THE UNWANTED: DEAD WITNESSES AND THE ABSENCE OF A PAPER TRAIL: LOOKING AT THE DEAD MAN'S ACT AND THE FRAUDS ACT

Although we do not like to acknowledge it, much like taxes, and the ability to generate waste, mortality will call some day. Oftentimes, we ignore what we should heed most. The making of a will or trust is scheduled for next week. An agreement is not reduced to a memorandum. As advocates we need to have the vision to put our patron's promises, contracts and the recitation of events in writing. This avoids legal pitfalls when a document's author dies. Also, it makes us better stewards of client problems instead of making oral agreements - a centerpiece for discord - of which a decedent or one who is incapacitated, knows little about. The following case is a good example. (*Brown, Udell & Pomerantz Ltd. v. Frances Ryan and Sharon McCollum* (2006) 369 Ill.App.3d 821).

I. THE FRAUDS ACT

Charles Watson ("Watson") asked a law firm ("Brown") to represent him. Watson thought a local ordinance which regulated his business was illegal. The agreement for the legal service to fight this ordinance was in writing with Watson. Brown filed a lawsuit on Watson's behalf and won a temporary restraining order against the enforcement of the ordinance. Watson, with Brown at the helm, eventually, lost the case. The Appellate Court affirmed (*Watson v. Stone Park* (2003) 343 Ill.App.3d 1300).

Later, that year Brown filed a complaint against Watson, the estate of Daniel McCollum, and Service Amusement Corporation for attorney's fees and costs expended for legal services in the challenge to the ordinance. Brown alleged the promise to pay those fees was made by Daniel McCollum in 2000. Unfortunately, McCollum expired in 2003. There were no other witnesses to

this agreement other than McCollum and a lawyer who worked for Brown.

At the trial level, McCollum mounted a two pronged attack. First, he claimed that if such agreement was made it was unenforceable because it violated the Frauds Act (740 ILCS 80/1) which says:

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> No action shall be brought, whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

* * *

The second argument McCollum advanced was that Brown could never prove its claim because to do so would violate the Dead Man's Act. (735 ILCS 5/8-201). In short, McCollum alleged the lawyer for Brown who claimed to have been a witness to McCollum's agreement was not a competent witness because the executor of McCollum's estate could not refute that claim. The Dead Man's Act states:

* * *

> In 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 conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability.

* * *

The trial court never ruled on the claim the Dead Man's Act rendered the witness incompetent. It held the complaint was barred by the Frauds Act. It agreed with Brown, the Frauds Act did not apply to McCollum's oral promise to pay before the debt was incurred. (See, *Rosewood Care Center v. Caterpillar, Inc*. (2006 366 Ill.App.3d 730), petition for leave to appeal allowed, No. 103212). In short, Brown said because McCollum's promise was original and independent, and not a debt for, or collateral to, the promise of another that the Frauds Act did not apply. The Appellate Court agreed with this argument and reversed the trial court. It sent the case back for the trial court to determine whether the Dead Man's Act was dispositive.

This may not be the end of the matter depending how the supreme court rules in *Rosewood*. The distinction, namely an antecedent agreement to pay a debt before the debt is incurred, as opposed to an existing debt already being in place, seems artificial. Neither is in writing, regardless of when the debt came about. The purpose of the writing requirement, as a matter of law, seems equally fundamental when the person against whom the alleged promise may affect can no longer respond to such a claim.

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Practice Pointer. When analyzing witness testimony relating to a decedent or a person under legal disability do so under the Dead Man's Act as well as the Frauds Act. Clearly they can interact to make a witness incompetent to testify.

