

ALIVE AND WELL: THE NORTH CAROLINA DEAD MAN'S STATUTE

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I. SCOPE NOTE¹

This presentation examines the history and application of the North Carolina Dead Man's Statute in the context of fiduciary litigation. Part II broadly defines evidentiary rules of competency and discusses the relative merits of having a Dead Man's statute. Part III traces the history of the dead man's statute, from its roots in English common law to its current iterations in the United States. Part IV discusses the various applications of the North Carolina Dead Man's Statute in fiduciary litigation. Part V identifies exceptions to the North Carolina Dead Man's Statute. Part VI reviews hypothetical scenarios for practical application of the North Carolina Dead Man's Statute. Finally, Part VII provides general litigation tips for attorneys who may encounter the North Carolina Dead Man's Statute in their practice.

II. RULES OF COMPETENCY AND DEAD MAN'S STATUTES: RELATIVE MERITS

A. Determining the Competency of a Witness

1. General Rule of Witness Competency:

“A fact witness is someone who testifies as to what she saw or otherwise perceived about the events underlying a case. Historically, the common law deemed a number of fact witnesses incompetent to testify for fear they would lie under oath. These witnesses included atheists, agnostics, convicted felons, parties to the case and their spouses, persons with an interest in the case, children and the mentally ill. As might be expected, these common law limitations often had the consequence of preventing the witnesses with the most knowledge of the case from testifying.”²

Accordingly, our federal and state laws have since removed most of these limitations, allowing those characteristics to be used as an attack on the

¹ This presentation and outline would not exist or be possible without three lawyers at my office: Satie Munn, Liz Kemper, and Ryan McIntyre. I am grateful for their thoughtful attention to this subject and hard work.

² Sydney Aaron Beckman, Susan Crump, and Fred Galves, *Evidence – A Contemporary Approach* 397 (2d ed. 2012).

witnesses' credibility, but not a complete prohibition of their testimony.³ This new framework creates a presumption that any witness with personal knowledge of the facts is competent to testify in court: “[e]very person is competent to be a witness unless these rules provide otherwise.”⁴

In North Carolina, “the test of competency is the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts. This is the applicable test even when the trial court finds . . . that the witness is suffering from a mental illness. Even there, the witness may testify if they have sufficient understanding to apprehend their obligation to tell the truth and are able to give a correct account of the matters the witness seeks to testify about.”⁵

2. Disqualification of a Witness:

Despite this presumption of competency to testify as a witness, state and federal courts have enacted their own statutory exclusions in their rules of evidence. For example, North Carolina precludes a witness from testifying when “that person is (1) incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her, or (2) incapable of understanding the duty of a witness to tell the truth.”⁶ Similarly, many other jurisdictions disqualify witnesses from testifying in a case if the witness is incapable of understanding the court proceeding, understanding their duty to tell the truth, articulating their testimony to the court, or the witness has some other fatal flaw that prevents their testimony from promoting the Court’s interest in justice.

B. What are Dead Man’s Statutes?

Dead man’s statutes are a significant limitation on the generally accepted evidentiary rule that all competent persons with personal knowledge of a case are qualified to offer their testimony in a legal proceeding. Dead man’s statutes are an evidentiary protection that exclude witnesses interested in the outcome of a case from testifying as to oral communications between that witness and a deceased person.⁷

³ *Id.*

⁴ N.C. R. Evid. 601; *see also State v. Rael*, 321 N.C. 528, 364 S.E.2d 125 (1988) (“The general rule is that every person is competent to testify unless determined to be disqualified by the Rules of Evidence”).

⁵ *In re Will of Leonard*, 82 N.C. App. 646, 347 S.E.2d 478, 480 (1986).

⁶ N.C. R. Evid. Rule 601(b).

⁷ St. John’s Law Review (2012) “CPLR 4519: Dead Man’s Statute Not Applicable When an Interested Claimant Enters Decedent’s Deposition Into Evidence,” St. John’s Law Review: Vol. 51: Iss. 3, Article 9, p. 646.

