

The New Colorado Dead Man's Statute

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This column is sponsored by the CBA Trust and Estate Law Section. The column focuses on trusts and estate law topics, including estate and trust planning and administration, elder law, probate litigation, guardianships and conservatorships, and tax planning.

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The authors served on a Trust and Estate Law Section subcommittee that evaluated Colorado's Dead Man's Statute and proposed recommendations for the enactment of a new statute.

Colorado's Dead Man's Statute was reenacted to take effect July 1, 2002. This article introduces Colorado's new statute, which vests more discretion in the trial court to determine the admissibility of oral evidence. The article also ties the language of similar state statutes to that adopted in Colorado's new statute.

On March 13, 2002, Governor Bill Owens signed into law House Bill 02-1106, which repealed and reenacted CRS § 13-90-102. As a result, Colorado has a new and simplified Dead Man's Statute effective July 1, 2002. This new statute addresses parties' rights to testify concerning oral communications they had with a party who has since died or otherwise become incompetent to testify.

The new statute is streamlined and no longer contains the numerous exceptions to the rule that previously led to confusion regarding the statute's interpretation and application. The enactment of the new statute was not easy. In the 1998-1999 legislative session, the Colorado Bar Association ("CBA") successfully opposed a repeal of the Colorado Dead Man's Statute. Through that process, the CBA Trust and Estate Law Section ("Section") recognized that the Dead Man's Statute was full of "snares, traps, and pitfalls"¹ that created uncertainty in court proceedings. In response, the Section formed a subcommittee ("Subcommittee") to evaluate the Colorado Dead Man's Statute and similar statutes nationwide. As a result of that analysis, the Section proposed substantial revisions to the statute to incorporate the beneficial aspects of more modern statutes and to address Colorado court and legislative concerns that the statute was too long and complicated.²

This article introduces Colorado's new Dead Man's Statute. It ties the language

of the new CRS § 13-90-102 to other states' similar statutes. The article should serve as a practice aid for courts and attorneys.

State Statutes Relied on To Create New Statute

Nineteen states, including Colorado, currently have some form of a Dead Man's Statute.³ The majority of these states vest discretion in the trial court to admit otherwise excludable testimony, but only when the purported testimony is deemed "trustworthy" through corroborating independent evidence.

Because the new statute is derived from several other states' statutes, practitioners and courts will want to look to case law in those states for guidance in the interpretation and application of Colorado's new statute. In creating the new statute, the Subcommittee was persuaded by the Dead Man's Statutes and evidentiary rules of the District of Columbia, Michigan, Texas, Virginia, and Wyoming. All of these states have Dead Man's Statutes or evidentiary rules that permit oral statements of a decedent to be admitted into evidence if those statements are corroborated by material evidence of an independent or trustworthy nature.⁴

Analysis of Colorado's New Dead Man's Statute

CRS § 13-90-102, as amended July 1, 2002, now reads as follows:

Testimony concerning oral statements made by person incapable of testifying—when allowed.

(1) Subject to the law of evidence, in any civil action by or against a person incapable of testifying, each party and person in interest with a party shall be allowed to testify regarding an 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 statement is corroborated by material evidence of an independent and trustworthy nature; or

(c) The opposing party introduces evidence of related communications.

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

(b) "Person in interest with a party" means a person having an interest in the outcome of the civil action or any other interest that makes the person's testimony, standing alone, untrustworthy. "Person in interest with a party" does not include a person whose only interest is an expectation of receiving just compensation for the value of services rendered as a witness.

... This Act shall take effect July 1, 2002, and shall apply to causes of action filed on or after said date.

Petitions and complaints filed before the new statute's effective date of July 1, 2002, are subject to the rules of the old statute. Those filed July 1, 2002, and later trigger application of the new statute.

