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Dead Man Talking

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Dead Men Do Tell Tales: Connecticut's Dead Man's Statute

By R. Bradley Morris

Introduction

The old saying goes "Dead men tell no tales," but when it comes to litigation in Connecticut, the dead keep talking. The so-called dead man's statute,¹ C.G.S. § 52-172, creates an exception to the well-known prohibition against hearsay. First enacted by the Connecticut legislature in 1850, first interpreted by the Connecticut Supreme Court in 1857,² and most recently interpreted by the Connecticut Appellate Court in *Pender v. Muftranga* in 2000,³ the statute permits the declarations of the deceased to be offered into evidence through their legal representatives.⁴ Connecticut is believed to be the first state to have enacted such an exception.⁵

Although litigators may find infrequent the cases in which the statute applies, it is not so obscure as to warrant no reflection. Over the course of a career, counsel will undoubtedly find situations in which knowledge of the statute would be helpful to prosecute or defend a case. Thus, a basic understanding of the statute's three conjunctive conditions is advisable. This article will discuss those conditions and the cases interpreting them, as well as provide a brief historical and practical background for the statute.

History and Practice

The dead man's statute, as it was first enacted in 1850, provided as follows:

[I]n suits by or against the representatives of deceased persons, the entries and written memoranda of the deceased relevant to the matter in issue, may be received as evidence; subject in regard to weight and credit, to the rules under

which the testimony of parties and other interested evidence is received.

The original statute was passed in response to a statute enacted two years earlier that "allowed parties and other persons interested in suits to be witnesses."⁶ Although this earlier statute is now a fundamental part of the law of evidence, shortly after it was passed it was recognized to give "living parties a very great advantage over representatives of the dead,"⁷

since the living could testify, but the deceased were forever silent. The dead man's statute obviated this mortal advantage⁸ by permitting the deceased the "right to speak...from beyond the grave."⁹

Over the last 150 years that Connecticut litigators have used the statute to conjure up the testimony of the dead, the legislature has added to the original bones of the statute, while the courts have added the flesh. The statute, presently short-titled "Declarations and Memoranda of Deceased Persons," provides as follows:

In actions by or against the representatives of deceased persons, and by or against the beneficiaries of any life or accident insurance policy insuring a person who is deceased at the time of the trial, the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence. In actions by or against the representatives of deceased persons, in

which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter, in issue, given at his examination, upon the application of such trustee or receiver, shall be received in evidence.¹⁰

Under the dead man's statute, the deceased's right to speak from the grave is subject to three well-recognized conditions: First, the deceased

may only speak in an action by or against the deceased's representative or insurance beneficiary who is acting in the interests of the deceased's estate; second, the medium (or declarant) for this communication from the spirit world must be the deceased's representative or insurance beneficiary;¹¹ and third, the deceased's testimony must not violate another evidentiary rule.¹²

Provided the three conditions of the statute are met, the deceased are effectively free to speak from their graves, and to do so unfettered by the earthly indignity of cross-examination. Although the statute does not actually proscribe cross-examination of the deceased's representative, cross-examination of the representative is wholly ineffective to test the accuracy and veracity of the deceased's statements. After all, the deceased's representative may very well have no first-hand knowledge of the facts and circumstances about which the

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tative's understanding of the communication went to the weight of the testimony, not its admissibility.²⁶

Actions By or Against the Deceased's Estate

The dead man's statute "protects the [deceased's] estate for the benefit of those who represent the deceased in taking some portion of his estate...."²⁷ As such, the testimony of a representative is allowed only in suits in which representatives sue or defend in the interest of the deceased's estate.²⁸ For instance, in an action between parties who both claimed title to land under deeds from the decedent, one of whom was the

decedent's son, the statute did not apply because the son was protecting his own interests and not those of the decedent's estate.²⁹ "The right to bring [the action] and the right to defend did not result from the death of the declarant."³⁰

In the most recent case discussing the statute, *Pender v. Matranga*,³¹ the Supreme Court determined that the statute did not apply because the action, again, was not prosecuted or defended in the interest of the decedent's estate. There, the plaintiffs brought an injunction action to halt the defendants' construction of a roadway on easements over the plaintiffs' property.³² Plaintiffs conceded that there were easements, but disputed their scope.³³ One of the plaintiffs, who had inherited the property from her mother, was asked at trial whether she recalled her late mother telling her the

(Please see next page)

deceased spoke. Instead, cross-examination of the representative is primarily effective to test the representative's knowledge and comprehension of the deceased's statements,³⁴ and to ferret out any bias that the representative may hold.

