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Evidence—Dead Man's Statute—Gift Causa Mortis

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EVIDENCE

Dead Man's Statute—Gift Causa Mortis. By reducing the burden of proving a gift causa mortis where the state is the only contestant, *In re McDonald's Estate*[1] has evidently attached an exception to the Washington "dead man's" statute.[2] While eliminating the common law prohibition against testimony by an "interested person," this statute does prohibit such persons from testifying concerning "transactions" with a decedent. It also prohibits testimony about "statements" made by a decedent.

In re McDonald's Estate was a contest between the state, claiming escheat, and a friend of the decedent, claiming as donee of a gift causa mortis. At trial the alleged donee testified that he had taken bank books from the decedent's cabin to the decedent's nursing home and that the decedent had returned the books to him. Because of the state's objection, based on the "dead man's" statute, the friend was not allowed to testify about his transaction with the decedent at the nursing home, and there were no other witnesses. Nevertheless, the trial court found that the decedent had given the books to his friend with the intention that they were to belong to him unless the donor recovered from his illness. The state appealed, arguing insufficiency of proof.

A majority of the supreme court rejected the state's contention. While recognizing the normal requirements for a gift causa mortis,[3] they stated that the burden of proof to show such a gift is "lightened

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[1] 160 Wash. Dec. 457, 374 P.2d 365 (1962).

[2] RCW 5.60.030. "No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his credibility: *Provided, however,* That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him, or in his presence, by any such deceased or insane person, or by any such minor under the age of fourteen years: *Provided further,* That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action."

[3] The court listed the requirements: "(1) the gift must be made in view of approaching death from some existing sickness or peril; (2) the donor must die from such sickness or peril without having revoked the gift; (3) there must be a delivery, either actual, constructive, or symbolical, of the subject of the gift to the donee or to someone for him, with the intention of passing title thereto, subject, however, to revocation in the event of recovery from the pending sickness." *In re* McDonald's Estate, 160 Wash. Dec. 457, 459, 374 P.2d 365, 366 (1962); *In re* White's Estate, 129 Wash. 544, 225 Pac. 415 (1924).

somewhat"[4] in the absence of competing creditors or donees. For this proposition they relied on *Phinney v. State.*[5] There the decedent directed his physician to write a check in favor of the donee. The check reached the bank after the decedent's death. Since there were no competing creditors or donees, the bank did not need protection, and the court held that the check was a valid assignment of funds. Because the physician was able to testify, the *Phinney* case clearly did not involve the "dead man's" statute.

The majority in *McDonald* also relied on *Wilson v. Joseph,*[6] where the decedent had allegedly made a gift causa mortis of jewelry to the defendant and his wife. The decedent had made a gift of the same jewels during a previous illness, but had taken them back when she recovered. The "dead man's" statute prevented the defendant or his wife from relating their conversation with the decedent. But despite the lack of "direct evidence of what... [the decedent] said or did at that time,"[7] the court found sufficient evidence to prove delivery with intent to pass title. The similar factual pattern in *Wilson* thus gave strong precedent for upholding the gift in the *McDonald* case.

In *McDonald* four judges dissented. While admitting that the decedent had intended to make a gift to his friend, they found insufficient evidence to prove that the decedent had intended a present transfer of title.[8] Rather, they argued, the evidence showed no more than an intent to make a transfer effective upon death. In support of this conclusion, they relied not only on the absence of direct evidence, but also on the fact that the friend had filed escheat forms.

When a divided court must make a factual decision while hampered by lack of evidence, it becomes important to inquire into the policy behind the "dead man's" statute. One of the earliest theories in support of the statute regarded the right to testify as a mutual privilege: "Death having closed the lips of one party, the law closes the lips of the other."[9] This statement is in reality a gloss for the legislative feeling that survivors will take advantage of the court and will use

[4] *In re* McDonald's Estate, *supra* note 3, at 460, 374 P.2d at 367.
[5] 36 Wash. 236, 78 Pac. 927 (1904).
[6] 101 Wash. 614, 172 Pac. 745 (1918).
[7] *Id.* at 616, 172 Pac. at 746.
[8] Judge Hill quoted Newsome v. Allen, 86 Wash. 678, 151 Pac. 111 (1915), quoting the rule from Jackson v. Lamar, 67 Wash. 385, 388, 121 Pac. 857, 859 (1912): "The donor must not only signify his purpose to give, but he must deliver, and as the law does not presume that an owner has voluntarily parted with his property, he who asserts title by gift must prove it by evidence that is clear and convincing, strong and satisfactory."
[9] *In re* Cunningham's Estate, 94 Wash. 181, 183, 161 Pac. 1193 (1917). See 2 WIGMORE, EVIDENCE 578 (3d ed. 1940).

perjury to pilfer the defenseless estate of the decedent. Scholars have been nearly unanimous in attacking this theory.[10] They believe that legislatures have underestimated the ability of the courts and juries to detect false testimony on the part of estate "bounty hunters."

