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Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change

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AN OUTDATED FORM OF EVIDENTIARY LAW: A SURVEY OF DEAD MAN'S STATUTES AND A PROPOSAL FOR CHANGE

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I. INTRODUCTION

A surviving form of common law, a Dead Man's statute[2] is "a law prohibiting the admission of a decedent's[3] statement as evidence in certain circumstances, as when an opposing party or witness seeks to use the statement to support a claim against the decedent's estate."[4] Over the past 150 years, these statutes have "excluded the testimony of the parties to [a] lawsuit and of all persons having a direct pecuniary or

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[2]Authorities and commentators are inconsistent as to whether the proper term is "Dead Man statute," "Dead Man's statute," or "Deadman's statute." For purposes of this article, the author will use "Dead Man's statute."

[3]For purposes of this paper, the author will use the word "decedent" to refer to the individual a Dead Man's statute is designed to protect. Although in various Dead Man's statutes, other types of individuals, including insane persons and the like, are protected, using "decedent" alone will assist with the flow of the article.

[4]BLACK'S LAW DICTIONARY 404 (7th ed. 1999).

proprietary interest in the outcome [of a lawsuit]."[5] While they may very well be applicable in other circumstances, including family law matters,[6] the majority of Dead Man's statute case law centers around an interested witness being refused the right to testify in a probate proceeding.

Dead Man's statutes have received constant criticism since their first appearance almost 150 years ago;[7] however, these statutes still remain valid law in many states. Dead Man's statutes are confusing to lawyers, judges, scholars and the average citizen, as "[t]he mere mention of the [Dead Man's] statute is enough to make most practitioners shudder."[8] More importantly, these statutes are unfairly prejudicial to those truly honest people who have valid claims but are nevertheless prevented from testifying in court. Therefore, in order to move toward an evidentiary system that is fairer to the majority of people and to be in line with the majority of states that have rejected the Dead Man's statute altogether,[9] this paper will propose a modification or a replacement for those states that still have a Dead Man's statute.

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[5]J. MCCORMICK, LAW OF EVIDENCE § 65, at 250 (4th ed. 1992) [hereinafter MCCORMICK].

[6]*See generally* Steve Planchon, Comment, *The Application of the Dead Man's Statute in Family Law*, 16 J. AM. ACAD. MATRIMONIAL LAW 561 (2000).

[7]For a more complete discussion of the criticisms behind Dead Man's statutes, see *infra P*art IV.

[8]Michael D. Simon & William T. Hennessey, *Estates, Trusts, and Guardianships: 1998 Survey of Florida Law*, 23 NOVA. L. REV. 119, 145 (1998).

[9]Thirty-two states have expressly rejected the Dead Man's Statute. *See* CAL. EVID. CODE § 1261 (West 2004) (permitting testimony from an interested witness); 735 ILL. COMP. STAT. 5/8-101 (West 2004) (permitting testimony from an interested witness); GA. CODE ANN. § 24-9-1 (2004) (permitting testimony from an interested witness); N.C. GEN. STAT. § 8-49 (2004) (permitting testimony from an interested witness); S.D. CODIFIED LAWS § 19-16-34 (Michie 2004) (permitting testimony from an interested witness); VA. CODE ANN. § 8.01-397 (Michie 2003) (permitting testimony from an interested witness); WYO. STAT. ANN. § 1-12-102 (Michie 2003) (permitting testimony from an interested witness); OR. REV. STAT. § 40.310 (2001) (permitting testimony from an interested witness); IOWA CODE § 622.3 (1997) ("No person offered as a witness in any action or proceeding in any court . . . shall be excluded by reason of the person's interests in the event of the action or proceeding, or because the person is a party thereto, except as provided in this chapter."); MASS. GEN. LAWS ch. 233, § 65 (1997) (permitting testimony from an interested witness); MO. REV. STAT. § 491.010 (1997) (permitting testimony from an interested witness); NEV. REV. STAT. § 48.075 (1997) ("Evidence is not inadmissible solely because it is evidence of transactions or conversations with or the actions of a deceased person."); OKLA. STAT. tit. 12, 2601 (1997) (noting that "[e]very person is competent to be a witness except as otherwise provided in this Code); CONN. GEN. STAT. § 52-172 (1996) (permitting testimony from an interested witness); R.I. GEN. LAWS 9-17-12 (1996) ("No person shall be disqualified from testifying in any civil action or proceeding by reason of his or her being interested therein or being a party thereto."); N.H. REV. STAT. ANN. § 516:25 (repealed 1994); KY. REV. STAT. ANN. § 421.210 (repealed 1992); MISS. CODE ANN. § 13-1-7 (repealed 1991); ME. REV. STAT. ANN. tit. 16, § 1 (repealed 1977); NEB. REV. STAT. § 25-1202 (repealed 1975); DEL. R. EVID. 601 (superseding the Delaware's Deadman's Statute and permitting testimony from an interested witness); MINN. R. EVID. 616 (superceding Deadman's Statute and permitting testimony from an interested witness); MONT. R. EVID. 601 (abolishing the state's Deadman's Statute and permitting testimony from an interested witness); N.D. R. EVID. 601 (superceding North Dakota's Deadman's Statute and permitting testimony from an interested witness); TEX. R. EVID. 601

In order to understand why Dead Man's statutes should be amended by state legislatures, it is important to look at the historical context of Dead Man's statutes and how they have been handled, interpreted and applied in different states. Consequently, Part II of this paper presents an historical outline of Dead Man's statutes; Part III surveys nine states that currently have a common law Dead Man's statute; Part IV analyzes the weaknesses behind the Dead Man's statute; Part V presents three separate alternatives that states should consider adopting in lieu of their current Dead Man's statutes. Finally, part VI concludes this paper.

II. A HISTORY OF DEAD MAN'S STATUTES

The modern day Dead Man's statute is the descendant of ancient English law. During the fifteenth century, juries in England consisted only of those persons who were familiar with the context of the case; therefore, the parties and witnesses to a lawsuit were also interested.[10] Disinterested witnesses were actually discouraged from participating in the proceedings.[11] This practice, however, was amended over time, and in the seventeenth century, English law gave a defendant two choices for his or her trial: a trial by jury or a wager of law.[12] Under a wager of law, a defendant was tried solely on his or her own testimony and the testimony of those who would testify on his or her behalf.[13] Under a trial by jury, however, the defendant did not testify on his or her own behalf; instead, the jury decided guilt or innocence based on the weight of the evidence.[14] "Before a jury, the parties do not swear. They plead orally, or argue, or allege things 'in evidence' – either by themselves or by their counsel; but they do not take an oath."[15] The trial by jury soon became the normal choice for defendants, and therefore, the choice of wager of law was removed as an option.[16] In a trial by jury, however, interested witnesses were prohibited from testifying. English courts determined that juries were unable to properly weigh the

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(abrogating the Dead Man's Statute); UTAH R. EVID. 601 (permitting testimony of an interested witness); Johnson v. Porter, 471 N.E.2d 484, 487 (Ohio 1984) (holding that Evidence Rule 601 abrogated the Deadman's Statute); Cavanah v. Martin, 590 P.2d 41, 42 (Alaska 1979) ("Alaska has completely eliminated the common law disqualification of witnesses based on interest, including when their interest involves a claim against an estate."); Davis v. Hare, 561 S.W.2d 321, 322 (Ark. 1978) (noting that the Arkansas Deadman's Statute "was in fact expressly repealed by the [state's adoption of the] Uniform Rules of Evidence"); Hew v. Aruda, 462 P.2d 476, 479 (Haw. 1969) (noting that this "archaic rule of disqualification" has "not [been] adopted in Hawaii"); Scott v. Farrow, 391 P.2d 47 (Kan. 1964); Estate of Bergman v. Gunn, 761 P.2d 452, 455 (N.M. Ct. App. 1988) (noting that New Mexico's Deadman's Statute was repealed in 1973).

[10] 2 J. WIGMORE, EVIDENCE § 575, at 800-02 (Chadbourn rev. 1979) [hereinafter WIGMORE].

[11] *Id*. at 802 ("[I]t was rather the disinterested persons who were likely to be treated as improper witnesses.").

[12] *Id*. at 806.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*.

testimony; therefore, "[u]ntil 1843 no person who had been convicted of a crime or had any pecuniary interest in a case could give evidence at its trial . . . ."[17]

In the nineteenth century, due to changing circumstances and criticism, English law officially abolished the statutory disqualifications for interest. English legal scholar Jeremy Bentham "first furnished the arsenal of arguments for transforming the public opinion."[18] Instead of prohibiting an interested person from testifying on his own behalf or on someone else's behalf, Lord Denman's Act in 1843 adopted a policy that gave the jury the power of deciding guilt or innocence. The Act states as follows:

> Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony.[19]

Only eight years later, in 1851, England passed another Act, amending its laws of evidence to allow interested witnesses and parties who were "competent and compellable to give evidence."[20] After Lord Denman's Act and the 1851 evidentiary changes, England did not enact a form of Dead Man's statute prohibiting interested persons from testifying.[21]

In the United States, many of the states followed England's lead in abolishing the disinterested witness rules. In 1841, Michigan was the first state to abolish the interest disqualification,[22] and the remaining states followed Michigan's lead by 1904.[23] Although these states removed the interested witness disqualification, the same states began enacting Dead Man's statutes to "protect[] estates of decedents."[24] Judge Alpheus F. Haymond of the West Virginia Supreme Court of Appeals, who supported the creation of these statutes, wrote in 1878 that

> the intention of the law in the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affairs, or expose the omissions, mistakes or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered

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[17]*Id*. at 816-17.

[18]*Id*. at 816.

[19]Supreme Court of Judicature Act, 1843, 6 & 7 Vict., ch. 85 (Eng.); *see also* WIGMORE, *supra* note 10, § 488, at 647-48 n.1 (quoting Lord Denman's Act).

[20]Supreme Court of Judicature Act, 1851, 14 & 15 Vict., ch. 99 (Eng.).

[21]Stanley E. Didisman, *The West Virginia Dead Man's Statute*, 60 W. VA. L. REV. 239, 240 (1957).

[22]Act of Apr. 13, 1841, Pub. L. No. 80, § 1, 1841 Mich. Pub. Acts 176, 176-77 (codified as amended at MICH. COMP. LAWS. ANN. § 600.2158 (2003)).

[23]WIGMORE, *supra* note 10, § 488, at 647 n.1.