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II. THE DEAD MAN'S ACT

The Dead Man's Act ("the Act") has nothing to do with fairness, or really, evidence, for that matter. It addresses whether a witness has the capacity or competency to testify. It has applicability not only to those who are deceased but also to those who are under a legal disability. It casts a wide net, because it applies to all actions. This means personal injury (*Ruback v. Doss* (2004) 347

Ill.App.3d 808); will contests (*Manning v. Mock* (1983) 119 Ill.App.3d 788); forfeiture actions (*People v. $5,608 United States Currency* (2005) 359 Ill.App.3d 391); contracts (*Muka v. Estate of Muka* (1987) 164 Ill.App.3d 223); guardianship cases (*Estate of Rollins* (1995) 269 Ill.App.3d 261) as well as professional negligence (*Hoem v. Zia* (1994) 159 Ill.2d 193). It applies to all cases where the opposing party to the decedent or who is operating under a legal disability sues or defends as a representative of a person who is legally disabled or deceased.

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Practice Pointer. In every case where the testimony of a decedent, or a person under legal disability is implicated you need to analyze how the Dead Man's Act applies. In this regard take a look at Illinois Pattern Jury Instruction 5.02, which is attached. The court will give this instruction in a jury trial where trial testimony obviates the Act. The instruction is utilized so the jury can understand why a witness has not come forward to testify when, quite naturally, the jurors think s/he should be doing so.

* * *

The existence of the Act has been criticized. ("The Death of the Dead Man's Act?, Hoffman and Shawski 82 Illinois Bar Journal 620(1994)). One argument, is that the law is anachronistic since the question of a witness's credibility and the weight to be accorded the testimony of such witness should be left to the trial court to assess. (*In re: Estate of Babcock* (1985) 105 Ill.2d 267). The second, is the common law historical notion that a witness should be disqualified from testifying in favor of his own cause of action. Although both these premises are well-articulated, they miss the point. The genesis for the Act derives from the imperfection of the human condition; namely, that one who outlives an event or transaction with a decedent is more prone to prevaricate where to do so is in his/her pecuniary interest to do so. It has to do with lying. Courts have difficulty dealing with this type of behavior. It is something we need to be aware of not only in the witness box but also in our client relationships.

Furthermore, if the fact sought to be advanced cannot be disputed by the person against whom it should operate, the proposition becomes incontrovertible without other witness testimony. In other words, the issue is not the admissibility of testimony, but the capacity of the witness to utter what was said. This is because the testimony can be introduced from another party who is not adverse and is not interested in the action. (See, Estate of Sewart (1995) 274 Ill.App.3d 298) [attorney who drafted will was competent to testify concerning decedent's testamentary scheme].

The Act has three prerequisites to render the witness incapable of testifying. These are: (a) the person who seeks to be a witness must be an adverse party or directly interested in the action; (b) he must testify in his own behalf; and (c) the adverse party suing or defending as a representative of the decedent is protected as to those conversations with the deceased or any event taking place in the person's presence.

Let's take these up in inverse order.

A. Events

As to what constitutes an "event" a recent Illinois supreme court case establishes what this denotes. (*Gunn v. Sobucki* (2005) 216 Ill.2d 602).

Ed Gunn filed a complaint for replevin and conversion against Lorraine Sobucki the surviving spouse of Robert Sobucki, contesting the ownership of a coin collection. The trial court entered judgment for Gunn declaring he was the lawful owner of the coins. The appellate court reversed and remanded for a new trial and the supreme court affirmed.

The facts are interesting. A copy of the opinion appears in the materials. Basically, Gunn, who was a lawyer, claimed that he had a notarized bill of sale that said he sold the coin collection (which weighed half a ton) to Bob Sobucki for $30,000 in 1979. Gunn moved to Florida and then

divorced his wife. Bob Sobucki died in 1998 and his wife Lorraine inherited all of his personal property including the coin collection. Gunn demanded that Mrs. Sobucki return the coins to him. She refused.

At trial, Mrs. Sobucki's main defense was that her husband had purchased the coins and she had a bill of sale to prove it. Brazenly, Gunn conceded that he had given Mr. Sobucki the bill of sale. He argued this conveyance was a sham and only delivered so he could conceal his ownership to the collection during the divorce proceedings with his wife in a Florida state court. In attempting to prove this fact, among other things, Gunn testified as to many conversations which took place in Mr. Sobucki's presence and that in fact he had not "paid" the $30,000 to Mr. Sobucki as evidenced by the bill of sale. No evidence was ever introduced by anyone orally that this sum had, in fact, been paid. The supreme court held the testimony that one did not do a certain act is the same as testimony that one did a certain act. Acts of commission and omission are prohibited by the Act where they occur in the decedent's presence. Hence, evidence of non-payment as offered by Gunn, an interested and adverse party, disqualified him from testifying and his declarations should have bene excluded at trial.

