

The 2013 Revised Colorado Dead Man's Statute

by Herb E. Tucker and Marc Darling

This article discusses the problems confronted by lawyers and judges in the last ten years interpreting and applying the 2002 Dead Man's Statute and how those problems have been addressed in the 2013 revised Dead Man's Statute.

This article discusses the 2013 revisions to the Colorado Dead Man's Statute that went into effect on August 7, 2013 as a result of the General Assembly passing Senate Bill 13-077. The new statute is included as an appendix to this article. The statute applies retroactively to all pending cases, unless the court determines it is in the interest of justice that the former statute apply.¹

The last major overhaul to the Colorado Dead Man's Statute became effective July 1, 2002.² At that time, the Colorado Legislature directed the Trust and Estate Law Section of the CBA to simplify the statute, which had become overly complicated by nine recognized exceptions to the rule. The 2002 revisions incorporated the beneficial aspects of modern statutes from other states, while still addressing the concerns of Colorado's courts and the legislature that the old statute was too long and complicated.³

Problems With the 2002 Statute

Colorado practitioners, through courtroom experience, have had an opportunity over the last ten years to identify some of the problems they and the courts have had interpreting the 2002 statute. As a result, the Dead Man's Statute subcommittee revised the 2002 statute to remove some of the stumbling blocks to its interpretation and to provide greater clarification and guidance to facilitate the analysis courts must make.

Proceeding Included Equitable Actions

An argument has arisen that an equitable action is not a civil action for purposes of the statute. The subcommittee concluded

that the argument is weak and esoteric; however, instead of devoting considerable energy to that distinction, the subcommittee simply has added the words "other proceeding" to section (1), because "proceeding" is defined in the Colorado Probate Code to include equitable actions.⁴

By or Against a Person Incapable of Testifying

A number of difficulties have arisen from the "by or against" a person incapable of testifying language in section (1). For example, in a breach of fiduciary duty action and in a trustee removal action, arguments were made that the deceased settlor's uncorroborated and contrary verbal wishes or directions were fully admissible (and not subject to the statute). The case did not involve an action by or against a person incapable of testifying. The subcommittee originally had adopted that particular phrase from a different state's statute, but on revisiting the language saw no reason to retain the phraseology that was creating the problems. Accordingly, the subcommittee has deleted it.

Elimination of the Requirement That Corroborating Evidence be Independent

The use of the word "independent" in subsection (1)(b) was intended to reinforce the trustworthy nature of the corroboration necessary to allow a party or a person in interest with a party to testify to the statement; that is, the corroboration had to come from any other competent witness or from trustworthy documentary evidence. However, in practice, courts construed "independent" as a separate and additional element that had to exist for the corrobora-

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tive evidence to come in, even if the evidence was otherwise trustworthy. For example, an argument could be made that a party's contemporaneous notes reflecting conversations with the decedent cannot be used to corroborate his testimony, because the notes are not independent.

The subcommittee concluded that although independence is one way in which a statement can be trustworthy, it is not the only or necessarily the best way in which testimony can be trustworthy; hence, it should not be a required element for the statement to be admissible. Therefore, the subcommittee deleted "independent" in subsection (1)(b) and clarified the nature of the corroboration required in new subsection (3)(c), and that what needs to be corroborated is the proposed witness's testimony, not the statement of the person who is incapable of testifying.⁵

It has been suggested to the subcommittee that there is no prohibition to the actual will or trust document at issue to constitute material evidence sufficient for corroboration. However, the subcommittee concluded that argument is weak because the document at issue would not be trustworthy and, therefore, could not be used to corroborate otherwise incompetent testimony concerning decedent's oral statements.

Rebuttal Exception

Subsection 1(c) of the 2002 statute arguably and unintentionally created a rebuttal exception even when there had been no waiver by opposing counsel. As such, it subverted the purpose of the statute, which is to keep out incompetent testimony. To prevent intentional "juggling" with rebuttal testimony, the subcommittee added language clarifying that a waiver occurs only when an opposing party first introduces uncorroborated evidence of a related communication by a person incapable of testifying through a party or a person in interest with a party. The new language creates a waiver permitting rebuttal testimony from a party or person in interest with a party only when an opposing party first introduces uncorroborated evidence through an otherwise incompetent witness.

For example, assume Proponent (daughter) of a will puts on as witnesses the drafting attorney and a treating doctor, neither of whom is a party or a person in interest with a party. Both witnesses testify that the decedent told them on separate occasions that he wanted to disinherit his son (Contestant), because he had not repaid loans. That testimony is competent and admissible under the Dead Man's Statute because it came in through disinterested witnesses.

