From the Desk of the President

The National College of Probate Judges (“NCPJ”) is going strong, with membership up by 20 percent since last year. We had a dynamic and well attended spring conference in beautiful Tucson, AZ in May with informative educational sessions about Assisted Outpatient Treatment, Creating a Probate Help Center, Adoptions, and the Anne Heche Estate Case Study. Retired New York Surrogate Judge Kristin Booth Glen was the recipient of the Isabella Horton Grant Award for her significant contributions to Guardianships.

Our NCPJ website, www.ncpj.org has been updated with all the NCPJ conferences through 2024 listed. “Probate Stars,” is our new website feature, highlighting NCPJ members for significant probate accomplishments, such as Mary Joy Quinn, past NCPJ President and Professor Rebecca Morgan of Stetson Law School who has been a long time NCPJ supporter and was the monitor of our only virtual conference during the pandemic.

Thank you for your responses to my requests for your probate jurisdiction areas so we can ensure our conference curriculum co-chairs provide relevant educational programs at our conferences.

Watch for the new initiative, “Probate Judge’s Zoom Roundtable” which I am launching on Thursday, August 17th at 1:00pm, to provide an opportunity for our members to have conversations with fellow probate judges and NCPJ members about common issues and topics.

Lastly, please join us at the NCPJ Fall Conference and Annual Meeting from November 15 to 18, 2023 which will allow you to meet and engage with our NCPJ members from across the country in a beautiful beach resort in Tampa, FL.

Feel free to email (JudgeDianne@aol.com) or call me (203-731-1359 cell) any time with your questions or comments, as I value the input of every one of our members! Enjoy the summer! Life’s too short!

Dianne Yamin
Hon. Dianne Yamin
NCPJ President
2022-2023
Resources

In 2005, (reprinted in 2007 and in 2021) the American Bar Association and the American Psychological Association published three outstanding handbooks that examine the issue of capacity from both a legal and a medical perspective. The first of these, republished as a Second Edition in 2021, is labeled a handbook for attorneys, but provides valuable analysis for all interested in this field. Entitled Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, it covers a discussion of different types of capacity, factors that can influence retention or loss of capacity, and difficult topics such as undue influence. A second corollary handbook for the medical profession, Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists, was published in 2008 and revised in 2017 to provide background for psychologists who are asked to review issues of capacity in civil legal proceedings. A third handbook for judges, Judicial Determination of Capacity of Older Adults: A Handbook for Judges, was also published as part of this effort in 2006 and is available online at www.abanet.org/aging. All three of the handbooks are also searchable by Google. The author of this article strongly commends all three handbooks to anyone interested in gaining a deeper knowledge of the intersections among law, medicine and psychology, including understanding the different perspectives of the professions, and how these differing constructs affect legal and medical conclusions.

Medical perspective. Lawyers and judges tend to discuss whether an individual lacks capacity to enter into a particular transaction. In medicine, the term used is competence, not capacity, and primarily refers to the patient's ability to understand and make particular medical decisions, including weighing any risks and benefits.

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Global competence or capacity is defined as a patient's ability to engage in a wide range of functions, closer to what in law we think of as legal capacity.

Specific competence or capacity is a patient's ability to perform specific, more limited functions and specific methods for enhancing these abilities. The trend in medicine is to focus increasingly on specific competences rather than a global approach.

Legal perspective. Historically the legal perspective has tended to be black and white: is the individual capable or incapable? Yes or no? All or nothing? There is a trend now to take a more nuanced approach to the issue of diminishing or declining capacity, with an emphasis on determining whether an individual has the capacity to enter into the specific transaction at issue. The law presumes that anyone over eighteen years of age has legal capacity, but in fact, not every adult does.

Contractual capacity. This is a higher level standard, involving the individual's capacity to understand the nature and effect of the business being transacted. This could be the decision to hire an attorney to make an estate plan, including a power of attorney; the decision to purchase items at a grocery store; or the decision to engage in complex strategies such as generation skipping transfer (GST) planning or sales of assets to intentionally defective grantor trusts (IDGTs). Different tasks will require higher or lower standards of capacity to be effective.

Donative capacity is the capacity to make a gift. It requires the donor to understand the extent of his or her assets and the natural objects of the donor's bounty, but it also requires the ability to understand and calculate the effect of the proposed gift on the donor's current finances. For relatively small gifts made by a wealthy individual, the standard may not be too imposing, but if an individual's principal assets consist solely of his or her home, or his or her retirement account, then a proposed transfer of that asset to another individual leaving the individual with limited resources should raise questions.

Capacity to execute a durable power of attorney has been related to the capacity to contract, and often includes some level of awareness of the consequences of the action and the identity, relationship and abilities of the person or persons to be appointed. In some jurisdictions, this standard may be similar to that for testamentary capacity, a generally lower standard.

Capacity for health care decisions means an individual must be able "...to understand the significant benefits, risks and alternatives to proposed health care and to make and communicate a health care decision."

Testamentary capacity is one of the lower standards of capacity. In most states it requires the testator to understand the nature and extent of his or her assets, the natural objects of the testator's bounty and the ability to rationally create a plan to dispose of those assets. See Streisand, Adam and Spar, James E., "A Lawyer's Guide to Diminishing Capacity and Effective Use of Medical Experts in Contemporaneous and Retrospective Evaluations," 33 ACTEC Journal, pp. 180-194 (2008).

On the positive side, powers of attorney are private, inexpensive alternatives to court-supervised guardianship and conservatorship proceedings. They are legal documents based in principal-agency law, and encompass the fiduciary duties of good faith and loyalty. Most states recognize both powers of attorney for health care decisions and powers of attorney to manage finances. This discussion is limited to financial powers.

