

Comment,
THE APPLICATION OF THE DEAD MAN'S
STATUTES IN FAMILY LAW

Gaby Vernoff just gave birth to a healthy, newborn girl.¹ As she cuddles with her 8 lb. 5 oz. blue-eyed daughter, Gaby is clearly a proud and happy mother.² She insists that her husband would be equally as enthusiastic.³ She says he told her so.⁴ Unfortunately, Bruce Vernoff is not here to confirm her statements.⁵ Bruce has been dead for several years.⁶

In the first known case of its type, Gaby Vernoff had a baby using the sperm that was extracted from her dead husband's body.⁷ Bruce Vernoff died in 1995 as the result of a sudden allergic reaction.⁸ After he lay dead for 30 hours, doctors went to the coroner's office to retrieve a sample of sperm from the lifeless corpse.⁹ The sperm was frozen for 15 months before it was used to impregnate Gaby.¹⁰ Nine months later, she gave birth to a baby girl.¹¹

The case has raised issues of consent and harvesting from the dead. Glenn McGee, Ethics professor at the University of Pennsylvania, believes that actions like this violate the rights of the dead. "The reason for that is simple; unless there is clear consent to make a child this way it violates the rights of the person involved."¹² Alexander M. Capron, professor of Law and Medicine and co-director of the Pacific Center for Health Policy and Ethics at the University of Southern California, asks the question "is it appropriate to consciously bring a child into this

¹ Ian Cobain, *I Just Wish My Husband Was Here to Hold Her*, *Daily Mail*, April 7, 1999. (hereinafter *I Just Wish*)

² *Id.*

³ *Id.*

⁴ Cobain, *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Baby is Born Using Sperm From Dead Father*, *Los Angeles Times*, March 27, 1999. (hereinafter *Baby is Born*)

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *I Just Wish*, *supra* note 1.

world with a dead father?"¹³ In Great Britain, it is illegal to use sex cells that were taken from a deceased person without permission.¹⁴ The United States does not yet have any laws regulating the procedure.¹⁵ Lori Andrews, professor at the Chicago-Kent College of Law at the Illinois Institute of Technology, believes that, "collecting sperm from comatose or dead men is perilously close to rape. Unless the man has previously consented, his sperm should not be used to create a child."¹⁶

At the center of controversy is the issue of whether Mr. Vernoff wanted to be a father. His wife insists that he did.¹⁷ She claims:

"I know my husband, and I know he would be really happy about Brandolyne."¹⁸ "We were planning to have children the year after he died"¹⁹ "I know my husband would have done anything to make me happy."²⁰ If for any reason this case would go to court, and Gaby Vernoff would have to prove that her dead husband had truly wanted to father this child, she could have a major problem. If she lives in one of the states that has Dead Man's Statutes on the books, she could be barred from testifying about statements he allegedly made to her giving his "consent." This article will address the existence and use of Dead Man's Statutes in the court system. Specifically, it will concentrate on the application of these statutes in the arena of family law. Dead Man's Statutes have been used in cases involving paternity, common law marriage, antenuptial agreements, child support and alimony payments, as well as general estate issues.

A. The Dead Man's Statutes

Dead Man's Statutes are laws of the state that generally address the issue of the incompetency of a witness that wishes to

¹³ *Baby is Born*, *supra* note 7.

¹⁴ *Baby Born of Dead Man's Sperm*, American Health Line, Vol. 6 No. 9, March 30, 1999.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *I Just Wish*, *supra* note 1.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

testify about conversations or transactions with a decedent.²¹ There is no federal Dead Man's Statute.²² Each state has formed its own version of a statute, resulting in a wide variety of statutes throughout the nation. Each of the 50 states has at one time had some form of Dead Man's Statute.²³ At the present time, twelve states have statutes that act as an absolute bar that prohibit testimony from an interested witness in respect to conversations or transactions with the deceased.²⁴ An example of this type of statute is found in Washington's Revised Code Section 5.60.030 (the Dead Man's Statute). It reads in part:

In an action or proceeding where the adverse party sues or defends. . . as the guardian or limited guardian of the estate or person of any incompetent or disabled person. . . 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. . . incompetent or disabled person.²⁵

