

A PRIMER ON THE APPLICABILITY OF THE DEAD MAN'S ACT TO LITIGATION MATTERS

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The death of an active client is a somber and often tragic event in any attorney's career, particularly if the relationship with the client was cultivated over many years and significant relationships were forged. With respect to handling active litigation for the deceased client, the death of the client, however, maybe only the beginning of an intense frustration. Moreso in Pennsylvania than just about any other jurisdiction, the experience of the death of a client after a tort matter has initiated can become an excruciating exercise in futility or an apparent windfall on behalf of the client, depending upon whether the client was a defendant and the progress of discovery.

The Dead Man's Act in Pennsylvania ("the Act") provides, in pertinent part:

Except as otherwise provided in this subchapter, in any civil action or proceeding, where any party to a thing or contract in action is dead, or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased or lunatic party, shall be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy
42 Pa. Cons. Stat. Ann. § 5930.

The purpose of the Act is to prevent the injustice that may result from permitting the surviving party to the incident that gave rise to the lawsuit to testify favorably to himself and adversely to the decedent because the decedent's representative is unable to refute such testimony. To account for this disparity in positions, the Act provides an exception to the general rule of competency. The effect is that the witness is rendered incompetent, not the testimony. In other words, the testimony is admissible provided there is a competent witness to present the testimony. Because the Act provides an exception to the general rule of competency, Courts narrowly construe its application. The practice of narrow consternation by the judiciary is often hit or miss and too often draconian.

The party challenging the competency of a witness has the burden of proving the incompetency of the witness. Three conditions must be present in order to disqualify a witness under the Act: (1) the deceased must have had an interest in the matter at issue; (2) the interest of the witness sought to be disqualified must be adverse; and (3) a right of the deceased must have passed to a party of record who represents the deceased's interest.

With respect to the first condition (the deceased's interest in the result of the suit), the Courts require that the decedent have had an interest in the immediate result of the suit. However, the actual interest of the deceased need not be proven. Proof of a prima facie interest is sufficient. For example, deceased's status as a partner is sufficient evidence of interest in a dispute involving alleged partnership

property. An even more inapposite application, in tort actions the plaintiff's offer to limit the claim and not seek judgment against the deceased's assets does not affect the applicability of the Act even though, technically, the deceased would have no interest in the lawsuit.

With respect to the second condition (the potential witness must be adverse), the focus is on the interest of the witness not his expected testimony. Thus, the test for determining the interest of the witness is whether he will gain or lose as the direct legal operation and effect of the judgment rendered. The focus is solely upon the pecuniary and proprietary interests of the witness. It must be an interest in the judgment in the cause. If the witness would neither acquire or lose a right, nor incur a responsibility, which the law recognizes, then he is competent. Every other kind of interest goes to credibility. There must be a present, certain, vested interest not one which is uncertain, remote or contingent.

With respect to the third condition (a right of the deceased must have passed to a party of record who represents the deceased's interest), the general rule is that a person's rights pass to his legal representative or heirs upon his death. The legal representative or heir is the party who may assert the Act. Standing is not limited to the administratrix of the estate and it is not essential that the party asserting the Act be the nominal representative of the decedent. The requirement is that the party represent the interest of the decedent and claim through the decedent. The courts routinely allow counsel hired by a deceased tortfeasor's insurance company to invoke protections of the Act because they represent the interests of the deceased. This is true even in cases where there is no real estate to speak of, but instead an estate is raised solely for the purposes the particular litigation.

The Act applies to any civil action or proceeding where any party is dead or where any participant in the matter at issue in the action or proceeding, contract or otherwise, is dead. The Act renders any remaining party to the matter at issue in the action and any witness whose interest is adverse to the decedent incompetent to testify regarding any matter occurring before the death of the decedent. The Act only disqualifies testimony, as opposed to written evidence. In practice, however, a judge, or an arbitration panel, considering the application often interprets the Act's reach as broader than it was intended. This is because a reading of the entire Act is a little confusing and case law interpreting it draconian. For example, the term "matter" does not refer to only the transaction at issue. The term refers to anything occurring before the decedent's death which has any bearing on the claim at issue. Hence, it is entirely plausible that photos could be excluded by the Act if there were taken before the death and the witness testifying to their authenticity was a party to the action.

Testimony on damages, however, is not precluded, provided the testimony is unrelated to the issue of negligence and the decedent's representative is as capable of refuting the testimony as the decedent himself would have been when he was alive. Matters occurring after the death of decedent are not protected by the Act. Likewise, Pennsylvania Courts have held that admitting testimony that the estate of the decedent is in as good a position as the decedent would have been to refute, does not violate the Act.

