



Understanding the Role and Application of the Dead-Man's Act in Disputed Estates and Trusts

BY MATTHEW R. DAVISON

No stranger to controversy,¹ the Illinois Dead-Man's Act² is a common denominator among specious arguments in disputed estates and trusts. Why? First, and like the "Slayer Statute,"³ the phrase itself sounds grievous and unquestionably legal. Surely then, anyone citing it during an argument knows what he or she is talking about, right? Not really.

Second, lawyers (and judges) often bypass the actual language of the statute and instead rely on poorly developed case law or their own, subjective recollection. The Act is short enough to read in one sitting but given the framework of modern estate-planning, whether a will, a trust, a combination of the two, or even other

mechanisms such as payable-on-death designations, proper handling of the Act's exclusionary powers requires a precise understanding. This article highlights three common pitfalls of the Dead-Man's Act awaiting unprepared attorneys in the context of disputed estates and trusts.

'REPRESENTATIVE' VS. 'REPRESENTATIVE'

One of the biggest misunderstandings among practitioners and reviewing courts is who may assert, or waive, the exclusionary power of the Act. With notable exceptions, the Act generally provides that "[i]n the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conver-

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1 See generally, Timothy V. Hoffman & John J. Skawski, *The Death of the Dead-Man's Act?*, 82 Ill. B.J. 620 (Nov. 1994); David S. Lipschultz, *The Dead-Man's Act in Trial Practice*, CBA Rec., April 2005, at 48 (2005); Morton John Barnard, *The Dead Man's Act Rears Its Ugly Head Again*, 72 Ill B. J. 420 (Apr 1984); Mason and Weisbard, *The Pitfalls of Will Contest Litigation*, 16 J.Mar.L.Rev. 510 (1983).

2 735 ILCS 5/8-201.

3 755 ILCS 5/2-6, which prohibits a person who intentionally or unjustifiably causes the death of another from receiving any benefit in probate as a result of that death.

sation with the deceased or person under legal disability or to any event⁴ which took place in the presence of the deceased or person under legal disability.” So, in order to summon the Act’s protections, the party must be acting as a representative. At first blush, one may interpret that the evidentiary rights conferred by the Act belong only to an estate’s “Representative” (capital “R”). This confusion for a term of art is a mistake, and such error is further compounded by imprecise case law.

Fortunately, some reviewing court decisions remind practitioners to read the entire Act, including the definitions. Unlike the definition of “Representative” found in the Probate Act⁵, under the Dead-Man’ Act, “representative” actually means “an executor, administrator, heir or legatee of a deceased person and any guardian or trustee of any such heir or legatee, or a guardian or guardian ad litem for a person under legal disability.”⁶ In other words, Illinois courts recognize a broader classification of representatives in the Dead-Man’s Act, because “based on the clear language of the statute, the Dead Man’s Act is not restricted to just probate actions filed on behalf of an estate or decedent. Instead, it applies to any action in which the representative of the deceased person sues or defends. As such, it pertains not only to actions where a representative sues to protect the interests of an estate, but also to actions brought by heirs and legatees to protect their status and rights as heirs and legatees (emphasis added).”⁷

In practice, examples of how this definition functions

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are more common than expected. For instance, in one matter⁸, a plaintiff was the legatee of a decedent’s will and by separate proceeding sought to enforce a promissory note previously issued by the defendant to the decedent. The legatee moved for summary judgment on the note, asserting that the Dead-Man’s Act applied and prohibited the defendant from testifying on his own behalf as to certain events and conversations with the decedent involving the note. The trial court agreed and granted summary judgment to the legatee. The appellate court affirmed, noting that, by definition, the Dead-Man’s Act’s provisions and protections extend to an executor, admin-

istrator, heir, legatee, or guardian. Indeed, as one author explains, “an heir or legatee may be suing on their own behalf and not as the personal or legal representative of the decedent and still be able to invoke the protections of the Act.”⁹ Once it crystallizes who, exactly, may assert the safeguards found in the Act, it is equally important to ascertain who is subject to the silencing effect of such safeguards.

