

The Pennsylvania Dead Man's Rule

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Why We're Here

“No evidentiary rule is more difficult to apply than the Dead Man’s Rule.”

Hon. Mark I. Bernstein, *Pennsylvania Rules of Evidence* § 601[9] (Gann 2018)

True or False #1

The Dead Man's Rule addresses admissibility of evidence.

True or False #2

The Dead Man's Rule prevents testimony about what the decedent said.

True or False #3

Under the Dead Man's Rule, a surviving party to a transaction with the decedent can testify about anything except things the decedent said to that party.

True or False #4

Under the Dead Man's Rule, a surviving party to a transaction with the decedent can't testify about anything.

The Rule: 42 Pa. C.S. § 5930

Except as otherwise provided in this subchapter, in any civil action or proceeding, where any party to a thing or contract in action is dead, or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased or lunatic party, shall be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy, unless the action or proceeding is by or against the surviving or remaining partners, joint promisors or joint promisees, of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors or joint promisees and the other party on the record, or between such surviving or remaining partners, promisors or promisees and the person having an interest adverse to them, in which case any person may testify to such matters; or, unless the action is a possessory action against several defendants, and one or more of said defendants disclaims of record any title to the premises in controversy at the time the suit was brought and also pays into court the costs accrued at the time of his disclaimer, or gives security therefor as the court in its discretion may direct, in which case such disclaiming defendant shall be a fully competent witness; or, unless the issue or inquiry be devisavit vel non, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy is between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses.

The Rule: 42 Pa. C.S. § 5930

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A Word about “Lunacy”

Statute has remained unchanged as other language has changed from lunacy to incompetency to incapacity.

Lunacy ≠ Incapacity

However, two statutes enacted with § 5930 refer to “mental incapacity” when citing § 5930.

42 Pa. C.S. §§ 5931, 5932

The Rule: 42 Pa. C.S. § 5930

[I]n any civil action or proceeding, where any party to a thing or contract in action is dead, ... and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased ... party, shall be a competent witness to any matter occurring before the death of said party

Truth Revealed

1. The Dead Man's Rule addresses admissibility of evidence

FALSE: It is not a rule of evidence, but part of Pennsylvania's substantive law having nothing to do with admissibility.

2. The Dead Man's Rule prevents testimony about what the decedent said

FALSE: It relates to the competence of a witness to take the stand in the first place.

3. Under the Dead Man's Rule, a surviving party to a transaction with the decedent can testify about anything except things the decedent said to that party

FALSE: If the Rule applies, the party cannot testify about anything that occurred during the decedent's lifetime.

4. Under the Dead Man's Rule, a surviving party to a transaction with the decedent can't testify about anything

FALSE: If the Rule applies, the party can testify about things that occurred after the decedent's death and also may identify documents, even if created before the decedent's death.

Rationale

“The purpose of the Act is to prevent the injustice that would result from permitting a surviving party to a transaction to testify favorably to himself and adversely to the interest of the decedent, when the decedent’s representative would be hampered in attempting to refute the testimony, or be in no position to refute it, by reason of the decedent’s death.”

In re Estate of Hall, 535 A.2d 47, 53 (Pa. 1987)

Criticism

- Obstructs good faith claims
- Difficult to understand and apply
- Underestimates fact finder's ability to assess credibility

Pennsylvania is one of only 19 U.S. jurisdictions to retain a Dead Man's Rule.

The Rule: 42 Pa. C.S. § 5930

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Three Requirements

1. The decedent must have had an interest in the matter at issue, i.e., an interest in the immediate result of the suit;
2. The interest of the witness must be adverse; and
3. A right of the decedent must have passed to a party of record who represents the decedent's interest.

Decedent's Interest

The decedent's estate must have an actual interest in the outcome of the litigation.

- Claim for services ✓
- Gifts/Actions for turnover ✓
- Beneficiary designations ✗
- Survival actions ✓
- Wrongful death actions ✗

Witness's Adverse Interest

The interest – not only the testimony – must be adverse: does the witness have a financial interest in the outcome of the litigation?

- Claim for fees for services
- Surviving party to mortgage or loan agreement
- Surviving spouse to marital agreement
- Surviving party to personal injury action
- Officers or shareholders in action in which the corporation is a party

No Adverse Interest

- Employee of claimant
- Scrivener of contested documents
- Family members of incompetent witness
- Third-party eyewitness
- Police making accident report
- Physician treating patient in accident case
- Individuals who spoke with decedent regarding her intent but did not benefit from any gifts

Decedent's Interest Represented in Action

- Personal Representative
- Donee of completed inter vivos gift

Multiple Parties

- Two plaintiffs; one deceased defendant: Plaintiffs can testify for each other, but not for themselves.
- Same result in gifting case with multiple donees.
- Plaintiff sues estate and estate joins additional defendant: Additional defendant can testify against estate.
- Multiple defendants; one is deceased: Surviving defendant can testify against plaintiff or any living co-defendants.

“Except as otherwise provided
in this subchapter”

Called to testify against interest. 42 Pa. C.S. § 5932

Good faith release of interest. 42 Pa. C.S. § 5932

“Living Witness Rule.” 42 Pa. C.S. § 5933

- Decedent’s representative calls witness who testifies about a matter that occurred in the presence of the incompetent witness, and
- Such testimony is adverse to the incompetent witness

“unless . . . unless . . . unless . . .”