A number of other states have limited Dead Man's Statutes, that prohibit the party from testifying about oral communications with the deceased, but allow testimony regarding transactions with the deceased. Florida's Dead Man's Statute, found in Section 90.602, Florida Statutes (1979) reads in part:

No person interested in an action. . . shall be examined as a witness regarding any oral communication between the interested person and the person who is deceased. . . at the time of the examination.²⁶

Several states have provisions that testimony is barred unless there is other corroborative evidence, in which case testimony would be allowed.²⁷ Finally, several states have actually repealed their previous Dead Man's Statute.²⁸ Because of the

²¹ Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* (4th ed.) 1995, pgs. 503-504.

²² *Id.*

²³ *Id.*

²⁴ Shawn K. Stevens, *The Wisconsin Deadman's Statute: The Last Surviving Vestige of an Abandoned Common Law Rule*, 82 MARQ.L.REV. 281 (1998).

²⁵ WASH. REV. CODE § 5.60.030 (2000), *Lasher v. Univ. of Washington* 957 P.2d 229, 231 (Wash. Ct. App. 1998) 231.

²⁶ FLA. STAT. ch. 90.602 (2000).

²⁷ 50 A.L.R. 4th 1238 (2000).

²⁸ Shawn K. Stevens, *The Wisconsin Deadman's Statute: The Last Surviving Vestige of an Abandoned Common Law Rule*, 82 MARQ.L.REV. 281 (1998).

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wide variety of specifics and the ever-changing status of evidentiary rules in the various states, the reader is advised to consult the relevant statutory requirements of the particular jurisdiction of interest.

The purpose of the Dead Man's Statute is to place all parties on an even plane regarding a litigation where one of the key parties is deceased. The general objective is to prevent the fabrication of claims that the deceased, or an agent of the deceased, cannot refute.²⁹ The courts are concerned that allowing a party to testify about communications he or she allegedly had with the decedent would allow that party an unfair advantage. The Missouri Supreme Court, in *Flanagan v. De Lapp*, reflected that:

The purpose of the statute in general is to put all interested parties on an equality, and, if all are living, all may testify; but, when an adverse party is dead, so that he could not contradict or explain the evidence of the living party, then the living party cannot testify.³⁰

A similar, although slightly more colorful definition, was expressed by the Indiana Court of Appeals in *Satterthwaite v. Estate of Satterthwaite*, which stated:

As an exception from the general rule that all persons are competent witnesses the dead man's statutes guard against false testimony by a survivor to a transaction by establishing a rule of mutuality: **when the lips of one party are closed by death, the lips of the other party are closed by law.**³¹

The implementation of Rule 601, Federal Rules of Evidence has caused some confusion regarding the validity of Dead Man's Statutes. Rule 601 provides that: "every person is competent to be a witness except as otherwise provided in these rules."³² At least one Court has held that the adoption of Rule 601 by the State abrogated the state's Dead Man's Statute. In *Jenkins v. Bazzoli*, the Ohio Court of Appeals rejected the State Dead Man's Statute in favor of the State's adoption of Rule 601.³³ Op-

²⁹ Mueller & Kirkpatrick, *supra* note 21.

³⁰ *Flanagan v. De Lapp*, 533 S.W.2d 592 (Mo. 1976).

³¹ *Satterthwaite v. Estate of Satterthwaite*, 420 N.E.2d 287, 289 (Ind. Ct. App. 1981) (emphasis added).

³² FED. R. EVID. 601

³³ *Jenkins v. Bazzoli*, 650 N.E.2d 966 (Ohio Ct. App. 1994).

ponents of Dead Man's Statutes point to the Advisory Committee's Notes on Rule 601, which state:

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. **These rules contain no provision of this kind. . .**³⁴

Proponents of the Statutes argue that the implementation of Rule 601 does not affect existing Dead Man's Statutes. They point to the second sentence in Rule 601, which reads:

However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, **the competency of a witness shall be determined in accordance with State law.**³⁵

Additionally, comments contained in the Report of House Committee on the Judiciary, regarding Rule 601, held that the States should be allowed to maintain Dead Man's Statutes if they desired.³⁶ The committee 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."³⁷ The Court in *Cross v. State Farm Mut. Auto. Ins. Co.* followed this opinion and held that Rule 601 still required the exclusion of testimony based on grounds covered by the State Dead Man's Statute.³⁸

The Dead Man's Statutes are often a controversial area of law, with strong opinions on both sides, as to whether or not they should continue to be used in the judicial system. The future of the statutes is unclear at this time. However, it is possible to look at the past and present application of the statutes and attempt to draw some general observations. Although the statutes vary from state to state, it is possible to get an overview of how they have been applied to various areas of family law.