[24]Didisman, *supra* note 21, at 240-41.

> too great, to allow the surviving party to testify in his own behalf. Any other view of this subject, I think would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous, which with due deference to the views and opinions of others, it seems to me, the Legislature never intended.[25]

Judge Haymond's views were shared by many of those in favor of enacting Dead Man's statutes; therefore, statutes were drafted "to prevent the fabrication of claims that neither the deceased nor the executor of the estate is in a position to rebut and to preserve estates for the benefit of heirs of the decedent whenever there is any room to doubt the merits of the claims being brought."[26]

In the years following Judge Haymond's remarks, Dead Man's statutes were enacted across the nation to ensure equality in the courtroom.[27] Many commentators supported these statutes, and one particular scholar noted that

> [i]t is also easy for persons, who are prejudiced or prepossessed, to put false and unequal glosses upon what they give in evidence; and therefore the law removes them from testimony, to prevent their sliding into perjury; and it can be no injury to truth to remove those from the jury, whose testimony may hurt themselves, and can never induce any rational belief.[28]

Another commentator noted that state legislatures not only enacted Dead Man's statute legislation, but they also felt entirely justified with their states' Dead Man's statutes.[29]

In time, however, commentators began to point to the confusing nature and unfairness of these statutes, noting that certain individuals were not allowed to testify because of an assumption that all interested parties are dishonest. Criticism began to grow for these statutes, and, in 1922, the first of many public outcries was published demanding the statutes' revocation. In 1922, the Commonwealth Trust Fund of New York selected a committee of eight persons[30] to study this evidentiary rule.[31] After surveying 300 trial judges and attorneys, the Committee "reached the conclusion that the rule was not a necessary protection against false claims, but rather an obstruction

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[25]Owens v. Owens's Adm'r, 14 W. Va. 88, 95 (1878).

[26]B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.1, at 503-04 (1995).

[27]Montgomery County v. Herlihy, 575 A.2d 784, 789-90 (Md. Ct. Spec. App. 1990).

[28]WIGMORE, *supra* note 10, § 576, at 810 (quoting BARON GILBERT, EVIDENCE 119 (1726)).

[29]Shawn K. Stevens, Comment, *The Wisconsin Deadman's Statute: The Last Surviving Vestige of an Abandoned Common Law Rule*, 82 MARQ. L. REV. 281, 284-85 (1998).

[30]The Committee consisted of Judges William A. Johnston, the Chief Justice of the Kansas Supreme Court, Judge Charles M. Hough of the U.S. Court of Appeals, and professors from Harvard University, Columbia University, the University of Chicago, Yale University, the University of Michigan, and Northwestern University. *See* WIGMORE, *supra* note 10, § 578a, at 824 n.1.

[31]*Id*. at 824.

to the thorough investigation of truth."[32] Using Connecticut's evidentiary system as a model, the Committee found that a vast majority of those surveyed favored a less-restrictive Dead Man's statute.[33] The Committee thus urged that New York adopt a statute similar to Connecticut's, which allowed both statements of the interested person and statements of the decedent.[34]

The Dead Man's statute suffered another blow "[i]n 1938 when the American Bar Association's Committee on Improvements in the Law of Evidence referred to the [D]ead [M]an's statute as an anachronism and an obstruction to truth."[35] The Committee, which consisted of nearly seventy persons from all fifty states and all U.S. territories, agreed with the New York Committee and "recommended the substitution of a rule similar to the present permissory statue of Connecticut . . . ."[36] Since the ABA's report, states have enacted legislation to abolish their Dead Man's statutes;[37] nevertheless, a number of states have refused to alter or otherwise amend the ancient form of disqualification statute.[38]

While there is no federal Dead Man's statute,[39] the federal government enacted legislation affecting the survivability of these acts. In 1972, the drafters of the Federal Rules of Evidence first proposed that an interested requirement be totally removed at the federal judiciary level, and proposed Rule 601 was drafted to read that "[e]very person is competent to be a witness except as provided in these rules."[40] Because the remaining Dead Man's statutes were different in language and scope, the Committee proposed that the statutes should no longer have effect in federal diversity cases.[41] Congress, however, did not go so far as to outlaw Dead Man's statutes; instead, the House Judiciary Committee decided that Dead Man's statutes represented a form of state policy that should not be overturned without a state's input.[42] Even though there was "substantial disagreement as to the merit of Dead Man's Statutes,"[43] Congress added a second sentence to Rule 601 that noted that "the competency of a witness shall be determined in accordance with state law."[44] Thus,

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[32]*Id*. at 825.

[33]*Id*. at 824.

[34]*Id*. at 825.

[35]Didisman, *supra* note 21, at 248 (quoting 36 ABA Rep. 581 (1938)).

[36]WIGMORE, *supra* note 10, § 578a, at 826.

[37]For examples of those states that have abolished their Dead Man's statutes, see *supra* note 9.

[38]*See infra* Part III.

[39]MICHAEL H. GRAHAM, EVIDENCE TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 36 (2d ed. 1988).

[40]See FED. R. EVID. 601 advisory committee's note.

[41]*Id*.

[42]*See* H.R. REP. NO. 650, 93d Cong., 2d Sess. 4 (1974).

[43]*Id*. at 9.

[44]FED. R. EVID. 601; *see also* GRAHAM, *supra* note 39, at 36.

although the Advisory Committee hoped to do away with these statutes in the 1970's, Congress gave a much needed breath of life to Dead Man's statutes.

Besides the Advisory Committee, over the past 100 years Dead Man's statutes have survived public policy assaults by a number of distinguished commentators, including Dean Wigmore.[45] The statutes have also survived challenges brought forth under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.[46]

While these individual challenges have been unsuccessful, states have continued to pass legislation that abolishes Dead Man's statutes. One such route taken by states has been to follow the guidelines enacted by the 1972 Advisory Committee to the Federal Rules of Evidence. Alabama, in 1996, enacted Alabama Rule of Evidence 601, which reads as follows: "Every person is competent to be a witness except as otherwise provided in these rules."[47] It is unclear whether this rule, which is similar to the Advisory Committee's first proposed Federal Rule of Evidence 601, actually abolished the common law Dead Man's statute in Alabama.[48] While the Advisory Committee to the Alabama Rules of Evidence notes that the Dead Man's statute has been abrogated, the Alabama Supreme Court has not yet ruled on whether or not the statute has been officially abolished.[49] Nevertheless, one professor at the University of Alabama School of Law believes that the Alabama Supreme Court will shortly announce via a certified question from federal district court that Rule 601 did abrogate the state's Dead Man's statute.[50]

While Alabama's Supreme Court has not yet determined whether Rule 601 abrogated the Alabama Dead Man's statute, Ohio's Court of Appeals, in *Jenkins v. Bazzoli*, rejected the Ohio Dead Man's statute in favor of Ohio Rule of Evidence 601.[51]

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[45]*See, e.g.*, WIGMORE, *supra* note 10, § 578; Roy R. Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89, 110 (1963).

[46]*See, e.g.*, *In re* Estate of Lopata v. Metzel, 641 P.2d 952, 956 (Colo. 1982) (holding that the statute involves neither a suspect classification nor an infringement of a fundamental right); Russell v. Wolford, 395 N.E.2d 904, 906 (Ohio Ct. App. 1979) (holding that the statute did not violate the Due Process or Equal Protection clauses); Murphy v. Hook, 316 N.E.2d 146, 152 (Ill. App. Ct. 1974) (stating that there is "no basis for declaring the Dead Man's Act unconstitutional").

[47]ALA. R. EVID. 601.

[48]*See* ALA. CODE § 12-21-163 (1997).

[49]Jerome A. Hoffman, *The Alabama Rules of Evidence: Their First Half-Dozen Years*, 54 ALA. L. REV. 241, 295 (2002) ("Whether Alabama's 'Dead Man Statute' has survived the stroke awaits determination by the Alabama Supreme Court, which – at last look – had not yet addressed the question.").

[50]*See* e-mail from Charles Gamble, Professor of Law, University of Alabama School of Law, to the author (Feb. 28, 2004) (on file with author); *see also* e-mail from Jerome A. Hoffman, Professor of Law, University of Alabama School of Law, to the author (Mar. 1, 2004) (on file with author).

[51]650 N.E.2d 966 (Ohio Ct. App. 1994).

Overall, most states have followed the initial leads of Connecticut and New York and have abolished their Dead Man's statutes.[52] Some states, however, retain some form of this ancient common law rule and apply the ancient doctrine that because "[d]eath has sealed the lips of one of the parties," legislation should exist to silence the remaining interested parties.[53]

III. A SURVEY OF STATE DEAD MAN'S STATUTES

The various Dead Man's statutes in existence vary widely from state to state; therefore, this paper will present an overview of nine states that currently have some form of a Dead Man's statute.[54] Because this paper proposes that current Dead Man's statutes unfairly burden certain individuals, this paper will not examine certain state Dead Man's statutes that have partially limited the application of the traditional rule.[55] Also, in addition to Alabama's Dead Man's statute, which may no longer be applicable, this paper will also not examine Colorado's Dead Man's Statute, which was redefined in 2002,[56] and Arizona's Dead Man's Statute.[57]

Each Dead Man's statute is different, in that it affects a different person or is limited to a specific type of action, but most of the statutes focus on the same criteria. Overall, Dead Man's statutes were enacted for the same basic purpose, and most statutes are strictly construed to limit their application to a limited set of events; however, each of the following nine statutes differ in respect to (1) what type of proceeding is required for the statute to apply, (2) who is prohibited from testifying,

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[52]*See* Simon & Hennessey, *supra* note 8 and accompanying text.

[53]O'Connor v. Slatter, 93 P. 1078, 1079 (Wash. 1908).

[54]This article overviews the following states' Dead Man's statutes: Florida, Indiana, Louisiana, Maryland, South Carolina, Tennessee, Washington, West Virginia, and Wisconsin.

