Deadman Statute and Hearsay Issues and Objections for Orphans' Court Judges

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ATTORNEY-CLIENT PRIVILEGE

1.0 The Attorney-Client Privilege – Background. As a general rule, the attorney-client privilege survives the client's death.[1] The U.S. Supreme Court upheld the posthumous application of the common law attorney-client privilege against the argument that the privilege should not prevent disclosure of confidential communications where the client has died and the information is relevant to a criminal proceeding:

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanished altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.[2]

1.1 The Testamentary Exception to the Attorney-Client Privilege. A well-recognized exception to the general rule is the "testamentary exception" which permits disclosures from the drafting attorney in disputes among the client's heirs.[3] The attorney-client privilege, of course, belongs to the client, not the attorney. As such, the client may waive the privilege. The testamentary exception is seen as an implicit waiver by the client of the privilege in contests among heirs or other takers under a testamentary instrument:

> [W]e are of opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin.

* * *

[1] *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998) (deciding that an interview of Deputy White House Counsel Vincent W. Foster, Jr. with his lawyer shortly before Mr. Foster's death was privileged).
[2] *Id.* at 407.
[3] *Id. See also Zook v. Pesce*, 91 A.3d 1114 (Md. 2014).

> The client may waive the protection of the rule. The waiver may be expressed or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its objects, and in direct conflict with the reason upon which it is founded.[4]

The attorney-client privilege, which normally protects the client's interests, is "impliedly waived in order to fulfill the client's testamentary intent."[5]

1.2 The Testamentary Exception in Maryland. The testamentary exception to the attorney-client privilege was first recognized in Maryland in a 1919 case, *Benzinger v. Hemler,* 134 Md. 581, 107 A. 355 (1919). The *Benzinger* case involved a will executed by a woman "more than 80 years of age" which essentially left her entire estate to "her servant or attendant … to the exclusion of her heir at law.[6]" Unsurprisingly, the case revolved around whether the will was a product of undue influence. At trial, the heir at law sought to examine the attorney who drafted the will and who was also named executor therein. The caveator sought to examine the lawyer "as to the transactions, circumstances, instructions given to him by the testatrix in connection with the preparation of the will, and what was said by her in relation thereto at the time the same was prepared." Ms. Hemler, the residuary beneficiary, objected to the testimony on the ground that it was a privileged communication. The trial court sustained the objection and did not permit the testimony.

[4] *Glover v. Patten,* 165 U.S. 394, 406-8 (1897) (quoting, in part, from *Blackburn v. Crawfords,* 70 U.S. 175 (1865)).
[5] *Swidler & Berlin v. U.S.*, 524 U.S. at 405. (disclosure "helps the court carry out the decedent's estate plan"). *See also* Edward J. Imwinkelfied, *The New Wigmore, a Treatise on Evidence: Evidentiary Privileges* § 6.13.2(b) (Richard D. Friedman ed., 2d ed. 2010).
[6] The testator's niece was the caveator but she died during the course of the proceedings and the case was then pursued by Mr. Benzinger, her executor.

The Court of Appeals reversed that evidentiary ruling. After reciting cases from other jurisdictions (including the *Glover* case) it concluded that there was a testamentary exception to the privilege and that the purpose of that exception was to protect the clients from having his or her will be either established as a valid will or set aside if it is found to be induced by undue influence over the testator/trix. In *Benzinger*, the caveator was seeking the scrivener's testimony. In other words, the caveator believed that he/she could elicit testimony from the drafting attorney that would upend the will drafted by that attorney. The testamentary exception to the attorney-client privilege is not limited to situations that would sustain the document prepared by the attorney but rather based on the idea that a decedent would want their true testamentary wishes followed even if that meant voiding the document in question.

The Court of Appeals revisited this issue in 2014 in *Zook v. Pesce*, 438 Md. 232, 91 A.3d 1114 (2014): "We reaffirm that in a dispute between punitive heirs and devisees under a will or trust, the attorney-client privilege does not bar admission of testimony and evidence regarding communication between the decedent and any attorneys involved in the creation of the instrument, provided that the evidence or testimony tends to help clarify the donative intent of the decedent."