³⁴ FED. R. EVID. 601 advisory committee's notes (emphasis added).

³⁵ FED. R. EVID. 601 (emphasis added).

³⁶ FED. R. EVID. 601 report of House Committee on the Judiciary.

³⁷ *Id.*

³⁸ *Cross v. State Farm Mut. Auto. Ins. Co.*, 387 S.E.2d 556 (W. Va. 1989).

B. Specific Applications in Family Law

Estates

The area of law where the application of Dead Man's Statutes is most likely to occur would certainly be matters regarding the Estate of a deceased. The mere nature of probating an estate requires that there be a deceased party against whom parties could be making claims. Many of the states' Dead Man Statutes were initially enacted specifically to deal with claims against an estate. Numerous court decisions have excluded testimony of parties, based on the respective states' Dead Man's Statutes.

The Court in *Paullus v. Yarnelle*, held that the Indiana Dead Man's Statute properly excluded the testimony of the daughter of the testator in an action against the testator's estate.³⁹ In *Paullus*, the daughter of the testator was contesting codicils to the will.⁴⁰ The Court relied on the language found in the Indiana Dead Man's Statute, I.C. 34-1-14-6 (1994) which provides:

In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during a lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator; any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate."⁴¹

The Court held the daughter was deemed incompetent as a witness, under the Dead Man's Statute.⁴²

In *Estate of Barr*, the New York Surrogate's Court in St. Lawrence County, dismissed a claim against a deceased's estate, because testimony of complainants was inadmissible under the State Dead Man's Statutes.⁴³ In *Barr*, the children of decedent's sister-in-law claimed that decedent had promised to pay them for services they provided to her during her lifetime.⁴⁴ The claim, in the amount of \$78,350.00 for services rendered, was dismissed

³⁹ *Paullus v. Yarnelle*, 633 N.E.2d 304 (Ind. Ct. App. 1994).

⁴⁰ *Id.*

⁴¹ *Id.* at 308.

⁴² *Id.*

⁴³ *Estate of Barr*, 658 N.Y.S.2d 933 (N.Y. Sup. Ct. 1997).

⁴⁴ *Id.*

due to lack of evidence, since the parties were precluded from testifying as a result of the Dead Man's Statute.⁴⁵

The Colorado Court of Appeals has also upheld the use of the State Dead Man's Statute. In *Crandell v. Resley*, the plaintiff entered a claim against the deceased's estate, based on an oral contract with the deceased.⁴⁶ The plaintiff claimed that the contract entitled her to a conveyance of the decedent's personal property, an interest in real property, and damages for the conversion of personal property.⁴⁷ The Court applied the Colorado Dead Man's Statute⁴⁸ and held that it would preclude plaintiff from testifying concerning her conversations with the decedent relating to her alleged contractual agreement with him for conveyance of personal property and her performance pursuant to that contract.⁴⁹ As a result, the plaintiff was disqualified as a witness to testify on her own behalf.⁵⁰ The courts have regularly been forced to deal with unsubstantiated claims against decedents' estates. Dead Man's Statutes have been an effective tool in dismissing many of these claims.

Common Law Marriage

Another area of family law that has seen a repeated application of the Dead Man's Statutes is the area of common law marriages. The very nature of a common law marriage can make the testimony of the common law spouse critical to establishing that such a relationship existed. The courts have not been kind to surviving common law spouses, and have repeatedly excluded their testimony in relevant cases.

The Supreme Court of Pennsylvania, in *Estate of Stauffer v. Stauffer*, held that a woman who claimed a spousal elective share against the will of decedent, could not testify under the Dead Man's Statute to establish her status as a common law spouse.⁵¹ The court noted its disdain for common law marriage, comment-

⁴⁵ *Id.* at 934.