[55]*See* IDAHO CODE § 9-202 (Michie 1997) (noting that certain testimony in writing is allowed); MICH. COMP. LAWS ANN. § 600.2166 (West 1997) (permitting an interested witness to testify as to any communications she had with the deceased if her testimony is supported by material evidence tending to corroborate her claim); N.J. STAT. ANN. § 2A:81-2 (West 1997) (noting that interested witnesses can introduce testimony if there is clear and convincing proof to support the claim); N.Y. C.P.L.R. § 4519 (McKinney 1997) (permitting an interested witness to testify as to any facts of any automobile, aircraft, or boating accident in which both she and the decedent were involved and where the interested witness is claiming negligence); 42 PA. CONS. STAT. ANN. § 5930 (West 1997) (permitting an interested witness to testify as to any communications she had with the deceased if the action or proceeding is by or against surviving or remaining partners, joint promisors, or joint promisees); VT. STAT. ANN. tit. 12, § 1602 (1997) (permitting an interested witness to testify as to any memoranda or declarations of the deceased relevant to the matter in issue when the interested witness is suing in tort).

[56]The Colorado Dead Man's statute was only recently revised in 2002; therefore, no case law presently exists on the legislature's newly enacted statute. *See* COLO. REV. STAT. § 13-90-102 (2002). For a thorough discussion on the statute, see H. Tucker et al., *The New Colorado Dead Man's Statute*, 31 COLO. LAW. 7, 119 (2002).

[57]In Arizona, the applicability of the Dead Man's statute is at the discretion of the trial court; therefore, because of its subjective application, this paper will not examine the statute. *See* ARIZ. REV. STAT. § 12-2251 (2003); Troutman v. Valley Nat'l Bank, 826 P.2d 810, 812 (Ariz. Ct. App. 1992); Mahan v. First Nat'l Bank of Arizona, 677 P.2d 301, 303 (Ariz. Ct. App. 1984).

(3) what the person is prohibited from testifying about in the trial, and (4) when the statute can be waived. Nevertheless, although each of the nine statutes has different characteristics, the statutes all unfairly discriminate against honest persons who are prevented from testifying.

A. Florida

Florida's Dead Man's statute can be found at Florida Statute chapter 90.602 and provides, in relevant part, as follows:

> No person interested in an action or proceeding against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased persons, or against the assignee . . . shall be examined as a witness regarding any oral communication between the interested persona and the person who is deceased or mentally incompetent at the time of the examination.[58]

Florida's Dead Man's statute has specific exceptions included in its provisions for when the statute does not apply, including (1) when the personal representative or similar party is questioned about the oral communication and (2) when evidence concerning the oral communication is offered by the personal representative or similar party.[59] According to the Probate and Trust Litigation Committee of the Real Property, Probate and Trust Law section of the Florida Bar Association, "the [Dead Man's] Statute continues to be one of the most difficult statutes to understand in considering the exclusion or admissibility of testimony in a probate litigation procedure."[60] The Committee is currently reviewing the Dead Man's statute.[61]

Florida's Dead Man's statute is limited in scope, in that it only applies to actions against "the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased persons, or against the assignee."[62] The person bringing the action against this party must also have "a personal and immediate interest in the issue being litigated."[63] The statute also only refers to oral communications and not to "transactions," a term used in most state Dead Man's statutes.[64] When Florida limited its Dead Man's statute in 1976, the statute was worded so that it "only excludes testimony that refers to conversations between an interested party and a deceased person. It does not exclude written testimony by an interested party regarding written transactions or communications with a deceased person."[65] The

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[58]FLA. STAT. ch. 90.602 (2003).

[59]*Id*.

[60]Florida Bar Association, Probate and Trust Litigation Committee, *at* http://www.flagbarpptl.org/pt_litigation.html (last visited Feb. 29, 2004).

[61]*Id*.

[62]FLA. STAT. ch. 90.602(1) (2003).

[63]Walton v. Estate of Walton, 601 So. 2d 1266, 1268 (Fla. Dist. Ct. App. 1992) (citing Estate of Parson, 416 So. 2d 513, 517 (Fla. Dist. Ct. App. 1982)).

[64]*See* Sun Bank/Miami, N.A. v. Saewitz, 579 So. 2d 255, 256 (Fla. Dist. Ct. App. 1991).

[65]*Id*.

statute also does not exclude "[t]estimony regarding nonverbal conduct, such as execution, delivery, and negotiation of a contract . . . ."[66] Florida's revision of its Dead Man's statute reduced the scope of potential litigation surrounding the statute, but the revisions did not prevent the fraudulent and unfair treatment of honest persons in court.

Practitioners can waive the statute's application, and "many practitioners inadvertently waive the [Dead Man's] statute and the potential impact it could have on their cases."[67] Overall, the Dead Man's statute is waived when the protected party introduces or relies on evidence that relates to the oral communication.[68] One recent case, *In re Estate of Stetzko v. Coleman*,[69] dealt a harsh blow to the future availability of the Dead Man's statute in will contest cases. In *Stetzko*, the court held that a party will waive the applicability of the statute if any written or documentary evidence concerning the subject matter of the litigation is entered into evidence.[70] Thus, "in most, if not all, will contests, the statute will be waived because the person attempting to uphold the will must first introduce it was properly executed."[71]

B. Indiana

The Indiana Dead Man's statute, located at Indiana Code Annotated § 34-45-2-4, provides, in part, that "a person (1) who is a necessary party to the issue or record; and (2) whose interest is adverse to the estate; is not a competent witness as to matters against the estate."[72] "[T]he purpose of this statute is to protect decedents' estates from spurious claims,"[73] and fairness is no justification for a trial judge to ignore the specific instructions of the statute.[74] The statute is most commonly applied in Indiana "when an executor or administrator of an estate is one party, [and] the adverse parties are not competent to testify about transactions that took place during the lifetime of the decedent."[75]

For the statute to be applied, the moving party must establish multiple criteria, including (1) that the personal representative is a party to the lawsuit, (2) that there could be a judgment against the estate, (3) that the testifying witness is a party to the lawsuit and has an interest in the outcome of the lawsuit, (4) that the action involves some "matter" that occurred when the decedent was alive, and (5) that the statute has not been waived. If the preceding criteria are met, the witness cannot testify "as to

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[66]Bauerle v. Brush, 820 So. 2d 310, 314 (Fla. Dist. Ct. App. 2001); *see also* Carpenter v. *ex. rel.* Wemyss, 638 So. 2d 592 (Fla. Dist. Ct. App. 1994); *Saewitz*, 579 So. 2d 255.

[67]Simon & Hennessey, *supra* note 8, at 145.

[68]*See* FLA. STAT. ch. 90.602(2)(b) (2003); *see also* Moneyhun v. Vital Indus., 611 So. 2d 1316, 1320 (Fla. Dist. Ct. App. 1993).

[69]714 So. 2d 1087 (Fla. Dist. Ct. App. 1998).

[70]*Id*. at 1090.

[71]*Id*. (quoting CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 602.1, at 358-59 (1997)).

[72]IND. CODE ANN. § 34-45-2-4 (Michie 2003).

[73]*In re* Estate of Lambert v. Southard, 785 N.E.2d 1129, 1132 (Ind. Ct. App. 2003).

[74]*Id.*

[75]*Id.*; *see also* J.M. Corp. v. Roberson, 749 N.E.2d 567, 571 (Ind. Ct. App. 2001).

matters against the estate,"[76] but the witness could still testify as to "matters that occurred while the decedent was alive."[77] A "matter" under the statute "includes transactions or actions as well as conversations."[78] Witnesses prevented from testifying in the trial court are also prevented from authenticating documents and other tangible evidence that is somehow related to the "matter" with the decedent.[79]

First, the statute will only apply "to all cases in which a judgment may result for or against the estate, notwithstanding the parties' positions as plaintiff or defendant."[80] Thus, following the language established by the Indiana Court of Appeals, the judgment must "either directly or indirectly affect the estate of the decedent."[81] This initial provision also requires that the personal representative be a party to the lawsuit.[82] Thus, defendants in wrongful death actions are not prohibited from testifying, because the wrongful death action is not brought against the estate.[83] In addition, if for some reason the statute of limitations or otherwise the passage of time has prevented the decedent's estate from being held liable for damages, testimony by interested witnesses or parties is allowed because the Dead Man's statute does "not intend . . . to prevent testimony that could not, in any way, affect the estate assets."[84]

Second, the moving party must show the witness is a party to the issue or record and that the party has some interest in the outcome to the lawsuit.[85] The Indiana Court of Appeals has held that a witness has an interest in the proceeding when "the witness will gain or lose by the direct legal operation of that judgment."[86] Nevertheless, a witness's testimony will be excluded only if the witness is a party to the issue. "A party to the issue means the parties between whom there is a controversy submitted to the court for trial, the parties who are litigating the particular issue against whom or for whom the court will render judgment."[87] The moving party must establish both of these criteria.

Third, the moving party must establish that the event occurred in the decedent's lifetime and that the statute has not been waived. While proving that an event

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[76]IND. CODE ANN. § 34-45-2-4 (Michie 2003).

[77]Johnson v. Estate of Rayburn, 587 N.E.2d 182, 185 (Ind. Ct. App. 1992).

[78]*In re* Estate of Sutherland, 204 N.E.2d 520, 523 (Ind. 1965).

[79]State Farm Life Ins. Co. v. Ft. Wayne Nat'l Bank, 474 N.E.2d 524, 528 (Ind. Ct. App. 1985); *see also* Merritt v. Straw, 33 N.E. 657 (Ind. Ct. App. 1893).

[80]*In re* Estate of Loubert, , 785 N.E.2d at 1132.

[81]Jenkins v. Nachand, 290 N.E.2d 763, 768-69 (Ind. Ct. App. 1972).

[82]Johnson v. Estate of Rayburn, 587 N.E.2d 182, 184 (Ind. Ct. App. 1992).

[83]Goldman v. Cha, 704 N.E.2d 157, 159 (Ind. Ct. App. 1999); *see also* Lake E. & W. R. Co. v. Charman, 67 N.E. 923 (Ind. 1903).

[84]*Jenkins*, 290 N.E.2d at 769.

[85]*See* IND. CODE ANN. § 34-45-2-4(b) (Michie 2003).

[86]*In re* Estate of Lambert v. Southard, 785 N.E.2d 1129, 1133 (Ind. Ct. App. 2003); *see also* Satterthwaite v. Estate of Satterthwaite, 420 N.E.2d 287, 290 (Ind. Ct. App. 1981).