The dead man's statute is worded broadly, has been interpreted broadly and, indeed, the case law fails to reveal any specter of limitation on the type or quality of the evidence that may be admitted under it. "The statute has no reference at all to the kind of property to be recovered, or the subject matter of the suit, but simply to the relation of the parties (or one of them) to the deceased."³⁵ Moreover, the dead man's statute has no temporal limitation, unlike the deceased themselves. "Days, weeks, even years may intervene and the words of the deceased may be heard."³⁶

Virtually any form of communication by

the deceased may be entered into evidence under the statute³⁷: account books in the decedent's handwriting;³⁸ endorsement of interest on a note;³⁹ letters;⁴⁰ written statements to counsel;⁴¹ and the representative may simply offer the substance of the deceased's statements, when he or she cannot recall the deceased's exact words.⁴² The statute even applies to non-verbal communication. In the case of *Facey v. Markle*,⁴³ the statute was held to apply to the decedent's nod of the head while on his deathbed. In that case, the plaintiff unsuccessfully argued that the statute should not be applied to "monosyllabic responses, whether by speech or sign, to questions propounded by another."⁴⁴ In rejecting this proposed limitation, the court held that "the statute is broad enough to include ordinary modes of communication...."⁴⁵ It further held that any uncertainty as to the represen-

reasons and purposes for the agreement giving rise to the easements. The defendants objected to the late mother's declarations being admitted into evidence, and their objection was sustained. The appellate court affirmed the trial court and held that the proposed testimony did "not fall within the bounds of the dead man's statute."⁴⁴ The suit was instituted to protect the heir's interest in the property, not the decedent's estate.

Representatives of Deceased Persons

"Representatives of deceased persons" has long been held to include legal representatives who take some part of a decedent's estate, either as devisees, heirs, distributees, and purchasers by will, as well as personal representatives, such as executors and administrators.⁴⁵ For example, in an action seeking the enforcement of a constructive trust and a transfer of title, the defendant who took title to the property as a devisee of her deceased husband was designated a representative.⁴⁶ Likewise, in an action against a defendant who died pending

suit, the administrator who continued to defend the action was deemed the deceased's representative.⁴⁷ Despite the broad interpretation applied to the phrase "representatives of deceased persons," it does not encompass purchasers by contract.⁴⁸ For instance, in the case of *O'Brien v. Coburn*,⁴⁹ the plaintiff and defendant were owners of adjoining property conveyed to them by a common grantor. The plaintiff's property included a shop and garage on the rear of the property, which the grantor had used as a tool shop. The only access to the

shop and garage was over a driveway on the defendant's property, but neither the plaintiff's nor the defendant's deed made any mention of an easement. In 1993, the defendant sought to obstruct the plaintiff's use of the driveway. In response, the plaintiff filed a complaint claiming an easement and seeking injunctive relief.⁵⁰

At trial, the plaintiff gave testimony—over the defendant's objection—that the grantor had stated to him that a right-of-way would be provided for in the defendant's deed.⁵¹ On appeal, the appellate court held that it was an error to admit the statement because the plaintiff was only a purchaser by contract and thus not a representative of the deceased grantor.⁵²

Other Evidentiary Rules Still Apply

While the dead man's statute is intended to restore equality between the living and the dead in the eyes of the law, it is not meant to discriminate against the living.⁵³

Thus, "every utterance of a deceased person is not automatically admissible solely because the speaker has died."⁵⁴ The dead man's statute only removes one level of hearsay, so that the proffered testimony must not violate any other evidentiary rule if it is to remain admissible. For example, in the case of *Brown v. Butler*,⁵⁵ the plaintiff, the administrator of the deceased's estate, commenced suit to compel the defendant to transfer her interest in a schooner named the *H.H. Hanscom*.⁵⁶ At issue was whether a bill of sale for the interest had properly passed to the defendant. At trial, the court received testimony from the administrator that the decedent had stated that he did not intend to transfer the interest in the schooner to the

defendant. These declarations attributed to the deceased were not made directly to the administrator, however. Instead, the deceased had made them to a third party, who at the time of trial was also deceased. On appeal, the Supreme Court held that it was improper to admit the declarations. As the Court bluntly held, "The dead cannot...be made to speak through the dead."⁵⁷ In other words, the administrator's testimony contained improper double hearsay,⁵⁸ and the dead man's statute removes only one level of hearsay.