Many contemporary scholars are critical of dead man's statutes because "it runs contrary to the philosophy underlying the general rule of witness competency and [] it stifles potentially valid claims where an honest claimant has only his own testimony upon which to rely. The statute operates to level the playing field by 'sealing the lips' of an interested survivor who wishes to testify about a transaction with a person whose 'lips have been sealed' by death. The problem arises, then, when the claimant is honest, yet has only his own testimony on which to rely. Without his own testimony to prove his claim, the honest claimant is left without a remedy."⁸

C. Benefits of Having a Dead Man's Statute

1. They Protect the Interests of the Deceased as They Cannot Counter the Arguments of the Living

"[T]he intention of the law . . . was [] to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affairs, or expose the omissions, mistakes or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify on his own behalf. Any other view of this subject, I think would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous, which with due deference to the views and opinion of others, it seems to me, the Legislature never intended."⁹

2. They Prevent Interested Witnesses from Unilaterally Asserting Self-Serving Testimony Without an Opportunity to Rebut the Claims

Dead man's statutes were drafted to protect the deceased and his or her estate against self-serving testimony that can be fabricated by a witness. Dead man's statutes exclude this self-serving testimony when it cannot be corroborated by another person who does not have an interest in the matter.¹⁰

3. They Safeguard the Interests of the Decedent's Heirs

Although dead man's statutes are counter to the general rule that all relevant evidence is admissible, they are an acceptable limitation because the

⁸ Wesley P. Page, *Dead Man Talking*, 109 W. Va. L. Rev. 897, 898 (2007).

⁹ *Owens v. Owens's Adm'r*, 14 W. Va. 88, 95 (1878).

¹⁰ B. Mueller & Laird C. Kirkpatrick, *Evidence* § 6.1, at 503-04 (1995).

exclusion of this testimony favors the protection of the estate's heirs whenever there is room to doubt the impartiality of an interested witness.¹¹

D. Detriments of Having a Dead Man's Statute

1. They Prevent the Admission of Unique Truthful Testimony

Dead man's statutes "are based upon the delusion that perjury can be prevented by making interested persons incompetent or by excluding certain classes of testimony. They persist in spite of experience which demonstrates that they defeat the honest litigant and rarely, if ever, prevent the dishonest from introducing the desired evidence: if the dishonest party is prevented from committing perjury, he is not prevented from suborning it. If the statutes protect the estates of the dead from false claims, they damage the estate of the living to a much greater extent. And frequently their application prevents proof of a valid claim by the representative of the decedent's estate."¹² As such, critics of dead man's statutes think they obstruct a thorough investigation of the truth.

2. They Supervene the Jury's Discretionary Ability to Weigh the Value and Credibility of Conflicting Evidence

"Most commentators agree that the expedient of refusing to listen to the survivor is . . . a 'blind and brainless' technique. In seeking to avoid injustice to one side, the statutory drafters ignored the equal possibility of creating injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard."¹³

3. They Create Confusion Rather than Clarity Regarding the Admissibility of Evidence

States that retain a version of the dead man's statute must negotiate decades of fact specific case law whenever presented with one of these evidentiary issues. These rulings are tedious and varying interpretations of the law over decades creates uncertainty for litigants.

"Repealing the dead man's statutes would overturn tens of thousands of pages of case law . . . and create a system where triers-of-fact would be

¹¹ *Id.*

¹² Edmund M. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation*, 187-88 (1956).

¹³ Ed Wallis, *Outdated Form of Evidentiary Law: A Survey of Dead Man's statutes and a Proposal for Change*, 53 *Clev. St. L. Rev.* 75, 101 (2005) (quoting J. McCormick, *Law of Evidence* § 65, note 5, at 251 (4th ed. 1992)).

given the ability to determine the competency and credibility of a witness. Instead of placing faith in 100 year-old decisions from this ‘archaic view of the law’ juries could judge for themselves whether a witness was entitled to property or assets.’¹⁴

III. HISTORY OF THE DEAD MAN’S STATUTE

A. Origin:

1. The dead man’s statute can trace its origins back to English common law from the seventeenth century, when defendants were given a choice whether to have their case heard in a trial by jury or a wager of law.¹⁵ The wager of law tried defendants solely on their own testimony and the testimony of anyone who would testify on his or her behalf. The state did not present any evidence. However, in a trial by jury, the state needed to present enough evidence to show the defendant’s guilt by the weight of the evidence.¹⁶ The trial by jury soon became the choice of most defendants and eventually the wager of law option was completely removed from the legal system.
2. Despite the trial by jury’s popularity with defendants, this legal option had a significant flaw. Interested parties, including a criminal defendant, could not testify at their own trial because English courts believed juries would not be able to properly weigh the interested party’s testimony.¹⁷ This prohibition against the testimony of interested parties remained in English law until the mid-nineteenth century. Accordingly, it was also written into the early versions of our American legal system.¹⁸
3. In 1851, England amended its evidentiary laws to allow competent, interested witnesses and parties to testify during court proceedings. Interestingly, England did not enact a form of the dead man’s statute when abolishing the interested person’s disqualification.

B. English/American Split Regarding Dead Man’s Statutes

During the nineteenth century, many U.S. states followed England’s example and abolished their disinterested witness rules. However, as the states repealed this rule, many of the same states passed dead man’s statutes to protect decedents’

¹⁴ *Id.*, at 108.