[87]*Satterthwaite*, 420 N.E.2d at 290.

occurred within the decedent's lifetime is self-explanatory, Indiana practitioners can waive the Dead Man's statute's application if the practitioner "opens the door" by questioning the witness or if the practitioner enters the deposition testimony of the decedent taken while the decedent was alive.[88]

C. Louisiana

Louisiana's Dead Man's statute is slightly different than other jurisdictions in that it allows parol evidence, so long as certain conditions are met. More specifically, the statute, found at Louisiana Revised Statute Annotated § 13:3721, reads:

> Parol evidence shall not be received to prove any debt or liability of a deceased person against his succession representative, heirs, or legatees when no suit to enforce it has been brought against the deceased prior to his death, unless within one year of the death of the deceased: (1) A suit to enforce the debt or liability is brought against the succession representative, heirs, or legatees of the deceased; (2) The debt or liability is acknowledged by the succession representative as provided in Article 3242 of the Code of Civil Procedure, or by his placing it on a tableau of distribution, or petitioning for authority to pay it; (3) The claimant has opposed a petition for authority to pay debts, or a tableau of distribution, filed by the succession representative, on the ground that it did not include the debt or liability in question; or (4) The claimant has submitted to the succession representative a formal proof of his claim against the succession, as provided in Article 3245 of the Code of Civil Procedure.[89]

Although this statute will, at times, allow an interested party to testify against the estate of the decedent, the statute still prevents "stale and unfounded claims from being filed against the succession which could have been refuted by the decedent had he been alive."[90] Louisiana courts are to strictly construe the statute.[91]

To help prevent fraudulent claims against an estate, Louisiana first requires that all claims against an estate be filed within one year of the death of the decedent.[92] Second, Louisiana will allow certain testimony about a debt against an estate, including the testimony of the claimant; however, "the debt or liability of the deceased must be proved by the testimony of at least one creditable witness other than the claimant, and other corroborating circumstances."[93] The "one credible interest," however, cannot have an interest in the claim.[94] "[A] person who has a

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[88]Kalwitz v. Estate of Kalwitz, 759 N.E.2d 228, 233 (Ind. Ct. App. 2001); *see also* IND. CODE ANN. § 34-45-2-4(e) (Michie 2003).

[89]LA. REV. STAT. ANN. § 13:3721 (West 2003).

[90]*In re* Succession of Moore, 696 So. 2d 1040, 1041 (La. Ct. App. 1997).

[91]*In re* Succession of Larmore, 518 So. 2d 1085, 1087 (La. Ct. App. 1987).

[92] *See* LA. REV. STAT. ANN. § 13:3721 (West 2003).

[93]Harper v. Wells Estate, 575 So. 2d 894, 897 (La. Ct. App. 1991).

[94]*Id.* at 898 (citing Savoie v. Estate of Rogers, 410 So. 2d 683, 687 (La. 1981)).

direct pecuniary or proprietary interest in the plaintiff's claim against the deceased person may not serve as the one creditable witness" against the estate.[95]

D. Maryland

Maryland's Dead Man's statute was "[f]irst enacted by Chapter 109, Acts of 1864, [and] the Maryland Dead Man statute remains merely a remnant of the common law disqualification of all interested witnesses."[96] The statute, found in Maryland Code Annotated, Courts and Judicial Proceeding § 9-116, reads:

> A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent person, may not testify concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead, unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement.[97]

Similar to most states, Maryland enacted their Dead Man's statute "to equalize the parties' positions by imposing silence on the survivors as to transactions with or statements by the decedent and thereby require those who have asserted a claim against the decedent's estate to produce testimony from disinterested persons."[98] Maryland courts, however, "consistently ha[ve] favored the admission of testimony"[99] and the qualification of a witness is largely at the discretion of the trial court.[100]

Because Maryland courts have favored admitting evidence, the Dead Man's statute applies only when the suit is brought "by or against a personal representative, heir, devisee, distributee, or legatee."[101] Moreover, only certain parties are excluded from testifying at the trial court. A "party," as defined by the Maryland Court of Appeals in *Reddy v. Mody* is "one who has an interest in the property sought or a person having a direct pecuniary and proprietary interest in the outcome of the case."[102] The court in *Mody* goes on to note that "[e]xcept in very unusual cases, the persons excluded from testifying are not those with an interest of any sort, but rather traditional real parties in interest and their representatives."[103] Maryland's statute is

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[95]Savoie v. Estate of Rogers, 410 So. 2d 683, 687 (La. 1981).

[96]Herbert J. Belgrad, Note, *The Effect of the Dead Man's Statute on the Testimony of Party-Witnesses:* Ridgley v. Beatty, 21 MD. L. REV. 60, 64 (1961).

[97]MD. CODE ANN., CTS. & JUD. PROC. § 9-116 (2002).

[98]Walton v. Davy, 586 A.2d 760, 765 (Md. Ct. App. 1991).

[99]*Id.*

[100]Davis v. Corbin, 346 A.2d 488, 495 (Md. Ct. App. 1975).

[101]MD. CODE ANN., CTS. & JUD. PROC. § 9-116 (2002).

[102]Reddy v. Mody, 388 A.2d 555, 560 (Md. Ct. App. 1978) (citations omitted).

[103]*Id.*

thus extremely limited in scope, allowing attorneys,[104] third parties and the like to testify in proceedings.[105] In Maryland, the Dead Man's statute does not apply to actions brought by the beneficiary of an insurance contract[106] or by "an officer, director, or shareholder of a corporate party."[107] The statute also does not apply in wrongful death actions, as "money recovered by [one party] is received by them in their own right and not through the estate of the deceased because of their status as heir, devisee, distributee or legatee."[108]

The Maryland Dead Man's statute applies only to "testimony of a party to a cause which would tend to increase or diminish the estate of the decedent."[109] Furthermore, this testimony must involve a "transaction" with the decedent. The Maryland Supreme Court in *Ridgley v. Beatty*[110] relied on a New Jersey Supreme Court opinion to develop a test for what is and what is not a transaction. Thus, in *Beatty*, the Court announced that "for determining what is a 'transaction with' a decedent in the statutory sense . . . [one should ask] '[w]hether, in case the witness testify falsely, the deceased, if living, could contradict it of his own knowledge.'"[111]

Maryland's courts are required to strictly construe the statute "in order to disclose as much of the evidence as possible."[112] Courts, nevertheless, must allow testimony if a party trigger's the statutes first exception, the admission of "testimony of the dead or incompetent person."[113] As noted by the Maryland Court of Appeals in *Hamilton v. Caplan*,[114] testimony is "evidence given by a competent witness, under oath or affirmation, as distinguished from evidence derived from writings, and other sources."[115] Because the admission of the decedent's testimony would further the purpose of the statute, by placing both parties on equal ground, courts must admit a witness's testimony if it relates to the decedent.[116] The statute's second exception is triggered when a party "opens the door" by cross-examining or otherwise questioning the witness about a "transaction" or statement with the decedent.[117]

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[104]*See, e.g.*, Walton v. Davy, 586 A.2d 760 (Md. Ct. App. 1991) (noting that an attorney, who was not a beneficiary and did not represent a beneficiary, was allowed to testify).

[105]Ebert v. Ritchey, 458 A.2d 891, 896 (Md. Ct. App. 1983) (noting that the Dead Man's statute applies to "testimony by parties, not by third persons").

[106]Stout v. Home Life Ins. Co., 651 F. Supp. 28, 31 (D. Md. 1986).

[107]Guernsey v. Loyal Fed. Sav. & Loan Ass'n, 172 A.2d 506, 507 (Md. Ct. App. 1961).

[108]*Reddy*, 388 A.2d at 559.

[109]*Id.*

[110]Ridgely v. Beaty, 159 A.2d 651 (Md. Ct. App. 1960).

[111]*Id.* at 655 (quoting Hollister v. Fiedler, 111 A.2d 57, 62 (N.J. 1955)).

[112]*Reddy*, 388 A.2d at 560; *see also* Stacy v. Burke, 269 A.2d 837, 845 (Md. Ct. App. 1970).

[113]MD. CODE ANN., CTS. & JUD. PROC. § 9-116 (2002).

[114]Hamilton v. Caplan, 518 A.2d 1087 (Md. Ct. App. 1987).

[115]*Id.* at 1095 (quoting *Reddy*, 388 A.2d at 560).

[116]*Id.*; *see also Reddy*, 388 A.2d at 560.

[117]Kaouris v. Kaouris, 603 A.2d 1350, 1353-54 (Md. Ct. App. 1992).

E. South Carolina

South Carolina's Dead Man's statute can be found at South Carolina Code Annotated § 19-11-20 and reads, in part:

> Notwithstanding the provisions of § 19-11-10, no party to an action or proceeding, no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him.[118]

While the statute is longer than most other state's Dead Man's statutes, the South Carolina Supreme Court noted in *Hanahan v. Simpson*[119] that "the rule prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest."[120] The *Hanahan* court went on to note that "[t]he rule is founded on the principle that it is against public policy to allow a witness thus interested to testify as to matters when such testimony, if untrue, cannot be contradicted."[121] Courts in South Carolina narrowly construe the statute "to limit its applicability to cases which clearly fall within its intended note."[122]

South Carolina courts have determined that the Dead Man's statute applies only in a number of limited circumstances. Three main criteria need to be proven for the statute to apply: (1) there must exist some transaction or communication between the witness and the deceased; (2) the lawsuit must be against or brought by the executor, administrator, heir-at-law, next of kin or the like of the decedent, and (3) the outcome of the lawsuit must affect a present interest of the witness.[123]

First, the statute is applicable only to those persons who are "interested" in the outcome of the lawsuit.[124] "As such, a person is only disqualified if he or she has a

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[118]S.C. CODE ANN. § 19-11-20 (Law Co-op. 2003).

[119]Hanahan v. Simpson, 485 S.E.2d 903 (S.C. 1997).

[120]*Id.* at 909.

[121]*Id.*; *see also* Harris v. Berry, 98 S.E.2d 251 (S.C. 1957); Trimmier v. Thomson, 19 S.E. 291 (S.C. 1894).

[122]*Hanahan*, 485 S.E.2d at 909 (citations omitted).

[123]Kelly v. Peeples, 362 S.E.2d 636, 638 (S.C. 1987).

