

**Code and Rules of Evidence Committee
Proposed Repeal of Deadman's Statute
Friday, June 25, 2004**

The Deadman's statute is perhaps the most criticized rule of evidence in the history of American jurisprudence. Commentators and courts alike have soundly rejected the philosophy behind the statute and repeatedly complained of the hair-splitting decisions which seek to avoid the statute's application. The case law in Florida is a literal minefield of inconsistencies and loopholes. This has made it almost impossible for practitioners to plan prior to trial as to whether the testimony will be allowed or excluded.

Having carefully studied and reviewed Florida's Deadman's Statute, considered numerous alternatives to correct the perceived inequities and shortcomings of the statute, and consulted with Professor Ehrhardt, the Probate and Trust Litigation Committee of the Florida Bar ultimately voted in January, 2004 to seek the repeal of the Deadman's Statute. As more fully explained below, the Probate and Trust Litigation Committee asks for the support of the Evidence Committee to repeal the Deadman's Statute and add an exception to the hearsay rule. The hearsay exception would permit relevant communications of the deceased or incompetent person to be heard by the trier of fact.

This memorandum will give a brief summary of the Deadman's statute, the reasons for repeal, and the proposed addition of an exception to the hearsay rule which should be made with the repeal of the statute.

I. What is the Deadman's Statute?

Florida's Deadman's statute (now called Deadperson's statute) is part of the evidence code and generally prevents an "interested person" from testifying as to communications between the "interested person" and a Decedent or mentally incompetent person. In a broad sense, the statute protects an estate from false and fraudulent claims. However, it can also apply in many contexts outside of the estate arena. The statute, F.S. § 90.602, provides as follows:

1. No person interested in an action or proceeding against the personal representative, heir-at-law, assignee, legatee, devisee, or survivor of a deceased person, or against the assignee, committee, or guardian of a mentally incompetent person, shall be examined as a witness regarding any oral communication between the interested person and the person who is deceased or mentally incompetent at the time of the examination.
2. This section does not apply when:
 - a) A personal representative, heir-at-law, assignee, legatee, devisee, or survivor of a deceased person, or the assignee, committee, or guardian of a mentally incompetent

person, is examined on his or her own behalf regarding the oral communication.

b) Evidence of the subject matter of the oral communication is offered by the personal representative, heir-at-law, assignee, legatee, devisee, or survivor of a deceased person, or the assignee, committee or guardian of a mentally incompetent person.

- 3) For the purpose of this section, a “mentally incompetent person” is one who, because of mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other mental incapacity, is incapable of either managing his or her property or caring for himself or herself, or both.

Imbedded in the complex language of the statute are numerous concepts which courts have struggled to define and apply such as who is an interested person, who is entitled to raise the protections of the statute, what types of communications are covered by the statute, and how is the statute waived. Many of these concepts will be discussed later in this memorandum. First, it is important to understand the history of the statute and how it was almost repealed when the Evidence Code was adopted.

II. History of the Deadman’s Statute

Professor Ehrhardt’s treatise on Florida Evidence provides a good history of the statute:

“In 1874, the Florida legislature removed the general common law rule which disqualified as a witness any person interested in the event of the suit. In the same statute the legislature retained a narrow prohibition as it related to testimony of an interested person regarding transactions and communications between that person and another individual who had since died. The statute, commonly known as the Deadperson’s Statute, was retained to protect the estate of a decedent against false and fraudulent claims . . . The drafters of the [current Evidence] Code felt that the application of the Deadperson’s Statute sometimes led to harsh results. Often it was impossible for persons having valid claims against the estate of the decedent to prove those claims. The statute’s ultimate effect was to defeat legitimate claims against the decedent’s estate instead of protecting it against false claims. The drafters also felt that the application of the statute resulted in hair-splitting decisions, was difficult to understand, and frequently the statute would be unintentionally and unknowingly waived. The drafters decided to completely eliminate the Deadperson’s Statute. However, at their final meeting prior to recommending the Evidence Code to the Florida legislature, a strong argument was made, and accepted, that a statute was needed in Florida to protect estates, particularly of the elderly, against claims of the unscrupulous . . .”