Generally, the new statute is more liberal in the sense that the courts will have broader discretion to admit testimony, except with regard to its application to "parties in interest." Although the old statute, because it excluded both written and oral testimony, may have afforded greater protection and certainty, it arguably created greater confusion as well, given that there are over eighty reported cases in Colorado interpreting the old statute and the nine exceptions to the rule. The old statute also was more permissive in that witnesses with an indirect interest were permitted to testify.⁵

Testimony Limited to Oral Statements

Colorado's new statute applies only to oral statements. This is a major change from the prior law. Under the new statute, written communications by persons no longer capable of testifying now may be admissible, subject to the normal rules of evidence controlling the admissibility of written evidence. Thus, the new statute removes the bar regarding "transactions" because it was recognized that most transactions with the decedent are corroborated through some form of written evidence. The new statute also reads in the affirmative and removes most of the exceptions from the prior law, thereby giving the trial court greater latitude and discretion in determining what testimony is received.⁶

Ensuring Trustworthy Testimony

It is anticipated that application of the new statute will be more equitable and less onerous on both litigants and trial courts. Thus, the new statute seeks to preserve the protections afforded under the old statute—namely, to keep out perjured testimony by dishonest litigants while simultaneously reducing the potential harm in sealing the lips of honest litigants. To ensure the integrity of the oral statement, the new statute requires that the statement be corroborated by "material evidence of an independent and trustworthy nature."⁷

Critics of the states that have retained a Dead Man's Statute, and those that have repealed the statute in favor of an evidentiary rule of competency or as a hearsay exception, contend that the term "trustworthy" is too subjective to be defined easily.⁸ However, the Subcommittee that drafted the new Colorado Dead Man's Statute believed that a finding of trustworthiness would be a familiar threshold to trial courts determining whether certain evidence is admissible. This is because Colorado's Rules of Evidence already incorporate the criteria of trustworthiness. For example, the Rules of Evidence address hearsay exceptions and require that prior to the admission of certain documents and oral testimony, the court must make findings that the particular evidence is trustworthy.⁹

Broader Application of Pecuniary Interest Bar

As discussed previously, in some respects, the new statute is more permissive than the old statute. However, it expands the pecuniary interest bar to potentially

disqualify persons who previously were not barred from testifying. Critics of the old statute viewed the pecuniary interest bar as artificial because it did not disqualify many persons from testifying who had an indirect, yet clearly biased, interest in the outcome of the civil action. Under the old statute, the following persons were permitted to testify as to conversations or transactions with the decedent: spouses; close relatives; and agents, officers, or directors of corporate parties—all of whom might be just as motivated to dissemble as the parties having a direct interest.¹⁰

The new statute arguably expands the bar to include: spouses; immediate family members; and agents or business partners of a party. All of these individuals may have only an indirect pecuniary interest in the outcome of the civil action, but their testimony, standing alone, still might be considered untrustworthy. If so, they will not be allowed to testify unless the statement can be corroborated.¹¹

Minors and Incapacitated Persons

In recognition of the new Colorado Uniform Guardianship and Protected Proceedings Act,¹² where minimum protections and limited guardianships and conservatorships are encouraged, Colorado's new statute relaxes the standard previously used to determine incompetency to testify. Hence, CRS § 13-90-102 now allows for the testimony of minors whom the court finds competent, as well as testimony of incapacitated persons who might lack the capacity to make medical or financial decisions, but still might be deemed competent to testify on other matters.¹³

Practice Considerations

By virtue of the changes to CRS § 13-90-102, practitioners should consider whether they need to demonstrate through pre-trial hearings, or motions *in limine*, whether competency to testify exists in cases involving minors and persons who are subject to protective proceedings. In will contests, common law marriage claims, decedent's estates involving creditors' claims, wrongful death claims, and other similar proceedings, pre-trial rulings regarding a person's competency to testify may become necessary to avoid the uncertainty of that determination at trial.

Courts eventually will have to make a threshold determination as to the sufficiency of corroborating evidence in support of a witness's proposed testimony. Pre-

sumably, pre-trial rulings will help streamline trials by encouraging preliminary findings as a condition to the admissibility of the testimony of witnesses and by eliminating delays caused by competency rulings in trial. Pre-trial rulings also may promote settlement.

Example of Applicability Of New Statute

The following factual pattern may help to demonstrate the application of the new statute. The decedent was diagnosed with terminal cancer. The decedent called his son, Phil, and sadly reported his condition. At the end of the conversation, the decedent urged Phil to sell his apartment in New York and return to Colorado. The decedent promised that if Phil came to Colorado to care for the decedent, Phil would receive the decedent's residence at his death. Phil and the decedent corresponded for the next several months before Phil decided to move back to Colorado with his wife and two small children to care for the decedent. As a result, Phil, in reliance on the decedent's promise, sold his home in New York and quit his job.