Advantages and Disadvantages
The principal granting a financial power of attorney appoints an agent either to perform specific acts for the principal or, in general, to manage the principal's financial income and assets. In the latter case, a power of attorney most often is "durable," meaning that it remains in effect even if the principal later becomes incapacitated. In some jurisdictions, powers of attorney are automatically durable unless the principal states otherwise; in other jurisdictions, the principal must state expressly that the power of attorney will be durable. The existence of a durable power of attorney may

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obviate the need to have a conservator or guardian of the property appointed when the principal loses the capacity to manage his or her property.

Despite the many advantages of a power of attorney, there are also disadvantages. Because powers of attorney are relatively easy to obtain -- an internet search quickly leads to online forms available for free or at a very low cost—an unscrupulous individual may use a power of attorney to divert the principal’s money and property to persons whom the principal did not intend to benefit. For example, in In re Olliff, 184 Ga. App. 846, 363 S.E.2d 158 (1987), judgment aff’d, 258 Ga. 157, 366 S.E.2d 289 (1988), an 81-year-old woman had given an unlimited power of attorney to a long-time friend after her husband died. Accountants hired by her family later discovered that the “friend” had diverted over $590,000 of the woman’s assets to his own personal accounts.

One of the most challenging problems in recent years is the growing prevalence of financial exploitation of the elderly or vulnerable, including undue influence. Undue influence is a particularly difficult abuse to regulate. While there is no nationwide standard definition of undue influence, the most common definitions acknowledge that this is a process that happens when the individual still retains capacity. Typically the individual may have vulnerabilities, but overall, a court or an attorney faced with an individual who is being subjected to undue influence will be meeting with or evaluating a person who meets or exceeds the definition of legal capacity. The individual will express a desire to benefit the influencer, and thus, by carrying out the individual’s wishes, attorneys, financial advisors, bankers and even courts become an inadvertent part of an undue influence scheme. The most common technique of potential influencers, whether family or caregivers, is to isolate the vulnerable person from support networks, whether family, friends, long time attorneys or other advisors -- anyone who knows the person well, can detect a change in capability and would be alert to unusual modifications of an estate plan or finances. While many cases focus on wills and dispositions after death, in fact, much mischief is accomplished during life using powers of attorney to make gifts (no witnesses necessary), change beneficiaries on retirement plan assets (no witnesses necessary), create joint accounts (no witnesses necessary), execute deeds or otherwise modify an individual’s ownership of assets and future plan. In the wrong hands, a power of attorney may become a tool that allows an unscrupulous actor to take financial advantage of a vulnerable person.

In some states, another disadvantage to a power of attorney is that many people find that just when they need them most, financial institutions may decline to accept the power of attorney. In “Finding Out Your Power of Attorney is Powerless,” a May 6, 2016 New York Times article, writer Paula Span describes a number of instances where in states like New York, perfectly valid power of attorney documents were rejected when the principal became incapacitated. Banks may refuse to accept a power of attorney if it is not written on their own power of attorney form. Brokerage firms also may insist on their own forms, including numerous pages of indemnifications and few actual useful provisions; or may require court documents, involving an expensive, potentially embarrassing and otherwise unnecessary guardianship or conservatorship proceeding. These problems led to the efforts by the Uniform Law Commission to update the power of attorney model act.

The Uniform Power of Attorney Act (UPOAA)

As of March 2023, 30 states have adopted a form of the UPOAA and it has been introduced in two additional states (Vermont and Massachusetts). The uniform act provides for mandatory acceptance by financial institution after a simple process, and safe harbors if a financial institution has a legitimate question about the document’s validity or the bona fides of the agent. Additionally, the act provides a process by which the principal, the agent, and other interested persons can ask a court to review the agent’s conduct and grant appropriate relief if financial exploitation or abuse is suspected.

To assist with broad recognition of these documents, if a power of attorney is acknowledged before a notary or other officer duly permitted to take oaths per state law, the signature is presumed to be genuine and the document is entitled to special protection. The uniform act also provides that powers of attorney executed in compliance with the act are presumed valid in other states, and vice versa: Copies of the document are presumed effective unless otherwise prohibited - for example, real estate transactions may still require recording of an original document on the land records to be effective.

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A principal may also designate a conservator or guardian of the principal's estate or guardian of the principal's person in the document in the event of future incapacity. As a practical matter, most state courts give significant deference to such an advance designation, potentially discouraging attempts to bring a court action simply for the purpose of overturning a power of attorney. A principal can also choose to have the power of attorney be effective immediately upon signing (the default rule) or can choose to have the power of attorney become effective only upon the occurrence of a future event or contingency such as the future incapacity of the principal (a "springing" power of attorney). (Some states—e.g., Florida—will not recognize springing powers of attorney.)

An agent is deemed to have accepted appointment by exercising authority, performing duties or by any assertion or conduct indicating acceptance. Acceptance is the critical element for beginning both the duties of agency and the commencement of the fiduciary relationship. If an agent does not know of his or her appointment, simple actions to help the principal do not constitute acceptance of responsibility or the imposition of fiduciary duties.

Powers of attorney typically terminate when the principal dies or revokes the power of attorney; when its purpose has been fulfilled (e.g. if created for a specific purpose such as a real estate transaction); or if the agent ceases to act and there is no successor named.