EHRHARDT, FLORIDA EVIDENCE 2004 EDITION § 602.1 at p. 428-29.

III. Criticisms of Florida's Deadman's Statute

The criticisms of the Deadman's Statute which were made by the drafters of the Evidence Code are equally applicable today, perhaps even more so. Commentators and courts continue to acknowledge the shortcomings of the Deadman's statute and have complained of its harsh results, inconsistent application, and traps for the unwary.

A. Interferes with the "Quest for Truth" and leads to harsh results

Judges and juries are as capable of weighing the conflicting evidence and determining the credibility of witnesses in probate matters as they are in tort or criminal suits. All considerations that generally are considered by fact-finders are appropriate in probate matters. Only testimony that is worthy of belief will be credited; all of the facts and circumstances will be considered in determining which party's version of the events will be believed.

EHRHARDT, FLORIDA EVIDENCE 2004 EDITION § 602.1 at p. 441.

"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 statutory drafters ignored the equal possibility of creating injustice to the other. The survivor's temptation to fabricate a claim or defense is obvious enough- so obvious indeed that any jury should realize that his story must be cautiously heard. A searching cross-examination will often, in case of fraud, reveal discrepancies in the "tangled web" of deception. In any event, the survivor's disqualification is more likely to disadvantage the honest than the dishonest survivor. One who would resort to perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story."

STRONG, MCCORMICK ON EVIDENCE § 65, at 278 (5th ed. 1999).

It is also consistent with the policy of the law to make available all relevant evidence in its quest for truth in any particular factual situation. The credibility of the testifying survivor who is under oath may certainly be evaluated by the jury and tested by cross-examination. In the ultimate, we agree with those courts which have taken the position that the exclusion of such testimony will work greater injustice by preventing recovery of legitimate claims as against the view that admissibility might result in the establishment of fraudulent claims against decedents' estates.

Farley v. Collins, 146 So. 2d 366, 370 (Fla. 1962)

In every jurisdiction where the statute now exists, there is a wide range of hair-splitting distinctions opening the avenue for the survivor to testify. The

most common of these is overheard statements rather than direct communications. If disposed to falsify, the survivor may make out a case sufficient to sustain a decision in spite of these statutes. The honest claimant suffers by being denied the right to testify to personal communications and transactions. The honest rights of the living are sacrificed in a vain effort to protect a dead man's estate from false claims. The model code of evidence, in accordance with the practice of a number of states, eliminates altogether this last historical relic of a disqualification because of interest. But until the legislature sees fit to repeal or modify the rigors of the statute the courts must enforce it.

Jackson v. Parker, 15 So. 2d 451, 455-56 (Fla. 1943)

B. The Deadman's Statute is unworkable in its present form

The statute has been correctly described by many as unduly complex. Attorneys and trial judges struggle to understand and apply its provisions. As a result, the case law itself is riddled with exceptions and inconsistencies. In fact, the law on waiver of the statute is so complex and full of traps that the statute is almost always either intentionally or unintentionally waived. Further, trial judges tend to dislike the statute because it hinders the search for truth and their desire to hear all relevant evidence. The end result is that the statute is not uniformly applied and it is almost impossible to determine prior to trial whether the testimony will be allowed or excluded.

The Deadman's Statute also impedes the discovery process. For example, as will be discussed in more detail below in the section on waiver, the district courts are currently divided as to whether the use of a portion of a deposition by a protected party constitutes a waiver "as to all legally competent evidence contained therein." As a result, a lawyer is faced with a Catch-22 when taking the deposition of an interested party prior to trial. If the lawyer asks the interested person about the oral communications with the decedent at any time in the deposition, the opposing party may have a waiver argument if the deposition is used at trial. If the lawyer does not ask the interested person about the communications, the lawyer may be hearing the communications for the first time at trial if the testimony is permitted over objection.