Three years later, the decedent died. After his death, Phil learned that the decedent had not revised his ten-year-old will, which devised his residence to Phil's sister in California. Phil brought a claim against the estate to enforce the decedent's promise. At trial, in support of his claim, Phil sought to testify as to his conversations with the decedent, as well as to introduce their written correspondence.

Under the old statute, Phil would have been incompetent to testify as to his conversations with the decedent. He also would have been barred from submitting the letters and any other written correspondence that he exchanged with the decedent. However, under both the old Dead Man's Statute and new statute, a waiver of the bar would occur and Phil would be permitted to testify if opposing counsel: (1) sought to introduce oral testimony of the decedent on cross-examination of Phil; or (2) tried to introduce the written correspondence or any other evidence from an otherwise incompetent witness.¹⁴

Under the old statute, Phil's wife, who participated in or overheard conversations between her husband and the decedent, would have been allowed to testify.¹⁵ Under the new statute, her testimony would be barred if it were determined that her testimony, standing alone, was untrustworthy. In that circumstance, she would not be permitted to testify unless the state-

ment she was to offer could be corroborated through some form of evidence satisfactory to the court.

Under the new statute, Phil may overcome his incompetency to testify on direct examination as to his oral conversations with the decedent by submitting material evidence of an independent and trustworthy nature.¹⁶ Thus, Phil's counsel might file motions *in limine* and request a pre-

trial hearing to obtain a ruling that Phil's testimony, otherwise barred, should be permitted because his verbal conversations with the decedent can be corroborated by "material evidence of an independent and trustworthy nature." Phil would offer extrinsic evidence that would include his letters to the decedent, as well as the decedent's letters to him detailing their mutual understanding.

Phil's counsel, in support of Phil's conversations with the decedent, also might look to third parties who could corroborate the decedent's promise. This might include affidavits or deposition testimony from people such as Phil's employer, realtor, stockbroker, and housekeeper.

Conclusion

Those states that have repealed their Dead Man's Statutes in favor of an evidentiary rule under a hearsay exception tend to admit any relevant oral declarations of the decedent, if trustworthy. Similarly, states that have retained some form of Dead Man's Statute also vest discretion in the trial court to admit what otherwise might be incompetent evidence where the purported testimony is trustworthy and can be corroborated.

Colorado, by joining the rank and file of the eighteen other states that have retained a Dead Man's Statute, is now in the mainstream. The new CRS § 13-90-102 provides that questions of admissibility that arise shall be determined by the trial court as a matter of law, thus eliminating the jury from the threshold inquiry over statements made by decedents or otherwise incompetent persons. By vesting trial courts with more discretion to determine the admissibility of otherwise incompetent evidence, it is hoped that the uncertainty and confusion regarding witnesses' testimony, as well as the delays that occurred at trial when objections were raised, will be eliminated.

Through pre-trial proceedings, trial courts also will have the opportunity and discretion to disallow the testimony of non-parties whose interest is indirect where they determine that the testimony standing alone is untrustworthy. Ultimately, it will be up to Colorado's appellate courts to interpret trial court rulings that apply the safeguard under the new Colorado Dead Man's Statute requiring corroboration by "material evidence of an independent and trustworthy nature."