⁴⁶ *Crandell v. Resley*, 804 P.2d 272 (Colo. Ct. App. 1990).

⁴⁷ *Id.* at 274.

⁴⁸ COLO. REV. STAT. §13-90-102 (2000).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Estate of Stauffer v. Stauffer*, 476 A.2d 354 (Pa. 1984)(quoting *Wagner's Estate*, 398 Pa. 531 (1960)).

ing that, “[w]hile the general policy in this Commonwealth is to accept common law marriage, we have stated that the same is to be tolerated and not encouraged” and that “common law marriage is a fruitful source of perjury and fraud.”⁵² It noted its strong concern that; the law imposes a heavy burden on one who grounds his or her claim on an allegation of common law marriage. This is especially so where one of the parties is dead and the claim, so grounded, is to share in the distribution of the estate.⁵³

In *Stauffer*, the decedent died leaving a will that devised his entire estate to his brother.⁵⁴ The plaintiff filed an election to take against the will, claiming that she was the wife of the decedent, as the result of a common law marriage.⁵⁵ The Court held that a common law marriage is a civil contract, and as a result, the alleged spouse would be testifying to a contractual relationship between herself and the decedent.⁵⁶ The Court noted that such testimony was clearly prohibited by the Dead Man’s Statute.⁵⁷

The Superior Court of Pennsylvania relied on the *Stauffer* decision when it rendered its opinion in *Estate of Corace v. Graeser*.⁵⁸ In *Corace*, a woman was claiming against the estate of the deceased, alleging that she was the surviving common law spouse.⁵⁹ The Court cited the Supreme Court decision in *Stauffer*, and also pointed to Section 2209 of Title 20 of the Pennsylvania statutes, which reads:

A person who is or claims to be the surviving spouse shall be a competent witness as to all matters pertinent to his rights under this chapter (relating to the elective share of a surviving spouse) other than the creation of his status as a surviving spouse. That is, a person who seeks to obtain an elective share of the estate of a deceased spouse is statutorily prohibited from testifying about the creation of one’s status as a surviving spouse.⁶⁰

⁵² *Id.* at 356.

⁵³ *Id.*

⁵⁴ *Id.* at 355.

⁵⁵ *Id.*

⁵⁶ *Id.* at 357.

⁵⁷ *Id.*

⁵⁸ *Estate of Corace v. Graeser*, 527 A.2d 1058 (Pa. Super. Ct. 1987).

⁵⁹ *Id.* at 1059.

⁶⁰ *Id.*

The Court also noted that a common law marriage is a civil contract, and permitting testimony by the claimant regarding such a relationship would clearly be proscribed by the Dead Man's Act.⁶¹

The Supreme Court of Iowa has addressed the impact of the Iowa Dead Man's Statute on the testimony of an alleged common law spouse on several occasions. In *Estate of Long v. Bartlett*, the Court affirmed a lower court decision that barred testimony by a man claiming to be the surviving common law spouse of the deceased.⁶² The Court noted that,

A claim of common-law marriage is regarded with suspicion and will be closely scrutinized. Thus, in order to establish a common-law marriage, all the essential elements of such a relationship must be shown by clear, consistent, and convincing evidence, especially must all the essential elements of such relationship be shown when one of the parties is dead and such marriage must be proved by a preponderance of the evidence.⁶³

Without the testimony of the alleged spouse, the Court held that there was not enough evidence to establish that a marriage existed between the parties.⁶⁴ The Court revisited the issue again in *Adams v. Bonacci*, twenty two years later.⁶⁵ In *Adams*, the Court affirmed a lower court decision that prevented a woman from testifying about an alleged common law marriage she had with the deceased.⁶⁶ The Court recognized that:

The purpose of dead man's statutes is to prevent false testimony by the survivor concerning his dealings with one now dead. Since death has silenced one party, the law silences the other. Its object is to achieve equality and to guard against fraudulent claims.⁶⁷ The Court also addressed the claim by the plaintiff that the state Dead Man's Statute denied her due process of law.⁶⁸ Although the Court took notice that many legal scholars have characterized the statute as unfair and unnecessary, it held that

⁶¹ *Id.* at 1060.