The *Zook* court addressed the testamentary exception in the setting of a dispute over an amendment to a revocable trust made 22 days before the settlor's death. One of the decedent's children received her share continuing in trust rather than outright and she contested this amendment. The unhappy heir wanted to receive a copy of the revocable trust executed a year earlier than the last instrument and to question the drafting attorney as to the events surrounding the earlier draft. The court denied the complainant a copy of the earlier trust and denied her seeking testimony from the drafting attorney regarding that earlier trust. One of the elements determined

to be characteristic of undue influence is that a request constitutes a change from a former will.[7] Accordingly, the Court of Appeals in *Zook* held that there was a right for the contestant to receive the earlier version of the testamentary document.

DEAD MAN'S STATUTE

2.0 The Dead Man's Statute in General. The Dead Man's Statutes have been widely disapproved by scholars and judges.[8] Indeed, most jurisdictions have abandoned the dead man's statute.[9] Nevertheless these statutes continue, in some form, in over one-third of U.S. jurisdictions.

The Dead Man's Statue in Maryland states:

> 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.[10]

This statute purportedly seeks to "equalize the position of the parties by imposing silence on the survivors as to transactions with or statements by the decedent or at least by requiring those

[7] Various characteristics that may demonstrate undue influence were set out by the Court of Appeal in *Moore v. Smith*, 321 Md. 347, 352, 582 A.2d 1237, 1239 (1990): We have recognized in many appellate cases several elements characteristic of it's (undue influence) presence, including: (1) the benefactor and beneficiary are involved in a relationship of confidence and trust; (2) the will contains substantial benefit to the beneficiary; (3) the beneficiary caused or assisted in effectuating execution of will; (4) there was an opportunity to exercise influence; (5) the will contains an unnatural disposition; (6) the bequests constitute a change from a former will; and (7) the testator was highly susceptible to undue influence."

[8] John H. Langbein, *Substantial Compliance with the Wills Act*, 88 Harv. L. Rev. 489, 501 (1975) ("[T]he dead man statutes are widely condemned among commentators and practitioners. To Wigmore, 'The exclusion is an intolerable injustice,' since 'cross-examination and other safeguards for truth are a significant guarantee against false decision.' As long ago as 1938 the American Bar Association's Committee on the Improvement of the Law of Evidence voted disapproval of dead man statutes by the margin of forty-six to three, following a national survey of professional and judicial opinion.").

[9] Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man Statutes and a Proposal for Change*, 53 Clev. St. L. Rev. 75 (2005-6). Mr. Wallis lists 32 states that have expressly rejected the dead man's statute. Footnote 9. See Appendix for a more up to date and comprehensive list. The Appendix lists 30 jurisdictions as not recognizing or repealing the statute. The remaining jurisdictions either recognize it fully or with some degree of limitation.

[10] Courts & Judicial Proceedings § 9-116.

asserting claims against a decedent's estate to produce testimony from disinterested persons. "[11]

2.1 History. At early Common Law, an interested party – one with a stake in the outcome of the proceedings – was viewed as inherently untrustworthy and therefore was rendered incompetent to testify:

> The theory of disqualification by interest was merely one variety of the general theory which underlay the extensive rules of incompetency at common law. It was reducible in its essence to a syllogism, both premisees of which, though they may now seem fallacious enough were accepted in the 1700s as axioms of the truth: total exclusion from the stand is the proper safeguard against false decision, whether the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the events of the cause are specially likely to speak falsely; therefore such persons should be totally excluded.[12]

Dead man's statutes constitute part of these more general witness incompetency rules, one designed "to close the mouth of an interested survivor."[13]

2.2 The Impact of the Federal Rule of Evidence. After years of debate and study, the Warren Court promulgated Federal Rules of Evidence to govern all trials in the federal courts. Those rules contained Rule 601 which generally eliminated the Common Law witness incompetency rules.[14] Justice Douglas, however, questioned whether the Court had authority to promulgate evidentiary rules that effectively alter the substantive outcome of a case solely based on its removal to the federal court. Based on this objection, the rules of evidence as promulgated by the federal courts were transmitted to Congress for consideration. Congress revised Rule 601 to continue allowing witness disqualification if a Dead Man's Statute was recognized as part of the relevant state law: "The greatest controversy centered around (Rule 601's) rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging

[11] *Reddy v. Mody*, 39 Md.App. 675, 679, 388 A.2d 555, 558-9 (1978).
[12] John H. Wigmore, Evidence § 576 at 810 (Chadbourn Rev. 1979).
[13] Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Creditability: The Next Step in an Historic Trend*, 47 Ala. L. Rev. 145 (1995).
[14] House Report No. 93-650 (Committee on Judiciary).