Proponent's counsel calls Proponent to testify, but intentionally chooses to not have Proponent testify to any oral statements of the decedent because he does not want to trigger a waiver under the Dead Man's Statute. Contestant's counsel, on cross-examination of Proponent, deliberately asks Proponent what the decedent told her with regard to his estate plan. After Proponent rests, Contestant's counsel puts his client on the stand and asks him what the decedent told him with respect to forgiveness of loans. Proponent objects.

Contestant's attorney argues that there has been a waiver by Proponent's testimony on cross-examination as to oral statements pursuant to subsection (1)(c). Proponent's attorney correctly counters that there has been no waiver, because he did not open the door in his case in chief to the oral statements of the decedent through an incompetent witness.

The revisions to (1)(c) are consistent with early Colorado cases construing the pre-2002 Dead Man's Statute. The Colorado Court of Appeals in *Crandell v. Resley*⁶ reaffirmed a 1981 Colorado Supreme Court case, *Wise v. Hillman*,⁷ construing the rebuttal exception. In *Hillman*, the Colorado Supreme Court held that "a person for whose protection the statute was enacted may not juggle with it, claiming and waiving in part as it suits his convenience." In *Crandell*, the court of appeals upheld the trial court's finding that introduction of the deposition of the party opened the door to rebuttal testimony. The court of appeals recognized that counsel waived the protection of the statute by eliciting favorable deposition testimony on cross-examination of the opposing party who otherwise was barred under the statute.

Person in Interest Must Have a Significant Financial Interest

Counsel and courts have struggled with what a "person in interest with a party" means. As a result, the subcommittee has revised subsection (3)(b) to provide greater clarity on what a disqualifying interest is. Rather than allow a speculative or non-financial interest to be sufficient to disqualify an otherwise competent witness from testifying, the subcommittee has changed the definition to make clear that the disqualifying interest has to be a financial one that is significant and non-speculative. That clarification is consistent with the original intent of the subcommittee to permit more (not less) testimony to become admissible to give the courts greater discretion to weigh the testimony and the trustworthiness of witnesses who have some interest with a party. In sum, to be disqualified from testifying, a nonparty must be aligned with a party or an outcome of the suit in a way that is not merely speculative, but is significant and financial in nature.

Issues have arisen regarding whether a nonparty spouse, including a designated beneficiary⁸ or partners in a civil union,⁹ may corroborate his or her spouse's testimony for purposes of the Dead Man's Statute. One would logically assume in most instances that a husband and wife would support each other's testimony, because they presumably would share in any monetary reward as a result of prevailing in a lawsuit. The subcommittee retained the language in the 2002 statute that classifies witnesses as a "party," "person in interest with party," or "person who is neither a party or a person in interest with a party." If a nonparty spouse is found to be a person in interest with a party, there must be some form of trustworthy corroborating evidence before the nonparty spouse will be permitted to testify as to oral statements of the decedent.

Courts applying the statutory criteria will have to determine whether the nonparty spouse is sufficiently trustworthy. Courts will have to first determine whether the nonparty spouse is sufficiently aligned with his or her party spouse so as to have a significant financial interest that makes his or her testimony standing alone untrustworthy. If the nonparty spouse has a sufficient stake in the outcome of the litigation to render his or her testimony untrustworthy, that testimony may not serve to corroborate the party spouse's testimony. If, for example, the wife admitted in her deposition testimony that she would share in her husband's inheritance should he prevail at trial, the court could, in its discretion, find that the wife is a person in interest with a party whose testimony may not serve as corroborating evidence under the Dead Man's Statute.

The changes made in subpart (i) of subsection (3)(b) are to make it clear that, in most probate proceedings involving the valid-

ity or effect of a document, the court needs to hear from the scrivener/drafter of the will or trust that is at issue, because his or her testimony typically is very relevant, material, and probative evidence critical to the underlying issues. Thus, the possibility—even likelihood—of a malpractice action arising out of a will or trust contest or reformation action should not be enough to preclude the scrivener's testimony. In such a case, the public policy should favor allowing the trial judge to receive that testimony and consider and weigh the potential bias or motives of the scrivener witness.

Corroboration by Material Evidence

The changes in subparts (ii) and (iii) of subsection (3)(b) are consistent with a long line of pre-2002 Colorado decisions holding that an expectancy of a fiduciary or attorney fee alone should not be a disqualifying interest. For example, a drafting attorney named as personal representative, who becomes a party but is not a successor of the decedent, is not necessarily disqualified under the statute.