Support for the "dead man's" statute arises also from the fact that decedents cannot contradict the testimony of survivors.[11] This argument does not suppose either inability of courts to discover false testimony nor the dishonesty of survivors. Rather, it rests on the common experience that honest people derive conflicting impressions from a single event. Thus it is felt that there may be injustice if only half of the "honest" testimony is heard by the court. This argument has been met somewhat in those states following the Connecticut scheme, where statements of the decedent are admissable to contradict the testimony of survivors. Aside from this imperfect device, there is no way to overcome the "contradiction" argument.

A consideration often overlooked is the practical effect of the "dead man's" statute on the everyday administration of estates by the administrator or executor. These statutes give the administrator a strong advantage in dealing with claims that may not be easily susceptible of proof or disproof. He can simply deny the claim and force the claimant to produce satisfactory evidence. While this procedure has undoubtedly destroyed many valid claims, it has, in all probability, also defeated many spurious claims.

Several states have taken significant steps to retain protection of the decedent's estate and at the same time allow the testimony of interested persons. The most widespread scheme is Connecticut's.[12] It allows a living person to testify concerning any transaction with the deceased; but, to satisfy the "contradiction" argument,[13] it also allows the representative of the decedent to admit all self-serving statements by the deceased which tend to contradict the testimony of the living. This is clearly an added exception to the hearsay rule. Normally

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[10] *Ladd, The Dead Man Statute: Some Further Observations and a Legislative Proposal,* 26 IOWA L. REV. 207 (1941); MORGAN, EVIDENCE 24 (1927); WIGMORE, *op. cit. supra* note 9, at 696.

[11] Lee, *The Dead Man Statute and the Uniform Rules of Evidence,* 11 MIAMI L.Q. 103 (1956).

[12] "No person shall be disqualfied as a witness in any action by reason of his interest in the event of the same as a party or otherwise . . . but such interest or conviction may be shown for the purpose of affecting his credit." CONN. GEN. STAT. ANN. § 52-145 (1958). "In actions by or against the representatives of deceased persons . . . the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence." CONN. GEN. STAT. ANN. § 52-172 (1958).

[13] Lee, *supra* note 11

courts admit only those statements of deceased persons which are strictly against interest.[14]

Under the present Washington scheme, the donee of a gift causa mortis cannot offer his own testimony showing delivery by the donor with the appropriate words of intent. But the donee can offer declarations of the donor made to other persons wherein the donor stated that he had made a gift, since these are declarations against interest.[15] The donor's representative finds himself barred from offering evidence of statements by the deceased that he did not make a gift, since these are self-serving declarations and hence inadmissable.[16] Thus, in Washington a living person has the advantage once he can produce a disinterested witness. The Connecticut system allows the donee to give full details of the gift and all statements made by all parties. At the same time, the representative of the deceased may introduce all self-serving statements that are relevant. If *In re McDonald* had been heard under the Connecticut plan, the court would have had before it all relevant evidence to aid its decision. Thus, there would have been no need for the "escheat" exception created by this case.

Five states have followed the lead of Connecticut.[17] This approach has been recommended by the Commonwealth Trust Fund of New York[18] and the American Bar Association.[19] The Model Code of Evi-

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[14] 5 WIGMORE, EVIDENCE § 1457 (3d ed. 1940).

[15] Colby v. Nelson, 13 Wash. 650, 230 Pac. 629 (1924). *Accord, In re* Krause's Estate v. Miller, 173 Wash. 1, 21 P.2d 268 (1933) (contract to make a will); Corbett v. Weaver, 59 Wash. 248, 109 Pac. 803 (1910) (action for services rendered). See Annot., *Admissibility of Declarations by Donor Subsequent to Alleged Gift, on Issue as to Gift,* 105 A.L.R. 398 (1936).

[16] Annot., *supra* note 15, at 403. *Accord,* Carey v. Powell, 32 Wn.2d 761, 204 P.2d 193 (1949) (contract to make a will); Doernbecher v. Mutual Life Ins. Co., 16 Wn.2d 64, 132 P.2d 751 (1943) (cancellation or rescission); Eastman, Inc. v. Northwestern Mutual Life Ins. Co., 169 Wash. 125, 13 P.2d 488 (1932); Levy v. Simon, 119 Wash. 179, 205 Pac. 426 (1922) (accounting); Reese v. Murnan, 5 Wash. 373, 31 Pac. 1027 (1892) (sale of land). Recent decisions required that the statement must have been made with the belief that it was against the declarant's pecuniary interest, or would be against his interest in the future. *In re* Allen's Estate, 54 Wn.2d 617, 343 P.2d 867 (1959); National Bank of Commerce v. Lutheran Brotherhood, 40 Wn.2d 790, 246 P.2d 843 (1952); Allen v. Dillard, 15 Wn.2d 35, 129 P.2d 813 (1942).