[124] S.C. CODE ANN. § 19-11-20 (Law Co-op. 2003).

certain or vested legal or equitable interest which may be affected by the direct, legal operation of the judgment."[125] Possible or future interests are thus not enough for South Carolina courts; instead, the South Carolina Court of Appeals, in *In re Estate of Mason v. Mason*,[126] noted:

> The four classes [of persons to whom the Dead Man's statute applies] are (1) a party to the action, (2) a person having an interest which may be affected by the trial's outcome, (3) a person who previously had an interest which may be affected by the trial, and (4) an assignor of the thing in controversy.[127]

"Interest" means the witness will "either gain or lose by the direct legal operation and effect of the judgment."[128] Therefore, if a witness does not stand to gain or lose from the judgment, such as an attorney representing the estate, he or she will be considered competent to testify.[129]

Second, the statute applies only to "transactions" between the witness and the decedent.[130] The testimony about the transaction must involve the witness and the decedent, it must be offered against the estate, and it must affect the witness's interest.[131] "Transactions," however, do not include "the acts, demeanor or conduct of the decedent where the testimony is offered merely for its bearing on an issue of mental competency."[132] In addition, because a transaction requires mutuality between the witness and the decedent, accidents, such as boat and trailer accidents and car accidents, are not considered "transactions" under the Dead Man's statute.[133] Witnesses, however, may testify to transactions between the decedent and a third person,[134] and witnesses may testify against his or her own interest.[135] Witnesses and parties may also introduce documentary evidence.[136]

A party can waive the statute's applicability when the representative of the estate "opens the door" by offering testimony and evidence that would have been excluded

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[125]*Hanahan*, 485 S.E.2d at 910; *see also* Long v. Conroy, 143 S.E.2d 459, 462 (S.C. 1965).

[126]*In re* Estate of Mason, 346 S.E.2d 28 (S.C. Ct. App. 1986).

[127]*Id.* at 31 n.2 (citing Long v. Conroy, 143 S.E.2d 459 (S.C. 1965)).

[128]*Conroy*, 143 S.E.2d at 463.

[129]*Hanahan*, 485 S.E.2d at 910; *see also* Havird v. Schissell, 166 S.E.2d 801 (S.C. 1969) (holding that an attorney was not disqualified even though he stood to collect an ordinary and usual fee from the proceeding).

[130]*See* S.C. CODE ANN. § 19-11-20 (Law. Co-op. 2003).

[131]*In re* Estate of Mason v. Mason, 346 S.E.2d 28, 31-32 (S.C. Ct. App. 1986).

[132]*Havird*, 166 S.E.2d at 806.

[133]*See* Starnes v. Miller, 266 S.E.2d 790, 791 (S.C. 1980).

[134]*See* Moore v. Trimmier, 11 S.E. 548 (S.C. 1889); *see also Hanahan*, 485 S.E.2d at 910.

[135]*See* Devereux v. McCrady, 24 S.E. 77 (S.C. 1896); Shell v. Boyd, 11 S.E. 205 (S.C. 1890); *see also Hanahan*, 485 S.E.2d at 910.

[136]*See* Harris v. Berry, 98 S.E.2d 251 (S.C. 1957); *see also Hanahan*, 485 S.E.2d at 910.

under the statute.[137] The statute is also waived when the representative of the estate fails to object to testimony at the trial court.[138]

F. Tennessee

Tennessee enacted its Dead Man's statute to prevent the surviving party from having some sort of advantage when a decedent's representative is disadvantaged for not being able to recount the decedent's version of the transaction or statement.[139] Enacted in 1869, Tennessee's Dead Man's statute can be found at Tennessee Code Annotated § 24-1-203 and reads:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.[140]

In 2003 the Tennessee Court of Appeals held that the Dead Man's Statute "prohibits an interested party in a proceeding involving the estate of a deceased person from testifying as to transaction or statements by the deceased, unless the interested party was called to testify by the opposite party."[141]

For the statute to apply in Tennessee, "the proposed witness must be a party to the suit in such a way that judgment may be rendered for or against him . . . [and] the subject matter of his testimony must be of some transaction with or statement by the testator or intestate."[142] Tennessee's statute is thus more liberal than some states, as it does not apply to statements made by non-parties,[143] even if the non-party has an interest in the litigation.[144] The statute also does not apply to statements by parties that neither increase nor decrease the size of the decedent's estate.[145] Thus, if the outcome of the case would require the estate to pay the successful party regardless of the litigation's outcome, the testimony will not be excluded.[146] In addition, while

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[137]*Hanahan*, 485 S.E.2d at 909-10; *see also* Norris v. Clinkscales, 25 S.E. 797 (S.C. 1896); Thomas v. Taylor, 386 S.E.2d 630 (S.C. Ct. App. 1989).

[138]*See* Pinkerton v. Jones, 423 S.E.2d 151, 153 (S.C. Ct. App. 1992); Harris v. Campbell, 358 S.E.2d 719, 720 (S.C. Ct. App. 1987).

[139]*See* Baker v. Baker, 142 S.W.2d 737 (Tenn. Ct. App. 1940).

[140]TENN. CODE ANN. § 24-1-203 (2003).

[141]Estate of Myers v. Farmers & Merchs. Bank Corp., No. M2002-00888-COA-R3-CV, 2003 Tenn. App. LEXIS 612, at *13-14 (Tenn. Ct. App. Aug. 29, 2003).

[142]Estate of Pritchard v. McDonald, 735 S.W.2d 446, 448 (Tenn. Ct. App. 1986).

[143]Gibson v. Parkey, 217 S.W. 647, 648 (Tenn. 1919).

[144]*See* Montague v. Thomason, 18 S.W. 264, 265 (Tenn. 1892).

[145]Cantrell v. Estate of Cantrell, 19 S.W.3d 842, 846 (Tenn. Ct. App. 1999) (citing *Baker*, 142 S.W.2d at 744).

[146]Beadles v. Alexander, 68 Tenn. 604 (1877).

Tennessee extended the Dead Man's statute in 1947 to include officers and directors of corporations, Tennessee courts have refused to extend the statute to other forms of agency.[147]

While an interested party to the lawsuit is excluded from testifying, "the Dead Man's Statute applies only in cases 'by or against executors, administrators, or guardians.'"[148] Thus, "where an action is brought against a surviving party in his or her individual capacity only, the statute does not apply."[149] Witnesses are not prevented from testifying as to transactions between him or herself and a third party.[150]

The decedent's personal representative can testify in limited circumstances when multiple parties are involved. "Where there are multiple parties to a lawsuit, one of whom is [the personal representative], that witness can still testify as to the transaction with the decedent as to the other parties to the suit, even though [the statute] renders a witness incompetent to testify against the estate."[151] Because the estate would not be diminished if the personal representative's testimony is favorable to the estate, such testimony would also be allowed.

While there exists little case law in Tennessee as to what constitutes a transaction, it is clear that a transaction can be either oral or in writing.[152] The Tennessee Supreme Court noted that transactions "refer to things done in the intestate's presence, to which he might testify of his personal knowledge, if alive, not to transactions out of his hearing and presence, though affecting liability of his estate."[153] The Tennessee Court of Appeals, in *Watts v. Rayman*, has further defined a transaction to include "matters of personal communication between the claimant and the deceased."[154] The Court of Appeals has also held that transactions can occur via tort actions.[155] Overall, following the Tennessee Court of Appeal's decision in *Kurn v. Weaver*, the Dead Man's statute will come into play when "judgment may be rendered for the representative party and against the proposed witness, or vice versa."[156]

Similar to other states, Tennessee's Dead Man's statute can be waived if the interested party is called to testify and the opposing attorney (1) neglects to object to

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[147]*See Pritchard*, 735 S.W.2d at 449.

[148]*In re* Estate of Burress, No. E2002-00320-COA-R3-CV 2003 WL 238820, at *5 (Tenn. Ct. App. Feb. 4, 2003).

[149]*Id.*; *see also* Hooper v. Neubert, 381 S.W.2d 569 (Tenn. Ct. App. 1963); McKamey v. Andrews, 289 S.W.2d 704 (Tenn. Ct. App. 1955).

[150]Waggoner v. Dorris, 68 S.W.2d 142, 145 (Tenn. Ct. App. 1933).

[151]Haynes v. Cumberland Builders, Inc., 546 S.W.2d 228, 231 (Tenn. Ct. App. 1976).

[152]*Montague*, 18 S.W. at 265.

[153]Newman v. Tipton, 234 S.W.2d 994, 996 (Tenn. 1950) (quoting *Waggoner*, 68 S.W.2d at 145.

[154]Watts v. Rayman, 462 S.W.2d 520, 522 (Tenn. Ct. App. 1970).

[155]Christofiel v. Johnson, 290 S.W.2d 215, 217-18 (Tenn. Ct. App. 1956).

[156]Kurn v. Weaver, 161 S.W.2d 1005, 1021 (Tenn. Ct. App. 1940).

his or her testimony and (2) cross-examines the witness.[157] On the other hand, Tennessee law protects the parties from cross-examining a witness who testifies over objection[158] and during discovery proceedings, as one party can depose the other party without having to worry about waiving the Dead Man's statute.[159] This does not include a situation where a party is deposed before trial and then dies after giving his or her deposition. In these cases, because both parties had the benefit of their own testimony, the purpose of the Dead Man's statute is not invoked, and the testimony is allowed.[160]

In Tennessee, the Dead Man's statute "cannot be extended by the courts to cases not within its terms upon the idea they fall within the evil which was intended to be guarded against."[161] In other words, the Tennessee statute must be strictly construed.[162] The competency of the witness is nevertheless to be determined by the trial judge.[163]

G. Washington

Washington's Dead Man's statute is found at Revised Code of Washington section 5.60.030 and states:

> No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.[164]

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[157]Rose v. Stalcup, 731 S.W.2d 541, 542 (Tenn. Ct. App. 1987).

[158]Leffew v. Mayes, 685 S.W.2d 288, 293 (Tenn. Ct. App. 1984) (noting that "where transactions with the dedecent are first developed on direct examination over objection of the representative of the decedent, the objection is not waived by subsequent cross-examination"); *see also* Nabors v. Gearhiser, 525 S.W.2d 145, 148 (Tenn. 1975).

[159]*See* Ingram v. Phillips, 684 S.W.2d 954, 958-59 (Tenn. Ct. App. 1984).

[160]Bernard v. Reaves, 178 S.W.2d 224, 227-28 (Tenn. Ct. App. 1943).

[161]*Haynes*, 546 S.W.2d at 230.

[162]*Id.* at 231; *see also Newman*, 234 S.W.2d at 996; *Christofiel*, 290 S.W.2d at 218.

[163]Roy v. Sanford, 204 S.W. 1159, 1161 (Tenn. 1918).

[164]WASH. REV. CODE, § 5.60.030 (2003).