The agent's authority continues regardless of the passage of time, eliminating the argument of many financial institutions that a document is "too old." Executing a new power of attorney does not automatically revoke a prior document unless the new document so states, though divorce will do so. In order for a revocation to be effective, knowledge by the agent and by third parties of that fact is necessary. Without actual knowledge, following the Restatement (Third) of Agency, even if the principal dies or has revoked the document, if the agent or third party continues to act on or rely on the document in good faith, the principal and the principal's successors in interest are still bound.

The three mandatory duties for an agent, like any fiduciary, are to act in accordance with the principal's reasonable expectations, to the extent known by the agent (otherwise to act in the principal's best interests); to act in good faith; and to act only within the scope of authority granted in the power of attorney. In addition to the three mandatory duties, there are default duties that will apply unless modified in the document.

The default duties are: to act loyally for the principal's benefit; to avoid conflicts of interest that would interfere with the agent's ability to act impartially in the principal's best interest; to act with care, competence and diligence, similar to the level of care exercised by other agents in similar circumstances; to keep a record of all receipts, disbursements and transactions made on behalf of the principal; to cooperate with the principal's health care agent or proxy to carry out the principal's reasonable expectations to the extent known; otherwise to act in the principal's best interests; and to attempt to preserve the principal's estate plan to the extent actually known by the agent, if such preservation is consistent with the principal's best interests based on all relevant factors (including the nature and extent of the principal's property, the principal's foreseeable needs and obligations, minimization of taxes and eligibility for benefit programs). Finally, if an agent acts in good faith and with care, competence and diligence for the best interest of the principal, the agent is not liable if there is a conflict of interest and the agent may also benefit. This is a departure from traditional fiduciary standards, but it does represent a practical realization of how powers of attorney function among family members in the real world. The uniform act provides for compensation to the agent that is "reasonable under the circumstances" and reimbursement of expenses reasonably incurred on behalf of the principal.

While powers of attorney are designed to be private, self-enforcing documents, the agent can be called to account by a court. The principal, a guardian or conservator on behalf of the principal, the governmental agency having authority to protect the welfare of the principal, and after death, the executor, administrator or personal representative of the decedent's estate can always request an accounting of the agent's actions. The uniform act also provides an expanded list of petitioners from whom a court may but need not consider a request to account: the health care proxy of the individual; the spouse, parent or descendant; a presumptive heir, a person named as a beneficiary; anyone

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having a financial interest in the principal's estate; a caregiver of the principal who demonstrates sufficient interest in the principal's welfare; and finally, a person or entity asked to accept the power of attorney. Both a court and the principal, if competent, may reject the petition of an individual on the expanded list. The expanded list of petitioners and the court's discretion to entertain or reject a motion for accounting reflect the modern tension between the principal's ability to keep his or her affairs private versus the increasing specter of financial abuse and undue influence. The drafters of the uniform act recognized a potential need for investigation in light of increased exploitation of the elderly and sought a balance between the desire for privacy and the public benefits of intervening in potentially abusive situations.

Acceptance by third parties

One of the most frustrating aspects of the use of powers of attorney has been the refusal of outside parties, especially financial institutions, to accept a legally valid document, especially after the principal has lost capacity, which is when the document is most needed. To encourage third party acceptance, if a document has been acknowledged or notarized, then a financial firm or other person who accepts the document in good faith is entitled to broad protections.

A third party may still request an agent's certification; an English translation or an opinion of counsel, if the reasons for the latter are specified, and requested within a short period from the time after the document is tendered. The entity or person may not delay or require use of its own form. Because of the need to balance the rights of individuals to have valid, functioning powers of attorney, and the ability of unscrupulous persons to take advantage of vulnerable individuals and cause great harm, financial institutions may still reject the document if they, in good faith, believe the power of attorney is not valid. They may make a referral to the state adult protective services agency or a court.

If a person or entity refuses to accept a legitimate document after following the process above, the principal or agent can bring an action to a court of competent jurisdiction requiring the document's acceptance, potentially at the financial institution's expense, or the petitioner's expense, including liability for reasonable attorneys' fees and costs incurred in an action to mandate acceptance. Other damages may be available.

Powers both General and “Hot”

In addition to the common or general powers, to sell or manage real estate, securities, bank accounts, etc. the uniform act has added optional “hot” or broad expanded powers to manage or alter an individual's estate plan. These include the power to create, amend, revoke or terminate an inter vivos trust; the power to make a gift (with default restrictions that can be waived); the power to create or change rights of survivorship, create or change a beneficiary designation; delegate authority to another; exercise fiduciary powers or disclaim property. Some scriveners include access to digital assets, a new form of property rights. Because these "hot" powers have significant wealth transfer potential and may have estate and gift tax consequences, and could change a principal's estate plan on death, the uniform act requires each of these powers to be specifically acknowledged and authorized by separate initialing. It also limits these powers if an agent is not a close relative of the principal. Specifically, an agent who is not an ancestor, spouse or descendant of the principal cannot use these "hot" powers to favor the agent unless there are direct, explicit instructions otherwise. Once again, the act demonstrates the tension between granting broad powers for practicality and efficiency, and preventing financial abuse or exploitation by unscrupulous individuals.

Construing powers of attorney

Typically powers of attorney are strictly construed by courts. Within the document, however, if there are overlapping provisions and authorities, the broadest authority prevails. Powers in the document apply both to property owned by the principal at the time of execution, and property acquired thereafter. The powers also apply to property outside the state of execution, although for real property, one must never assume that a valid power of attorney created and executed in State A will be sufficient to meet the requirements for transferring real property located in State B. States often have very precise requirements for real property conveying, so it is important to be aware.