⁶² *Estate of Long v. Bartlett*, 102 N.W.2d 76 (Iowa 1960).

⁶³ *Id.* at 79.

⁶⁴ *Id.*

⁶⁵ *Adams v. Bonacci*, 287 N.W.2d 154 (Iowa 1980).

⁶⁶ *Id.* at 155.

⁶⁷ *Id.*

⁶⁸ *Id.*

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the plaintiff failed to prove that the statute was unconstitutional beyond a reasonable doubt.⁶⁹

The Appellate Court of Indiana upheld the use of the Dead Man's Statute in a case determining the validity of a common law marriage. In *Azimow v. Azimow*, the Court affirmed a lower court decision that prohibited testimony from a woman claiming to be the common law spouse of the deceased, as well as the testimony of the decedent's alleged daughter by such marriage.⁷⁰ The Court reaffirmed its previous decision in *Estate of Dittman v. Biesenbach*⁷¹ where it stated:

Common-law marriages are recognized in Indiana, but since they are a fruitful source of perjury and fraud, they are merely tolerated and are not encouraged. . . it must be examined with great scrutiny. . . if any of the essential requirements are lacking as herein pointed out, the relation becomes illicit and meretricious and not a valid common-law marriage.⁷²

The Court barred the testimony of the alleged wife and alleged daughter and subsequently held that there was not enough evidence to prove the existence of a common-law marriage.⁷³

The courts appear to take a fairly hard view toward common law marriages. More than one court has made reference to common law marriages being ripe grounds for fraud and perjury. The courts view the use of the Dead Man's Statutes as a good method to keep fraudulent claims from being successful.

Antenuptial Agreements

Several courts have addressed the issue of antenuptial agreements and the effect of the Dead Man's Statutes on testimony in those cases. These cases tend to follow the rationale of the common law marriage cases and view antenuptial agreements as a contractual relationship that would typically fall under the umbrella of the Dead Man's Statutes.

The Court of Appeals for the Third District in Florida, in *Hulsh v. Hulsh*, used the state's Dead Man's Statute to bar testimony from a surviving spouse regarding oral communications

⁶⁹ *Id.*

⁷⁰ *Azimow v. Azimow*, 255 N.E.2d 667 (Ind. Ct. App. 1970).

⁷¹ *Estate of Dittman v. Biesenbach*, 115 N.E.2d 125 (Ind. Ct. App. 1953).

⁷² *Id.* at 131.

⁷³ *Id.*

with the decedent, regarding an antenuptial agreement.⁷⁴ The Court cited Section 90.602(1), Florida Statutes (1979), commonly known as the Dead Man's Statute, which provides; No person interested in an action. . . shall be examined as a witness regarding any oral communication between the interested person and the person who is deceased. . . at the time of the examination.⁷⁵ The Court ruled that the plaintiff was thus barred from testifying about any oral communications with the decedent, but would be allowed to testify about the decedent's actions in procuring and tearing up the agreement.⁷⁶

The Supreme Court of Arkansas, in *Arnold v. Arnold*, also addressed the issue of the Dead Man's Statute affecting testimony in a suit about an antenuptial agreement.⁷⁷ In *Arnold*, a widow was barred from testifying about an antenuptial agreement, based on the state's Dead Man's Statute. This case was notable, because the Court also found that the husband had previously divorced the woman, with the sole purpose of obtaining a more favorable antenuptial agreement and then remarrying the wife he had just divorced.⁷⁸

The Court did subsequently find that the husband's actions of design, planning and concealment constituted fraud, and that the agreement was therefore unjust, inequitable and unconscionable under the circumstances.⁷⁹ But, it is important to note that the Court rendered its decision without the benefit of the spouse's testimony.

The Missouri Court of Appeals has also addressed the issue of the Dead Man's Statute and antenuptial agreements. In *Estate of Dennis v. Dennis*, the Court affirmed a district court decision holding that the surviving wife was properly barred from testifying about the terms in an antenuptial agreement between herself and the deceased.⁸⁰ In *Dennis*, the widow was attempting to take against the will of her deceased husband.⁸¹ At trial, she wanted

⁷⁴ *Hulsh v. Hulsh*, 431 So.2d 658 (Fla. Dist. Ct. App. 1983).