The statute, which has contained roughly the same language since 1881,[165] is designed to "prevent interested parties from giving self-serving testimony about conversations or transactions with the decedent."[166] The statute protects estate from fraud and invasion.[167]

First, a "party in interest" in Washington covers "one who stands to gain or lose in the action in question."[168] Thus, a "party in action" need not be limited to an actual party in the lawsuit; however, third parties are not excluded under Washington's statute.[169] Non-natural parties, including corporations and agents to corporations, [170] and certain employees[171] are also not prevented from testifying.

Second, a transaction, under the statute, "is broadly defined as the doing or performing of some business between parties, or the management of any affair"[172] and includes events "much broader than a contract" between the decedent and the witness.[173] The subject matter of testimony will fit the definition of a "transaction" when "the deceased, if living, could contradict the witness of his own knowledge."[174] "[T]he testimony must indicate that the decedent was both present and directly involved in the matter at hand."[175] In addition, if the proffered testimony "tends to show either what did or did not take place between the parties, it must be excluded so long as it concerns the transaction or justifies an inference as to what it really was."[176] A party in action, nevertheless, can testify about "his or her own feelings or impressions" of the decedent in the lawsuit.[177]

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[165]Patrick A. Trudell, Comment, *The Deadman's Statute in Washington*, 15 GONZ. L. REV. 501, 504 (1979).

[166]Wildman v. Taylor, 731 P.2d 541, 543 (Wash. Ct. App. 1987); *see also* Erikson v. Kerr, 883 P.2d 313, 316 (Wash. 1994).

[167]Estate of Lennon v. Lennon, 29 P.3d 1258, 1264 (Wash. Ct. App. 2001).

[168]*Id.* at 1263; *see also* Bentzen v. Demmons, 842 P.2d 1015, 1019 (Wash. Ct. App. 1993).

[169]*Erikson*, 883 P.2d at 316; *see also* Rabb v. Estate of McDermott, 803 P.2d 819, 823 (Wash. Ct. App. 1991); Aetna Life Ins. Co. v. Boober, 784 P.2d 186, 189 (Wash. Ct. App. 1990).

[170]Thor v. McDearmid, 817 P.2d 1380, 1384 (Wash. Ct. App. 1991).

[171]*See, e.g.*, McLean v. Archer, 201 P.2d 184 (Wash. 1948) (holding that a secretary and bookkeeper of a corporation was allowed to testify); May v. Triple C Convalescent Ctrs., 578 P.2d 541 (Wash. Ct. App. 1978) (holding that a nurse at a nursing home was allowed to testify).

[172]*Lennon*, 29 P.3d at 1263 (quoting Bentzen, 842 P.2d at 1019) (internal quotation omitted).

[173]*In re* Shaughnessy's Estate, 648 P.2d 427, 429 (Wash. 1982).

[174]*Lennon*, 29 P.3d at 1263.

[175]*Id.* at 1265.

[176]*Id.* at 1263; *see also* Martin v. Shaen, 173 P.2d 968, 971 (Wash. 1946).

[177]*Lennon*, 29 P.3d at 1263; *see also* Jacobs v. Brock, 437 P.2d 920, 922 (Wash. 1968).

This statute, however, applies only to oral evidence and actions of the decedent.[178] "[R]ecords kept in the ordinary course of business,"[179] "documents written or executed by the deceased,"[180] and "other documents relating to the transaction at issue"[181] are not excluded via an application of the statute. Testimony about these written documents, however, could be limited by application of the Dead Man's statute.[182]

Washington's Dead Man's statute can be waived under three separate circumstances: "the failure to object to the evidence, by cross-examination that is not within the scope of direct examination, or by presenting testimony favorable to the estate."[183] First, as noted by the Washington Court of Appeals in In re Estate of *Lennon v. Lennon*,[184] "[f]ailure to timely object to the testimony of an interested party waives the bar of the deadman's statute."[185] This objection must occur in contested hearings.[186] Second, *Lennon* also notes that "[o]nce the protected party has opened the door, the interested party is entitled to rebuttal."[187] This door, however, is not opened by taking depositions or serving interrogatories during the discovery portion of the trial, so long as some portion of the deposition transcript or other evidence related to the transaction is not introduced in the trial court as evidence.[188] If the representative of the estate enters such evidence, the statute's application will be waived.[189]

H. West Virginia

The West Virginia Dead Man's statute, first adopted in 1868, states, in relevant part, that:

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[178]*Bentzen*, 842 P.2d at 1019.

[179]*Erikson*, 883 P.2d at 316; *see, e.g.*, Sanborn v. Dentler, 166 P. 62, 64 (Wash. 1917); Goldsworthy v. Oliver, 160 P. 4, 5 (Wash. 1916); Ah How v. Furth, 43 P. 639, 640 (Wash. 1896); Vogt v. Hovander, 616 P.2d 660, 662-63 (Wash. Ct. App. 1979).

[180]*Erikson*, 883 P.2d at 316; *see, e.g*, Hampton v. Gilleland, 379 P.2d 194, 197-98 (Wash. 1963); Denis v. Metzenbaum, 213 P. 453, 454 (Wash. 1923); Slavin v. Ackman, 204 P. 816, 817 (Wash. 1922); Kauffman v. Baillie, 89 P. 548, 550-51 (Wash. 1907).

[181]*Erikson*, 883 P.2d at 316; *see also Bentzen*, 842 P.2d at 1015 (waiver by submission of affidavit of decedent's son regarding transaction in support of summary judgment); *Thor*, 817 P.2d at 1384 (waiver by introduction of letter written to decedent).

[182]*Wildman*, 731 P.2d at 545-46.

[183]Stranberg v. Lasz, 63 P.3d 809, 813 (Wash. Ct. App. 2003); *see also* Botka v. Estate of Hoerr, 21 P.3d 723, 726 (Wash. Ct. App. 2001).

[184]Lennon v. Lennon, 29 P.3d 1258 (Wash. Ct. App. 2001).

[185]*Id.* at 1264.

[186]*Id.*

[187]*Id.* at 1263; *see also* Johnston v. Medina Imp. Club, Inc., 116 P.2d 272 (Wash. 1941).

[188]Lennon, 29 P.3d at 1263 (2001); *see also* McGugart v. Brumback, 463 P.2d 140, 144 (Wash. 1969).

[189]*Lennon*, 29 P.3d at 1263-64.

> No party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic.[190]

Premised on the belief that "there is a very strong temptation to lie or to conceal material facts to the detriment of the decedent's representative,"[191] the purpose of the statute, as defined by the West Virginia Supreme Court, "is to prevent the injustice that would result from a surviving party to a transaction testifying favorably to himself or herself and adversely to the interest of a decedent, when the decedent's representatives would be hampered in attempting to refute the testimony by reason of the decedent's death."[192] Instead of disqualifying the testimony itself, West Virginia disqualifies the witness alone, giving third parties the right to testify to matters that would be prevented by the statute.[193]

In the 1996 case *Meadows v. Meadows*, the Supreme Court of Appeals of West Virginia established new guidelines for applying the West Virginia Dead Man's statute and further limited the previously broad scope of the statute.[194] Although West Virginia Rule of Evidence 601 notes that "[e]very person is competent to be a witness except as otherwise provided for by statute or these rules,"[195] Rule 601 defers to the state legislature to determine the competency of witnesses.[196] More importantly, "the primary purpose for providing for the exception in Rule 601 was to protect the integrity of the West Virginia Dead Man's Statute."[197] Rule 601 did not abolish the Dead Man's statute.[198]

When applying the West Virginia statute to a proceeding, "the language of the Dead Man's statute should be strictly construed and limited to its narrowest application."[199] After all, as the Supreme Court of Appeals of West Virginia notes, a restrictive application of the statute promotes "an enhanced confidence in the jury

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[190]W. VA. CODE § 57-3-1 (2003).

[191]Cross v. State Farm Mutual Automobile Ins. Co., 387 S.E.2d 556, 561 n.6 (W. Va. 1989).

[192]Meadows v. Meadows, 468 S.E.2d 309, 313 (W. Va. 1996).

[193]*Id.*

[194]*Id.* at 312.

[195]W. VA. R. EVID. 601.

[196]*Meadows*, 468 S.E.2d at 313.

[197]*Id.*

[198]*Cross*, 387 S.E.2d at 560 (1989).

[199]*Meadows*, 468 S.E.2d at 314 (citing Harper v. Johnson, 345 S.W.2d 277, 280 (Tex. 1961)).

system and the role of the adversarial cross-examination."[200] When applying the statute, the court should ensure that (1) the witness is a party to or is interested in the lawsuit and (2) that the testimony involves some communication or some personal transaction with one of the statutorily-listed persons.[201]

For the statute to apply, a witness must either be a party to the lawsuit or be "interested" in the outcome of the proceeding. Parties to lawsuits, even if they have no interest in the lawsuit's outcome, are not allowed to testify.[202] Interested persons, as defined in *Coleman v. Wallace*[203] to include those persons who can be affected by the result of the suit, are also prohibited from testifying.[204] To exclude testimony, the interest must be definite and present, not somehow contingent or remote.[205]

While a "communication" is somewhat self-explanatory, the *Meadows* court narrowed the definition of "personal transaction" to "requiring something in the nature of a negotiation or a course of conduct or a mutuality of responsibility resulting from the voluntary conduct of opposing parties . . . [such as] when one enters upon a course of conduct after a knowing exchange of reciprocal acts or conversations."[206] Because it is not a transaction, the statute "does not bar a party or interested witness from testifying as to the deceased's appearance and demeanor and the witness may give an opinion as to the deceased's competency . . . ."[207] A witness is also not prevented from testifying against his or her own interest in the lawsuit.[208]

As with other states, the disqualification of a witness via the Dead Man's statute is waived in certain circumstances. First, a party waives the right to apply the Dead Man's statute if the party calls the witness on its own behalf.[209] Second, if the personal representative opens the door by testifying against the claim of some interested party, the previously excluded witnesses are allowed to testify as to the specific matter mentioned by the personal representative.[210] The witness's responsive testimony, however, should be limited to explaining, rebutting or otherwise denying the testimony by the personal representative.[211] Third, application

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[200]*Id.* at 314 (quoting FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 1-4(A) (3d ed. 1994)).

[201]*See* W. VA. CODE § 57-3-1 (2003).

