Trust & Estate Section

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WHAT'S INSIDE?

"DEAD MEN DON'T LIE" APPLICABILITY OF THE STATE OF MIND HEARSAY EXCEPTION IN PROBATE LITIGATION

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Frequently in will contest litigation, attorneys attempt to introduce, through competent witnesses, a decedent's statements regarding his or her intent to make or revoke a will.[1] The introduction of these types of statements from the dead are often met by opposing counsel's hearsay objection.[2] The well-prepared probate litigator can treat these objections as a mere nuisance, however, because he is well-versed regarding the admission of decedents' statements under the state of mind exception to the hearsay rule.[3]

Note From the Editors:

The Trust & Estate Section is committed to maintaining the high quality of this newsletter and will continue to publish articles on substantive legal matters, information about the activities of the Section's various committees, and substantive and procedural information provided to us from the Courts sitting in Probate. Proposed articles, comments and suggestions are always welcome and can be provided to the editors of *Council Notes*, Julia McVey (303-238-1707 or juliagmcvey@msn.com) or Merry Balson (303-329-2215 or mbalson@wadeash.com).

Rule 801(c) of the Colorado Rules of Evidence defines hearsay as "a statement other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." The rationale underlying the rule against hearsay is to prohibit the introduction of evidence by out-of-court statements where the offered statements' accuracy and truth are not tested by cross-examination.[4]

Over the years, the legal system came to recognize that by their very nature, certain circumstances counterbalance any doubt surrounding the declarant's veracity in the absence of cross-examination. Spontaneity is one such circumstance, and like many of the hearsay exceptions, the state of mind exception arises from the presumption that spontaneous statements are inherently trustworthy.[5]

In will contest litigation, the decedent's statements regarding his intent to make or revoke a will would be offered to prove the truth of the matter asserted. However, because such statements are hearsay, they must fall under one of the exceptions to the hearsay rule to be admissible. Rule 803(3) of the Colorado Rules of Evidence sets out the state of mind exception:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (3) **Then existing mental, emotional, or physical condition**. A statement of declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to **the execution, revocation, identification, or terms of the declarant's will.** (*Emphasis added.*)

Again, the rationale for this exception is the presumed trustworthiness of the declarant's statement due to its spontaneity. A simple reading of the rule reveals that the state of mind exception plays a special role in probate proceedings, as it carves out a specific exception from the hearsay rule for certain statements of a declarant regarding his or her will. The probate practitioner can use this exception to introduce essential evidence necessary to prosecute, defend or construe a will.

Historically, courts have limited the applicability of the state of mind exception to the declarant's statements of future intent, and have not allowed memory or belief of past events. Statements of memory or belief of past events are generally excluded unless raised in the context of the creation, revocation or construction of the decedent's will, because they are deemed unreliable.

In *Mutual Life Insurance Co. v. Hillmon* [6], the U.S. Supreme Court reversed the U.S. Circuit Court findings that letters written by John Hillmon and another gentlemen, Frederick Adolf Walters, could not be introduced as evidence in support of proof of the decedent's identity

in an action by Hillmon's heirs to recover life insurance policy proceeds. In this case, the plaintiffs were heirs of Hillmon and they were beneficiaries under three life insurance policies. The defendant insurance company refused to pay on the policies arguing that Hillmon and his friend John Brown had conspired to defraud the insurance company by falsely representing that Hillmon was dead, and that the dead body that had been procured was not Hillmon, but a man who resembled Hillmon named Frederick Adolph Walters.

At trial, Hillmon's heirs introduced evidence, including letters, showing that Hillmon and Brown left Wichita, Kansas on or about March 5, 1879, heading south in search of a cattle ranch. The evidence further supported the heirs' argument that while the two were in camp at Crooked Creek on March 18th, Hillmon was killed by the accidental discharge of a gun, Brown notified persons in the area and the body was taken to a nearby town and buried. The insurance company, however, introduced letters tending to show that the body found in the camp at Crooked Creek was not the body of Hillmon, but the body of Walters who looked like Hillmon. Conflicting evidence was submitted on the question of the identity of the body buried, including photographs and descriptions of the corpse, marks and scars and testimony to the corpse's likeness to both Hillmon and Walters.