that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest."[15] Thus, in its final form, continued today but for stylistic changes, Federal Rule of Evidence 601 sweeps away the Common Law witness incompetency rules but for that imposed by the Dead Man's Statutes:

> The general ground-clearing (of federal rule of civil procedure 601) eliminates all grounds for incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds this abolished are religious belief, conviction of a crime, and connection with the litigation as a party for interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds. …
>
> The Dead Man's Acts are surviving traces of the Common Law disqualification of parties and interested persons.[16]

Federal Rule of Evidence 601 provides: "Every person is competent to be a witness unless those rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision." Thus those jurisdictions without a Dead Man's Statute permit the historically excluded testimony to be heard, with the fact finder charged with "determining the weight and creditability of a witness's testimony."[17]

Most states have adopted all or part of the Federal Rules of Evidence, including Rule 601 either in its original or revised form. Ironically, several jurisdictions have used its version of Rule 601 to overturn existing Dead Man's Statutes regardless of the carve-out for it explicitly permitted by Congressional action. The Arkansas court, for example, held that its Dead Man's Statute was repealed by its Rule 601: "[I]t (the Dead Man's Statute) was in fact expressly repealed by the

[15] Id.
[16] 28 U.S.C.A., Federal Rules of Evidence, Rule 601, Advisory Committee Notes (1972).
[17] Colquitt & Gamble, *supra* note 46 at 176. Although Rule 601 swept away the broad categories of disqualified witnesses, that does not mean that anyone, including persons with no comprehension may testify. Federal Rule of Evidence 603 requires that a witness must be able to affirm that he or she will testify truthfully.

Uniform Rules of Evidence."[18] Other jurisdictions have more straightforwardly repealed their statutes.[19]

2.3 Maryland Adoption of Federal Rule 601. Maryland Rule 5-601 (General Rule of Competency) states: "Except as otherwise provided by law, every person is competent to be a witness." It was adopted in late 1993, effective July 1, 1994. The "except as otherwise provided by law" portion of this Rule pays tribute to the Maryland Dead Man's Statute while acknowledging that generally witnesses may testify.

Indeed, in 1864 the Maryland General Assembly enacted what is now Court's Art. § 9-101 which states that "A person shall not be excluded from testifying in a proceeding because of incapacity from a crime or interest in the matter in question." This statute swept away earlier law that prohibited the parties to a contract from testifying even if both were still living at the time of the suit. It did not dislodge the Dead Man's Statute.[20]

2.4 The National Application of the Dead Man's Statute Where Not Repealed. Those seeking to introduce extrinsic evidence of settlor intent must contend with the Dead Man's Statutes in those jurisdictions that continue to retain such statutes. The extent to which such statutes impose a barrier to extrinsic evidence of settlor intent depends, to a large degree, on the nature of the specific statute and its interpretation.

Some jurisdictions take a traditional approach and apply the Dead Man's Statute to exclude testimony of settlor intent from a party with a stake in the outcome of the case. For instance, Illinois is a state with broad, traditional prohibition on testimony and its courts enforce that broad

[18] *Davis v. Hare*, 561 S.W.2d 321 (Ark. 1978).
[19] Florida, for example, adopted Rule 601 in 1976 which mirrored the Congressional model: "Every person is competent to be a witness, except as otherwise provided by statute." Fla. Stat. Ann. §90.601 (West 2013). Then the Dead Man's Statute was repealed in 2005 (prior Fla. Stat. Ann. § 90.602).
[20] *Shaneybrook v. Blizzard*, 209 Md. 304, 121 A.2d 218 (1956).

prohibition.[21] Under the Illinois statute, "no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased person … or to any event which took place in the presence of the deceased (person)."[22] Beneficiaries and putative beneficiaries have sufficient interests in the estate to trigger the Dead Man's Statute under Illinois law. Thus, in a case seeking to impose a constructive trust on a specific bequest to enforce a "secret" trust, the punitive beneficiary's testimony was not permitted. The court held the Dead Man's Statute was not merely to guard against the impairment of the estate but also to defend the legacies set out in the will.[23] It is a statute, however, meant to preclude only those with an actual stake in the outcome from testifying. Merely being a party to the action is not enough. In a dispute between the residuary beneficiaries of a trust and the intestate takers, the trustee of the trust was permitted to testify as to transfers of property to the trust regardless of being an essential, named party. The testimony of the trustee, although a formal party to the suit, was proper because she had no pecuniary stake in the outcome of the suit.[24]