[202]Hudkins v. Crim, 61 S.E. 166, 169 (W. Va. 1908) (stating that a party is to be excluded from testifying "regardless of any interest").

[203]Coleman v. Wallace, 104 S.E.2d 349 (W. Va. 1958).

[204]*Id.* at 351.

[205]Lilly v. Ellison, 148 S.E. 380 (W. Va. 1929).

[206]*Meadows*, 468 S.E.2d at 315.

[207]*Id.* at 316.

[208]Cale v. Napier, 412 S.E.2d 242, 247 (W. Va. 1991) (quoting Holland v. Joyce, 185 S.E.2d 505, 511 (W. Va. 1971)).

[209]*See* Holland v. Joyce, 185 S.E.2d 505, 511 (W. Va. 1971).

[210]*In re* Estate of Thacker, 164 S.E.2d 301, 306 (W. Va. 1968)

[211]Kimmel v. Shroyer, 28 W. Va. 505, 510 (1886), *overruled on other grounds by* Meadows v. Meadows, 468 S.E.2d 309 (W. Va. 1996).

of the Dead Man's statute is waived if no objection to the competency of the witness is made at the trial court; a party cannot wait until appeal to claim testimony should have been excluded via the Dead Man's statute.[212] A party is not precluded from cross-examining witnesses in West Virginia if there has been a proper objection to the direct examination.[213] A party is also not precluded from taking the deposition of a witness during the discovery phases of the trial, if the witness is otherwise prevented from testifying at the trial because of the application of the Dead Man's statute.[214]

I. Wisconsin

Wisconsin's Dead Man statute is contained in Wisconsin Statute § 885.16 and is extended in Wisconsin Statute § 885.17 to transactions one party has had with an agent of an adverse party, when the agent is deceased.[215] Section 885.16 states:

> No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives the party's interest or title, shall be so examined, except as aforesaid.[216]

For over three decades, Wisconsin courts have urged the statute should be repealed and have "unabashedly take[n] the position that [the Dead Man's statute's] effect should be limited wherever possible."[217] The Wisconsin Supreme Court has advocated a strict construction of the statute, suggesting "that it is preferable for a

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[212]First Nat'l Bank v. Bell, 215 S.E.2d 642, 645 (W. Va. 1975).

[213]Poteet v. Imboden, 88 S.E. 1024, 1028 (W. Va. 1916).

[214]Martin v. Smith, 438 S.E.2d 318, 323 (W. Va. 1993).

[215]*See* WIS. STAT. § 885.17 (2003) (stating, in relevant part, that "[n]o party . . . shall be examined as a witness in respect to any transaction or communication by the party or person personally with an agent or an adverse party of the agent of the person from, through or under whom such adverse party derives his or her interest or title, when such agent is dead or insane . . .").

[216]WIS. STAT. § 885.16 (2003).

[217]*In re* Estate of Molay v. Molay, 175 N.W.2d 254, 259 (Wis. 1970).

jury to weigh the credibility of a witness's testimony rather than suppress his testimony altogether."[218]

While the Supreme Court has noted the statute is an "archaic view of the law,"[219] a party moving to exclude a witness's testimony "must show that: (1) there was a transaction or communication between the decedent or witness; (2) the witness has an interest in the matter at hand; and (3) the liability or cause of action of the party advocating incompetence arose from, through or under the deceased."[220] The Wisconsin Supreme Court places strong emphasis on objecting not to the evidence itself but to the competency of the witness.[221] Because the Court is in favor of the statute's repeal, the Court will not consider, on appeal, objections at the trial court made to the testimony itself.[222]

First, the objecting party must establish that an interested survivor will "testify about a course of conduct between himself and the deceased which may constitute a transaction"[223] or that the witness will "testify to conduct between himself and the deceased which may provide the basis for an inference that a transaction occurred."[224] A transaction means some "personal transaction with the deceased . . . in which each [party] is an active participant."[225] The statute, on the other hand, "does not prohibit the survivor from describing an event or physical situation, or the movements or actions of a deceased person . . . in no way connected with . . . the conduct of the party testifying."[226] The statute also does not prohibit testimony by third persons, so long as the third-person witness did not participate in the transaction and "the participants were not affected by the witness presence."[227] Quite possibly a loophole, third persons can also testify as to transactions between an interested witness and the decedent.[228]

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[218]Havlicek/Fleisher Enters. v. Bridgeman, 788 F. Supp. 398 (E.D. Wis. 1992).

[219]*Molay*, 175 N.W.2d at 259.

[220]Schimpf v. Gerald, Inc., 52 F. Supp. 2d 976, 987 (E.D. Wis. 1999).

[221]Estate of Robinson, 123 N.W.2d 515, 517 (Wis. 1963).

[222]*Molay*, 175 N.W.2d at 260 (quoting FRANK L. MALLARE, WISCONSIN CIVIL TRIAL EVIDENCE, § 1.663, at 24) (1967); *see also* Giese v. Reist, 281 N.W.2d 86, 91-92 (Wis. 1979); *In re* Estate of Chrisopherson, 650 N.W.2d 52, 60 n.13 (Wis. Ct. App. 2002) (noting that the "strictly-imposed requirement about the precise wording of the objection is the result of the disfavor with which the courts view this statute, and one way the courts have limited its effect").

[223]Johnson v. Mielke, 181 N.W.2d 503, 509 (Wis. 1970).

[224]*Id.*

[225]Seligman v. Hammond, 236 N.W. 115, 117 (Wis. 1931).

[226]*Id.*

[227]Schimpf v. Gerald, Inc., 52 F. Supp. 2d 976, 987-88 (E.D. Wis. 1999).

[228]*See, e.g.*, Bridgeman, 788 F. Supp. at 397; Stuart v. Crowley, 217 N.W. 719, 721 (Wis. 1928); Nelson v. Christensen, 172 N.W. 741, 742 (Wis. 1919); McHatton v. McDonnell's Estate, 165 N.W. 468, 469 (Wis. 1917); *In re* Laugen's Will, 99 N.W. 437, 438 (Wis. 1904); Brader v. Brader, 85 N.W. 681, 683 (Wis. 1901); Wollman v. Ruehle, 80 N.W. 919, 920 (Wis. 1899).

Second, because "when a witness has no interest in the outcome of the action, he has no reason to conceal or lie about facts surrounding the transaction,"[229] the objecting party must establish the witness is somehow interested in the verdict.[230] As noted by the Wisconsin Supreme Court, it must be shown that the witness is a party[231] that has some right or interest in the verdict itself, or could somehow receive an interest after the verdict is rendered.[232] "[T]he true test of the disqualifying interest of the witness is whether he [or she] will gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him [or her] in some other action."[233] The interest cannot be uncertain or contingent; instead, the interest must be "present, certain, and vested."[234] Thus, the testimony of a spouse or a child of an interested party is allowed, since those parties' interests are held as remote and contingent.[235]

Wisconsin courts are strict in applying the Dead Man's statute; therefore, a party must be careful that he or she does not waive the statute's applicability at the trial court. First, a party will waive the statute's application if the party cross-examines the witness and does not object to the competency of the witness, but the party can cross-examine the witness after a proper objection is overruled.[236] The party should be careful to not extend its cross-examination into areas not previously covered by the initial objection, as exceeding the scope of the objection is a grounds for being denied protection of the statute.[237] Second, the party will waive the statute's application if the trial court objection is not precisely worded.[238]

IV. CRITICISM OF DEAD MAN'S STATUTES

Although they remain valid law in nearly a dozen states, Dead Man's statutes have been criticized by nearly all famous legal scholars over the past 150 years. Dean Wigmore, former Dean of the Northwestern University School of Law and a master on American evidentiary law, stated:

> As a matter of policy, this survival of the now discarded interest qualification is deplorable in every respect; for it is based on a fallacious

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[229]*Bridgeman*, 788 F. Supp. at 397 (citing Estate of Kemmerer, 114 N.W.2d 803 (Wis. 1962)).

[230]*See* WIS. STAT. § 885.16 (2003).

[231]*In re Estate of Christen*, 239 N.W.2d 528, 530 (Wis. 1976).

[232]Johnson v. Mielke, 181 N.W.2d 503, 509 (Wis. 1970).

[233]*Id.* at 510; *see also In re* Williams' Will, 41 N.W.2d 191 (Wis. 1950); *In re* Estate of Novak, 193 N.W. 1000 (Wis. 1923).

[234]State v. Fonk's Mobile Home Park & Sales, Inc., 395 N.W.2d 786, 792 (Wis. Ct. App. 1986).

[235]*See, e.g.*, *Estate of Christen*, 239 N.W.2d at 530; Estate of Nale, 213 N.W.2d 552, 555 (Wis. 1974).

[236]*Molay*, 175 N.W.2d at 260.

[237]*Id.*

[238]*In re* Estate of Chrisopherson, 650 N.W.2d 52, 60 n.13 (Wis. Ct. App. 2002).

> and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words.[239]

Edmund Morgan, another famous scholar and former Reporter for the MODEL CODE OF EVIDENCE, noted that Dead Man's statutes:

> are based upon the delusion that perjury can be prevented by making interested persons incompetent or by excluding certain classes of testimony. They persist in spite of experience which demonstrates that they defeat the honest litigant and rarely, if ever, prevent the dishonest from introducing the desired evidence: if the dishonest party is prevented from committing perjury, he is not prevented from some suborning it. If the statutes protect the estates of the dead from false claims, they damage the estate of the living to a much greater extent. And frequently their application prevents proof of a valid claim by the representative of [the] decedent's estate.[240]

Even Professor McCormick, whose very treatise on evidence law is considered a staple in the world of hornbooks, notes that:

> Most commentators agree that the expedient of refusing to listen to the survivor is . . . a "blind and brainless" technique. In seeking to avoid injustice to one side, the statute-makers ignored the equal possibility of creating injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard.[241]

Even though each of the nine states surveyed in this article have different forms of a Dead Man's statute, each state statute suffers from the same four criticisms.

First, as outlined by Dean Wigmore, these statutes assume that some people are more dishonest than honest.[242] America's judicial system is based on presuming one is innocent until proven guilty, but by their very nature, Dead Man's statutes prevent an entire class of persons from testifying because of an assumption that all witnesses are bound to lie when the lips of one are sealed due to death. For this very reason alone, Dead Man's statutes should be repealed so as to give each party and witness the opportunity to present evidence to the trier-of-fact. Cross-examination provides a decedent's counsel the ability to highlight bias and potential fraudulent claims, and in today's world of television, movies, and multimedia, juries are smarter than ever about judicial proceedings and are unlikely to act incompetent when a potential fraudulent claim is presented in court. With the options of deposing and interviewing both the "interested" parties and third parties, "[a] searching cross-examination will usually, in case of fraud, reveal discrepancies inherent in the

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[239]WIGMORE, *supra* note 10, § 578, at 822-23.