As previously discussed, agents under a power of attorney are fiduciaries, so courts need to be alert to possible breaches of fiduciary duties in reviewing actions under powers of attorney. The duties of loyalty to the principal and the principal's wishes and instructions; the duty to follow the terms of the document; the duty to keep records, act fairly and avoid self-dealing or breach of trust are all as applicable to agents under powers of attorney as to personal representatives and trustees under wills and trusts. A principal may
allow conflicts and self-dealing, but a waiver of such a fiduciary duty should be spelled out in the document to be valid, and should not extend to outright conversion of assets.

People will be people, and temptation is still very much a part of the human condition. Powers of attorney are tools, increasingly powerful tools that through proper use can be a great benefit to individuals to keep their financial affairs private and under the control of trusted family members or friends as they age and lose capacity. However, because powers of attorney can be such powerful documents and have the potential capacity to change who inherits and how much, they are also tempting targets for those with less than pure motives. For all these reasons, a power of attorney and its precise terms can sometimes be the most important part of an individual’s estate plan, and can present difficult issues relating to capacity, vulnerabilities, intention, undue influence, good faith and fiduciary duty when the actions of an agent are challenged in court.

Deadman’s Statutes

By: William E. Phillips
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The basic theory behind a state’s Deadman’s statute is that the living should not have an unfair advantage over the dead. They were enacted to “to prevent the fabrication of claims that neither the deceased nor the executor of the estate is in a position to rebut and to preserve estates for the benefit of heirs of the decedent whenever there is any room to doubt the merits of the claims being brought.” They were, in effect, remnants of the common law disqualification of all interested witnesses. Judge Alpheus F. Haymond (1823 — 1893) of the West Virginia Supreme Court of Appeals, supported the creation of these types of statutes. In 1878, Judge Haymond wrote as follows:

the intention of the law in the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affairs, or expose the omissions, mistakes or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify in his own behalf. Any other view of this subject, I think would place in great peril the estates of the dead, and would … make them an easy prey for the dishonest and unscrupulous, which with due deference to the views and opinions of others, it seems to me, the Legislature never intended.

Judge Haymond’s views were shared by many people who were in favor of enacting Deadman’s statutes. Therefore, statutes were drafted “to prevent the fabrication of claims that neither the deceased nor the executor of the estate is in a position to rebut and to preserve estates for the benefit of heirs of the decedent whenever there is any room to doubt the merits of the claims being brought.” In the years following Judge Haymond’s remarks, many states enacted Deadman’s statutes to try and ensure equality in the courtroom. One of the problems with a Deadman’s statute is that they assume that all interested parties are dishonest. In some cases, that could be a true assumption. In other cases, isn’t it possible that none of the interested parties are dishonest?

In states where Deadman’s statutes exist, they vary greatly in scope, application and exceptions. “Each Dead Man’s statute is different, in that it affects a different person or is limited to a specific type of action, but most of the statutes focus on the same criteria.”

By the end of the 1960s, thirty-four (34) states had enacted some form of the Dead Man’s Statute. However, the modern trend among the states has been to abolish these statutes. Sometimes, these abolitions have occurred through legislative action. Other times, that are abolished by judicial intervention.

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South Carolina, where I live and practice, has a “Deadman’s Statute.” It is contained in S.C. Code Ann. §19-11-20 (Law. Co-op. 1976) and reads, in relevant part, as follows:

[N]o party to an action or proceeding, no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf in regard to such transaction or communication or when testimony of such deceased or insane person or lunatic in regard to such transaction or communication, however the same may have been perpetuated or made competent, shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing.

This statute is very difficult to read. It is too convoluted and its language is somewhat archaic. On the other hand, some Deadman’s statutes are fairly simple. For example, Idaho’s version of the Deadman’s statute (IDAHO CODE §9-802(3) contains the following prohibition:

“The following persons cannot be witnesses: … Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any communication or agreement, not in writing, occurring before the death of such deceased person.”

Indiana’s version of the Deadman’s statute (IND. CODE ANN. §34-45-2-4 (Michie 2021)), is even more straightforward: “a person (1) who is a necessary party to the issue or record; and (2) whose interest is adverse to the estate; is not a competent witness as to matters against the estate.”

Regardless of the language used in a particular Deadman’s statute, these statutes have been highly scrutinized. In 1938, Dean McCormick criticized the rule as having a “baneful potency for injustice,” where “in the name of solicitude for the dead, the law permits one set of living folks to cut off another’s claim without a fair hearing.” As we know, the rule is designed to prohibit any interested person from testifying concerning conversations or transactions with a deceased person if the testimony could affect his or her interest. See, e.g., Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965); Douglas A. Wilson, Comment, Recent Developments Under the Dead Man Statute, 22 Wash. L. Rev. & St. B.J. 211 (1947). Because a Deadman’s statute is an exception to the general rule of witness competency, it requires a restrictive reading on which the party requesting its muzzling effect bears the burden. See Havird v. Schissell, 252 S.C. 404, 166 S.E.2d 801 (1969).

“Regardless of the language used in a particular Deadman’s statute, these statutes have been highly scrutinized.”