The Act, by its stated terms, includes several exceptions to its applicability. The first exception arises when the action is by or against a remaining partner, joint promisor or joint promisee of the decedent and the matter to which the witness intends to testify occurred between the remaining partner, joint promisor or joint promisee and another party on the record.

Another exception to the Act applies to actions *devisavit vel non* (right claimed by devolution) or actions involving any other issue or inquiry respecting the property of a deceased owner when the controversy is between parties respectively claiming such property by devolution on the death of such owner. In these cases all persons are fully competent witnesses.

The Court's have carved out an additional exception to the Act. When a principal survives, the death of the agent through whom a contract was made, does not exclude the testimony of a party who brings an action against the principle.

A statutory exception to the Act created by the terms of 42 Pa.C.S.A. § 5932, which provides that "any person who is incompetent under section 5930 (relating to surviving party as witness, in case of death, mental incapacity, etc.) by reason of interest . . . shall also become fully competent for either party by filing of record a release or extinguishment of his interest. A release or extinguishment made solely for the purpose of enabling the witness to testify is not considered to be made in good faith and, therefore, is not effective to circumvent the Act.

Another statutory exception to the Act created by the terms of 42 Pa.C.S.A. § 5932 provides that "any person who is incompetent under section 5930 (relating to surviving party as witness, in case of death, mental incapacity, etc.) by reason of interest may nevertheless be called to testify against his own interest, and in that event he shall become a fully competent witness for either party. Accordingly, calling an incompetent witness to testify against his own interest makes the witness competent to testify as to any matter.

The most often practicable and significant exception to the Act with respect to a litigation matter was created by the terms of 42 Pa.C.S.A. § 5933(a), which essentially provides that an independent witness is competent to testify as to any relevant matter. An independent witness is one with no interest in the outcome of the matter.

Pursuant to this exception, when a competent witness testifies adversely to the interests of a surviving party or an incompetent witness with an adverse interest with regard to a transaction which occurred between the witness and the surviving party or incompetent witness with an adverse interest or which occurred in the presence or hearing of the competent witness, the surviving party or witness with the adverse interest is rendered competent to testify to any relevant matter. The Courts have held that the remaining party or witness with an adverse interest is competent only for the purpose of contradicting the matters testified to by the living competent witness.

The most significant aspect of the protection afforded by the Act is that it is easily waived. The most common form of waiver is service of discovery. Another form of waiver is eliciting testimony protected by the Act. The Act affects the competency and admissibility of testimony. Hence, pleadings asserting the legal rights of the estate do not constitute waiver.

A representative of the decedent's estate waives the protection of the Act by actively participating in discovery. A representative of the decedent's estate waives the protection of the Act by taking the deposition of an adverse party and the adverse party becomes competent to testify as a result thereof. Likewise, requesting responses to written interrogatories from an adverse party and the adverse party becomes competent to testify as a result thereof. Waiver is found because written interrogatories may be

the functional equivalent of placing the adverse party on the witness stand at trial. With respect to requests for documentary evidence, the application of the Act across the country. While there is no Supreme or Superior Court decision which addresses whether a general request for production of documents constitutes a waiver of the protections of the Act, some specific and focused request may be deemed a waiver. Several lower courts have held that a decedent's representative's inspection of an opponent's documents, rendered that opponent competent to testify. Likewise, another lower court found that a decedent's representative's expert medical examination of a plaintiff and request for an authorization to inspect and copy the plaintiff's medical records constituted a waiver of the Act.

Even at trial the party claiming protection of the Act must take a "back seat." A representative of the decedent's estate waives the protection of the Act by cross-examining an adverse party as to matters occurring during the decedent's lifetime and the adverse party becomes competent to testify as a result thereof. Of all the waivers, this is perhaps the most unsettling to a trial attorney.

While this application of the Act is not prevalent in litigation practice, the issue does come up and an attorney should carefully consider invoking its protections and even more careful in applying it to an individual. Specifically, defense counsel claiming protection of the Act must be vigilant in what requests are made of an opposing party as the protections of the Act are easily waived. Protection of the Act is a double edged sword. If properly applied, it severely limits the opposing party's ability to testify and if there is no independent evidence except the testimony of that party regarding liability, the case is effectively unprovable and a non-suit should ensue. If, however, the decedent's representative participated in discovery in any form whatsoever with the adverse party at any time, even if the party died after discovery was issued, the protections are waived and the adverse witness will be a competent witness.

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