The insurance company also introduced evidence that Walters left his Iowa home and fiancé in March 1878 and remained in Kansas until March 1879. During that time, he corresponded regularly with his family and his fiancé. The last letter received by his fiancé arrived March 3rd, and was post-marked March 2nd from Wichita, while the last letter received by his family arrived March 4th or 5th, post-marked from Wichita a day or two before. Testimony established that no one had heard from Walters since. The letters, the fact that Walters had not been heard from since March 5th, together with other evidence to identify the body found at Crooked Creek as his, tended to show that he went from Wichita to Crooked Creek between those dates. Corroborating evidence also indicated that just before March 5th he intended to leave Wichita with Hillmon to go to Crooked Creek. One letter Walters wrote to his fiancé stated:

> *Dearest Alvina: Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name Hillmon, who intends, to start a sheep ranch, and, as he promised me more wager than I could make at anything else, I concluded to take it, for a while at least, until I strike something better. There is so many folks in this country that have got the Leadville fever, and if I could not of got the situation that I have now I would have went there myself; but as it is at present I get to see the best portion of Kansas, Indian Territory, Colorado, and Mexico. The route that we intend to take would cost a man to travel from $150 to $200, but it will not cost me a cent; besides, I get good wages. I will drop you a letter*

> *occasionally until I get settled down. Then I want you to answer it.*[7]

The U.S. Supreme Court remanded the case to the Tenth Circuit with instructions to admit the letters written by Hillmon and Walters as competent evidence of Walters' intent to go with Hillmon, and not as narratives of facts communicated. The Court recited the state of mind exception as it then existed:

> Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory, or corroborative evidence it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury.[8]

Hillmon recognized the applicability of the state of mind exception in probate, stating,

> Even in the probate of wills . . . where the validity of a will is questioned for want of mental capacity, or by reason or fraud and undue influence, or where the will is lost, and it becomes necessary to prove its contents, written or oral evidence of declarations of the testator before the date of the will has been admitted . . . to show his real intention as to the disposition of his property. . .[9]

Forty years after *Hillmon*, the U.S. Supreme Court, in *Shepard v. United States*[10], again addressed the state of mind exception to the hearsay rule. This case involved the highly publicized murder of a woman by her physician-husband, Dr. Shepard. The trial court admitted the testimony of Mrs. Shepard's nurse, Clara Brown, who testified that the victim told her, "Dr. Shepard has poisoned me." Reversing the Tenth Circuit Court of Appeals, the Supreme Court rejected the argument that the statement was admissible as either a dying declaration or declaration of state of mind. The Supreme Court held that statements of intent to perform an act are generally admissible as proof that the act was, in fact, done. By contrast, statements by the declarant that he or she had in fact done that act are excluded under the state of mind exception unless it relates to execution, revocation and identification or terms of the declarant's will. In addressing the admissibility of the nurse's testimony as to the decedent's statement, Justice Cardozo opined:

> Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction is ignored. . . The

> testimony now questioned faced backwards and not forward. This at least it did in most obvious implications. What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker. Other tendency, if it had any, was filament too fine to be disentangled by a jury.[11]

Hillmon and *Shepard* thus established the state of mind rule followed by Courts today, permitting the admission of statements of future intent or plan, while barring statements regarding memory or belief relating back in time (i.e., "I felt sick last week"). Courts have also adopted the *Hillmon* rationale to permit the admission of decedents' statements of memory or belief to prove past events regarding execution, revocation, identification or terms of a will (i.e., "I revoked my will last week").