C. The Statute is intended to be a shield but can be used as a club.

Krevatas v. Wright, 518 So. 2d 435, 438 (Fla. 1st DCA 1988) ("We also agree with appellee, that in Florida, a personal representative may bring an action and still retain the ability to raise the Dead Man's Statute as to offered evidence.")

IV. It is Time for a Repeal

Florida is in the minority as it relates to the retention of a Deadman's statute, particularly in its current form. Thirty-one states have repealed or never enacted a

Deadman's statute. Of the remaining states, many have greatly modified their statute to permit testimony by interested persons under many circumstances.

As explained by Professor McCormick:

The lawmakers and courts are gradually being brought to see the stupidity of the traditional survivor's evidence acts, and liberalizing changes are being adopted. A few states provide that the survivor may testify, but his testimony will not support a judgment unless corroborated by other evidence. Other authorize the trial judge to permit the survivor to testify when it appears that his testimony is necessary to prevent injustice. Both of these solutions have reasonably apparent drawbacks which are avoided by a third type of statute. The third statutory scheme sweeps away the disqualification entirely and allows the survivor to testify without restriction, but seeks to minimize the danger of injustice to the decedent's estate by admitting any relevant writings or oral statements by the decedent, both of which would ordinarily be excluded as hearsay.

STRONG, MCCORMICK ON EVIDENCE § 65 at 278 (5th ed. 1999).

V. Probate and Trust Litigation Committee Proposal

For the past several years, the Probate and Trust Litigation Committee of the Florida Bar carefully considered various proposals to modify and correct the glaring problems with the statute. Ultimately, it was determined that the best course of action would be to follow the trend of other jurisdictions, and the advice of the commentators, including Professor Ehrhardt, by supporting a repeal of the statute.

On January 22, 2004, at its meeting in Ocala, the Probate and Trust Litigation Committee of the Real Property, Probate and Trust Law Section of the Florida Bar voted in favor of a repeal. At its meeting on May 27, 2004 in Key West, the Committee approved the following proposed amendment to the hearsay rule which would permit certain statements by a decedent which would otherwise be excludible as hearsay:

90.804. Hearsay exceptions; declarant unavailable

(2) Hearsay exceptions.- The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:

* * * *

(e) Statements by deceased or mentally incapacitated persons. -- In a civil trial, a written or oral statement made by a person who is deceased or mentally incapacitated at the time of the trial or hearing regarding the same subject matter as other statements made by such person which have been admitted as evidence in the trial or hearing. For the purpose of this subsection, a "mentally incapacitated person" is one who because of

mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other mental incapacity, is incapable of either managing his or her property or caring for himself or herself, or both.

VI. A Primer on the Deadman's Statute

In order to successfully navigate the Deadman's Statute, the practitioner must be familiar with a myriad of complex concepts which only the case law defines. In fact, an entire chapter is dedicated to the statute in *Litigation Under Florida Probate Code*. See Hearn & Allison, *Dead Person's Statute*, LITIGATION UNDER THE FLORIDA PROBATE CODE Chapter 10 (5th ed. 2003). The remaining sections provide a flavor of some of the issues which the statute raises.

A. Interested Persons- Who is prohibited from testifying by the Deadman's Statute?

A witness is deemed interested if he or she has a direct and immediate pecuniary interest in the subject matter of the action, or, stated another way, if he or she will "either gain or lose by the direct legal operation and effect of the judgment." Jensen v. Lance, 88 So. 2d 762, 763 (Fla. 1956); In re Estate of Parson, 416 So. 2d 513, 518 (Fla. 4th DCA 1982), rev. denied, 426 So. 2d 27 (Fla. 1983); Broward Nat'l Bank v. Bear, 125 So. 2d 760, 762 (Fla. 2d DCA 1961). A witness also is interested if the record in the suit may be used as legal evidence for or against the witness in some other action about which the witness testifies. Bear, 125 So. 2d at 762.