B. Interested/Adverse Parties

So, who is an interested or adverse party? The question may be answered in two parts: will the testimony of the party witness be of benefit to that witness and against the protected party; and, will the person offering that testimony directly experience a monetary gain or loss as an immediate result of a favorable judgment (*People v. $5,608 U.S. Currency* (supra), (see also *Herron v. Underwood* (1987) 152 Ill.App.3d 144).

Paul Herron died. Prior to his death he executed three deeds, a trust agreement and an

antenuptial contract between he and his third spouse. He gave these documents to a third party with instructions to give them to the grantees after his death. That party was his sister who was to act as trustee of the Trust Agreement. She was not a beneficiary under the Trust. She delivered the deeds consistent with his instruction. Paul died without a will. A dispute developed amongst his heirs and his surviving spouse as to the real estate conveyed by the deeds. During the trial, Anna Bush, Paul's sister and Trustee, testified over objection that she was an interested party. Her testimony replicated conversations with Paul as to what was to happen with the deeds. The trial court rejected the contention that Anna Bush was an interested party.

The Appellate court agreed. First, it concluded that Anna was not an adverse party regardless as to whether she was named as a defendant in the litigation. In calculating adversity the court looked at what the actual interests of Anna were. This requires whether the testimony will benefit the witness, not whether she was named as a defendant. Because Anna had nothing to gain, personally, by her testimony she was not adverse.

Furthermore, the court found she was not incompetent because she was not directly interested in the action. This requires some immediate pecuniary interest to be gained or lost. Merely, because Anna had an "emotional interest" in seeing the third wife not get anything under the trust, such is not sufficient to show a direct interest to disqualify the witness. (see, "The Dead Man's Act in Trial Practice," Lipschultz, Chicago Bar Association Record 19 APR 48) (2005).

In my career, I have tried two will contests to a jury's verdict and several more before the court. In every one of those trials, at some point *Mannig v. Mock* has been cited. I don't know whether the result reached was right, but it was a good job of lawyering and a fair result.

Madge Willis was 85 years young when she died in a nursing home in Toledo, Illinois on

January 16, 1980. Her will was admitted to probate and was contested by her heirs. They claimed she lacked testamentary capacity, was unduly influenced in the execution of her will and that defendant, John Mack, abused his fiduciary relationship and procured Madge's will for his own benefit. After a jury trial, the court entered judgment on the jury's verdict finding her will invalid. The Appellate Court affirmed that ruling. The facts and what happened at trial are must reading.

Madge's husband, Ben, was the president of probably the only bank that mattered in Toledo. Also, Madge was on its Board of Directors. The couple were childless. Ben predeceased her. After a fall, she was confined to a nursing home in 1971. She took care of her own affairs until 1979. Then, her husband's sister was given a power of attorney. Later, John Mock assumed that role after, Betty, the sister in law died. Madge owned the largest minority block of stock in the bank.

The trial was hotly contested and a great deal of the evidence focused on Madge's mental and physical condition prior to her death. The contestants called various nursing home employees, who testified on balance that prior to execution of her will Madge was incapable of caring for her own physical needs like, dressing, bathing, toilet and was generally disoriented.

The lawyer who drafted Madge's will testified that he knew Madge all of his life and he drafted her will based on instructions that were given to him by John Mock. Glen Neal, the lawyer never talked to Madge about her will. Of course, various "expert" witnesses on gerontology testified about Madge's condition, even though none had ever met her. Her personal physician testified he thought she was of sound mind at the time she executed her will.