¹⁵ *Id.*, at 77.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 78.

interests and estates.¹⁹ These laws were popular at the time, as most leading scholars thought of them as necessary to prevent self-interested witnesses from perjuring themselves to the detriment of the deceased, their heirs, and their estates.²⁰

C. No Federal Dead Man’s Statute, But Deference to States with Dead Man’s Statutes

Federal Rule of Evidence, Rule 601: “[e]very person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.”²¹

1. There is no federal dead man’s statute, however, the Federal Rules of Evidence drafters were unsuccessful in completely removing the prohibition against testimony by an interested party from federal courts in 1972.²² These legislators recommended completely removing the second sentence from Rule 601.²³ By eliminating this sentence, federal courts would not have to defer to state law regarding the admissibility of witness testimony and the dead man’s statute would never apply in federal court.
2. However, Congress did not pass that version of Rule 601. The House Judiciary Committee determined dead man’s statutes were a form of state policy the federal government should not effectively overturn them without input from the states who democratically passed such laws.²⁴ Although many scholars disagreed about the merits of maintaining a dead man’s statute, Congress added the second sentence to Rule 601, allowing dead man’s statutes in federal diversity jurisdiction cases when the applicable state law maintains a dead man’s statute.²⁵

D. The Dead Man’s Statute in North Carolina

1. N.C. Gen. Stat. § 8-51: Repealed by Session Laws 1983 (Regular Session, 1984), c. 1037, s. 5:

¹⁹ *Id.*

²⁰ *Id.* at 79

²¹ Fed. R. Evid. 601.

²² *Wallis*, 80.

²³ See Fed R. Evid. 601, advisory committee’s note.

²⁴ *Id.* (citing H.R. Rep. No. 650, 93d Cong., 2d Sess. 4 (1974)).

²⁵ H.R. Rep. No. 650, 93d Cong., 2d Sess. 9 (1974).

(c) Disqualification of interested persons. – Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.²⁶

This first version of the North Carolina Dead Man’s Statute took a broad approach to disqualifying the testimony of interested witnesses. The law prevented witnesses from testifying as to oral communications and personal transactions between themselves and the deceased. However, this law was repealed in 1983 to update the language of the text and to narrow the disqualification of interested witnesses.

2. N.C. Gen Stat. § 8C-1, Rule 601 (Passed in 1983; Amended 2011):

(a) General rule. – Every person is competent to be a witness except as otherwise provided in these rules.

...

(c) Disqualification of interested persons. – Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his or her interest or title by assignment or otherwise, shall not be examined as a witness in his or her own behalf or interest, or in behalf of the party succeeding to his or her title or interest, against the executor, administrator or survivor of a deceased person, or the guardian of an incompetent person, or a person deriving his or her title or interest from, through or under a deceased or incompetent person by assignment or otherwise, concerning any oral communication between the witness and the deceased or incompetent person. However, this subdivision shall not apply when:

²⁶ See *Brown v. Green*, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

- (1) The executor, administrator, survivor, guardian, or person so deriving title or interest is examined in his or her own behalf regarding the subject matter of the oral communication.
- (2) The testimony of the deceased or incompetent person is given in evidence concerning the same transaction or communication.
- (3) Evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, guardian or person so deriving title or interest.

Nothing in this subdivision shall preclude testimony as to the identity of the operator of a motor vehicle in any case.

3. Short Form Text: “Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness in his or her own behalf . . . concerning any oral communication between the witness and the deceased person . . .”
4. The North Carolina Dead Man’s Statute will render a witness incompetent “when it appears (1) that such a witness is a party, or interested in the event, (2) that his testimony relates to . . . a communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest.”²⁷
5. Changes from N.C. Gen. Stat. § 8-51 to N.C. Gen Stat. § 8C-1, Rule 601:
 - a. The first significant change was a narrowing of the scope through which interested witnesses were automatically disqualified from testifying in a legal proceeding. N.C. Gen. Stat. § 8-51 disqualified both oral communications and personal transactions between the interested party and the deceased. However, N.C. Gen Stat. § 8C-1, Rule 601 eliminated the personal transactions element and only disqualifies oral communications.
 - b. N.C. Gen Stat. § 8C-1, Rule 601 also added a third exception to the disqualification of interested persons. This exception allows

²⁷ *In re Will of Lamparter*, 348 N.C. 45, 51, 497 S.E.2d 692, 695 (1998) (quoting *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963)).

testimony from interested witnesses when the opposing party opens the door for such testimony.²⁸

- c. Finally, in 2011, the North Carolina Legislature revisited N.C. Gen Stat. § 8C-1, Rule 601 to update its language. The Legislature made numerous edits included changing the word “lunatic” to “incompetent” and adding female pronouns to the text of the statute.
6. The 1983 update to the North Carolina Dead Man’s Statute was just a small piece of an enormous overhaul of the entire North Carolina Rules of Evidence.²⁹ Although this update left the North Carolina Dead Man’s Statute in place, multiple state legislators petitioned for its elimination.