⁷⁵ *Id.* at 663.

⁷⁶ *Id.* at 664.

⁷⁷ *Arnold v. Arnold*, 553 S.W.2d 251 (Ark. 1977).

⁷⁸ *Id.* at 253.

⁷⁹ *Id.*

⁸⁰ *Estate of Dennis v. Dennis*, 714 S.W.2d 661 (Mo. Ct. App. 1986).

⁸¹ *Id.* at 665.

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to testify regarding sections of the antenuptial agreement that were unclear in meaning. The Court barred her testimony.⁸²

The courts have consistently used the Dead Man's Statutes in cases regarding antenuptial agreements, specifically regarding oral communications with the deceased. It should also be noted that oral antenuptial agreements have been specifically addressed by several states. The Supreme Court of Maine, in *Busque v. Marcou*, held that oral prenuptial agreements are unenforceable.⁸³ In *Golden v. Golden*, the Maryland Court of Appeals held that an oral antenuptial agreement was unlikely to meet the state's specificity requirements.⁸⁴ It is clear that an antenuptial agreement needs to be well-documented in writing and should not hope to rely on any testimony by the surviving spouse.

Child Support and Alimony

A limited number of cases have addressed the effect of the Dead Man's Statutes on testimony regarding the payment of child support or alimony. The common practice is to have the support payments paid through the county trustee's office in order to track the payments. However, some jurisdictions may allow the payment of support directly to the ex-spouse. Also, an ex-spouse may claim that he made extra payments to the obligee, outside of the normal method of payments through the trustee's office. In cases like these, the testimony of the surviving ex-spouse may be the only source of testimony regarding payments. At that time, the Dead Man's Statutes may apply.

The Supreme Court of Nebraska addressed the validity of the surviving spouse's testimony regarding payments made directly to the ex-wife, outside of the clerk's office. In *Harrison, v. Grizzard*, the ex-wife's administrator brought suit against the ex-husband to determine the amount of accrued child support that remained unpaid.⁸⁵ The ex-husband wanted to testify regarding numerous cash payments he allegedly made directly to the ex-wife, outside of the clerk's office.⁸⁶ The Court held that pay-

⁸² *Id.*

⁸³ *Busque v. Marcou*, 86 A.2d 873 (Me. 1952).

⁸⁴ *Golden v. Golden*, 695 A.2d 1231 (Md. Ct. Spec. App. 1997).

⁸⁵ *Harrison v. Grizzard* 219 N.W.2d 766 (Neb. 1974).

⁸⁶ *Id.*

ments as such were considered to be “transactions” within the meaning of the Dead Man’s Statute and that a:

divorced husband is a person having a direct legal interest in the result of proceedings to revive judgement as to unpaid installments of child support vested in the deceased ex-wife.⁸⁷

The Court subsequently ruled that the ex-husband’s testimony as to the delivery of the cash payments and money orders was incompetent and inadmissible.⁸⁸

The Supreme Court of Alabama addressed the issue of the Dead Man’s Statute and its effect on testimony regarding unpaid child support payments. In *Austin v. Austin*, the surviving ex-spouse filed a claim against the estate of her deceased ex-husband, claiming unpaid child support payments in the amount of \$12,829.10.⁸⁹ The court noted that the payments had not been ordered to be paid through the court.⁹⁰ The court relied heavily on the fact that the amount of unpaid child support had not been rendered to be a judgement, under a civil action.⁹¹ Instead, it was merely a claim against the estate of the deceased.⁹² As such, the Dead Man’s Statute clearly prohibited the ex-wife from testifying that the deceased had failed to make the child support payments.⁹³

The Supreme Court of Mississippi, in *Medders v. Ryle*, upheld a lower court decision that barred the testimony of a surviving ex-spouse in a claim against the estate of the deceased ex-husband for unpaid alimony.⁹⁴ In *Medders*, the deceased’s first wife filed a claim against his estate, claiming unpaid alimony.⁹⁵ The Court held the testimony of the first wife was barred, in accordance with the Mississippi Dead Man’s Statute.⁹⁶ The Court cited Miss. Code Ann. § 13-1-7 (1972), which states: A person shall not testify as a witness to establish [her] own claim. . . against the estate of a deceased person, which originated during

⁸⁷ *Id.* at 767.