Although imposing silence of those with a direct stake in the outcome of the proceeding, Illinois has a series of cases permitting the drafting lawyer to testify. Generally these decisions are

[21] In a wrongful death action by an estate against a defendant motorist, nether the motorist or his spouse could testify to the facts of the accident (they claimed that the decedent was on the wrong side of the road). In that action, the estate relied exclusively on accident reconstruction experts and did not offer any testimony from the decedent's spouse/administrator who was in the car at the time of the accident. Such testimony, under the statute, would have constituted a waiver of the prohibition. *Murphy v. Hook*, 316 N.E.2d 146 (Ill. App. Ct. 1974). Another Illinois case, a suit in federal court applying the Illinois Dead Man's Statute, dismissed a case for fraud against a deceased unlicensed business broker because the plaintiff would need to testify about the business dealings with the decedent in order to prevail. The federal judge observed: "While this (the dismissal) may seem an inequitable result, courts have entered summary judgment where the plaintiff lacks sufficient proof to support his case after his own testimony has been inadmissible pursuant to the Dead Man's Act." *Zang v. Alliance Financial Services of Illinois, Ltd.*, 875 F Supp. 2d 865 (N.D. Ill. 2012).

[22] 735 Ill. Comp. Stat. Ann. 5/8-201 (West's Smith-Hurd 2012).

[23] *Kamberos v. Magnuson*, 510 N.E.2d 112 (Ill. App. Ct. 1987). *See also In re Est. of Fisher*, 2012 IL App. (4th) 111125-U (West 2012). (The Dead Man's Statute applies to defend an heir's bequest regardless of how the suit is structured).

[24] *Herron v. Underwood*, 503 N.E.2d 1111 (Ill. App. Ct. 1987). Appellants argued that the while the trustee may not have had a monetary stake in the outcome, she had a "definite emotional interest in seeing that her brother's 'new wife' did not get her hands on the estate." The court held that the disqualifying interest had to be of a pecuniary nature and that the emotional stake in the outcome merely went to the trustee's credibility.

based on the draftsperson not having a sufficient "interest" in the outcome of the case to pull him or her into the operation of the statute. In one case, the attorney was permitted to testify as to the settlors' intent to transfer real property to a trust for the benefit of some, but not all, of their children and grandchildren. Although the attorney testified to preparing and overseeing the execution of the deeds, no deeds could be found. The disinherited heirs objected to the attorney's testimony on the basis that he had a definite interest in the outcome of the suit and that he had, in fact, notified his insurance carrier of a potential malpractice case against him. The court disagreed, noting that he had no direct interest in the suit and that there was no suit against him thereby making the purported "interest" in the proceeding speculative.[25]

Before amendments to its statute, Colorado had a Dead Man's Statute similar to that of Illinois. The Colorado court likewise permitted the attorney to testify as a fact witness regardless of the operation of the Dead Man's Statute under the prior law because the attorney lacked a direct interest in the outcome of the suit.[26] It observed: "We are aware of only one instance in which an attorney, by reason of his services, was determined to have gained an interest in the outcome of the litigation to warrant disqualification of his testimony. This arises when the attorney has entered into a contingent fee agreement with his client."[27] Generally, however, the attorney may testify.[28]

Other states have modified the Dead Man's Statute to permit otherwise disqualified

[25] *Michalski v. Chicago Title & Trust Co.*, 365 N.E.2d 656 (Ill. App. Ct. 1977). See also *Est. of Hurst v. Hurst*, 769 N.E. 2d 55 (Ill. App. Ct. 2002), another Illinois case permitting the attorney to testify where a related malpractice case was pending (noting that to be disqualified from testifying, "The interest of the witness must be direct and be such that a pecuniary gain or loss will inure to the witness directly as the immediate result of the judgment."). See also *Ball v. Kotter*, 2012 WL 987223 (Slip Opinion US DIST. Ct. N.D. Ill. E. Div. 3/22/12).

[26] Colorado changed its statute to permit otherwise excludable testimony if corroborated. This will be discussed *infra*.

[27] *David v. Powder Mountain Ranch*, 656 P.2d 716, 718 (Col. App. 1982). The contingent fee case was *Lee v. Leibold*, 79 P.2d 1049 (Colo. 1938) In that case, the attorney represented a claimant against an estate on a contingent fee basis and tried to testify to establish the contract underlying the claim. His testimony was excluded.

