



According to the hornbook definition, the Act is an evidentiary rule barring testimony by someone with an interest in litigation about any conversation with or event occurring in the presence of a decedent. But what does that mean? This article offers some answers.

By William T. Gibbs

# A Quick Guide to the Illinois Dead Man's Act

**I**n the latter part of the 20th Century, various Illinois legal scholars championed the abolishment, abrogation<sup>1</sup> and/or repeal<sup>2</sup> of an alleged “outdated evidentiary rule”<sup>3</sup> known as the Dead Man's Act (“the Act”). As is discussed in detail below, and subject to exceptions, the Act forbids introduction of a dead man's – or woman's – statements at trial.

The legislature did not respond to these calls for abolition. While over half the states have eliminated their Dead Man's Act, Illinois courts have repeatedly found the statute constitu-

1. M. Graham, Cleary & Graham's *Handbook of Illinois Evidence* § 606.1 (3d Edition 1979).

2. Morton John Barnard, *The Dead Man's Act Rears Its Ugly Head Again*, 72 Ill Bar J 420 (April 1984); Nat M. Kahn, *Let's Give the Dead Man's Statute a Decent Burial*, 55 Ill Bar J 430 (January 1967).

3. Barnard, 72 Ill Bar J 420 (cited in note 2).

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tional.<sup>4</sup>

In the early part of the 21st Century, the Illinois Supreme Court has again interpreted the Act and endorsed its validity.<sup>5</sup> The Illinois Appellate Court, First District, has also analyzed its application in recent years.<sup>6</sup> Today, any lawyer trying cases in the Land of Lincoln must understand the Act and its intricacies.

### The Dead Man's Act (735 ILCS 5/8-201)

First enacted as an extension of English Common Law, the Dead Man's Act has been on the books in Illinois since 1867. The rationale for the rule is that "since a decedent's lips are sealed by death, a survivor's lips are sealed by law."

It stands to reason that witnesses may be tempted to testify falsely if their testimony cannot be rebutted or refuted. That enticement may grow if the witness is interested in the outcome of the litigation. The law thus protects the estates of individuals who cannot refute testimony due to their death or legal disability. In essence, The Act protects estates from fraudulent claims or defenses by removing the temptation to testify falsely and placing the parties on equal footing in cases involving deceased/disabled individuals.<sup>7</sup>

But, it does not simply apply to probate proceedings. In nearly every civil case, the Illinois Dead Man's Act could apply. The goal of this article is to provide the trial lawyer with a workable framework from which to analyze Dead Man's Act issues in their practice.

### When and to whom does the Act apply?

In its plain meaning, the Act renders incompetent certain testimony, from an interested witness, that concerns conversations and/or events taking place in the presence of the deceased/disabled person.<sup>8</sup> What this means is that certain testimony may be rendered "incompetent" if it concerns an event or conversation that an adverse party could have refuted, but for his/her death or legal disability.<sup>9</sup>

It has been recognized that the Act is often harsh, barring some legitimate claims to ensure that fraudulent claims are unsuccessful.<sup>10</sup> As such, it contains exceptions that apply when (a) the deceased/disabled party "opens the door" by introducing testimony or a deposition

transcript concerning conversations and/or events in the presence of the deceased person, (b) the proffered testimony pertains to the foundation of a document, or (c) the testimony to be introduced relates to any fact relating to the heirship of a decedent.<sup>11</sup>

Trial lawyers must be able to answer the following questions and apply the answers to various fact patterns that may arise.

*Q. Whose testimony is barred by the Illinois Dead Man's Act?*

A. Only that of witnesses directly interested in the outcome of the case.

*Q. What testimony is barred by the Act?*

A. Only that concerning a conversation or event involving the deceased/disabled person.

*Q. When does the Act apply?*

A. At the summary judgment<sup>12</sup> or trial stage, if the disabled/deceased does not open the door and the testimony does not pertain to heirship or foundation of a document.