These advocates were persuaded by legal scholars such as UNC Law Professor Henry Brandis who argued that the “[North Carolina Dead Man’s] Statute has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel. The situation calls for more than legislative tinkering. What is needed is repeal of the statute.”³⁰

The records of the 1983 General Assembly reveal these advocates nearly succeeded in eliminating the North Carolina Dead Man’s Statute. “The report of the Legislative Research Commission’s Study Committee on the Laws of Evidence to the 1983 General Assembly did not contain subdivision (c) [of Rule 601], nor did the original versions of House Bill 96 and Senate Bill 43. This would have completely eliminated the Dead Man’s [S]tatute.”³¹ However, the early versions of the Bill did not pass the legislature and the subsequent version of the Bill included the Dead Man’s Statute. Accordingly, “Rule 601(c) [was] a compromise between the traditional ‘Dead Man’s Act’ and complete abolition” of the Dead Man’s Statute in North Carolina.³²

IV. APPLICATION OF THE NORTH CAROLINA DEAD MAN’S STATUTE

A. Prevalence in Fiduciary Litigation

²⁸ *Carswell v. Greene*, 253 N.C. 266, 270, 116 S.E.2d 801, 804 (1960); Brandis on North Carolina Evidence § 75, at 282, 283 (1982).

²⁹ N.C. Session Law 1983-701.

³⁰ *Brandis and Broun on North Carolina Evidence* § 66 at 258, n. 62 (1982).

³¹ Robert P. Mosteller, et. al., *North Carolina Evidentiary Foundations* (2d 2006).

³² *Hunt v. Hunt*, 85 N.C. App. 484, 487 355 S.E.2d 519, 521 (1987).

The Dead Man’s Statute is likely more prevalent in fiduciary litigation than any other practice area. During caveat proceedings, for example, it is often necessary to evoke testimony regarding private conversations with the decedent from witnesses who may be considered “interested persons” pursuant to the North Carolina Dead Man’s Statute.

B. Who is an Interested Person?

1. “To be disqualified as a witness interested in the event of the action, the witness must have a *direct legal or pecuniary interest* in the outcome of the litigation.”³³

- a. Legal Interest: “The ultimate test is whether the legal rights of the witness will be affected one way or the other by the judgment in the case.”³⁴

Example: A father contracted to devise his real property to his daughter for the consideration that she take care of him until his death, and the testator’s daughter performed her obligations as contemplated by the contract. Thereafter, the father executed a will, devising the property between all three of his children. The daughter has a direct legal interest, i.e., enforcement of the contract, in an action contesting the will.³⁵

- b. Pecuniary Interest: The witness must have a direct and substantial pecuniary interest in the result at the time the witness is examined.³⁶

Example: The first will executed by a mother leaves her estate assets in equal shares to her son and daughter. After death, the son presents a will purportedly executed by his mother, which leaves her estate assets entirely to the son. Both the son and daughter have a direct pecuniary interest in the outcome of a caveat proceeding.

- c. A mere “sentimental preference,” (i.e. one based on the preference or alignment with one party over the other) will not disqualify a witness.³⁷

³³ *In the Matter of the Will of Hugh B. Hester, Deceased*, 84 N.C. App. 585, 353 S.E.2d 643, 651 (1987) (emphasis added).

³⁴ *In re Will of Yelverton*, 178 N.C. App. 267, 277, 631 S.E.2d 180, 186 (2006).

³⁵ *See Rape v. Lyerly*, 287 N.C. 601, 215 S.E. 2d 737 (1975).

³⁶ *Sanderson v. Paul*, 235 N.C. 56, 61, 69 S.E. 2d 156, 160 (1952).