In South Carolina, “[t]he Dead Man’s Statute … in substance provides that a witness may not testify (will not be a competent witness) should the witness be in either of four designated classes.” In re Estate of Mason, 289 S.C. 273, 346 S.E.2d 28 (1986). “The four classes are [as follows:] 1) a party to the action; 2) an interested person who may be affected by the trial’s outcome; 3) a person who previously had an interest which may be affected by the trial; and 4) an assignor of the thing in controversy.” In re Estate of Mason, 289 S.C. 273, 280, 346 S.E.2d 28, citing Long v. Conroy, 246 S.C. 225, 143 S.E. (2d) 459 (1965). Similarly, in Alabama, “the Dead Man’s Statute does not render a witness incompetent and thereby exclude his testimony unless the following four questions can be answered affirmatively: 1) Will the testimony concern a statement by or a transaction with a deceased person? 2) Will the estate of this deceased person be affected by the outcome of the suit? 3) Does the witness have a pecuniary interest in the result of (continued on page 9)
the suit? 4) Is the interest of the witness opposed to the interest of the party against whom he is called to testify?" Melvin v. Parker, 472 So. 2d 1024 (1985)

Like other states, South Carolina’s courts have recognized a number of exceptions to the Deadman’s Statute. Although not intended as a complete listing, the following are examples of situations in which the rule is inapplicable:


2) Testimony of the attorney preparing the will is generally held to be admissible on the ground that the attorney is not an “interested person.” Havird v. Schissell, 252 S.C. 404, 166 S.E.2d 801 (1969); Hanahan v. Simpson, 485 S.E.2d 903, 910 (S.C. 1997).

3) A witness is prohibited from testifying under the Dead Man’s statute only if his or her present or previous interest will be affected by the event of trial. Riddle v. George, 181 S.C. 360, 187 S.E. 524 (1936). As such, a person is only disqualified if he or she has a certain or vested legal or equitable interest which may be affected by the direct, legal operation of the judgment. Long v. Conroy, 246 S.C. 225, 232, 143 S.E.2d 459, 462 (1965).

4) A party may testify against his or her interest. Devereaux v. McCrady, 46 S.C. 133, 24 S.E. 77 (1896); Shell v. Boyd, 32 S.C. 359, 11 S.E. 205 (1890).

5) A witness may testify to a transaction between the deceased and a third party. Moore v. Trimmier, 32 S.C. 511, 11 S.E. 548 (1889).

6) As the statute is directed against the competency of a witness, rather than the transaction or communication itself, it does not prohibit the introduction of documentary evidence. See Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957) (letters from a decedent to two heirs were deemed admissible).

7) “[N]otwithstanding the [fact that the] testimony of an interested witness may generally fall within the inhibition of the statute as to evidence of transactions or communications with a decedent, he may testify to the acts, demeanor or conduct of the decedent where the testimony is offered merely for its bearing on an issue of mental competency.” Havird v. Schissell, supra, 252 S.C. 404, 166 S.E.2d 801 (1969) (Emphasis supplied); see also Meadows v. Meadows, 468 S.E.2d 309 (W. Va. 1996) (discussion as to why testimony of interested party concerning communications with decedent are properly admissible if used to demonstrate, not the truth of the matter asserted, but the basis of the witnesses’ opinion concerning the decedent’s mental capacity).

There is no federal Deadman’s statute. As set forth in Rule 601, Fed. R. Evid., “[e]very person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.” The Notes of Advisory Committee on Proposed Rules to Rule 601, Fed.R.Civ., provide some insight as to that committee’s view of Deadman’s statutes: “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.” The Notes further explain that in diversity cases, state Deadman’s statutes will be given no effect. Regardless of the federal government’s apparent disdain for Deadman’s statutes, they do exist in sixteen (16) states. Whether these statutes will be legislatively repealed, or abrogated by judicial decision, at some point in the future remains to be seen.

STATES WITH A CURRENT DEADMAN’S STATUTE

Arizona: AR.S. §12-2251 (2021)


Florida: Florida has somewhat of a hybrid rule as it relates that state’s Deadman’s Statute. §90.804(2)(e), FLA. STAT. (2021) reads as follows: “In an action or proceeding brought against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or against a trustee of a trust created by a deceased person, or against the assignee, committee, or guardian of a mentally incompetent person, when a declarant is unavailable … a written or oral statement made regarding the same subject (continued on page 10)
matter as another statement made by the declarant that has previously been offered by an adverse party and admitted in evidence.”


STATES ELIMINATING/REPEALING THE DEADMAN’S STATUTE

Thirty-five (35) states have expressly rejected the Dead Man’s Statute.12 These states are as follows:

Alabama: In 1998, the Alabama Supreme Court revised Rule 601 of the Alabama Rules of Evidence. The commentary to this rule supersedes any inconsistent statutory grounds of incompetency. Chief among these is Alabama’s Dead Man’s Statute. Ala. Code 1976, Section 12-21-163. Superseding the Dead Man’s Statute means that survivors will be allowed to testify, if their testimony otherwise complies with the rules of evidence, and that the unavailability of the deceased person will merely be a factor for the jury to consider in determining the weight to give the survivor’s testimony (citations omitted).7

Alaska: Cavanah v. Martin, 590 P.2d 41, 42 (Alaska 1979) (“Alaska has completely eliminated the common law disqualification of witnesses based on interest, including when their interest involves a claim against an estate.”);

Arkansas: Davis v. Hare, 561 S.W.2d 321, 322 (Ark. 1978) (noting that the Arkansas Deadman’s Statute “was in fact expressly repealed by the [state’s adoption of the] Uniform Rules of Evidence”);

California: CAL. EVID. CODE §1261 (West 2004) (permitting testimony from an interested witness);

Connecticut: CONN. GEN. STAT. §52-172 (1996) (permitting testimony from an interested witness);

Delaware: DEL. R. EVID. 601 (superseding the Delaware’s Deadman’s Statute and permitting testimony from an interested witness);

Georgia: GA. CODE ANN. §24-9-1 (2004) (permitting testimony from an interested witness);

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Oklahoma: OKLA. STAT. tit. 12, 2601 (1997) (noting that “[e]very person is competent to be a witness except as otherwise provided in this Code);

Oregon: OR. REV. STAT. §40.310 (2001) (permitting testimony from an interested witness);

Rhode Island: R.I. GEN. LAWS 9-17-12 (1996) (“No person shall be disqualified from testifying in any civil action or proceeding by reason of his or her being interested therein or being a party thereto.”)