### What is "direct interest" in the outcome?

Only persons directly interested in an action, or a spouse of an interested person, are incompetent to testify.<sup>13</sup> Obviously, this means parties and their spouses cannot testify to conversations or events that happened in the deceased/disabled party's presence. But, since non-party witnesses can testify to the events or conversations they observed, the net result is that "[o]nly unwitnessed conversations [or events] with the decedent are off limits."<sup>14</sup>

Confusion often arises about who is "directly interested" in the litigation. To disqualify a witness as one "directly interested in the action," the interest must be such that a pecuniary gain or loss will come to the witness directly as the immediate result of the judgment.<sup>15</sup> If the testimony of the witness does not show direct, certain, and immediate pecuniary interest, the witness' interest, if any, goes merely to his or her credibility and not to his or her competency to testify.<sup>16</sup>

By way of example, our courts have determined the following to be "interested persons": 1) a shareholder of a corporation that is a party;<sup>17</sup> 2) the spouse

of a person who is disqualified as a party or by interest;<sup>18</sup> 3) a grantor who would be liable on a covenant of a warranty;<sup>19</sup> 4) All parties generally to will contests;<sup>20</sup> and 5) the brother of the deceased and next-of-kin beneficiary.<sup>21</sup>

Conversely, the following have been deemed not "interested persons": 1)

## The Illinois Dead Man's Act only bars the testimony of witnesses directly interested in the outcome of the case.

members of a defendant-church;<sup>22</sup> 2) prospective heirs, since their interest in the judgment was only "contingent" such that they were not "directly inter-

4. *Lueth v Goodknecht*, 345 Ill 197, 177 NE 690 (1931); *Hoem v Zia*, 159 Ill 2d 193, 636 NE2d 479 (1994).

5. *Gunn v Sobucki*, 216 Ill 2d 602, 837 NE2d 865 (2005).

6. *Brown, Udell and Pomerantz, Ltd v Ryan*, 369 Ill App 3d 821, 861 NE2d 258 (1st D 2006); *Beard v Barron*, 882 NE2d 1062 (1st D 2008).

7. *Hoem* (cited in note 4); *Seaton v Lee*, 221 Ill 282, 77 NE 446 (1906).

8. *Matter of Estate of Babcock*, 119 Ill App 3d 482, 456 NE2d 671 (3d D 1983); *Manning v Mock*, 119 Ill App 3d 788, 457 NE2d 447 (4th D 1983).

9. *Ruback v Doss*, 347 Ill App 3d 808, 807 NE2d 1019 (1st D 2004); *Rerack v Lalley*, 241 Ill App 3d 692, 609 NE2d 727 (1st D 1992).

10. *Vazirzadeh v Kaminski*, 157 Ill App 3d 638, 510 NE2d 1096 (1st D 1987).

11. 735 ILCS 5/8-201(a-d).

12. *Groce v South Chicago Community Hospital*, 282 Ill App 3d 1004, 669 NE2d 596 (1st D 1996); *Rerack* (cited in note 9).

13. *Nardi v Kamerman*, 196 Ill App 3d 591, 554 NE2d 397 (1st D 1990).

14. *Vazirzadeh* at 645, 510 NE2d at 1101; *In re Estate of Rollins*, 269 Ill App 3d 261, 645 NE2d 1026 (1st D 1995); *Yetton v Henderson*, 190 Ill App 3d 973, 546 NE2d 1000 (3d D 1989).

15. *Michalski v Chicago Title & Trust Co*, 50 Ill App 3d 335, 365 NE2d 654 (1st D 1977); *Bellman v Epstein*, 279 Ill 34, 116 NE 707 (1917).

16. *Bernardi v Chicago Steel Container Corp*, 187 Ill App 3d 1010, 543 NE2d 1004 (1st D 1989).

17. *Thrasher v Pike County RR Co*, 25 Ill 340 (1861).

18. *In re Estate of Babcock*, 105 Ill 2d 267, 473 NE2d 1316 (1985).

19. *Zimmer v Zimmer*, 298 Ill 586, 132 NE 216 (1921).

20. *Estate of Jones v Altwood State Bank*, 159 Ill App 3d 377, 512 NE2d 1050 (4th D 1987).

21. *Van Meter v Goldfarb*, 317 Ill 620, 148 NE 391 (1925).