³⁷ *Id.*

Example: the spouse, parent, child or friend of a party to a lawsuit does not, simply by virtue of that relationship, have a direct pecuniary interest in the outcome, and therefore is a competent witness.³⁸

Exception: witness-spouse does have a direct legal interest if the litigation concerns the ownership rights of the party-spouse in a vested or inchoate share of real property.³⁹

2. Both propounders and caveators are interested parties within the meaning and spirit of Rule 601(c).⁴⁰
3. Beneficiaries under a will are interested persons, preventing them from testifying to private oral communications with the deceased. However, a beneficiary may give his or her opinion of the decedent's mental capacity at the time of the execution of a will or testify regarding transactions with the deceased.⁴¹

Examples of Beneficiaries:

- a. A named beneficiary of a will or trust;
- b. An unnamed person (e.g., heir, surviving spouse) who believes they are entitled to a share in the estate or trust, despite the language of the will or trust;
- c. A guardian where the guardian's ward stands to benefit from a gift based on communications between the guardian and the decedent;⁴²
- d. A surety to a bond issued by the Court, such that the surety is financially liable if the plaintiff fails to recover;⁴³ and
- e. The original beneficiary of a life insurance policy that has been changed.⁴⁴

C. What Are the Exceptions to the Interested Person Rule?

³⁸ Kenneth S. Broun, Brandis and Broun on North Carolina Evidence § 139 (2016).

³⁹ *Taylor v. Abernathy*, 174 N.C. App. 93, 97-98, 620 S.E. 2d 242, 246-47 (2005).

⁴⁰ *In the Matter of the Will of Hugh B. Hester, Deceased*, 84 N.C. App. 585, 353 S.E.2d 643, 651 (1987).

⁴¹ *Id.*

⁴² *Zollicoffer v. Zollicoffer*, 168 N.C. 326, 84 S.E. 349 (1915).

⁴³ *Mason v. McCormick*, 75 N.C. 263 (1876).

⁴⁴ *Harrison v. Winstead*, 251 N.C. 113, 110 S.E.2d 903 (1959).

1. A beneficiary under a holographic will may testify regarding relevant and material facts which establish the holographic will as a valid will without voiding the benefits he or she would receive under the will;⁴⁵
2. A beneficiary may testify if doing so is contrary to his or her own best interest. In *In re Will of Barnes*, a beneficiary testified about her private conversation with the decedent regarding his intent to revoke a will by tearing it up. Although the witness was also a beneficiary under the decedent's prior will, her testimony was allowed because she received less under the second will than she would have under the first will. This reduction in her recovery prevented her from being considered an "interested person" under the North Carolina Dead Man's Statute;⁴⁶
3. Executors of a will are not automatically considered interested parties unless they also receive some benefit under the will;⁴⁷ and

D. What Testimony is Prohibited?

1. Under the original North Carolina Dead Man's Statute, N.C. Gen. Stat. § 8-51, all testimony from an interested person involving either personal transactions or oral communications were prohibited.⁴⁸
2. Since 1983, however, this restriction has been limited to private oral communications between the interested party and the deceased.⁴⁹
3. Personal Transactions vs. Oral Communications:
 - a. Personal Transactions: After the passing of his aunt, a nephew's affidavit testimony that he never *took legal action* against his aunt without her knowledge and consent, nor *converted any assets* to his own benefit, nor *engaged in inappropriate behavior as attorney-in-fact*, was deemed admissible despite the Dead Man's Statute

⁴⁵ N.C. Gen Stat. § 31-10(b), *see also In re Will of Lamparter*, 348 N.C. 45, 497 S.E.2d 692 (1998).

⁴⁶ *In re Will of Barnes*, 157 N.C. App. 144, 579 S.E.2d 585 (2003) cert. Denied, 357 N.C. 460, 586 S.E.2d 96 (2003), appeal dismissed, 357 N.C. 460, 586 S.E.2d 95 (2003), cert. Denied, petition denied, 357 N.C. 460, 587 S.E.2d 94 (2003).

⁴⁷ *In re Will of Hester*, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987) (Noting that executors who are members of a church that is a named beneficiary in the will are not interested parties, under the reasoning that the interest is too distant to qualify the church member as an interested person.).

⁴⁸ *In re Will of Lamparter*, 348 N.C. 45, 497 S.E.2d 692 (1998).

⁴⁹ *Id.*

because these were personal transactions, not oral communications.⁵⁰

- b. Oral Communications: The sister-in-law of decedent *overheard a conversation* between her husband and the decedent regarding a contract from which her husband stood to benefit. On appeal, it was found that this testimony was improperly admitted by the trial court because she testified to an oral communication from which she stood to benefit via her husband in violation of the Dead Man's Statute.⁵¹ This case also established that a conversation is still considered private under the North Carolina Dead Man's Statute if it is corroborated only by another interested person.

(1) *Communication Must be Oral*: A decedent wrote a letter to her daughter discussing the contents of a jewelry box and how she did not want her sister to have any of the expensive heirlooms. This was a communication between the decedent and an interested witness, however, it was admissible because this was not an *oral* communication.