South Dakota: S.D. CODIFIED LAWS §19-16-34 (Michie 2004) (permitting testimony from an interested witness);

Texas: TEX. R. EVID. 601 (abrogating the Dead Man’s Statute);

Utah: UTAH R. EVID. 601 (permitting testimony of an interested witness);

Virginia: VA. CODE ANN. §8.01-397 (Michie 2003) (permitting testimony from an interested witness);

These repeals have generally been based on the theory that these restrictive statutes prevent parties, usually the plaintiff, from testifying as to any communications he or she may have had with the decedent.13 Also, opponents of these statutes argue that it discourages a party from bringing claims if the communication is essential to prove them.14 It has been argued that “the Deadman's Statute ... defeats more honest claims than it prevents fictitious ones.”15

Edmund Morgan, a famous scholar and former Reporter for the MODEL CODE OF EVIDENCE, noted that Deadman’s statutes:

are based upon the delusion that perjury can be prevented by making interested persons incompetent or by excluding certain classes of testimony. They persist in spite of experience which demonstrates that they defeat the honest litigant and rarely, if ever, prevent the dishonest from introducing the desired evidence: if the dishonest party is prevented from committing perjury, he is not prevented from some suborning it. If the statutes protect the estates of the dead from false claims, they damage the estate of the living to a much greater extent. And frequently their application prevents proof of a valid claim by the representative of [the] decedent’s estate.16

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EXAMPLES OF CASES APPLYING A STATE’S DEAD-MAN’S STATUTE


In this case, the plaintiff alleged that injuries she sustained from slipping on a mat and falling in the defendant’s garage were caused by the defendant’s negligence. The plaintiff slipped on the mat while the defendant was in the driver’s seat of a car parked in the garage. The defendant died while the case was pending, and the special representative of her estate subsequently filed a motion for summary judgment based on the Illinois deadman’s statute. The special representative argued that the Illinois deadman’s statute barred the plaintiff’s testimony regarding the fall because it occurred in the defendant’s presence. The trial court determined that the deadman’s statute was applicable and entered an order granting summary judgment. The appellate court affirmed, finding that the plaintiff’s testimony that the defendant was in the driver’s seat at the time of her fall is barred under the deadman’s statute and so was her testimony about the fall itself. This case “illustrates both the purpose of dead man’s statutes and the reason for their repeal in many states. On one hand, it would arguably be unfair to have allowed the plaintiff to testify as to the cause of her injuries when the defendant, if living, might have refuted the plaintiff’s testimony. On the other hand, the application of a dead man’s statute made it impossible for a plaintiff to prove her case against a defendant who may have actually been negligent in causing the plaintiff’s injury.”

In re Estate of Pritchard v. McDonald, et al., 735 S.W.2d 446 (Tenn.Ct.App. 1986)

A law firm filed a claim against an estate for legal services performed during the deceased’s lifetime. There had been no written contract and proving the claim depended solely upon the oral testimony of the deceased’s lawyer. That lawyer had subsequently left the firm after he had represented the deceased. When he was called to testify, the probate judge sustained the administrators objection on the ground that the deadman’s statute rendered him incompetent as an agent of a party. Since his testimony was the only evidence to establish the claim, the law firm was not able to prove its claim. The Tennessee Court of Appeals reversed and remanded, holding that the former associate was not a party and was competent to testify. The probate court was clearly wrong in excluding the testimony and held that the attorney, as a non-party with no personal interest in the case, was competent to testify about the claim.

Enacted in 1869, Tennessee’s deadman’s statute can be found at Tennessee Code Annotated §24-1-203 and reads as follows: “In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.” It would be interesting to see how the appellate court would have ruled if the lawyer was still employed by the law firm.

Estate of Rickert v. Taylor, 934 N.E.2d 726 (Ind. 2010)

Harry Rickert and his wife had no children. His wife suffered a stroke and Rickert hired a caregiver. After the wife’s death, the caregiver continued to provide general housekeeping duties and care for Rickert until his death several years later. Prior to his death, Rickert executed a will that divided his estate equally among four nieces and nephews, and Carole Baker, whom Rickert described in his will as a person he loved as much as a daughter. According to some witnesses, Rickert could sign his name, but was otherwise illiterate.

A few years before his death, Rickert executed a general power of attorney appointing the caregiver as his agent. He also executed a codicil to his will, adding the caregiver as a sixth beneficiary. Subsequently, a second codicil named Baker as personal representative of his estate. At that time, he told Baker that his estate was worth $600,000.00 and that each beneficiary would receive approximately $100,000.00 when he died. Over time, Rickert’s health declined and he required more constant care and was attended to by the caregiver during the week and other caregivers on the weekends. At Rickert’s death, his probate estate was valued at $147,000.00.

Apparently, at some point, 13 bank accounts benefiting the caregiver had been created without evidence of Rickert’s involvement. At trial, the Estate successfully invoked the deadman’s Statute to exclude any testimony from the caregiver. However, the trial court nonetheless ruled for Taylor on most issues. The Estate appealed, and a majority of the appellate court reversed and remanded with directions to apply the common law presumption of undue influence to

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determine the validity of the caregiver's transactions as attorney-in-fact.