[28] Colorado went from a traditional Common Law model to an approach in its 2012 revision permitting an interested party to testify as long the testimony "is corroborated by material evidence of an independent and trustworthy nature." C.R.S.A. § 13-90-102 (West 2012). Then, in 2013, it struck the requirement that the testimony had to be "independent" and defined "corroborated" as evidence that does not need to "support the verdict but must tend to confirm and

testimony as long as it is corroborated independently. Virginia, for example, takes this approach which "is designed to prevent a litigant from having the benefit of his own testimony when, because of death or incapacity, the personal representative of another litigant has been deprived of the testimony of the decedent or incapacitated person. The statute substitutes a requirement that testimony be corroborated in place of the harsher Common Law rule which disqualified the surviving witnesses for intent."[29] The corroboration must be from a disinterested party, who is not financially interested in the outcome of the case.[30] Thus, the spouse of a party could not be the corroborating witness.[31]

2.5 The Maryland Application of the Dead Man's Statute. The Dead Man's Statute may have the purpose of equalizing the playing field but it is narrowly construed because it is an exception to the general rule permitting evidence to be heard: "The statute is an exception to the general rule that all witnesses are competent to testify … and is strictly construed 'in order to disclose as much evidence as possible' without ignoring the purpose of the statute. … In close cases involving the Dead Man's Statute, Maryland precedent consistently has favored the admission of testimony." *Walton v. Davy*, 86 Md.App. 275, 285, 586 A.2d 760, 765 (1991).

One example of the narrow construction of the Dead Man's Statute is reflected by the case *Reddy v. Mody*. *Reddy* involved three causes of action in a medical malpractice case that resulted in death. The first cause of action was an action by the decedent's estate and the other two causes of action were by the decedent's husband and the decedent's child for wrongful death. The court

strengthen the testimony of the witness and show the probability of its truth." The 2013 revisions explicitly permit the testimony of the scrivener. Senate Bill 13-077.

[29] *Diehl v. Butts,* 499 S.E. 2d 833, 887 (Va. 1998) (holding that a confidential relationship increases the degree of corroboration needed).

[30] *Stephens v. Caruthers*, 97 F.Supp.2d 698 (E.D. Va. 2000).

[31] Interestingly, Maryland would permit a spouse to testify regardless of the interest. *See Marx v. Marx*, 96 A. 544 (Md. 1965).

held that the Dead Man's Statute did not apply as to the wrongful death actions because those actions were not brought by or against the personal representative. The estate case, on the other hand, fell directly into the statute. In *Reddy*, the testimony of a nurse (an employee of the defendant hospital) and the testimony of the attending physician (one of the defendants) were admitted. On appeal, the court held that the testimony of the nurse was admissible but not that of the doctor:

> The first two issues raised by the appellants attack the trial court's ruling that Nurse Nella Williams was a competent witness. It is the appellants' position that the working relationship of the appellee, Dr. Mody, and Nurse Williams was such as to render her a "party" for the purposes of the Dead Man's Statute and, therefore, she was rendered incompetent to testify. We disagree.
>
> The purpose of the Statute, as was pointed out above, is to prevent the surviving party from having the benefit of his own testimony where, by reason of the death of his adversary, his representative is deprived of the decedent's version of the transaction or statement. Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955). This disability, while protecting the deceased's estate, can create a great injustice to the survivor. As was stated in C. McCormick, Evidence, s 65 (2d ed. 1972):
>
> "Most commentators agree that the expedient of refusing (to) listen to the survivor is, in the words of Bentham, a 'blind and brainless' technique. In seeking to avoid injustice to one side, the statute-makers have 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. "
>
> Faced with the uncertainty and injustice created by the Dead Man's Statute, the Maryland courts have sought to construe strictly the Statute in an effort to disclose as much evidence as the rule will allow.[32]

2.6 Examples of Strict Construction. The exclusion of the nurse in *Reddy* as a non-party, although obviously very much associated with the party, illustrates the narrow interpretation of the statute. In *Trupp v. Wolff,* the Court of Special Appeals listed some witnesses who had been permitted to testify regardless of the statute:

> 1. "the husband of a party who would obviously benefit emotionally as well as tangibly by his wife's recovery, *Marx v. Marx,* 127 Md. 373;
> 2. a stockholder of a party corporation notwithstanding obvious similarity of

[32] *Reddy v. Mody,* 39 Md.App. 675, 681, 388 A.2d 555, 560 (1978).