THOSE DIRECTLY INTERESTED IN THE ACTION

Not only do the Act’s protections bar an adverse party’s testimony (under the right circumstances), it can also bar testimony from those “directly interested in the action.”¹⁰ An immediate caveat carved out in the Act is that this “does not include a person who is interested solely as executor, trustee or in any other fiduciary capacity, whether or not he or she receives or expects to receive compensation for acting in that capacity.”¹¹ Further, courts readily distinguish “interest” in the action as “having a pecuniary or legal interest in the outcome of the case, not an emotional, familial or ‘rooting’ interest.”¹² However, Illinois courts recognize that familial “rooting” interests often blend and blur with parallel, pecuniary interests.¹³ Generally, a spouse of a person who is incompetent to testify under the Act is similarly disqualified.¹⁴ Converse-

8 *Id.*

9 Peter C. John, Theodore J. Low, *The Illinois Dead Man’s Act-A Survival Guide*, CBA Rec., January 2013, at 24, 25 (2013).

10 735 ILCS 5/8-201.

11 *Id.* at second (c).

12 *The Illinois Dead Man’s Act-A Survival Guide*, supra note 9, citing *People v. \$5,608 U.S. Currency*, 359 Ill. App. 3d (2nd Dist. 2005); *Estate of Hurst v. Hurst*, 329 Ill. App. 3d (4th Dist. 2002).

13 See, e.g., *Bernardi v. Chicago Steel Container Corp.*, 187 Ill. App. 3d 1010 (1st Dist. 1989); *Kamberos v. Magnuson*, 156 Ill. App. 3d 800 (1st Dist. 1987); *Borman v. Oetzell*, 382 Ill. 110 (1943).

14 See *In re Estate of Babcock*, 105 Ill. 2d 267 (1985).

4 Aside from the issues highlighted in this article, practitioners should also consider the ongoing case law and related legal commentary involving the term “event,” which, by legislation, replaced the word “transaction.” Some case law suggests the Act’s application is now narrower because of such word change. See, e.g., *Rerack v. Lally*, 241 Ill. App. 3d 692 (1st Dist. 1992). But in the disputed estates setting, courts have signaled a wider view for purposes of what constitutes an “event.” See *Zorn v. Zorn*, 126 Ill. App. 3d 258, 262 (4th Dist. 1984) “Etymologically, ‘transaction’ appears to be narrower than ‘event.’ ‘Transaction’ is off’ times linked with its twin, ‘occurrence,’ and indicates a specific happening or episode. ‘Event’ is frequently regarded as arising from an antecedent state of things. (Webster’s Dictionary of Synonyms 582 (1st ed. 1951)). Thus, Jefferson’s immortal lines would have been robbed of that quality, if he had commenced, ‘When in the course of human transactions . . .’”

5 Under the Probate Act of 1975, “Representative” includes executor, administrator, administrator to collect, standby guardian, guardian and temporary guardian. See 755 ILCS 5/1-2.15

6 735 ILCS 5/8-201(b).

7 *Coleman v. Heidke*, 291 Ill. App. 3d 670, 673 (5th Dist. 1997) (emphasis added).

ly, a prospective heir of an otherwise interested person is not always barred from testifying, credibility notwithstanding.¹⁵

The rule becomes less fixed when additional facts or angles are developed. For example, where a mother, as next friend, testified on behalf of her daughter (a minor) in a dispute involving a decedent's statements and the daughter's right to certain property, the court found that the daughter's interest was parallel to the mother's, because the "claims being asserted were common to both of them" and that the mother's "personal interest in the outcome could not be 'segregated' from [daughter's] interest, and [mother's] testimony violated the proscriptions of the Dead-Man's Act."¹⁶ What makes someone "directly" interested in the action and thus disqualified to testify under the Act, is still case-specific, and ample room remains for advocacy and creativity. Likewise, practitioners seeking to invoke (or sidestep) the Dead-Man's Act in particular disputed estates and trusts must be acrobatic in their approach, and posture each case's facts and witnesses accordingly. Indeed, as next highlighted, the Act's availability seemingly vacillates among actions commonly found in the arena of estate and trust litigation.