The deadman's statute establishes as a matter of legislative policy that claimants to the estate of a deceased person should not be permitted to present a court with their version of their dealings with the decedent. During the course of the case, the Estate had taken the caregiver’s deposition. The caregiver acknowledged that she was an incompetent witness under the deadman's statute and argued that the Estate waived any objection to her competence by filing her deposition with the trial court. The caregiver cited the rule that if a party “uses” the deposition in court for an evidentiary purpose, that party waives the protection of the deadman's statute.

The Estate filed the deposition with the trial court, but did not cite it in summary judgment proceedings or offer it into evidence at trial. Although Taylor conceded that the Estate did not actually use the deposition for any evidentiary purpose, she contended that filing it with the trial court allowed for its potential use. Because the Estate could have used the deposition testimony, she argued, she should have been able to testify at trial. The appellate court disagreed. In order to waive objection to the competence of a witness under the deadman's statute by taking advantage of a deposition of a person who was adverse to a decedent's estate, the estate must use the deposition by offering it into evidence at trial or pretrial hearing, or citing it to the court as, for example, by designating it in support of or opposition to a summary judgment motion.

Jones v. Williams, 280 Va. 635, 701 S.E.2d 405 (2010)

A doctor delivered a baby, but there were complications when the baby, although born alive, had severe and permanent damage to the nerves of his right arm, a condition known as Erb’s Palsy. The delivering physician died shortly after the child was born. The baby, through his next friend, filed a complaint against the personal representative of the physician’s estate. The medical malpractice case went to trial and, at the close of plaintiff’s case, the defendant moved to strike the evidence. The defendant argued that testimony concerning the order from the deceased physician was inadmissible under Virginia’s deadman’s statute. The defendant asserted that a nurse’s testimony could not corroborate the plaintiff’s claim because she was an “interested party” within the meaning of the statute.

The statute provides: “[i]n an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.”

The Virginia Supreme Court held that the nurse was not an “interested party” within the meaning of the statute. The defendant had argued that the nurse was an interested party because the plaintiff’s recovery against the physician’s estate relieved the nurse of potential liability. The Court disagreed, holding that a witness whose testimony provides the basis for his or her own liability is not an “interested party” for purposes of the statute. The Court found that the nurse’s testimony was neutral regarding the dispositive issue in the case. Thus, the Court affirmed the decision below and held that the trial court committed no error in denying defendant’s motions to strike.

CONCLUSION

Deadman’s statutes are surviving remnants of the common law disqualification of parties and interested persons. They do appear to be on the decline, but in states where they do exist, these statutes can be extremely confusing. They can be frustrating to both lawyers and judges and they are almost incomprehensible to parties. Will it be raised as an issue? How will it be raised? When will it be raised? In those states where Deadman’s statutes are alive, they may be dying a slow death. However, they still live and breathe in some of the states. It is impossible to know if these states will ultimately remove these prohibitive statutes. In the meantime, if you are subject to these statutes, it is imperative to know when testimony should be muzzled and when it should not be muzzled.

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Proposed Changes to NCPJ Constitution and Bylaws

At the 2022 annual business meeting of the NCPJ proposed changes to the Constitution and Bylaws were presented to the membership for consideration and approval. There were objections to: (1) non-lawyer probate judges not being able to serve as president or president-elect of the College, (2) non-judges serving as president or president-elect of the College, (3) past presidents of the College being able to serve as a “President Emeritus” being limited to past presidents commencing in the year 2021, and (4) reimbursement of President Emeriti for attendance at Executive Committee meetings or conferences of the College. At the 2022 annual business meeting a majority of the members voted to approve the proposed bylaw changes sans the proposed revisions to: (1) Article III for President-Elect and (2) Article V for President Emeritus.

Following the 2022 annual business meeting, the Bylaws Committee has reviewed the Constitution and Bylaws further, based on the commentary received at the 2022 annual business meeting. The following additional amendments in italics) to the NCPJ’s Constitution and Bylaws were recently approved by the Executive Committee and will be presented at the NPCJ’s annual meeting to be held in Tampa, Florida, in November 2023, for consideration by the NPCJ’s membership:

ARTICLE V
PRESIDENT EMERITUS

23. An honorary office of President Emeritus and honorary memberships in the College may be designated by the Executive Committee. All past presidents of the College who are members of the College shall be designated as a President Emeritus of the College. A President Emeritus may attend meetings of the Executive Committee but may not vote at said meetings. The retiring Immediate Past President shall accede to the office of President Emeritus of the College. A President Emeritus who physically attends a meeting of the Executive Committee and is actively engaged in the business activities of the College may be reimbursed for their travel and lodging expenses as determined by the Executive Committee on condition that the reimbursable amount does not exceed the reimbursable amount authorized to be paid to members of the Executive Committee. and shall be entitled to the same reimbursement for attending such meetings as members of the Executive Committee unless said President Emeritus has another reimbursement source.

ARTICLE VII
MEETINGS

Use of Proxy Votes

27. Proxy votes shall not be permitted. If the College conducts a business meeting utilizing electronic video conference means, members of the College eligible to vote shall be permitted to do so electronically.