[17] ALASKA COMP. LAWS ANN. § 58-5-1 (1948); N.H. REV. STAT. ANN. §§ 516:22, 516:25 (1955); ANN. LAWS OF MASS. ch. 233 §§ 20, 65 (1956); R.I. GEN. LAWS §§ 9-17-12, 9-19-11 (1956); S.D. CODE §§ 36.0101, 36.0104 (1939). Louisiana appears to have a similar plan; at least the state does not forbid the survivor to testify. LA. CIVIL CODE § 2282 (1952).

[18] This fund established a committee to study problems in evidence. Professors Morgan, Chafee, Gifford, Hinton, Sunderland, and Wigmore, Hon. Charles M. Hough, Judge of the United States Circuit Court of Appeals, and the Hon. William A. Johnston, Chief Justice of the Supreme Court of Kansas, were members. After polling the attorneys of Connecticut, the committee recommended the following model statute:

"No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

"In actions, suits or proceedings by or against the representatives of deceased

dence[20] and the Uniform Rules of Evidence[21] contain provisions similar to the Connecticut rule. In addition to the Connecticut approach there are the "discretionary" and "corroboration" schemes. Arizona and Montana[22] follow the "discretionary" scheme whereby the trial court has discretion to admit testimony from survivors. Five jurisdictions[23] allow the survivor to testify so long as he has corroboration. This device is very similar to the Washington scheme, except that under the "corroboration" rule, once the survivor has a witness, then the survivor himself can also testify.

While the decision in *In re McDonald* probably resulted in justice, it is unfortunate that the court had to involve itself in a process of guess-work and loop-hole hunting.[24] The decades of successful practice under the Connecticut system indicate a practical solution to the "dead man's" statute that combines both justice and the necessary free supply of evidence.

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persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was made in good faith and on decedent's personal knowledge." MORGAN, EVIDENCE 35 (1927).

[19] 63 ABA REPORTS OF THE AMERICAN BAR ASSOCIATION 582 (1938).

[20] MODEL CODE OF EVIDENCE, rules 9 & 503 (1942).

[21] UNIFORM RULES OF EVIDENCE 7 & 63(4)(c).

[22] ARIZ. REV. STAT. ANN. § 12-2251 (1956); MONT. REV. CODE §§ 93-701-2, 93-701-3 (1947).

[23] DIST. OF COLUMBIA CODE §§ 14-301, 14-302 (1961); ILL. ANN. STAT. ch. 51, §§ 1, 2 (1950); N.M. STAT. ANN. § 20-1-7 (1953), N.M. STAT. ANN. § 20-2-5 (Supp. 1961); ORE. REV. STAT. §§ 44.010, 116.555 (1953); CODE OF VA. §§ 8-285, 8-286 (1950).

[24] The common exception to the "dead man's" statute is to allow the wife to testify as to a gift from the deceased donor to the husband. In three Washington cases the court allowed the wife to testify, but then the court held that there was insufficient proof of the alleged gift. *In re* Cunningham's Estate, 19 Wn.2d 589, 143 P.2d 852 (1943); Vining v. Butler, 138 Wash. 646, 244 Pac. 961 (1926); Showalter v. Spangle, 93 Wash. 326, 160 Pac. 1042 (1916). From these decisions it appears that the court does not need the "dead man's" statute to protect the deceased's estate from false or mistaken claims. If the court could weight and reject the wife's testimony, why is the court unable to weigh and test the testimony of the donee-husband?

Other exceptions have been created by the courts. In Nott v. McDonald, 146 Wash. 638, 264 Pac. 1003 (1928) parents were allowed to testify that the decendent delivered a deed to their daughter as they were not "parties in interest." In another situation, the husband and son could testify that they made a gift of property to the wife-mother. Since this testimony protected her estate from community property creditors, it was allowed. *In re* Cunningham's Estate, 94 Wash. 191, 161 Pac. 1193 (1917). And in Bardsley v. Truax, 64 Wash. 400, 116 Pac. 1075 (1911) the grantee was allowed to state that he had possession of a deed from the grantor immediately after the date of the deed as this was not testimony of a "transaction" with the deceased, nor a "statement" made by the deceased.