

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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September 13, 2010

Opinion No. 10-97

Notarization of Spouse's Signature

QUESTIONS

1. Can a notary public notarize his or her spouse's signature?
2. Can a notary public who is an attorney in a civil matter notarize documents bearing his or her spouse's signature from which the attorney/notary public could potentially receive a monetary benefit?

OPINIONS

1. No. It is the opinion of this Office that a notary public is prohibited from notarizing his or her spouse's signature because of the requirement that notaries discharge the duties of office "without favor or partiality." Tenn. Code Ann. § 8-16-105. The spousal relationship prevents the notary public from being impartial in the matter. The notarization of a spouse's signature would not, however, be void per se, but it would be voidable upon evidence of undue advantage, fraud, or oppression arising out of the fact of such relationship.

2. No. It is the opinion of this Office that it is improper for a notary public to notarize a document in a matter in which he or she has a financial interest.

ANALYSIS

Notaries public are governed by Tenn. Code Ann. §§ 8-16-101 *et seq.* Notaries public must also meet the requirements for public office outlined in Tenn. Code Ann. §§ 8-18-101 *et seq.* To hold the office of notary public, a person must be a United States citizen or a legal permanent resident. Tenn. Code Ann. § 8-16-101(a). Notaries public are elected by their county legislative body and commissioned by the governor. Tenn. Code Ann. §§ 8-16-101(a), 8-16-102. At the time of election, notaries public must be residents of or have their principal place of business in the county from which they are elected. Tenn. Code Ann. § 8-16-101(a). Notaries public are required to take and subscribe "an oath to support the constitutions of this state and of the United States, and an oath that the notary will, without favor or partiality, honestly, faithfully, and diligently discharge the duties of notary public." Tenn. Code Ann. § 8-1-105. Notaries public have "the power to acknowledge signatures upon personal knowledge or satisfactory

proof, to administer oaths, to take depositions, to qualify parties to bills in chancery, and to take affidavits in all cases.” Tenn. Code Ann. § 8-16-112.

“The general rule is that a notary cannot certify to or act in a matter in which the notary has a personal interest” 66 C.J.S. *Notaries* § 21 (2010). “One who is a party to an instrument, no matter how small or nominal his interest therein, cannot act as notary public with reference thereto.” 58 Am. Jur. 2d *Notaries Public* § 11 (2010). “A notary should not acknowledge his or her own signature nor notarize any signature if he or she is a party to the transaction or an agent of a party taking an acknowledgment.” *Tennessee Notary Public Handbook*, at 6 (County Technical Assistance Service, Mar. 2006), available at http://tennessee.gov/sos/bus_svc/notary.htm.

The Tennessee Supreme Court has recognized that

it is unwise and contrary to public policy for any officer to take an acknowledgment to any instrument to which he is a party, or in which he is interested directly or indirectly. In either event the officer should be disinterested and entirely impartial, as between the parties.

Cooper v. Hamilton Perpetual Bldg. & Loan Ass’n, 97 Tenn. 285, 288, 37 S.W. 12, 13 (1896). The Supreme Court went on to describe the rule governing acknowledgments by notaries public who have a relationship with the signatory or an interest in the matter as follows:

[W]hile acknowledgments taken before officers who are related to either party or interested in the instruments are contrary to public policy, and by no means to be encouraged, and while the practice which has become so prevalent should be discountenanced and discontinued, still such acknowledgments are not absolutely invalid and void because of such interest or relationship, without more. Where there is no imputation or charge of improper conduct or bad faith or undue advantage arising out of such interest or relationship, the mere fact that the acknowledgment was taken before such officer would not vitiate the instrument, or render it void, when it was otherwise free from objection or criticism.

...

[A]cknowledgment before parties related or interested are voidable, but not ipso facto void; and, while such acknowledgments will not per se be declared void, still they are open to attack, and the court will lend a ready ear to evidence of undue advantage, fraud, or oppression arising out of the fact of such relationship or interest in the officer taking the acknowledgment.

Id., 97 Tenn. at 289, 37 S.W. at 13; *see also State ex rel. Marquis v. U. S. Fidelity & Guar. Co.*, 57 Tenn. App. 662, 671, 424 S.W.2d 199, 203-04 (1966).

1. According to some commentators, it is not unusual for notaries public to notarize the signatures of their spouses and other family members. *See, e.g.,* Michael L. Closten & Trevor J. Orsinger, *Family Ties That Bind, and Disqualify: Toward Elimination of Family-Based Conflicts of Interest in the Provision of Notarial Services*, 36 Val. U. L. Rev. 505, 510 (2002) (“Notarizations performed by notaries for their family members undoubtedly occur thousands of times a day all over the United States. Notaries regularly notarize for their spouses, domestic partners, parents, children, and other family.”). The Tennessee statute governing notaries public does not contain a specific prohibition on this practice. The statute does, however, require a notary public to discharge his or her duties “without favor or partiality.” Tenn. Code Ann. § 8-16-105. A notary public “should be disinterested and entirely impartial, as between the parties.” *Cooper*, 97 Tenn. at 288, 37 S.W. at 13. A notary public cannot be disinterested and entirely impartial in a matter involving his or her spouse. Therefore, it is the opinion of this Office that a notary public should not notarize the signature of his or her spouse. As indicated in the sources cited above, however, the notarization of a spouse’s signature is not per se void, but it would be subject to attack in court and voidable upon evidence of undue advantage, fraud, or oppression arising out of the fact of the notary public’s relationship to the signatory.

2. The second question is whether a notary public who is an attorney in a civil matter can notarize documents bearing his or her spouse’s signature from which the attorney/notary public could potentially receive a monetary benefit. In this situation, the notary public has an even clearer interest in the matter. In light of *Cooper* and the other sources cited above, it is the opinion of this Office that it is improper for a notary public to notarize a document in a matter in which he or she has a financial interest. Again, the notarization in such a matter would not be per se void, but it would be subject to attack in court and voidable upon evidence of undue advantage, fraud, or oppression arising out of the fact of the notary public’s financial interest in the matter.

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