John Mock testified he was a life long resident of Toledo, had been a sheriff, county treasurer and the president of the bank in which Madge owned stock. Mock claimed he participated in the preparation of Madge's will after the objection was made based on the Dead Man's Act. Mock's

testimony came in by way of an offer of proof. This offer basically stated that he had met with Madge on various occasions in the month before her death and she was the one who told him to whom she wanted to leaver her property. Mock then conveyed this information to Attorney Neal who drafted the will for Madge to sign her will. Madge could not sign the will physically and one of the attendants had to help her complete the execution of the will.

On appeal Mock claimed the will contestants "opened the door" when they permitted Ina Green, Madge's attendant to guide her hand in signing the will. Also, they claimed Attorney Neal's testimony as to the provisions of her will had a likewise effect. The court dismissed these claims finding that neither Neal or Green ever discussed the meetings with Mock about the will. Nor was any cross examination apparently offered on these points. Accordingly, Mock's conversations about the will with Madge was not an event, or a door in which he could walk through.

III. EXCEPTIONS TO THE RULE

If this rule of witness disqualification sounds stark, the legislature did provide for exceptions. There are several:

1. If any person testified on behalf of the representative to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event. (735 ILCS 5/8-201(a).
2. If the deposition of the deceased or person under legal disability is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted in evidence.

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

3. Any testimony that qualifies as a public document (735 ILCS 5/8-201 (c)) and 8-401.

4. Certain conversations and or admissions by a decedent as to joint contractors, surviving partners, as well as the principal of a deceased agent. (735 ILCS 5/8-301)

Let's take a look at these.

A. WAIVER

Maybe when you were in law school you were taught that making objections at trial was important. It is: but not just to show the court how smart you are. Objections are necessary when the need arises. So you have to listen. And, that need occurs less than some of your partners or Law School Professors think. This is because objections break up the flow of why the court and jury has been assembled. Both, want to get to the main event. What is the problem that needs to be resolved by a community of peers? So you have to be thoughtful when making objections. Otherwise, the court and jury are just going to get mad at you for trying to prevent them from doing their job. Objections put the focus on the lawyer. That's not where you want it. If you are being a good advocate you want the judge and jury's eyes on the witness and how s/he is acting and what s/he is saying.

But, that is not the rule here. In fact, it is just the opposite. In this context, you need to make objections early and often. Put some starch in your collar. The waiver rule in this context is one of procedural default. If you don't object the court will not apply the disqualifying rules of the Act. *Estate of Netherton* (1978) 62 Ill. App. 3d 55; *Estate of Phillips* (2005) 359 Ill.App. 3d 833). You need to be persistent.

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Practice Pointer. The use of motions in limine has become a cottage industry. Lawyers make a lot of money filing them.Frankly, they are over-used. They are attempts by lawyers to provide the script for a trial. That's not our job. Trials should engender spontaneity, not predictability. Yet, with the Dead Man's Act, a motion in limine with a memorandum of law is a good thing. It tells the trial court what it is coming and whether limitations on testimony should be employed not because of what is to be said, but because the witness is not competent to say it. Trial judges will thank you for giving them this "heads up".

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Another part of the waiver concept is not procedural default, but putting into evidence testimony that maybe you should have left in a shoe box. Thus, if you put into evidence as the representative, what was said by the decedent to another, or an event which occurred in his presence, you have effectively waived the protection the Dead Man's Act affords. This is called, "opening the door". (see, *Manning v. Mock*, supra, *Estate of Phillips* (1st Dist 2005) 359 Ill. App. 3d 114).

The Phillips case is interesting. John Phillips was a Chicago lawyer. He wrote a will in 1965 which provided some legacies for extended family members and friends but the bulk of his property he left to his two sons. Apparently, another will was executed in 1987 by Phillips. At that time and prior thereto his nephew, John Klebba, was working in various capacities until he became a lawyer in 1981. The original 1987 will could not be found: only, a copy. Klebba filed a petition to admit a lost or destroyed will. He asserted in a very detailed affidavit how Phillips executed the will. Klebba was a substantial legatee under the will. Phillip's sons opposed this motion.