The development of the state of mind exception to the hearsay rule in the probate context can also be traced back to early probate cases in England and Massachusetts that permitted declarations of the decedent to show his or her intent as to the execution, revocation or the terms a will even though those declarations concerned past statements of memory or belief.[12]

In 1876, in the case of Lord St. Leonard's lost will, the English Court of Appeals Lord Chief Justice Cockburn stated, "I entertain no doubt that prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though of course not conclusive evidence, are yet legally admissible as secondary evidence, of the contents of a lost will."[13]

In 1868, the Massachusetts Supreme Court in *Shailer v. Bumstead* [14] held that "the declarations of the testator accompanying the act must always be resorted to as most satisfactory evidence to sustain or defend the will, whenever this issue is presented. The previous declarations of the testator, offered to prove the testator's intent is competent evidence. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements of declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct."

The impetus to recognize such an exception to the hearsay rule is furnished by the unavailability of the testator who best knew the facts and often was the only person with knowledge. The decedent's firsthand knowledge and lack of motive to deceive suggests special reliability.[15]

Despite the state of mind hearsay exception and the underlying rationale, the veracity of the dead man remains suspect regardless of whether his statements address past acts or future intent. As some courts have pointed out, the reliability of statements about a person's will remains in question to the extent that human nature dictates that testators sometimes purposely wish to deceive their relatives by advising them that they were in the will rather than suffer the unpleasantness of revealing that they had been disinherited.[16] Indeed, what estate planner has not encountered a client who threatened to include or exclude a certain family member from his will

simply because they have fallen into disfavor? One would be hard pressed to call these statements inherently reliable.

The state of mind exception to the hearsay rule is clearly applied by Colorado courts. The Colorado Supreme Court held in *People v. Madson* that the state of mind exception encompasses statements of the declarant's present intent to engage in future conduct as proof of the subsequent act.[17]

In *Morrison v. Bradley*[18], a wrongful death case, the Colorado Supreme Court permitted testimony from the decedent's son that his father wished to pay for his vocational training and a truck. The evidence was introduced and admitted to support the son's claim for damages against the father's murderer by proving that the father intended to provide financial support. The Supreme Court upheld the trial court's ruling admitting the decedent's statements as evidence indicative of the father's then existing state of mind to assist his son, because the statements satisfied the Colorado common law exception to the hearsay rule admitting evidence of plan or design in the form of "a present existing state of mind, something said in the usual course of things under the circumstances, and under circumstances excluding an ulterior purpose."[19]

In *Murphy v. Glenn*[20], the Colorado Court of Appeals upheld the trial court's admission of testimony from the decedent's accountant regarding his conversation with the testatrix that she and her husband had wills drawn at the same time, the terms of the wills and the wife's understanding of the wills' effects. In this case, the beneficiaries under mutual wills created by the wife and husband brought an action to impose a constructive trust against the beneficiaries of the wife's inter vivos trust by which the wife transferred a substantial portion of the estate in contravention of a marital agreement. During trial, the accountant was asked to relay the conversation with the wife in which the wife stated she would never change her husband's will, that her will was the same as her husband's will, and that she would never go against her husband's wishes. The accountant also testified that the wife told him that she and her husband had drawn their wills at the same time, and that the wills were alike and provided that if one predeceased the other, the remaining spouse would receive everything and upon the surviving spouse's death, the remaining estate would pass entirely to both sets of relatives. Applying the state of mind exception, the Court concluded that the accountant's testimony regarding the wife's statements was admissible over hearsay objections to show that the spouses had created wills at the same time, to establish the terms of the wills, and to demonstrate the wife's understanding of how their estates devolved under the wills.

The state of mind hearsay exception appears to be well established in Colorado law. Statements of a decedent, whether related to past or future acts, are admissible to show intent so long they are as related to the creation, revocation, identification or terms of the decedent's will. When the probate litigator is confronted with a variety of decedent's statements regarding past acts (as opposed to future intent), the decedent's statements regarding memory and belief related to will execution, revocation, identification or terms of the will must be carefully segregated from those statements related to other types of past acts, which will not be admissible via the state of mind exception. The state of mind exception allows forward looking statements of

future conduct or statements of intention to be admitted, while excluding backward looking statements of memory or belief unless they are related to execution, revocation or terms of a will.