Conclusion

The history of the dead man's statute rests deep in the early, fundamental evidentiary principles of Connecticut jurisprudence. Unlike its beneficiaries, the statute remains alive, and through interpretation, has emerged with added clarity and continued vitality. There is every indication that, for the future, the dead man's statute will remain a monument to the principle that death will not silence the dead. In Connecticut, dead men do tell tales. ■

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Notes

- 1 Contrary to its familiar name, the statute applies to women as well as to men.
- 2 *Douglas v. Chapin*, 26 Conn 76, 92 (1857)

3. 58 Conn. App. 19, 27 (2000).
4. C. Tait & J. LaPlante, *Connecticut Evidence*, § 8.47.1 - 8.47.11 (3d Ed. 2001).
5. *Craft's Appeal From Probate*, 42 Conn. 145, 154 (1875).
6. General Statutes, Ch. 10, Sec. 134 (1854).
7. *Bissell v. Beckwith*, 32 Conn. 509, 516 (1865).
8. *Id.*; *Rosales v. Lupien*, 50 Conn. App. 405, 408 (1998).
9. *Bissell*, 32 Conn. at 516 (1865).
10. *Graybill v. Plant*, 138 Conn. 397, 405 (1951).
11. C.G.S. § 52-172 (2001).
12. *O'Brien v. Coburn*, 46 Conn. App. 620, 632, cert. denied, 243 Conn. 938 (1997); *Pender*, 58 at 28.
13. *Rosales*, 50 Conn. App. at 408.
14. *Facey v. Merkle*, 146 Conn. 129, 134 (1959).
15. *Pixley v. Eddy*, 56 Conn. 336, 338-39 (1888).
16. *Craft's Appeal*, 42 Conn. at 154.
17. *Id.* at 153-154.
18. *Setchel v. Keigwin*, 57 Conn. 473, 479 (1889).

19. *Carlin v. Haddox*, 49 Conn. 492, 495 (1882).
20. *Bissell*, 32 Conn. at 509.
21. *Rowland v. Philadelphia, Wilmington & Baltimore Railroad*, 63 Conn. 415, 416 (1893).
22. *Bulkeley v. Brotherhood Accident Co.*, 91 Conn. 727, 730 (1917).
23. 146 Conn. 129 (1959).
24. *Id.* at 134.
25. *Id.*
26. *Id.*
27. *Lockwood v. Lockwood*, 56 Conn. 106, 109 (1887).
28. *Doolan v. Heiser*, 89 Conn. 321, 32 (1915).
29. *Lockwood v. Lockwood*, 56 Conn. at 109-110.
30. *Id.* at 110.
31. 58 Conn. App. 19 (2000).
32. *Id.* at 21 n.3.
33. *Id.* at 22.
34. *Id.* at 29.
35. *Baxter v. Camp*, 71 Conn. 245, 252 (1898), *Pixley*, 56 Conn. at 338-339; *Bowen v. Ide*, 109 Conn. 307, 311 (1929); *O'Brien*, 46 Conn. App. at 632.

36. *Galuck v. Galuck*, 30 Conn. App. 305, 317 (1993).
37. *Walter v. Sperry*, 86 Conn. 474, 476-477 (1913).
38. *Baxter*, 71 Conn. at 252.
39. 46 Conn. App. 620 (1997).
40. *Id.* at 621-623.
41. *Id.* at 631-632.
42. *Id.* at 632.
43. *Rowland v. Philadelphia, Wilmington & Baltimore Railroad*, 63 Conn. 415, 417 (1893).
44. *Rosales v. Lupien*, 50 Conn. App. 405, 408 (1998).
45. 71 Conn. 576 (1899).
46. A schooner is "[a] small sea-going fore-and-aft rigged vessel...carrying one or more top-sails." The earliest known occurrence of the word "schooner" was in 1716. It is thought to have been derived from a supposed New England verb "scoon" or "seun"—"to skim across the water." *The Oxford Universal Dictionary* (1955).
47. *Brown*, 71 Conn. at 582.
48. Colin C. Tait, *Tait's Handbook of Connecticut Evidence* § 8.47.5 (3rd ed. 2001).

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