Three built-in exceptions:

- Actions involving partners or joint promisors.
- Possessory actions in which at least one defendant disclaims.
- *Devisavit vel non* exception – focus on intent.
 - Will contests
 - Joint accounts
 - Competing deeds

How YOU Get Involved

- Motions in Limine
 - Can lead to summary judgment or settlement
 - Opens or closes the door to discovery
- Motions for Summary Judgment
 - Early dismissal of case
 - Don't forget third-party evidence is admissible
- Request for Bifurcation
- Trial Objections

Bifurcation

To avoid confusion regarding the Dead Man's Act's application, it may be beneficial to evaluate the Dead Man's Rule issue independently from the ultimate issues.

- Wrongful death and survival actions.
- Actions with multiple defendants, one of whom is deceased.

Waiver

To avoid waiver, the Dead Man's Rule must be asserted at every opportunity.

Examples of Waiver

- Personal representative fails to object when the incompetent witness takes the stand
- Personal representative calls incompetent witness to testify (42 Pa. C.S. § 5932)
- Personal representative crosses on pre-death events
- Personal representative takes discovery from incompetent witness

Hypothetical 1: Contractor Claim

Decedent, a childless widower who lived alone, dies on June 1. From June 2 through June 30, Contractor goes to Decedent's house, lets himself in with a key and continues to work on the pipes in Decedent's basement. Executor, who lives in the neighborhood, observes Contractor going in and out of the house on occasion. Decedent's cousin, who operates the business on property adjacent to Decedent's, saw Contractor working at Decedent's house throughout the month of May. Decedent's cousin is also a longtime friend of Contractor.

On July 1, Contractor goes to Executor's office. He hands over his key to Decedent's house and presents a written estimate, dated May 1, for the work he completed at Decedent's house. Decedent had not signed the estimate or any other agreement, and had not given Contractor a deposit. Executor refuses payment and requires Contractor to file a Notice of Claim.

No party takes discovery and the Orphans' Court schedules a hearing.

Contractor Claim: Issue #1

At a hearing on his claim, Contractor proposes to testify about (a) the existence of a contract between Decedent and him, and (b) the work he performed at Decedent's house from May 1 through June 30.

When Executor objects on grounds that Contractor is an incompetent witness under the Dead Man's Rule, how should the Judge rule?

Contractor Claim: Issue 1a

Can the contractor testify
about the terms of his
contract with Decedent?

Contractor Claim: Issue 1b

Can the contractor testify about
the work he did during
Decedent's lifetime?

Contractor Claim: Issue 1c

Can the contractor testify about
the work he did following
Decedent's death and his
presentation of the bill to
Executor?

Contractor Claim: Issue #2

Contractor proposes to call Decedent's cousin as a witness to testify about (a) a conversation he had with Decedent about whether Decedent should hire Contractor to do the work, and (b) his personal observations of Contractor working in Decedent's house from May 1 through June 30.

When Executor objects on grounds that Decedent's cousin is an incompetent witness under the Dead Man's Rule, should the Judge sustain it?

Mike v. Jim

- Jim struck Mike while driving his SUV.
- Mike was injured and permanently disabled.
- One of Mike's co-workers overheard Jim say "I wasn't paying attention."
- Jim gave an incriminating signed statement to his insurance company.

I wasn't paying
attention



Mike v. Jim

- Mike filed a civil action naming Jim as the Defendant.
- Shortly thereafter, Jim died of a heart attack and Jim's Estate was substituted as the Defendant.

Mike v. Jim

- Jim's Estate conducted no discovery on the case, but third party defendants conducted extensive discovery.
- Jim's Estate filed a Motion for Summary Judgment claiming that the Dead Man's Rule would prevent Mike from proving a claim at trial.

Mike v. Jim

- In response to the Motion, Mike claimed that:
 - 1) The Dead Man's Rule did not bar admission of the statement overheard by Mike's Co-worker or the written statement.
 - 2) The Dead Man's Rule had been waived by discovery.

Should the Motion be granted?

Karl v. Ray

- Ray lost control of his car, hit Karl, and then struck a tree, instantly killing Ray.
- A witness told the police that Karl ran into the crosswalk quickly without looking and caused the accident.
- Karl's wife, Emily, took two months off from work to care for a severely injured Karl.

Karl v. Ray



- Sue was appointed as executrix of Ray's estate by the Register of Wills of Allegheny County, Pennsylvania.
- Karl and Emily brought a cause of action for negligence against Sue as the executrix of Ray's estate.

Karl v. Ray

- Sue's Attorney took Emily and Karl's depositions.
- Karl testified that Ray was solely at fault for the accident and that Ray was traveling at a high rate of speed.
- At her deposition, Emily testified about her lost wages while rendering care and services to assist Karl while he was recovering.

Karl v. Ray

- At trial, Karl attempted to testify in his case in chief about the circumstances surrounding the accident, and the Estate objected based on the Dead Man's Rule.

Should the Court sustain the objection?

THE END

is just the beginning
in a Dead Man's Rule case....