ARTICLE IX
MEMBERSHIP

A. Membership Classes – The College shall consist of the following membership classes:

1. Regular Membership – Any judge, former judge, retired judge, judge-elect, surrogate, registrar, chief clerk, or any duly appointed referee, magistrate, commissioner, Chief Administrative Officer or otherwise designated judicial officer exercising probate jurisdiction, without regard for age, gender, religion, race, national origin or sexual orientation, shall be eligible to be a Regular Member of the College upon enrollment and payment of the annual regular membership dues as established for the membership category sought by the applicant. Each Regular Member shall be entitled to all benefits and privileges of membership, including the right to vote and hold office. except the President and President-Elect of the College must hold or have held a position that makes judicial decisions and be a graduate of an ABA accredited law school.

   * * *

6. Judicial Position Membership – In those states or territories which have a unified court system, or which do not otherwise have a separate court exercising probate jurisdiction a judicial circuit or district may
be eligible to hold one or more regular memberships in the name of the circuit or district to be filled by the judge(s) exercising probate jurisdiction during the annual membership period. Each Judicial Position Member shall be entitled to all benefits and privileges of Regular Membership, including the right to vote and hold office if the member is a graduate of an ABA accredited law school.

ARTICLE IX THROUGH ARTICLE XXIII

The relocation of Article XIII (an obvious typographic error) to Article VII, relating to meetings requires the renumbering of the paragraphs of the document starting on page 3 in Article VII, starting with the section entitled “Meetings of the College” and continuing to the end of the document.

Additionally, a scrivener’s error has been identified starting on page 4 of the document (starting with Article IX) and continuing to the end regarding the number of the paragraphs and subparagraphs. Starting on page 4 and continuing to the end of the document.

To address these errors, the paragraphs and subparagraphs would be renumbered in a consecutive manner, starting with paragraph 27 on page 3 of the document and continuing to the end of the document.

ARTICLE XXI
MISCELLANEOUS

Dividends Prohibited, Compensation, Reimbursement

6 (to be renumbered).

None of the College’s income shall inure to the benefit of a private individual and the College shall not pay a dividend, nor otherwise distribute any part of its income, to any member of the Executive Committee, a President Emeritus, or other committees of the College except for reimbursement of out of pocket expenses (not to exceed $800.00 per conference) incurred during the conduct of the College’s business.

ARTICLE XXII
AMENDMENTS

1 (to be renumbered).

Except with respect to Article X, these bylaws may be amended at any business annual meeting of the College by a vote of two-thirds of those present and voting at such meeting. To be considered, an amendment must be proposed in one of two ways:

a. An amendment approved by a majority of the Executive Committee and submitted to the membership at least 30 days in advance of a business annual meeting.

b. An amendment proposed in writing by at least 25 voting members of the College representing at least three states (with no more than half of the proposers being from any one state) and filed with the secretary of the College at least 60 days prior to a business annual meeting and submitted to the membership at least 30 days prior to a business annual meeting.

ARTICLE XII
USE OF PROXY VOTES

1. Proxy votes shall not be permitted. If the College conducts a business meeting utilizing electronic video conference means, members of the College eligible to votes shall be permitted to do so electronically.
Upcoming Conferences

Fall 2023 — Tampa, FL
November 15-18, 2023
Grand Hyatt Tampa Bay
2900 Bayport Drive
Tampa, FL 33607

Spring 2024 — Jacksonville, FL
May 7-10, 2024
DoubleTree by Hilton Hotel—Riverfront
1201 Riverplace Blvd
Jacksonville, FL 32207

Award Applications

Nominations should be submitted either via email to NCPJ@nesce.org, through the online form at www.ncpj.org, or by mail to National College of Probate Judges, 300 Newport Avenue, Williamsburg, VA 23185. Full details about each award are available at www.ncpj.org.

“Isabella” Award

The “Isabella” Award, named after NCPJ member and California Probate Judge, Hon. Isabella Horton Grant, was established by NCPJ to recognize and encourage achievements in a variety of activities, such as innovative programs leading to improvements in guardianship laws; articles, treatises, books or other publications of unusual quality and impact on guardianship issues; and leadership roles or other activities in organizations that have led to significant improvements in the laws, administration, or practices in the guardianship field. Nominations for the “Isabella” Award are due by December 1st of each year, and the award is presented to the recipient at the Spring Conference.

Treat Award for Excellence

The Treat Award for Excellence, named after Hon. William Treat, New Hampshire Probate Judge and founder and President Emeritus of NCPJ, was established by NCPJ in 1978 to recognize and encourage achievements in the field of probate law and related fields consistent with the goals of the NCPJ. The College annually selects one individual, a resident of the United States, who has made a significant contribution to the improvement of the law or judicial administration in probate or related fields, which contribution is of outstanding merit. Nominations for the Treat Award for Excellence are due by July 1st each year, and the award is presented to the recipient at the Annual Meeting which takes place during the Fall Conference.
Endnotes

DEADMAN’S STATUTES


4. Owens v. Owens’s Adm’r, 14 W.Va. 88, 95 (1878).

5. Wallis, supra note 3 at 78-79.


7. Wallis, supra note 3 at 79.

8. Id. at 82.


10. This subsection concerns deceased persons. Subsection (1) concerns “[t]hose who are of unsound mind.” Subsection (2) concerns children under the age of teen (10) years.


12. Wallis, supra note 3 at 76-77.


14. Id.


Article Submissions

The NCPJ Journal is published in the spring and fall and welcomes scholarly submissions for publication. If you or someone you know is interested in submitting an article for publication in a future NCPJ Journal, please do so by emailing ncpj@ncsc.org.

The NCPJ Journal is published in the spring and fall of each year by the National College of Probate Judges. Submissions may be made by visiting the NCPJ website at www.ncpj.org.

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