The "interest" must possess certain qualities:

- a) it must be a pecuniary interest. In re Estate of Paulk, 503 So. 2d 358, 369 (Fla. 1st DCA 1987)(holding that the scrivener of the will is not interested); and
- b) the interest must exist at the time the witness testifies. See Key v. Angrand, 630 So. 2d 646, 648 (Fla. 3d DCA 1994) (noting that the test is not whether the witness was interested at some time prior to the trial or whether the witness may receive a benefit sometime in the future).

B. Protected Parties- Who does the Deadman's Statute seek to protect?

The statute only protects personal representatives, heirs at law, assignees, legatees, devisees, and survivors of a deceased person. Fla. Stat. § 90.602(1). It has long been held that the statute can only be raised by parties in their representative capacities. McDonald v. Couey, 9 So. 2d 187, 188 (Fla. 1942); Hearn & Allison, *Dead Person's Statute*, LITIGATION UNDER THE FLORIDA PROBATE CODE § 10.11 (5th ed. 2003). The statute only applies to cases "where the rights of the deceased at the time of his death are involved." Helms v. First Nat. Bank of Tampa, 28 So. 2d 262, 263 (Fla. 1946); See also Howland v. Strahan, 219 So. 2d 472, 474 (Fla. 3d DCA 1969). Thus, the statute cannot

be raised by someone who is being sued in an individual capacity. Mathews v. Hines, 444 F.Supp. 1201, 1206 (M.D. Fla. 1978); CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 602.1 (2004). Rather, the individual must be bringing or defending a claim *on behalf of or through* the decedent.

The simplest way to analyze the issue of whether a person is protected by the statute is to ask the question: Is the person who is seeking to raise the statute asserting a claim or defense that the decedent could have raised if he were alive? See Klein v. White, 142 So. 2d 789, 792 (Fla. 2d DCA 1962). If the answer is yes, the statute may be applicable. Cases frequently note that those claiming "under the decedent" are protected. See, e.g., Bengyak v. Rosin, 437 So. 2d 220, 221 (Fla. 4th DCA 1983).

The statute will protect persons claiming "under the decedent" even though they are the ones bringing the claim. For example, several courts have held that a personal representative may bring an action and still retain the ability to raise the Deadman's statute as to offered evidence. Krevatas v. Wright, 518 So. 2d 435, 438 (Fla. 1st DCA 1988); Seeba v. Bowden, 86 So. 2d 432, 434 (Fla. 1956); *but see* In re Estate of Stetzko, 714 So. 2d 1087 (Fla. 4th DCA 1998).

C. How is the Deadman's statute waived?

One of the primary criticisms of the Deadman's statute is that it is so riddled with procedural pitfalls that it is almost always waived, either intentionally or unintentionally.

1. The "protected person" will waive the statute if they testify regarding the communications

The statute clearly provides that it does not apply when a protected person is examined on his or her own behalf regarding the oral communication. See Fla. Stat. § 90.602(2)(a). Nor does it apply when evidence of the subject matter of the oral communication is offered by the protected person. See Fla. Stat. § 90.602(2)(b).

Thus, the statute contemplates that a protected person may voluntarily become a witness as to a communication with the deceased. However, if the protected person testifies as to what the deceased said about the transactions at issue, the door is opened for the opposing parties to testify concerning what the deceased told them. Estate of Parson, 416 So. 2d 513, 518 (Fla. 4th DCA 1982); Mayer v. Mayer, 54 So. 2d 105, 107 (Fla. 1951). Note, once the door is opened, all evidence which would otherwise be barred under the statute is admissible at trial.

2. The statute is waived if a "protected person" offers other evidence of the subject matter of the oral communication

Courts have held that introduction of writings of the decedent by the protected party will waive the Deadman's Statute. For example, in Briscoe v. Florida Nat'l Bank of Miami, 394 So. 2d 492, 493-94 (Fla. 3d DCA 1981), the court, interpreting the predecessor statute

to § 90.602, held that the personal representative's introduction of a letter of authorization and joint signatory card in connection with a dispute over a survivorship account waived the Deadman's statute "for all purposes." Thus, the interested party was permitted to testify. See also In re Estate of Stetzko, 714 So. 2d 1087 (Fla. 4th DCA 1998).