> tangible interest differing in degree only, *Downs v. Md. & Del. Ry. Co.*, 37 Md. 100;
> 3. an officer of a corporation which was a party, *Guernsey v. Loyola Fed., etc. , supra*;
> 4. witnesses, not parties to the suit, who were stockholders or directors of a party corporation, *Whitney v. Halibut*, 235 Md. 517;
> 5. legatees under a will where the estate would benefit from a recovery by the executor, *Schaefer v. Spear, Ex'r.*, 148 Md. 620;
> 6. a daughter named as party defendant called by the plaintiff mother notwithstanding her "identity of interest" with the "opposite party" calling her, *Cross v. ller*, 103 Md. 592;
> 7. a son where his mother's estate was suing his creditors to enforce a prior lien on stock in his name. In spite of the obvious benefit to the son who was named a party defendant by the estate, he was permitted to testify when called by opposite party. *Duvall, Adm'r v. Hambleton & Co.*, 98 Md. 12." (*Trupp* at 599-600). [33]

In Farah v. Stout, the purported caretaker's husband was not permitted to testify, not because of his indirect interest as the husband, but because he had originally claimed to be directly owed money from the decedent in the original pleading. His amendment to the pleading to remove himself as a party plaintiff was to no avail. [6]

2.7 A "Transaction" for Purposes of the Statute. The Dead Man's Statute precludes testimony "concerning any transaction with or statement they made by the dead or incompetent person." The test for determining whether there has been a "transaction" within the meaning of the Dead Man's Statute is whether the deceased, if living, could contradict the assertion by his own knowledge. In *Boyd v. Bowen*, 145 Md. App. 635, 806 A.2d 314 (2002) one part of the lawsuit was whether money paid by a third party to a lawyer to facilitate the decedent's new will constituted a "transaction" between the third party and the decedent. The court held that it was such a transaction:

> The appellant maintains she was not a party to the transaction because the transaction was solely between Mr. Arch and Mrs. Cole. Admittedly, the professional relationship being established at the meeting was between Mr. Arch and Mrs. Cole and did not include the appellant. The term "transaction" as used in

[33] *Trupp v. Wolff*, 24 Md. App. 588, 599-600, 335 A.2d 171, 178-9 (1975).
[6] *Farah v. Stout*, 112 Md.App. 106, 684 A.2d 471 (1996).

> the dead man's statute, however, has a broader meaning than it might in other situations. Mrs. Cole, if alive, could, based on personal knowledge, contradict the appellant's testimony on the issue of reimbursement of the legal fees. Accordingly, the meeting was a "transaction with" the decedent, and the trial court properly precluded the appellant's testimony on the matter.
>
> The dead man's statute expressly prohibited the appellant from testifying about anything Mrs. Cole may have said to indicate her intention to reimburse the appellant.
>
> Further, the appellant could not testify that she paid Mrs. Cole's legal fees because she "understood" that she would be reimbursed at some point in the future.

The documents themselves, however, can be introduced into evidence but not testimony that links the documents to a "transaction" or other arrangement between the party and the decedent. The Court of Appeals in *Stacy v. Burke*, 259 Md. 390 (1970), on the other hand, permitted the nephew/claimant to identify and introduce two critical letters sent to him by the uncle/decedent, regardless of the Dead Man's Statute. In that case, the court made certain important distinctions:

- "The statute does not make the party in an action to which the statute applied incompetent as a witness for all purposes but only in regard to 'any transaction had with or statement made by' the decedent.
- Although the letters permitted to be introduced by the nephew/claimant, in fact, related directly to the transaction, the introduction of these documents "was not testifying in regard to any transaction had with or statement made by Uncle Erle. "

This was despite the fact that those very letters had to do with the "transaction" in question.

Likewise, in *Ridgely v. Beatty*, 222 Md. 76 (1960), checks and payments by the son-in-law/claimant were admissible by him because those checks and payments were not a "transaction" with the mother-in-law/decedent. This was despite the fact that those very checks and payments were the proof of his support of the decedent (the disputed contention in that case). In *Ridgely*, the distinction was made between permitting the introduction of documents versus the introduction of testimony as to what the "agreement or understanding" was between the claimant and the decedent about those payments:

> "In the instant case the claimant, over the objection of the executor, was allowed to testify as to some sixty checks given by the claimant to third persons during the period of time when he and his family resided with the decedent. The checks represented payments which had been made on the mortgage and expenditures for coal, electricity, telephone, taxes, legal expenses and hospital bills. The court permitted the clamant to identify each check, describe it and to state the item for which the check was given, but it would not permit him to connect such payments with any 'agreement or understanding or transaction' the claimant had with the decedent."