UNCHARTED TERRITORY

It is widely acknowledged that two clear purposes of the Dead-Man's Act are "to protect decedents' estates from fraudulent claims and to equalize the position of the parties in regard to the giving of testimony."¹⁷ Less clear though is whether the Act applies in matters solely involving disputed trusts. While the Act's definition of "representative" contemplates heirs and legatees, as both terms relate to probate estates and wills, it is devoid of any specific reference to common trust verbiage such as "beneficiary." Given the trend of modern estate-planning, it is easy to envision a scenario where a decedent leaves a nominal probate estate administered by an inconsequential will, accompanied by a significant amount held in trust governed by various disputed amendments and restatements. If a disgruntled beneficiary brings suit solely in a court of equity to challenge a trust restatement and he or she wants to testify about certain conversations with the Decedent regarding such changes, can another beneficiary or the trustee assert the Dead-Man's Act to prohibit such testimony?

Some may argue that since "trustee" is found in the Act's definition of representative, the fiduciary can employ the Act in such a dispute. Others would caution that, unlike an executor's statutory duty, a trustee, by law, is not conclusively required to always defend the Trust in such actions and may even risk displaying partiality or bias by endorsing a particular side in the instrument's underlying contest. Therefore, it is, at best, unclear

whether the Act's provisions would apply when beneficiaries clash over the validity of a Trust document.¹⁸

A natural inquiry from this dialogue is: what about pour-over wills in disputed estates and trusts? Meaning, if the Dead-Man's Act is available in a dispute over a decedent's will but arguably less viable in a standalone trust contest, then what happens when a common planning technique such as a pour-over will is contested contemporaneously alongside the trust document? Illinois commentary is split, with one author suggesting that the Court bifurcate the results of each objection, explaining an objection "must be sustained as to the will contest but overruled as to the contest of the trust, and the judge will hear the evidence outside the presence of the jury."¹⁹

Aside from will and trust contests, an adversely affected heir may, in some cases, initiate a tort action directly against a party who manipulated a decedent's assets through fraud or undue influence. Such a pleading is generally couched as a cause of action for intentional interference with an expectancy. Often overlooked, this action allows for punitive damages and for monetary relief directly against the defendant and may be pled in the alternative in key scenarios. What's more, given that the plaintiff in such a matter is likely filing suit as an aggrieved heir, counsel should strongly consider asserting the protections of the Dead-Man's Act when the defendant inevitably begins offering testimony about the challenged event and certain conversations with the deceased. After all, an objection anchored solely on hearsay will be countered with an appropriate exception.²⁰

CONCLUSION

Attorneys interested in litigating modern estates must reconcile the facts of the case which almost always intersect at some point with an event or conversation involving the decedent, with a concise, but powerful statute in the Dead-Man's Act. The Act's availability cannot be contemplated on the eve of trial, but should instead be assessed early on during case intake for matters ranging from probate claims to trust contests. In capable hands, the Act not only expedites litigation, it serves to quickly signal to opposing attorneys and the Court whether or not the citing counsel is prepared.

15 See *In re Franke's Estate*, 124 Ill. App. 2d 24 (1st Dist. 1970).

16 *Prignano v. Prignano*, 405 Ill. App. 3d 801, 818 (2nd Dist. 2010).

17 *Gunn v. Sobucki*, 216 Ill. 2d 602, 609 (2005).

18 See, e.g., *Mortimer v. Mortimer*, 6 Ill. App. 3d 217 (1st Dist. 1972) (Trustee was not, by reason of Dead-Man's statute, incompetent to testify regarding trust transactions with grantor in a suit to adjudicate which of three trust documents signed by grantor during his lifetime was valid and controlling, where no pleading was brought or defended by a person in capacity of personal representative, heir, legatee or devisee, and it did not appear that suit or proceeding involved or tended to impair estate of deceased grantor).

19 Morton John Barnard, *The Dead-Man's Act Is Alive and Well*, 83 Ill. B.J. 248 (1995).

20 See Illinois Rule of Evidence 803 (3)(A).