NOTES

1. Stout, "Should the Deadman Statute Apply to Automobile Collisions?" 38 *Tex.L.Rev.* 14, 23 (1959).

2. Tucker, "Colorado Dead Man's Statute: Time for Repeal or Reform?" 29 *The Colorado Lawyer* 45 (Jan. 2000).

3. Arizona: Ariz. Rev.Stat. Ann. § 12-2251 (West 1996); Colorado: CRS § 13-90-102; Florida: Fla. Stat. Ann. § 90.602 (West 1996); Idaho: Idaho Code § 9-202 (1996) (*see also Ilowry v. Ireland Bank*, 779 P.2d 22 (IdahoApp. 1989)); Illinois: 735 Ill. Stat. Ann. 5/8-201 (West 1997); Indiana: Ind. Code Ann. §§ 34-1-14-6, 34-1-14-7, 34-1-14-8, and 34-1-14-10 (West 1996); Louisiana: La. Rev.Stat. Ann. §§ 13:3721 and 13:3722 (West 1996); Maryland: Md. Code Ann. (Courts and Judicial Proceedings § 9-116 (1996)); New Jersey: N.J. Rev.Stat. 2A:81-2; New York: N.Y. (Civil Practice Law and Rules) Law § 4519 (McKinney 1997); Pennsylvania: Pa. Cons.Stat. Ann. § 5930 (West 1996); South Carolina: S.C. Code Ann. § 19-11-20 (Law Co-op 1996); Tennessee: Tenn. Code Ann. § 24-1-203 (1996); Texas: Tex. R.Civ.Ev. Rule 601; Vermont: Vt. Stat. Ann. Tit. 12 §§ 1602 and 1603 (1996); Washington: Wash. Rev.Code Ann. § 5.60.030 (West 1996); West Virginia: W. Va. Code § 57-3-1 (1996); Wisconsin: Wis. Stat. Ann. § 885.16 (West 1996); Wyoming: Wyo. Stat. Ann. § 1-12-102.

4. The Washington, D.C., Dead Man's Statute provides, in part: in civil action against representative of deceased person, judgment may not be rendered in favor of plaintiff founded on uncorroborated testimony of plaintiff, agent, or other interested party pertaining to transaction or declaration of decedent (D.C. Code Ann. § 14-302 (1996)); Michigan's Dead Man's Statute provides, in part: in action by or against person incapable of testifying, party's own testimony should not be admissible as to any matter which, if true, must have been equally within knowledge of person incapable of testifying, unless material portion of testimony is supported by other material evidence tending to corroborate claim (Mich. Comp. Laws Ann. § 600.2166 (West 1996)); Texas's Rules of Civil Evidence provide, in part: every person competent to be witness except as otherwise provided; there exists an exception in actions against executors or administrators, in which judgment may be rendered for or against them as such, neither party may be allowed to testify against the others as to any oral statement by

testator or intestate, unless that testimony is corroborated or unless the witness is called to testify by the opposite party (Tex. R.Civ.Evid. 601); Virginia's Dead Man's Statute provides, in part: in action by or against party or representative of party incapable of testifying, no judgment or decree may be rendered in favor of adverse or interested party founded on his or her uncorroborated testimony (Va. Code Ann. § 8.01-397 (Michie 1996)); Wyoming's Dead Man's Statute provides, in part: in action by or against person who from any cause is incapable of testifying, or by or against a trustee, executor, administrator, heir, or other representative of the person incapable of testifying, no judgment or decree founded on uncorroborated testimony may be rendered in favor of party whose interests are adverse to person incapable of testifying. However, in any such action, if adverse party testifies, all entries, memoranda, and declarations by party incapable of testifying, relevant to the matter in issue, may be received in evidence (Wyo. Stat. Ann. § 1-12-102 (Michie 1997)).

5. CRS § 13-90-102 (effective prior to July 1, 2002).

6. CRS § 13-90-102(2) (as amended, July 1, 2002).

7. CRS § 13-90-102(1)(b) (as amended, July 1, 2002).

8. Ray, "Dead Man's Statute: A Relic of the Past," 10 *S.W.L.J.* 390 (1956).

9. *See, e.g.*, C.R.E. 803(7) (absence of entry in records kept in the regularly conducted activity); C.R.E. 803(8) (public records and reports); C.R.E. 804(b)(3) (statement against interest); and C.R.E. 807 (residual exception).

10. Tucker, *supra*, note 2 at 47.

11. CRS § 13-90-102(3)(b) (as amended, July 1, 2002).

12. CRS §§ 15-14-101 to -433 (effective Jan. 1, 2001).

13. CRS § 13-90-102(3)(a) (as amended, July 1, 2002).

14. CRS § 13-90-102(I)(c) (effective prior to July 1, 2002); *Zackheim v. Zackheim*, 75 Colo. 161, 225 P.2d 268 (Colo. 1924); *Crandell v. Resley*, 804 P.2d 272 (Colo.App. 1990); *Hillman v. Braylines*, 591 P.2d 1332 (1978), *aff'd sub nom. Wise v. Hillman*, 625 P.2d 364 (Colo. 1981).

15. CRS § 13-90-102(a)(I) (effective prior to July 1, 2002); *In Re Estate of Gardner*, 505 P.2d 50 (Colo.App. 1972).

16. CRS § 13-90-102(1)(b) (as amended, July 1, 2002). ■