(2) *Oral Communication Insufficient to Show Intent to Discharge a Promissory Note*: A Defendant executed a promissory note to the deceased for \$35,000. The defendant made payments on the note for four (4) years, before defendant regained possession of the note from the deceased. Only the defendant and the deceased were present when the defendant regained possession of the note. Plaintiff was appropriately granted summary judgment because defendant's possession of the note was insufficient to show discharge of the promissory note. To prove the promissory note was actually discharged, defendant would have had to show the decedent's intent to discharge the promissory note. However, this could not be shown by defendant because the transaction was not reduced to writing and any oral communication between the defendant and the deceased is barred by the Dead Man's Statute.⁵²

E. Standard of Review

⁵⁰ *Forbis v. Neal*, 175 N.C. App. 455, 624 S.E.2d 387 (2006), aff'd in part, rev'd in part, 361 N.C. 519, 649 S.E.2d 692 (2007).

⁵¹ *Taylor v. Abernethy*, 174 N.C. App. 93, 620 S.E.2d 242 (2005), appeal dismissed, 360 N.C. 367, 630 S.E.2d 454 (2006).

⁵² *Almond v. Rhyne*, 108 N.C. App. 605, 424 S.E.2d 231 (1993).

1. Appellate courts use a *de novo* examination when assessing a trial court's ruling regarding the admissibility of testimony otherwise prohibited by Dead Man's Statute.⁵³
2. While *de novo* review is less rigorous than an abuse of discretion standard, in considering the trial court's ruling regarding admissibility of evidence, appellate courts still give the trial court's decision considerable deference.⁵⁴

V. WHEN JUSTICE REQUIRES DEAD MEN TO SPEAK: EXCEPTIONS TO THE DEAD MAN'S STATUTE

A. Statutory Exception: "Opening the Door"

1. Testimony of an oral communication between an interested person and the decedent that would otherwise be prohibited under the North Carolina Dead Man's Statute will be allowed if one of the parties "opens the door." Opening the door is a common law doctrine, allowing for the admission of inadmissible evidence by a party when the opposing party "opens the door" by first introducing otherwise inadmissible evidence at trial. The rationale is that admission of counter evidence is necessary to ensure the equitable administration of justice.
2. N.C. Gen. Stat. §8C-1, Rule 601(c)

The Dead Man's Statute does not apply when:

- a. The executor, administrator, survivor, guardian, or person so deriving title or interest is examined in his or her own behalf regarding the subject matter of the oral communication.

Example: The interested party testifies as to oral communications between *themselves and the deceased*, whether through discovery responses, deposition, or otherwise, and no objection is raised.

- b. The testimony of the deceased or incompetent person is given in evidence concerning the same transaction or communication.

Example: This is most likely to occur when the deceased died during the course of litigation, having previously provided sworn

⁵³ *Totorgul v. Abayhan (In re Will of Baitschora)*, 207 N.C. App. 174, 180-81, 700 S.E. 2d 50, 55-56 (2010); *see also State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E. 2d 226, 228 (1991).

⁵⁴ *Id.*

testimony, or the deceased provided sworn testimony in a separate matter.

- c. evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, guardian, or person so deriving title or interest.

Example: In *Carswell v. Greene*, the decedent died in an automobile accident, and the administrator of his estate initiated a wrongful death action. The deceased's nephew was a passenger in the car and survived the crash. The administrator of the estate examined the nephew as a witness, and the nephew testified as to the acts of the deceased before and at the time of the accident. The North Carolina Supreme Court determined this "opened the door" for the defendant to testify as to his version of the accident.⁵⁵

Note: This case was decided in 1960, prior to the 1983 rule revision, when testimony regarding transactions with the deceased was still prohibited.

3. Practical Considerations

- a. The door is **opened** (privileged waived) when:

- (1) Counsel directly solicits testimony from a witness (friendly or adverse) regarding privileged oral communication, and no objection is made, the *inquiring party* waives the privilege; or

- (2) If counsel does not directly solicit testimony regarding privileged oral communication from a witness, but the witness volunteers the information without objection, the *answering party* waives the privilege.⁵⁶

- b. The door is **not opened** when: counsel does not solicit testimony concerning an oral communication, but the answering party tries to force the door open by volunteering the information (e.g., inserting it in the answer to an interrogatory that does not implicate the oral

⁵⁵ *Carswell v. Greene*, 253 N.C. 266, 116 S.E.2d 801 (1960).

⁵⁶ *Weeks v. Jackson*, 207 N.C. App. 242, 245-47, 700 S.E. 2d 45, 47-49 (2010); see also *Estate of Redden v. Redden*, 194 N.C. App. 806, 808, 670 S.E. 2d 586, 588 (2009); *In re Will of Baitschora*, 207 N.C. App. 174, 185-87, 700 S.E. 2d 50, 58-59 (2010).

communication), waiver will not be imputed to the *inquiring party*.⁵⁷

B. Examples of Statutory Exceptions

The statute provides for three ways the door can be opened to admission of evidence that would otherwise be excluded pursuant to the Dead Man's Statute.