⁸⁸ *Id.* at 768.

⁸⁹ *Austin v. Austin*, 364 So.2d 301 (Ala. 1978).

⁹⁰ *Id.*

⁹¹ *Id.* at 302.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Medders v. Ryle*, 458 So.2d 685 (Miss. 1984).

⁹⁵ *Id.*

⁹⁶ *Id.* at 687.

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the lifetime of such deceased person.”⁹⁷ The court also noted that: The rationale underlying the Deadman’s Statute is that self-interested testimony should not be permitted to establish a claim against one whose lips have been sealed by death.”⁹⁸ The Court overturned the lower court ruling that had allowed the testimony, over objection of counsel.⁹⁹

In contrast to the decisions in *Harrison*, *Austin*, and *Medders*, the Court of Civil Appeals of Alabama allowed testimony regarding unpaid child support and alimony in an action against the estate of a deceased ex-husband. In *Solinger v. Solinger*, the Court ruled that testimony of the plaintiff ex-wife was properly admitted, and not barred by the state Dead Man’s Statute.¹⁰⁰ The Court noted that the decree of divorce expressly ordered that payments be made through the Register of the Circuit Court.¹⁰¹ As such, the Court ruled that the plaintiff’s testimony was properly admitted in evidence, because it “relates to a collateral matter, not a direct transaction with the deceased.”¹⁰²

Child support and alimony payments that are made outside of the Court system are clearly at risk of running into the application of Dead Man’s Statutes. Payments that are made through the court system are documented and have a reliable record that can be admitted into evidence. The Alabama decision in *Solinger* may have the most realistic approach to the application of Dead Man’s Statutes to child support and alimony payment issues.

Paternity

Courts in several states have been forced to address the issue of Dead Man’s Statutes and their applicability in paternity lawsuits. The issue of whether or not to allow certain testimony regarding the decedent’s conversations and actions could have a dramatic effect on the outcome of a paternity case. In a dramatic turnabout from other family law cases, the courts in paternity

⁹⁷ *Id.*

⁹⁸ *Id.* at 688.

⁹⁹ *Id.*

¹⁰⁰ *Solinger v. Solinger*, 327 So.2d 721 (Ala. Civ. App. 1975).

¹⁰¹ *Id.* at 722.

¹⁰² *Id.*

cases have almost exclusively held that Dead Man's Statutes should not apply to bar testimony.

The Court of Appeals of Indiana, in *Senff v. Estate of Levi*, ruled that the State's Dead Man's Statute did not bar the child's mother from testifying regarding her past relationship with the putative father.¹⁰³ In *Senff*, the mother brought an action against the estate of the putative father, on behalf of the daughter. The Court cited the Indiana Dead Man's Statute,¹⁰⁴ which states that a witness is rendered incompetent when the following requirements are made:

- (a) The action must be one in which an administrator or executor is a party, or one of the parties is acting in the capacity of an administrator or executor;
- (b) It must involve matters which occurred within and during the lifetime of the decedent;
- (c) It must be a case in which a judgement or allowance may be made or rendered for or against the estate represented by such executor or administrator;
- (d) The witness must be a necessary party to the issue and not merely a party to the record;
- (e) **The witness must be adverse to the estate and must testify against the estate.**¹⁰⁵

The Court stated that the resolution of the case depended upon requirement "e", and held that the mother was not a party with an adverse interest to the Estate.¹⁰⁶ As such, the testimony of the mother was not prohibited by the Dead Man's Statute.¹⁰⁷ The Court noted that: "The dead man's statute is not to be construed so as to give one party the power to deprive another of important testimony by making parties of those who have no adverse interest."¹⁰⁸ Since the daughter was the true party in interest, the mother was allowed to testify.¹⁰⁹

The Court of Appeals of Washington, in *Rabb v. Estate of McDermott*, used a similar rationale to allow the testimony of a mother in a paternity action against the estate of the deceased

¹⁰³ *Senff v. Estate of Levi* 515 N.E.2d 556 (Ind. Ct. App. 1988).