22. *Adams v First Methodist Episcopal Church of Irving Park*, 251 Ill 268, 96 NE 253 (1911).

ested” witnesses;<sup>23</sup> 3) attorneys who may in the future earn fees from a client (as long as not contingent fee arrangement);<sup>24</sup> 4) a former girlfriend of the decedent with no financial interest in litigation;<sup>25</sup> 5) a mother of claimant seeking workers’ compensation;<sup>26</sup> 6) police officer that took statements at the scene of a collision;<sup>27</sup> 7) the decedent’s former wife, who was not an adverse party, where the beneficiaries of decedent’s trust were her children.<sup>28</sup>

### What is an “event” about which testimony is barred?

An adverse party *can* testify to events outside the presence of the deceased/disabled without the Dead Man’s Act being invoked. For example, testimony concerning a witness’ observation of an envelope in a decedent’s bureau drawer is not barred because its observation took place outside decedent’s presence.<sup>29</sup> Further, conversations or events that do not specifically refer to the issue being litigated are not necessarily barred under the Dead Man’s Act.<sup>30</sup>

The rule is simple – under the Act, a directly interested witness may not testify “to any *conversation* with the deceased or person under legal disability or to any *event* which took place in the presence of the deceased or person under legal disability.”<sup>31</sup> Conversations are easy enough to comprehend and earmark as potentially barred by the Dead Man’s Act. An “event” is a bit more amorphous.

The word “event” is commonly defined as a happening or occurrence.<sup>32</sup> It stands to reason that an event could include a deceased driver’s action in a collision, the handing over of an object, or the signing of a contract. But what about a nonevent (i.e., the absence of payment)? And when does an “event” begin or end? These questions are best answered by analyzing recent caselaw.

In *Rerack v Lalley*,<sup>33</sup> a vehicle driven by the defendant-decedent rear-ended the plaintiff’s car, which had already come to a complete stop. While the plaintiff was barred from testifying about the details of the collision, the appellate court held that the plaintiff could testify to the overall mechanical condition of his car, the weather conditions at the time of the collision, that his vehicle was stopped for two minutes, that his foot was on the brake of his car continually, that he

heard no sound prior to accident’s impact, and that he observed damage to the rear of his car.<sup>34</sup> Likewise, testimony concerning the posted speed limit on a road where a collision occurred has been held to not be part of the “event,” nor is testimony that a defendant had his lights on prior to a collision.<sup>35</sup>

In *Gunn v Sobucki*,<sup>36</sup> a replevin case, the plaintiff alleged that he and the decedent had executed a sham sale to protect a coin collection from being turned over in a divorce proceeding. He attempted to introduce evidence that the decedent never made payment according to the sham bill of sale and, therefore, that the coins were his and not the decedent’s.

On appeal, the Illinois Supreme Court overruled a prior case and wrote as follows: “Since a decedent is unable to testify about a payment, whether actually made or not, fairness dictates that an adverse party also be unable to testify as to the payment.”<sup>37</sup> As such, under the Dead Man’s Act, distinguishing between positive testimony that an event occurred and negative testimony that it had not occurred is “nothing more than a semantic exercise.”<sup>38</sup>

These cases represent the proverbial tip of the iceberg. The meaning of an “event” under the Dead Man’s Act has been vigorously litigated for years and undoubtedly will continue to be contested.

### Exceptions to the Dead Man’s Act

There are three exceptions enumerated under the Act: (1) when the deceased/ disabled person’s representative “opened the door” by presenting testimony, either live or by deposition, concerning the conversation or event; (2) when the testimony is merely being offered as foundation; and (3) when the testimony concerns heirship and heirship is not at issue.<sup>39</sup>

**Opening the door.** The right to object to testimony as improper under the Dead Man’s Act belongs solely to the representative of the deceased/legally disabled person.<sup>40</sup> The protected party does not necessarily waive its right to preclude adverse testimony by introducing evidence

to protect its estate or assets.<sup>41</sup>

However, the statutory exception of waiver precludes presentation to the trier of fact of a one-sided story of the event – i.e., waiver may apply to keep a technical rule of law from preventing the adverse party from testifying while the protected party is allowed to do so.<sup>42</sup>

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## The Act only forbids testimony about a conversation or event involving the deceased/ disabled person.