1. The executor, administrator, survivor, guardian, or other person so deriving title or an interest in the property provides sworn testimony about otherwise prohibited communications while representing the decedent's estate.
2. The deceased's own testimony is admitted into evidence regarding the same transaction or communication seeking to be admitted.
3. Evidence related to the subject matter of the oral communication is offered by the interested party.

C. Case Law Exceptions:

1. Interested parties may testify against their own interests, even if other parties' interests are negatively affected. The Dead Man's Statute only applies when a witness testifies in his or her own behalf.⁵⁸
2. Interested parties may testify regarding private oral communications with a decedent or incompetent person when the decedent or incompetent person's mental capacity is at issue in the case.⁵⁹ If so requested, the testimony can be limited to that purpose.
3. When three parties are present for a conversation, and one dies, the Dead Man's Statute does not prohibit either of the remaining two parties to testify as to the details of that conversation if only one of the remaining parties is an interested witness.⁶⁰ However, if all remaining parties to the conversation are interested witnesses, they are not permitted to testify absent another exception.
4. Parties may unintentionally waive the protection of the North Carolina Dead Man's statute by asking and/or answering opposing party's interrogatories

⁵⁷ *Id.*

⁵⁸ *Sanderson v. Paul*, 235 N.C. 56, 69 S.E.2d 156 (1952).

⁵⁹ *Peterson v. Finger*, 82 N.C. App. 743, 348 S.E.2d 351 (1986).

⁶⁰ *Peacock v. Stott*, 90 N.C. 518 (1884); *see also Johnson v. Townsend*, 117 N.C. 338, 23 S.E. 271 (N.C. 1895); Robert P. Mosteller, et. al., *North Carolina Evidentiary Foundations* (2d 2006).

about relevant communications with the decedent.⁶¹ If an interrogatory probes about the details of interactions that would otherwise be protected under the Dead Man's Statute, answering this interrogatory could result in a waiver of the Dead Man's Statute.

5. Parties may waive the protections of the North Carolina Dead Man's Statute by asking and/or answering questions about relevant communication with the decedent by failing to object during a deposition or at trial. Parties may also preserve the protections of the Dead Man's Statute by timely objecting at the deposition.⁶² However, the statutes are unclear regarding the time when objections of various kinds must be made, therefore the entry of stipulations between parties prior to taking depositions may be necessary.⁶³

VI. DEAD MAN'S STATUTE HYPOTHETICALS

- A. Bob and Sue are in an automobile accident. Bob died from internal injuries a few weeks after the accident, and his estate sues for wrongful death. There were no other witnesses. Can Sue testify Bob smelled of alcohol as he approached her immediately after the accident and began speaking?

Yes, because the testimony is regarding Bob's *conduct*.

Sue's testimony that Bob smelled of alcohol as he approached her when speaking regards Bob's conduct, not an oral communication. The Dead Man's Statute only prohibits testimony regarding oral communications between the deceased and an interested witness. An interested witness is permitted to testify regarding any conduct or transaction with the deceased after the 1983 statutory revision.

- B. Five years ago, Tom and his father, Larry, were working on Larry's hotrod. Larry told Tom, "none of your siblings ever bothered to help me with this hotrod, so I'd like you to have it. I'll change my will tomorrow." Larry died without ever changing the will. The will left the hotrod to his daughter Jill, instead of Tom, though Tom inherited other assets pursuant to the will. Can Tom, as the executor, testify as to the conversation about the hotrod?

No, the dead man's statute applies and prohibits Tom's testimony regarding the conversation with his father.

⁶¹ *Lee v. Keck*, 68 N.C. App. 320, 315 S.E.2d 323 (1984); *see also Wilkie v. Wilkie*, 58 N.C. App. 624, 294 S.E.2d 230 (1982).

⁶² *Estate of Redden v. Redden*, 194 N.C. App. 806, 670 S.E.2d 586 (2009).

⁶³ *Cmt.*, N.C. Gen. Stat. § 1A-1, Rule 32.

Tom cannot testify as to the conversation because he is an interested witness, testifying in his own interest, and the testimony relates to oral communication with a deceased person.

- C. Bob and Sue enter into an oral contract and Christy witnesses the conversation. Sue denies she entered a contract with Bob. Before trial, Sue dies. Can Sue's friend Christy, who witnessed the contract, testify as to what Sue said and did?

Yes, because Christy was a disinterested, separate party to the communication.