During discovery the deposition of Betsy Ruley, Phillip's former secretary, was taken. She was not a legatee under the 1987 will. Ruley was asked when, how, and where the will was executed. This deposition was submitted in a motion for summary judgment that was filed by Phillips sons. The trial court ruled in favor of the sons, based, in part, on the presumption, that if a

testator retains an original will and that devise cannot be found upon his death it is presumed to have been destroyed by him.(*Estate of Moos* (1953) 414 Ill. 54).

Klebba argued that the representative of Phillip's estate "opened the door" when it attached to it's motion for summary judgment a copy of Betsy Ruley's testimony, and therefore he should be permitted to testify as to what happened after Ruley typed the will and gave it to Phillips. The court held the door was not opened since all Ruley testified to was what happened when the will was executed and not as to what the decedent said or did after that event. The opinion is worth reading since it details the fact that merely because the "events" testified to by Klebba were in temporal proximity to those of Ruley, they were different events, and clearly ones the Dead Man's Act disqualified Klebba from uttering as a witness.

B. THE "PUBLIC" DOCUMENT EXCEPTION

The legislature has provided an exception to the Act where public documents are utilized to buttress a claim against a decedent.(735 ILCS 5/8-401) (*Estate of Tunnell* (1991) 210 Ill. App. 3d 904).

In Tunnell the state employment department made a claim in Tunnell's estate. It alleged the decedent owed the department unemployment compensation payments she never made. It's entire case was based on written determinations it made as to Tunnell's obligations. The estate resisted the claim and the trial ruled for estate. The Appellate Court reversed.

Writing for the court, Justice Goldenhersh stated that the purpose of the Dead Man's Act was to protect the decedent from " a particular type of hearsay". The court thought that because public records are prepared by public officials this creates a certain indicia of reliability as evidenced by the fact the court can take judicial notice of certain public records. In short the court concluded the

employment department had a made a prima facie case and the trial court should have given the evidence some probative value.

Although this opinion addresses public records, the statue itself does not distinguish between the admissibility of public and private records except as to the admissibility of copies of public records and what is required to prove such copies. In my opinion private records, if in their original state, are covered by this exception.

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Practice Pointer. This exception provides that the parties can be required by the court, upon motion, to produce books and writings in their possession which contain "evidence pertinent to the issue". Use this when you have recalcitrant executors, administrators or trustees.

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C. PARTNERS, JOINT CONTRACTORS, AGENTS

The statute 735 ILCS 5/8-301 says:

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§ 8-301. Surviving partner or joint-contractor. In any action or proceeding by or against any surviving partner or partners, or joint contractor or joint contractors, no adverse party or person adversely interested in the event thereof, shall, by virtue of Section 8-101 of this Act, be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action or proceeding a party to the same who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between himself or herself and such agent, unless such admission or conversation with the deceased agent was had or made in the presence or a surviving agent or agents of such adverse party, and then only except where the conditions are such that under the provisions of Sections 8-201 and 8-401 of this Act he or she would have been permitted to testify if the deceased person had been a principal and not an agent.

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This provision is of importance because it applies to surviving partners and joint contractors. Also, it applies to surviving agents. Basically, it does not cover "events" as provided in the main proviso of 735 ILCS 5/8-201. In furtherance of the concept that a decedent or person under legal incapacity should have the ability to refute what the surviving person seeks to testify about, this provision only applies to conversations and admissions by the decedent. See, Cleary and Graham, Handbook of Illinois Evidence (8th Ed. 2004) Sec. 606.7, pp. 350-351).

IV. CONCLUSION

In representing our clients and being of assistance to the court, the Dead Man's Act and to a lesser degree, the Frauds Act require not only study of the case law but preparation for what you believe will unfold at trial. Like geometry, these are not easy lessons. To do an effective job it requires talking to witnesses, not necessarily taking depositions. Who was with the decedent at the time the event or conversation occurred. Who else was there? What was that person's relationship to the decedent or person under legal disability? When did it occur? It is only with this information we can understand the limits of a law that prohibits a witness from testifying about a matter in which he believes he has every right and obligation to do.