[240]EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 187-88 (1956).

[241]MCCORMICK, *supra* note 5, § 65, at 251.

[242]WIGMORE, *supra* note 10, § 578, at 822.

'tangled web' of deception."[243] Our judicial system should afford a trier-of-fact the option of weighing that testimony and determining whether a party indeed has a valid claim against an estate.

Second, Dead Man's statutes present an injustice to the very witnesses who are, in fact, honest and have a valid claim against a decedent or intestate who, by one reason or another, was unable to make testamentary arrangements for a person. A hypothetical helps to illustrate this injustice. A farmer has two sons, Dan and Andy. As the farmer grows old, Dan and Andy both move their separate ways in life. Andy remains home to assist with the needs of the farm and to care for his ailing father, and Dan moves to Los Angeles to pursue a career in acting. When their father has a massive stroke, Andy takes over all the daily tasks on the farm and works a second job on the side to pay for his father's medicinal needs. Dan, on the other hand, ignores pleas from his brother that his help is needed on the farm and that their father is dying. The father, aware of Andy's unconditional love and support and Dan's mere love of fame and fortune, tells his son Andy that "You are to take total possession of my estate. Please call my lawyer and ask him to come here tomorrow to change my will." The father, however, dies that night in his sleep. If Andy were to make a claim against the estate, he would be precluded from testifying that his father intended to give him all assets and property from his estate. Even though Andy has a valid and honest claim, no trier-of-fact will hear his claim if a Dead Man's statute is valid law. These laws create an injustice to Andy, as they will presume Andy is lying and attempting to take advantage of the estate. In the end, Dan will take half of the estate.

Third, Dead Man's statutes are incorrectly worded to accomplish their goal. While it is true that the statutes "intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omission, mistakes or perhaps falsehoods of such survivor,"[244] these very statutes contain critical exceptions that give dishonest persons the ability to use fraud and falsehoods to take advantage of an estate. Most importantly, many Dead Man's statutes create an exception that allows third parties to testify.[245] To quote Professor McCormick, "[o]ne who would not balk at perjury [on his or her own] will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story."[246] Therefore, even though Dead Man's statutes intend to prevent harm against an estate, these same statutes invite fraud, since an honest party will be unable to dispute the fraudulent third-party claims in court.

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[243]MCCORMICK, *supra* note 5, § 65, at 251.

[244]Owens v. Owens's Adm'r, 14 W. Va. 88, 95 (1878).

[245]Maryland, South Carolina, Tennessee, Washington, and West Virginia, for example, allow third parties to testify to transactions and communications surrounding the decedent and the "interested" party. *See, e.g.*, Ebert v. Ritchey, 458 A.2d 891, 896 (Md. Ct. Spec. App. 1983) (noting the Dead Man's statute applies to "testimony by parties, not by third parties"); Moore v. Trimmier, 11 S.E. 548, 552 (S.C. 1890); Waggoner v. Dorris, 68 S.W.2d 142, 145 (Tenn. Ct. App. 1933); Erikson v. Kerr, 883 P.2d 313, 316 (Wash. 1994); Meadows v. Meadows, 468 S.E.2d 309, 313(W. Va. 1996).

[246]MCCORMICK, *supra* note 5, § 65, at 251.

Fourth, scholars, lawyers, judges, and scholars alike are in utter confusion with the "labyrinth of decisions, which have often brought confusion rather than clarity."[247] Although taken over twenty years ago, one study in the state of Washington found that 68% of attorneys and 80% of judges felt the Washington Dead Man's statute was confusing and difficult to administer.[248] Nevertheless, since the Survey was taken in 1979, Washington courts have continued to broaden, narrow and otherwise change the scope of the Dead Man's statute, which still remains valid law.[249] Repealing the Dead Man's statutes would overturn tens of thousands of pages of case law in the nine jurisdictions surveyed in this article and create a system where triers-of-fact would be given the ability to determine the competency and credibility of a witness. Instead of placing faith in 100 year-old decisions from this "archaic view of the law,"[250] juries could judge for themselves whether a witness was entitled to property or assets.

V. PROPOSALS FOR CHANGE

In order to achieve justice in this nation, Dead Man's statues should be abolished for other forms of protection against a decedent. This article presents three separate alternatives for states to consider in order to become more in line with those other jurisdictions that have abolished or otherwise repealed the Dead Man's statute.[251]

First, this article proposes that states follow the lead of Ohio, and presumably Alabama, and pass a new Rule of Evidence 601 providing that "Every witness is competent except as provided by these rules."[252] Instead of stopping at a new Rule 601, states should also expressly repeal the Dead Man's statute in their jurisdiction. By repealing the statute and enacting a new Rule 601 to become the governing rule of competency of witnesses, states will simplify court procedure and follow the initial guidelines of the drafters of the Federal Rules of Evidence.[253] Such legislation also clears up both trial court and appellate court dockets and saves money from the statute's application. Although our nation adopted the Dead Man's statute from ancient English law, England never enacted a Dead Man's statute and "there has been no indication that dead men's estates have been plundered in that country by false claimants."[254] As such, besides being free of the "false claimants," England's trial dockets are also free of the Dead Man's statute clutter that fills dockets in the United States.

Justice cannot be truly served, however, by the mere passing of a new Rule 601 and the repeal of the Dead Man's statute. If a state is to allow an interested party to testify as to a decedent's statements and transactions, the state should also create a

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[247]Ray, *supra* note 45, at 108.

[248]Trudell, *supra* note 165, at 515.

[249]*See supra* notes 165-189 and accompanying text.

[250]*Molay*, 175 N.W.2d at 259.

[251]*See supra* note 8.

[252]*See* ALA. R. EVID. 601.

[253]*See* FED. R. EVID. 601 advisory committee's note.

[254]Ray, *supra* note 45, at 109.

new hearsay exception that affords a decedent's estate the right to submit evidence to the trier-of-fact that responds to, denies, or contradicts the interested party's testimony. Two states, California and New Hampshire, have enacted such a hearsay exception, and these two states present states the chance to mirror their legislation on already-existing legislation. New Hampshire Rule of Evidence 804(b)(5) provides:

> In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether written or oral, shall not be excluded as hearsay provided the Trial Judge shall first find as a fact that the statement was made by the decedent, and that it was made in good faith and on the decedent's personal knowledge.[255]

California's hearsay exception, found at Evidence Code § 1261, is similar and reads:

> (a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear. (b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.[256]

Both of these statutes give the decedent's estate the option of testifying as to the decedent's actual intentions. Furthermore, both statutes safeguard the rights of the decedent and the interested party by giving the trial judge the opportunity to exclude testimony if it appears remote or false, or if it is given in bad faith.[257]

To further the initial purpose of the Dead Man's statutes, states should repeal their current Dead Man's statute, enact a more concise Rule 601, and enact a hearsay exception that gives decedent's estates the right to introduce statements of the decedent in response to the interested party's testimony. As noted by the Maryland Court of Appeals, Dead Man's statutes intended to place two parties, the decedent and the interested party, on equal ground.[258] New legislation puts these parties on equal ground by allowing both parties to testify about the decedent's intentions, transactions or statements.

Second, if states decide they would like to enact more protection for the decedent's estate than the first proposal for change affords, states should enact legislation providing jury instructions in will contests and other similar matters noting that "clear and convincing evidence" must be provided to find a decedent intended to distribute property to or incurred some debt against an interested party. A "clear and convincing evidence" standard would place interested parties at an automatic disadvantage, as their testimony and evidence would be presumed false without other evidence to support the evidence. While it is true that the interested party could ask third parties and other witnesses to lie on their behalf as supportive

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[255]N.H. R. EVID. 804(b)(5).

[256]CAL. R. EVID. CODE § 1261.

[257]*See id.*; N.H. R. EVID. 804(b)(5).

[258]*See* Montgomery County v. Herlihy, 575 A.2d 784, 789-90 (Md. Ct. Spec. App. 1990).

evidence, third parties can already testify in proceedings; therefore, this potential downfall should not be considered.

Third, if states decide that Dead Man legislation is too vitally important for the protection of the decedent's estate, states should, at the minimum, follow the lead of Arizona and give trial judges the right to apply the statute at their own discretion.[259] Affording power to the trial judge gives states the ability to protect the rights of an honest, yet interested party, in limited circumstances as the trial judge sees fit.[260] Such legislation also affords the decedent's estate the right to appeal a trial judge's inclusion of testimony on an abuse of discretion standard.[261] At the very least, this option gives some light of hope to interested parties, although either of the previous two options are a more ideal solution to this common law nightmare.

VI. CONCLUSION

Although this article has provided a brief historical lesson on Dead Man's statutes and has overviewed the scope and application of nine separate Dead Man's statutes, hundreds of additional pages could be spent further outlining the specific application of each particular statute within its jurisdiction. Nevertheless, by providing the reader with a sense of the complicated, confusing and unfair nature of this form of common law legislation, the overall purpose of this article has been accomplished.

Thirty-two states have expressly repealed their Dead Man's statute.[262] Of those jurisdictions that retain this statute, Dead Man's statues vary in scope and application. These statutes are confusing and problematic, and as such, for each day that these statutes remain valid legislation, our nation will continue to deny justice to hundreds of persons. Therefore, when the state legislatures in the nine jurisdictions discussed *supra* revisit their respective legislation in upcoming years, a change should be made that allows all persons the chance to present their evidence and give their own testimony in court. No matter if a state chooses one of the three proposals for change outlined in this article or another option better suited for their jurisdiction and citizens, states should adopt the current majority view and move toward a evidentiary system that is more fair to the majority of persons.

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[259] *In re* Estate of Calligaro, 768 P.2d 660, 664-65 (Ariz. Ct. App. 1988); *see also* ARIZ. REV. STAT. § 12-2251 (2003).

[260] *See Calligaro*, 768 P.2d at 664.

[261] *In re* Estate of Mustonen, 635 P.2d 876, 877 (Ariz. Ct. App. 1981).

[262] *See supra* note 9.