Finally, the subcommittee received input that courts were struggling with the degree of "corroboration by material evidence" necessary for an oral statement of a person incapable of testifying to be admitted. The subcommittee reviewed the only published Colorado Court of Appeals case¹⁰ construing the 2002 statute, as well as several Texas cases that apply that standard. The subcommittee chose a definition described in a series of fairly recent Texas decisions to provide additional clarity for Colorado courts.¹¹ Under the new statute, "corroborated by material evidence" means corroborated by evidence that supports one or more of the material allegations or issues that are raised by the pleadings and to which the witness whose evidence must be corroborated will testify. Such evidence may come from any other competent witness or admissible source, including trustworthy documentary evidence. Also, such evidence need not be sufficient standing alone to support the verdict but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth.

In *Glover v. Innis*,¹² the Colorado Court of Appeals rejected the trial court's holding that the Dead Man's Statute, in effect, creates another exception to the hearsay rule. The Colorado Court of Appeals stated:

We disagree with the trial court's conclusion that the revised statute [the 2002 statute] merely creates an exception to the hearsay rule and does not prohibit the admission of any evidence. With respect to the first conclusion, the section begins with the words "[s]ubject to the law of evidence," thus necessarily retaining the limitations on the use of hearsay set forth in C.R.E. 801 through 807.

In addition, the court of appeals held that the general assembly intended that parties may not testify regarding oral statements made by an opposing deceased party unless one of the exceptions in subsections(1)(a) through (c) is established. The court of appeals found that:

1. The statute barred testimony by defendants only with respect to oral statements by the decedent. It does not prevent the admission of written statements by the decedent—such as correspondence or documents he or she may have signed—subject to other rules of evidence governing the admissibility of written evidence.
2. The statute does not preclude testimony from witnesses who are neither parties nor persons in interest with a party from testifying about the decedent's oral statements.

3. The statute does not render witnesses incompetent to testify except as specifically delimited. Defendants, therefore, remain free to testify, subject to any other applicable evidentiary rules, concerning what they said, thought, did, observed, or intended.

4. CRS § 13-90-102(1)(c) permits defendants to testify concerning an oral statement by decedent if "[t]he statement is corroborated by material evidence of an independent and trustworthy nature." The concepts of corroboration and trustworthiness are not new to Colorado evidence law.¹³

The Colorado Court of Appeals remanded the case to the trial court to exercise its discretion regarding whether the statements contained in an affidavit sufficiently corroborated the defendant's statements and whether those statements themselves would be independently admissible.

Conclusion

Colorado has had a Dead Man's Statute on the books since it was a territory.¹⁴ In 1999, the Colorado Legislature rejected repeal of the statute recognizing, as a matter of public policy, the need for the statute to reduce the risks of false claims against decedents and incapacitated persons at trial. Despite creative arguments by crafty trial lawyers, the 2002 Dead Man's Statute has survived twelve years of judicial scrutiny, with only one published Colorado Court of Appeals case construing the statute. In conjunction with the Elder Law Section, the Trust and Estate Section of the CBA has approved the subcommittee recommendations to refine the 2002 statute to provide greater clarity to both trial lawyers and judges throughout the state. It is the subcommittee's expectation that the

new statute will for many years to come continue to survive challenge and level the playing field in cases involving decedents or persons incapable of testifying.

Notes

1. CRS § 15-17-101(2)(b)(f).
2. CRS § 13-90-102. See Tucker, “Colorado Dead Man’s Statute: Time for Repeal or Reform?” 29 *The Colorado Lawyer* 45 (Jan. 2000).
3. See Tucker, “The New Colorado Dead Man’s Statute” 31 *The Colorado Lawyer* 7 (July 2002).
4. CRS § 15-10-201(41).
5. *Id. Glover v. Innis*, 252 P.3d 1204 (Colo.App. 2011).
6. *Crandell v. Resley*, 804 P.2d 272 (Colo.App. 1990).
7. *Wise v. Hillman*, 625 P.2d 364 (Colo. 1981). In *Hillman*, the rebuttal exception to the pre-2002 statute is referenced in a footnote wherein the Colorado Supreme Court stated:
We note that the legislature has expanded the number of circumstances which might lead to an implied waiver of the statute by its passage of Colo. Sess. Laws 1977, ch. 200, § 13-90-102 at 822. For transactions arising after July 1, 1977 “Once any witness has been permitted to testify concerning a conversation or transaction with a deceased