Thus, in a will a contest, if a neighbor testifies, *"the decedent told me that he was going to leave his son his house and Mercedes Benz if his son moved from New York to Colorado to take care of him,"* this statement would be admissible under the state of mind exception because it indicates the decedent's future intent. However, if the neighbor testifies instead that *"the decedent told me last month that he had given his son his house and Mercedes Benz for his son's two years of service to him,"* this statement would not be admissible under the state of mind exception to the rule against hearsay because it relates to past memory or belief. Under the more expansive testamentary exception to the rule, however, if the neighbor testifies that *"the decedent told me last month he met with his attorney and changed his will because his son had moved from New York to care for him,"* the state of mind exception would apply even though this statement relates to past acts, because the statement concerns the terms of the decedent's will.

One would question whether such statements made by decedents related to other types of testamentary documents including trusts also should be permitted. One would think that the same rationale to support the admission of a testator's statements concerning wills would also apply to a settlor's statements concerning his trust, especially where the trust was used as a will-substitute to effectuate the testator's intent. Perhaps the increase in probate litigation related to the aging baby boomer generation will yield the answer.

[1] In most will contests, the primary objection to a witness's testimony regarding a decedent's statements is competence under the Colorado Dead Man's Statute (C.R.S. § 13-90-102), and the secondary objection is hearsay. The state of mind exception does not overcome Dead Man's Statute objections, and will therefore be most useful when testimony regarding a decedent's statements comes from disinterested witnesses.

[2] Colo. R. Evid. 801(c).

[3] Colo. R. Evid. 803(3).

[4] *Fernandez v. People*, 490 P.2d 690 (Colo.1971).

[5] *Morrison v. Bradley*, 655 P.2d 385 (Colo. 1982).

[6] *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909 (1892).

[7] *Id.* at 298.

[8] *Id. at 296* (citing *Insurance Co. v. Mosley*, 8 Wall. 397, 404, 405).

[9] *Id.*

[10] *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22 (1933).

[11] *Id.* at 102. (See also, Thayer, *Preliminary Treatise on the Law of Evidence*, 266, 516; Wigmore, Evidence, §§ 1421, 1422, 1714).

[12] *Shailer v. Bumstead*, 99 Mass. 112, 120 (1868); *Sugden v. St. Leonards*, 1 Prob. Div. 154, 241 (C.A. 1876).

[13] *Sugden v. St. Leonards*, *supra* note 9.

[14] *Shailer v. Bumstead*, *supra* note 9 at 121.

[15] *See, e.g., Burton v. Wylde,* 103 N.E. 976 (Ill. 1913) (testatrix's later statements admissible to show her intent to revoke her entire will by mutilation); *Lewis v. Lewis*, 129 So.2d 353 (Miss. 1961) (testimony that deceased had said, "I have got [my will] right here in my pocket," admissible to show validity of will when authorship of a holographic will in doubt). *But see, In re Estate of Karris,* 166 N.E.2d 781 (Ohio Ct. App. 1959) (testimony by various persons regarding decedent's statements in regard to execution of will barred where execution of will was at issue).

[16] *Meeker v. Boylan*, 28 N.J.L. 274, 283 (1860).

[17] *People v. Madson*, 638 P.2d 18 (Colo. 1981).

[18] *Morrison v. Bradley, supra* note 5.

[19] *Id. At 387 (quoting Alexander Film Co. v. Industrial Comm'n*, 319 P.2d at 1074, 1077 (Colo. 1957)).

[20] *Murphy v. Glenn*, 964 P.2d 581 (Colo. App. 1998).

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Trust & Estate Section Brown Bag Luncheons

Date	Speaker	Topic
March 28	Marcia Chadwick	Update on Retirement Planning Issues
April 24	Joe Doussard	Domestic Asset Protection
May 9	Stuart Sargent Mike Stiff	Estate Planning in 2007: What's Hot and What's Not?
TBA	Darla Daniel Susan Fox Buchanan	HIPAA Issues
TBA	Steve Brainerd	Ethics Issues for T&E Lawyers

The cost of the brown bag luncheon is $15 to attend with lunch or $5 to participate by phone. CLE credit is given.