There were three parties to the conversation regarding the oral contract: Bob, Sue, and Christy. If there are three or more parties to a conversation, and one dies, the Dead Man's Statute does not prohibit the testimony of the remaining witnesses regarding statements of the deceased. This applies even if one of the parties is an interested party. However, if all living witnesses are interested parties, none may testify as to the conversation with the deceased.

- D. In his will, Tim left the family farm to his children, in equal shares. Tim's son, Mark, married Emily. After several years, Tim told Mark and Emily that they should share Mark's interest in the farm, and he did not want the other siblings to inherit. Tim died without amending his will. Mark now wants to testify regarding the conversation but is disqualified because of the Dead Man's Rule. Can Emily testify as to the conversation instead?

No, the dead man's statute applies because this is an exception to the sentimental preference regarding spousal ownership rights, regardless of whether her ownership rights have vested or not.

Emily, as the witness-spouse has a direct legal interest since the litigation concerns the ownership rights of the party-spouse (Mark) in his vested share of real property. For this reason, she is not allowed to testify as to the conversation. It does not matter whether Emily's ownership rights are vested or contingent. The exception applies in either case.

- E. Sam and Lewis are adverse parties in an action regarding their deceased father's estate. During a deposition, Sam's attorney asked Lewis, "did you close your father's bank accounts?" Lewis responded, "I closed the bank accounts the week after dad died because dad told me to handle his accounts. No objections were made. Is the door opened?"

Yes, Lewis opened the door.

Lewis' response, that "dad told me to handle his accounts," is regarding an oral communication between Lewis and his father, even though the question

contemplated a transaction. As such, Rule 601(c) is waived (unless objected to and stricken) and Sam can now testify about other oral communications he had with his father regarding those accounts.

VII. LITIGATION TIPS

A. Stipulations Against Opening the Door in a Deposition

1. Although not required by law, fiduciary litigation attorneys often mutually agree before a deposition that their clients' answers in depositions will not constitute an opening of the door with regard to the Dead Man's Statute. This stipulation will not permanently prevent the witness from opening the door outside of the deposition. However, it may be beneficial for both parties involved in the litigation.
2. Why do parties agree to this stipulation?
 - a. First, this stipulation shows opposing counsel you are litigating in good faith. Each party should work with opposing counsel to reach an equitable agreement for their clients.
 - b. Second, this stipulation will allow for more open answers to questions in the deposition. If opposing counsel is concerned about opening the door, they may instruct their clients to answer questions conservatively. Even if this information is not admissible at trial, both parties may benefit from hearing disclosures that may have been withheld without this stipulation.
 - c. Third, this stipulation may allow the witness to relax during the deposition. Fiduciary litigation is often stressful and incredibly personal for witnesses. Accordingly, any steps taken to reduce this stress may promote more honest and open testimony. This superior testimony may reveal additional facts that will help parties reach an equitable solution prior to trial.

B. Using Decedent's Testimony at Trial⁶⁴

1. Offering Testimony of Decedent's Oral Communications:

⁶⁴ David M. Governo and Corey M. Dennis, *Speaking from the Grave: The Admissibility of a Decedent's Testimony*, p. 303-304.

- a. Such testimony can be very powerful when used at trial. Fiduciary litigation often seeks to uncover the subjective intentions of the deceased. Since the deceased is not present to personally attest to their intentions, testimony regarding the deceased's conversations and actions will provide the greatest insight to the jury.
 - b. However, attorneys should also consider the costs of opening the door with the deceased's testimony. The Dead Man's Statute can provide the estate with significant protection against potentially damaging opposing testimony. Although your evidence may provide the jury with great insight into the favorable facts of the case, the Dead Man's Statute may also provide greater protection against unfavorable facts that would otherwise be excluded.
2. Defending Against Decedent's Testimony:

If opposing counsel plans to offer decedent's testimony at trial, preparation is key to a successful defense. Attorneys must closely review all discovery responses, including answers to interrogatories, responses for requests for production, and all accompanying documents to anticipate what testimony opposing counsel can and will offer.

C. Respect the Deceased

1. At trial, attorneys should consider how the jury will view the deceased's testimony while preparing their cross-examinations and rebuttals. The historical glorification of the deceased means jurors will give more weight to decedents' testimony than they otherwise would.
2. Additionally, jurors often grant the deceased the benefit of the doubt, with the phrase "de mortuis nil nisi bonum" ("don't bad mouth a dead man"), dating back to 600 B.C.
3. Attorneys should present all of their evidence against the deceased in a matter-of-fact, non-threatening manner that shows the jury respect for the decedent and their family. This respect should be shown through the attorney's voice, questions, and body language as he or she examines witnesses.