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The protected party may waive the Dead Man’s Act in an examination of an occurrence witness or an adverse examination of the interested person. First, if a witness is called by the pro-

23. *Bernardi* (cited in note 16). See also *Matter of Clausen’s Estate*, 51 Ill App 3d 18, 366 NE2d 162 (3d D 1977); *In re Franke’s Estate*, 124 Ill App 2d 24, 259 NE2d 841 (1st D 1970).

24. *Heller v Jonathan Investments, Inc*, 135 Ill App 3d 350, 481 NE2d 997 (1985); *In re Estate of Seuart*, 274 Ill App 3d 298, 307-8, 652 NE2d 1151, 1158-9 (1st D 1995).

25. *Heller* at 357, 481 NE2d at 1002.

26. *Sobigro Serv Co v Industrial Commission*, 172 Ill App 3d 47, 526 NE2d 683 (3d D 1988).

27. *Clifford v Schaefer*, 105 Ill App 2d 233, 245 NE2d 49 (1st D 1969).

28. *In re Estate of Ierulli*, 167 Ill App 3d 595, 521 NE2d 654 (3d D 1988).

29. *Matter of Netherton’s Estate*, 62 Ill App 3d 55, 378 NE2d 800 (3d D 1978).

30. *DeMarco v Univ of Health Sciences/Chicago Med School*, 40 Ill App 3d 474, 352 NE2d 356 (1st D 1976).

31. 735 ILCS 5/8-201 (emphasis supplied).

32. *Manning v Mock*, 119 Ill App 3d 788, 799, 457 NE2d 447, 453 (4th D 1983), citing *Webster’s New World Dictionary* at 485 (Second College Edition 1976).

33. *Rerack* (cited in note 9).

34. *Id.*

35. *Moran v Erickson*, 297 Ill App 3d 342, 696 NE2d 780 (1st D 1998); *Malavolti v Meridian Trucking Co, Inc*, 69 Ill App 3d 336, 387 NE2d 426 (3d D 1979).

36. *Gunn* (cited in note 5).

37. *Id.* at 611, 837 NE2d at 870.

38. *Id.* at 610, 837 NE2d at 870, quoting *Gunn* at 788, 817 NE2d at 591.

39. 735 ILCS 5/8-201(a-d).

40. *In re Estate of Seuart*, 274 Ill App 3d 298, 652 NE2d 1151 (1st D 1995).

41. See *Wells v Enloe*, 282 Ill App 3d 586, 669 NE2d 368 (5th D 1996).

42. *Goad v Evans*, 191 Ill App 3d 283, 547 NE2d 690 (4th D 1989).

tected party and testifies to a conversation with the deceased/disabled or an event in the deceased/disabled's presence, the adverse party will be allowed to testify to the same conversation or event.<sup>43</sup>

Second, the Act is waived when the protected party's examination of an adverse party goes beyond merely establishing surrounding facts to insinuating negligence.<sup>44</sup> The underlying policy is that once the protected party suggests fault as to a fact or transaction, it would be unjust to prohibit the adverse party from explaining the negative inference.<sup>45</sup> Note the Act is not waived when cross-examination of a witness called by the protected party goes beyond the scope of direct examination.<sup>46</sup>

**Foundation testimony.** The Act reads as follows:

Any party or interested person may testify to his or her account book, or any other record or document and the items therein contained; that the same is a book, record, or document of original entries, and that the entries therein were made by himself or herself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident person of the state at the time of the trial, and where made by such deceased or non-resident person in the usual course of trade, and of his or her duty or employment to the party so testifying; and thereupon the account book and entries or any other record or document shall be admitted as evidence in the cause.<sup>47</sup>

In sum, this exception applies where a claim is based upon a document.<sup>48</sup> In that case, the estate may present testimony to establish a document's authenticity and its authorship to lay a proper foundation for its admission into evidence. Doing so will not waive its right to preclude an opponent's testimony under the Act.<sup>49</sup>

**Heirship.** In 1966, a committee recommended adding an exception to the Dead Man's Act to allow testimony by an interested person as to heirship,<sup>50</sup> and

the drafters complied. While the impact of 5/8-201(d) has yet to be fully interpreted, the exception was clearly drafted with the intent of making all witnesses competent to testify as to "heirship" in cases where there is a dispute about who shares in the proceeds of the estate and/or to what extent.<sup>51</sup> In addition, no person will be barred from testifying in a proceeding to establish the proper administration of an estate.<sup>52</sup>

### Applying the Act: a scenario

Consider the following fact pattern:<sup>53</sup> Plaintiff sustained personal injuries when an automobile operated by defendant #1, in which Plaintiff was a passenger, collided with an automobile operated by defendant #2. Defendant #1 died after the commencement of plaintiff's action but prior to trial.