2.8 Dead Man's Statute is Limited to Situations that Increase or Diminish the Estate.

The Maryland court has restricted the Dead Man's Statute to situations that would "'tend to increase or diminish the estate of a decedent by establishing or defeating a cause of action by or against the estate.'"[34] The testimony of caveators and caveatees about statements made by the decedent, for example, is permitted because such testimony will not result in a judgment at law against the estate.[35] In one case, a creditor could testify to his dealings with the decedent to establish that he was such a creditor in an action challenging his appointment as the personal representative of the estate based on being a creditor. The court held that while the testimony was proper in a proceeding as to the correctness of his appointment, he would nevertheless encounter great evidentiary challenges when he thereafter tried to establish his claim for the purpose of asserting it against the estate.[36]

HEARSAY RULE

3.0 The Hearsay Rule and Its Exceptions. Maryland has codified the definitions of hearsay:

> The following definitions apply under this Chapter:

[34] *Soothcage's Estate v. King*, 176 A.2d 221 (Md. 1961) (quoting "as a correct statement of the law of the State of Maryland" an opinion by federal Judge Chestnut of the Federal District Court of Maryland in *Riley v. Lukens Dredging & Contracting Corp.*, 4 F. Supp. 144 (D. Md. 1933). Also, *Reddy v. Mody*, 39 Md.App. 675, 679 (1978).
[35] *Griffith v. Benzinger*, 125 A. 512 (Md. 1924).
[36] *Soothcage's*176 A.2d 221.

> **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> **(b) Declarant.** A "declarant" is a person who makes a statement.
>
> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[37]

Maryland Rule 5-802 generally makes hearsay not admissible unless otherwise provided by the Rules. The concept informing the general prohibition against hearsay is the importance of cross examination of witnesses in order to vet the truth of the assertion.

Although the general prohibition is against its admissibility, in practice the exceptions to the hearsay rule make most hearsay admissible:

> "Rule 803, 23 exceptions which may be invoked even though the hearsay declarant is available. 804(b), four exceptions, which may be invoked only when the hearsay declarant is unavailable. In addition to the foregoing, any other hearsay will be admissible if it tends to prove an important fact, if it's better than any other evidence that's available, if it has indicia of reliability, and you give the other side due notice."[38]

Thus, the exceptions to the hearsay rule became the key to understanding the rule itself. In fiduciary litigation, the most important exception is the state of mind/intent exception to the hearsay rule.

3.1 The History of the State of Mind/Intent Exception to the Hearsay Rule. Most jurisdictions have adopted Federal Rule of Evidence 803(3), or a version of it, which sets out an exception to the hearsay rule to permit declarations of intention. In its current form, Federal Rule 803(3) states the following:

> **(3) Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but

[37] Md. Rule 5-801.

[38] Irving Younger, *The Irving Younger Collection,* Chapter 4, "Hearsay," American Bar Association, Section of Litigation (2010). The Maryland Rules track the federal rules of evidence.

> not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.[39]

This is a true exception: it permits a third party to testify as to what the declarant said about his or her plan or intention, including in the case of testamentary documents, a memory or belief about what the declarant intended by a then-existing document.

Federal Rule of Evidence 803(3) is informed by two early Supreme Court cases, neither relating to wills or trusts. Those cases, however, explain why the Rule has its tortured syntax ("but not including…unless it relates to…"). The first case, *Mutual Life Ins. Co. v. Hillmon*,[40] established a broad exception to permit hearsay as to statements made by a decedent as to something that person planned to do in the future to prove, or tend to prove, that the person did exactly what he or she said that he or she would do. *Hillmon* was an insurance fraud case where a woman claimed her husband died in a certain remote location thereby entitling her to the death benefits from several policies. The insurance company acknowledged that someone had, in fact, died in that remote location but that it was not Mr. Hillmon but a Mr. Walter. As evidence, the insurance company wanted to introduce letters from Mr. Walter saying he planned to go to that remote location. The evidence was held admissible to demonstrate that Mr. Walter probably went to the remote location – a very broad exception to the hearsay rule.[41] The second case, *Shepard v. U.S.*,[42] involved a murder trial where the defendant, Dr. Shepard, was charged with poisoning his

[39] Rule 803(3) was rewritten in 2011 from the original version of 1975 for stylistic, not substantive, reasons. See Comment to 803. In its original form the exception covered: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

[40] 145 U.S. 285 (1892).