3. The use of deposition testimony may waive the statute if any part of the deposition contains statements protected by the Deadman's statute.

In addition, use of deposition testimony of an interested person that contains communications with the interested person and the decedent will constitute a waiver. For an excellent and current discussion regarding what constitutes "use" for purposes of a waiver of Deadman's statute protection see Allison & Hearn, *Dead Persons's Statute*, LITIGATION UNDER THE FLORIDA PROBATE CODE § 10.14 (5th ed. 2003). The district courts are currently divided as to whether the use of a portion of a deposition by a protected party constitutes a waiver "as to all legally competent evidence contained therein." The Second and Third Districts have held that use of a deposition containing the substance of an oral communication waives the statute, In re Estate of McCoy, 445 So. 2d 680, 684 (Fla. 2d DCA 1984); Bordacs v. Kimmel, 139 So. 2d 506, 507 (Fla. 3d DCA 1962), while the Fifth District has held that the statute is not automatically waived. Polk v. Crittenden, 537 So. 2d 156 (Fla. 5th DCA 1989).

Note that the taking of the deposition of an interested person, even on protected communications, by itself will not constitute a waiver of the protection of the Deadman's statute. Small v. Shure, 94 So. 2d 371 (Fla. 1957).

D. Exceptions- What type of evidence is not covered by the statute?

The statute does not apply to testimony by an interested person regarding written transactions or written communications with a deceased person. Carpenter v. Wemyss, 638 So. 2d 592, 593 (Fla. 4th DCA 1994) (holding that testimony which does not refer to "oral conversation" with the decedent are not barred); Sun Bank/ Miami, N.A. v. Saewitz, 579 So. 2d 255, 256 (Fla. 3d DCA 1991). Thus, courts have held that testimony regarding nonverbal conduct, such as execution, delivery and negotiation of a contract, is not barred by the Deadman's statute. Carpenter, 638 So. 2d at 593. In addition, a witness may testify as to whether or not they executed a deed or contract to the decedent. Security Trust Co. v. Calafonas, 68 So. 2d 562 (Fla. 1953). Moreover, a witness may testify as to the loss or destruction of a writing. Fields v. Fields, 191 So. 512 (Fla. 1939).

However, if a protected party offers such evidence, it will almost certainly result in a waiver of the statute permitting the interested person to then testify about the oral communications themselves. See, e.g. Briscoe v. Florida Nat'l Bank of Miami, 394 So. 2d 492, 493-94 (Fla. 3d DCA 1981) and In re Estate of Stetzko, 714 So. 2d 1087 (Fla. 4th DCA 1998) (discussed above).

An interested person may also testify to an independent fact not involving the oral communication even though they relate to the communication. Seeba v. Bowden, 86 So. 2d 432, 433 (Fla. 1956). In addition, a witness is not disqualified under the Deadman's statute from testifying to communications between a decedent and a third party if the witness was a mere listener and took no active part in the conversation. See In re Estate of McCoy, 445 So. 2d 680, 682 f.n. 3 (Fla. 2d DCA 1984).

VII. Conclusion

Respected experts of Florida evidence, such as Professor Ehrhardt, and the courts have long called for a repeal of the Deadman's statute. The proposal of the Probate and Trust Litigation Committee to repeal the statute and add a hearsay exception to permit other relevant statements of a decedent or incapacitated person is in line with the current trend in other jurisdictions. On behalf of the Probate and Trust Litigation Committee, we respectfully request that the Evidence Committee vote to support these proposed changes.

Respectfully submitted,

William T. Hennessey
Gunster, Yoakley & Stewart, P.A.
777 S. Flagler Drive, Suite 500E
West Palm Beach, Florida 33401
(561) 650-0663

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