Plaintiff's mother-in-law was also a passenger in defendant #1's vehicle at the time of the collision, and one independent eyewitness observed it. A police officer investigated the collision. Who may testify at trial about the collision?

Obviously, plaintiff and defendant #2 are barred from testifying to their observations of defendant #1's conduct *at the time of* the collision. Each is an interested party (i.e., plaintiff is seeking relief against the deceased; defendant could avoid liability by showing that the deceased caused the accident), so their testimony about the actual point of contact is barred.<sup>54</sup>

But because the mother-in-law, independent eyewitness, and investigating officers have no direct pecuniary interest in the outcome, they will not be barred from presenting their story to the jury.<sup>55</sup> Of course, defendant #1's representative waives his Dead Man's Act protection if he presents testimony from a disinterested witness about the collision, therefore opening the door to plaintiff and defendant #1 telling their side of the story.

### Conclusion

For over a century, the Dead Man's Act has been applied in cases throughout Illinois to place living and dead parties "upon a perfect equality."<sup>56</sup> It shows no signs of disappearing any time in the near future. The framework set forth in this article will help lawyers understand and apply the Act to the facts of their own cases.

The Dead Man's Act is indeed alive and well. Don't let it kill your case; use it to your advantage. ■

43. *Beard v Barron*, 882 NE2d 1062 (1st D 2008); *Groark v Anderson*, 222 Ill App 3d 880, 584 NE2d 468 (1st D 1991) See also *Hoem* (cited in note 4); Compare with *Yetton v Henderson*, 190 Ill App 3d 973, 546 NE2d 1000 (3d D 1989) (simply calling a witness as an adverse witness does not invoke the exception).

44. *Beard* (cited in note 43); *Haist v WU*, 235 Ill App 3d 799, 601 NE2d 927 (1st D 1992).

45. *Beard*, 882 NE2d at 1072, citing *Perkins v Brown*, 400 Ill 490, 497, 497, 81 NE2d 207, 211 (1948).

46. *Loeb v Stern*, 198 Ill 371, 64 NE 1043 (1902); *Lotta v Lotta*, 6 Ill 2d 397, 129 NE2d 153 (1955); *Vazirzadeh* at 645, 510 NE2d at 1101; *Theofanis v Sarrafi*, 339 Ill App 3d 460, 791 NE2d 38 (1st D 2003).

47. 735 ILCS 5/8-401.

48. Physician's notes of his conversations with the patient were not admissible under the exception in the Dead Man's Act for documents on which the cause of action was founded, because the notes were simply evidence; the action was certainly not founded on them. *Theofanis* (cited in note 46).

49. 735 ILCS 5/8-201(c); *McGlasson v Housel*, 127 Ill App 360 (1st D 1906).

50. *Barnard*, 72 Ill Bar J at 421 (cited in note 2).

51. *Matter of Estate of Bailey*, 97 Ill App 3d 781, 423 NE2d 488 (5th D 1981).

52. *Id.*

53. *Clifford v Schaefer*, 105 Ill App 2d 233, 245 NE2d 49 (1st D 1969).

54. *Id.*

55. The jury should be instructed on the reason the plaintiff and co-defendants could not testify. For example, in *Ellington v Bilsel* there was no error where counsel brought to the jury's attention the reason why the defendant was precluded from testifying about conversations he had with the decedent. 255 Ill App 3d 233, 626 NE2d 386 (5th D 1993). Likewise, counsel's suggestion to the jury that the defense was denied the opportunity to directly present relevant and material evidence due to technical rules of law was not reversible error since the comment explained the applicability of this section. *Smith v Perlmutter*, 145 Ill App 3d 783, 496 NE2d 358 (3d D 1986).

56. *Alexander v Hoffman*, 70 Ill 114, 118 (1873).