- or incompetent person then this section does not apply to rebuttal evidence in any form. Section 13-90-102(1.5)1973 (1979 Supp.)”
- However, it is important that in *Hillman* the Court recognized that counsel waived the statute by eliciting favorable testimony from a party who otherwise was barred under the statute. This opened the door to rebuttal testimony. The petitioner’s counsel elicited testimony in his cross-examination of Hillman (a party) as to her recollection of an automobile accident. The Supreme Court stated, “Petitioner took advantage of the resulting opportunity to cross-examine Hillman by eliciting favorable testimony.” *Id.* at 366. The Court went on to add, “Shaver’s [the opposing party] testimony offered in rebuttal about the same transaction was admissible for all purposes at trial.”
8. CRS § 15-11-102.5 (share of designated beneficiary).
 9. SB 11: Civil Unions. Effective May 1, 2013, eligible couples can enter into civil unions in Colorado.
 10. *Glover*, 252 P.2d 1204.
 11. See, e.g., *Quitta v. Fossati*, 808 S.W.2d 636, 641-42 (Tex.App. 1991), cert. denied; *Estate of Escamilla*, 921 S.W.2d 723, 726-27 (Tex.App. 1996).
 12. See *Glover*, 252 P.2d 1204.
 13. See CRE 803(7), 803(8), 804(b)(3), and 807.
 14. Territorial Law of Colorado (1870) at 63; 43 *Denver L.J.* 349 (1966).

Appendix

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, amend 13-90-102 as follows:

13-90-102. Testimony concerning oral statements made by person incapable of testifying – when allowed – definitions. (1) Subject to the law of evidence, in any civil action ~~by or against~~ OR PROCEEDING IN WHICH AN ORAL STATEMENT OF a person incapable of testifying IS SOUGHT TO BE ADMITTED INTO EVIDENCE, each party and person in interest with a party shall be allowed to testify regarding ~~an~~ THE oral statement ~~made by the person incapable of testifying~~ if:

- (a) The statement was made under oath at a time when such person was competent to testify;
- (b) The TESTIMONY CONCERNING THE ORAL statement is corroborated by material evidence of ~~an independent and~~ A trustworthy nature; ~~or~~
- (c) The opposing party introduces UNCORROBORATED evidence of related communications THROUGH A PARTY OR PERSON IN INTEREST WITH A PARTY; OR
- (d) SUCH PARTY OR PERSON TESTIFIES AGAINST HIS OR HER OWN INTERESTS.

(2) Questions of admissibility that arise under this section shall be determined by the court as a matter of law.

(3) For purposes of this section:

(a) “CORROBORATED BY MATERIAL EVIDENCE” MEANS CORROBORATED BY EVIDENCE THAT SUPPORTS ONE OR MORE OF THE MATERIAL ALLEGATIONS OR ISSUES THAT ARE RAISED BY THE PLEADINGS AND TO WHICH THE WITNESS WHOSE EVIDENCE MUST BE CORROBORATED WILL TESTIFY. SUCH EVIDENCE MAY COME FROM ANY OTHER COMPETENT WITNESS OR OTHER ADMISSIBLE SOURCE, INCLUDING TRUSTWORTHY DOCUMENTARY EVIDENCE, AND SUCH EVIDENCE NEED NOT BE SUFFICIENT STANDING ALONE TO SUPPORT THE VERDICT BUT MUST TEND TO CONFIRM AND STRENGTHEN THE TESTIMONY OF THE WITNESS AND SHOW THE PROBABILITY OF ITS TRUTH.

(b) “Person incapable of testifying” means any decedent or any person who is otherwise not competent to testify.

(c) “Person in interest with a party” means a person having ~~an~~ A DIRECT FINANCIAL interest in the outcome of the civil action OR PROCEEDING, or HAVING any other SIGNIFICANT AND NON-SPECULATIVE FINANCIAL interest that makes the person’s testimony, standing alone, untrustworthy. IN A PROCEEDING TO CONSTRUE, CONTEST, MODIFY, PROBATE, REFORM, OR RESCIND A GOVERNING INSTRUMENT, AS DEFINED IN SECTION 15-10-201(22), C.R.S., “person in interest with a party” does not include:

(I) AN ATTORNEY WHO PREPARED THE GOVERNING INSTRUMENT;

(II) A PERSONAL REPRESENTATIVE WHO IS NOT A SUCCESSOR OF THE DECEDENT; OR

(III) A person whose only interest is an expectation of receiving just compensation for the value of services TO BE RENDERED ~~as a witness~~ BY THE PERSON. ■