[41] In some instances, the proponent wants to introduce forward-looking hearsay to prove someone else did something which raises thorny due process issues. See Lynn McLean, *"I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker – and the Role of the Due Process Clause*, 32 Cardozo L. Rev. 373 (2010).

[42] 290 U.S. 96 (1933).

wife. The evidence sought to be used was the testimony of the deceased wife who said that she had some liquor from a bottle immediately before she became ill that tasted odd and, further, that "Dr. Shepard has poisoned me." These statements were inadmissible: "Declarations, of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if this distinction were ignored."[43]

The *Hillmon* situation involved a forward-looking statement of intent: Mr. Walter said he was going somewhere, so he probably went there after making the statement. Evidence Rule 803(3) carves out these forward-looking statements of intent as a general hearsay rule exception, not just an exception because the statement relates to a testamentary instrument. This exception, of course, applies equally to showing testator or settlor intent.[44]

Evidence Rule 803(3) appears to permit, however, backward-looking declarations of intent if these declarations relate to the terms of the declarant's Will. This is at variance to the Shepard-type prohibition which may well end the hearsay exception as to a testator's statements. Backward-looking statements related to the declarant's Will were carved out based on expediency:

> "The carving out, from the exclusion mentioned in the preceding paragraph, of declarations related to the execution, revocation, identification, or terms of the declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic."[45]

3.2 Modern Application of the Hearsay Rule. A Maryland case illustrates the backward-looking element of 803(3) and how statements by a testatrix after execution of a will

[43] *Id.* at 106. Nor did the statements qualify as a dying declaration under the facts of the case.
[44] *In re Sayewich's Estate*, 413 A.2d 581 (N.H. 1980); *Engle v. Siegel*, 377 A.2d 892 (N.J. 1977). Both cases permitting the scrivener to testify as to what the testator wished to accomplish in his Will as long as this testimony did not contradict the terms of the Wills.
[45] The Advisory Committee Notes for the 1972 proposed Rule 803(3) gives the game away.

may be admissible to show how she meant the will to be interpreted. *National Society of Daughters of American Revolution v. Goodman,* 128 Md.App. 232, 736 A.2d 1205 (1999) involved whether a restricted gift to the D.A.R. for the purpose of funding its nursing home facility lapsed because the D.A.R., in fact, did not maintain a nursing home. The decedent had prepared a will leaving part of her estate to Gallaudet University and part of her estate to the D.A.R. for the nursing home. After execution, the attorney contacted D.A.R. to discuss the gift and learned that the D.A.R. did not maintain a nursing home. He thereupon contacted his client who said that she did not intend any gift to go to the D.A.R. in that situation but all to Gallaudet University. The attorney prepared a new will but his client died before she was able to execute the new will. Nevertheless, the testimony was permitted as a backward-looking declaration of what she intended by her original will.

Another Maryland case followed suit. In *Yivo Institute for Jewish Research v. Zalenski*, 386 Md. 654, 874 A.2d 411 (2005), the decedent left a bequest in his will to a charity and then he later made a gift to the same institution. The issue was whether the subsequent gift adeemed the bequest in the will. The testimony sought to be excluded was that of a friend who said that the decedent declared years after making the subsequent charitable gift, that he did not need to change his will because the charitable institution would understand that the gift that he had made was adeeming the bequest in the will.

South Carolina, on the other hand, takes the opposite view, holding that a later statement related to funding a bequest was not admissible because it did not show the testatrix's intent when she executed her will. *In Estate of Gill v. Clemson Univ. Foundation,* 397 S.C. 419, 725 S.E. 2d 516 (2012), the testatrix left a $100,000 bequest to Clemson to fund a scholarship for "academically deserving football players." Later, she designated the scholarship fund as the payee

of a $100,000 IRA. Clemson saw this as two $100,000 gifts, whereas the estate contended the IRA designation was how the testatrix funded her one bequest to the school. The court excluded testimony of what the testatrix told his advisors when setting up the IRA designation because it was "not made at the time of the will to show her belief at that time…" and therefore violated Rule 803(3).