¹⁰⁴ IND. CODE 34-1-14-6.

¹⁰⁵ *Id.* at 558 (emphasis added).

¹⁰⁶ *Id.* at 559.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

putative father.¹¹⁰ In *Rabb*, the mother was wanting to testify that the deceased had engaged in sexual intercourse with her near the time of conception.¹¹¹ The Court held that the determination of whether the testimony would be allowed depended on two factors.¹¹² First, whether sexual intercourse constitutes a “transaction” under the Dead Man’s Statutes, and second, whether the mother was a “party in interest or to the record”.¹¹³ The Court ruled that sexual intercourse was a “transaction” under the Dead Man’s Statute, since it could have been refuted by the deceased, if he were alive.¹¹⁴ However, the Court then ruled that the mother was not an interested party in the suit, since she would receive no direct benefit from the judgment of paternity.¹¹⁵ As such, her testimony was allowed.¹¹⁶

The Missouri Court of Appeals, in *Estate of Dowdy v. Dowdy*, held that testimony from the mother was not prohibited by the Dead Man’s Statute, in a claim by the deceased’s alleged child against the putative father’s estate.¹¹⁷ In *Dowdy*, the Court held that the mother had no personal interest in the estate, and was therefore entitled to testify.¹¹⁸ As a result, the child was considered to be child of the deceased and was entitled to a one-third interest in the estate.¹¹⁹

In contrast to the decisions in *Senff*, *Rabb*, and *Dowdy*, the Mississippi Supreme Court, in *Pearson v. Korzekwa*, held the putative father to be disqualified as a witness under the State Dead Man’s Statute.¹²⁰ The case differs dramatically from the other cases because the putative father was ruled to be an interested party.¹²¹ In *Pearson*, the putative father filed a wrongful death action to recover for the death of an infant.¹²² As a result, he

¹¹⁰ *Rabb v. Estate of McDermott*, 803 P.2d 819 (Wash. Ct. App. 1991).

¹¹¹ *Id.* at 821.

¹¹² *Id.* at 822.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 823.

¹¹⁶ *Id.*

¹¹⁷ *Estate of Dowdy v. Dowdy*, 680 S.W.2d 362 (Mo. Ct. App. 1984).

¹¹⁸ *Id.* at 363.

¹¹⁹ *Id.*

¹²⁰ *Pearson v. Korzekwa*, 278 So.2d 419 (Miss. 1973).

¹²¹ *Id.*

¹²² *Id.*

was not bringing suit for the benefit of the child, but was acting as the primary interested party. The Court barred his testimony under the State Dead Man's Act.¹²³

The paternity cases clearly show that the classification of what parties are "interested" parties is crucial to the case, and whether the Dead Man's Statutes are applied. The courts have repeatedly ruled that the mothers are not interested parties, when bringing suits against the putative fathers in paternity cases.

II. Conclusion

The Dead Man's Statutes have been applied to cases in all areas of family law. Since each state has its own version of the statute, applications can vary from state to state. However, several trends and generalizations can be made after analyzing cases from many states. Generally speaking, most Dead Man's Statutes will exclude the testimony of an interested party, making a claim against the estate of a deceased party. The areas of estates, common law marriage, antenuptial agreements, unpaid child support and unpaid alimony all have a preponderance of cases holding that the person claiming against the deceased is an interested party and therefore precluded from testifying. However, in the paternity cases, the courts generally allow testimony of the ex-spouse over objections based on the Dead Man's Statutes. In the paternity cases, the ex-spouse typically makes the claim on behalf of the true interested party, the child. Since the ex-spouse is not the interested party, she is allowed to testify. This result also satisfies public policy, in that the child should not suffer as a result of faulty relationships or agreements between the parents.

The future of the Dead Man's Statutes is unclear. They are somewhat controversial and criticized by many legal scholars. Even so, they are actively used in many states. It is the responsibility of every attorney to become familiar with the appropriate statutes for the jurisdiction in which they chose to practice.

Steve Planchon

¹²³ *Id.*

