

PLANNING AHEAD

BY ILENE S. COOPER AND JOSEPH T. LA FERLITA



ILENE S. COOPER (icooper@farrellfritz.com) is a partner at Farrell Fritz, P.C., who concentrates her practice in trusts and estates. She is also a Fellow of the American College of Trust and Estate Counsel, an Adjunct Professor of Law at Touro Law School, and a Delegate-at-Large of the Trusts and Estates Law Section of the New York State Bar Association.

JOSEPH T. LA FERLITA (jlaferlita@farrellfritz.com) is an associate at Farrell Fritz, P.C., who concentrates his practice in trusts and estates. He is Vice-Chair of the Surrogate's Court Committee and a Member of the Estate Administration Committee of the Trusts and Estates Law Section of the New York State Bar Association.

What's a Distributee to Do? Renunciation and the Dead Man's Statute

Many estate practitioners are aware that a renunciation can eliminate the application of the Dead Man's Statute at trial, but may not realize that its utility is not uniform and may, in fact, be dependent upon whether the person renouncing is a legatee or a distributee.¹ The lesson to be learned from the distinction may prove critical to the strategy of an estate litigation.²

The Dead Man's Statute

The Dead Man's Statute provides, in pertinent part:

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 a person deriving his title or interest from, through or under a deceased person . . . , by assignment or otherwise, concerning a

personal transaction or communication between the witness and the deceased person, except where the executor, administrator, survivor, . . . or person so deriving title or interest is examined in his own behalf . . . concerning the same transaction.³

As defined by the provisions of CPLR 4519, the Dead Man's Statute bars the testimony of "any person interested in the event" regarding a transaction or communication with a decedent. Specifically, the statute prohibits testimony by (1) a party, (2) a person "interested in the event,"⁴ or (3) a person from whom such a party or interested person derives his or her interest, regarding transactions or communications with the decedent when such person or party is examined in his or her own behalf or interest⁵ against (a) the executor, (b) the administrator, (c) the survivor of a deceased person or (d) a person deriving his or her title or interest from, through or under a deceased person.⁶

The statute is wide-ranging and captures within its preclusive net any conversations, observations and even writings with or about a deceased person. Courts typically explain that

"[t]he underlying purpose of the [Dead Man's Statute] is to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court."⁷ On the other hand, it has been considered by practitioners to be an unwieldy evidentiary burden and an impediment to the fact-finding process.⁸

Given these evidentiary hurdles, estate litigators often find themselves confronted with the choice of navigating within the confines of the statute or strategizing a means of avoiding its application. It is not surprising that many of them choose to steer clear of the statute. Renunciation – divestiture of a witness's financial "interest" in the event or subject matter of the litigation – offers one such means. The problem is that while a renunciation by a legatee will eliminate the legatee's statutory disqualification as an interested witness, a renunciation by a distributee may not produce the same result.

Eliminating a Witness's "Interest"

A witness's incompetence under the Dead Man's Statute may be circumvented if such witness renounces his or her "interest in the event," as observed

above.⁹ “In order to be disqualified, the witness’ interest in the event must exist at the time of the proposed testimony. Therefore, a potential witness’ divestiture of his or her interest before testifying generally will restore the witness’ competency,”¹⁰ as the witness will no longer be a person “interested” within the scope of the statute.¹¹

Although the law is clear that this result will apply if the interest is rooted in a legacy, this is not necessarily the case if it is rooted in an intestate share. The distinction, which, indeed, can be significant to the trial of a proceeding, may be best understood through an examination of renunciations under both the common law and statute.

Renunciation of a Legacy Under the Common Law

As compared to the case of a distributee, the common law has always allowed a legatee to renounce an interest in an estate on the theory that such interest did not automatically vest in the legatee at the moment of death.¹² Although on the face of the Dead Man’s Statute the renouncing legatee appears to be “a person from, through or under whom . . . [the] interested person, [*i.e.*, the remaining legatee,] derives his interest or title,”¹³ under the circumstances, the legacy is deemed to pass to the remaining testamentary beneficiaries from the testator, and not from the renouncing legatee.¹⁴ This is true despite the fact that the renunciation will have enhanced the interests of any remaining residuary legatee in whose favor the renouncing legatee may be testifying. A leading commentator states:

A legatee who has released the legacy is competent to testify to transactions with the testator to support the will. As a result of the release, the witness is no longer a person interested in the event, and while it is true that the release has enlarged the interest of the residuary legatee, the increment is deemed to flow from the testator and not from the releasing legatee.¹⁵

Therefore, under the common law, a legatee rendered incompetent to testify under the Dead Man’s Statute may cure such incompetence by renouncing his or her interest derived under the will.

Renunciation of an Intestate Share Under the Common Law

Unlike a legatee, the common law does not allow a distributee to renounce his or her interest in an estate.¹⁶ Instead, any attempt to disclaim by a distributee is deemed a gift of his or her intestate share to the other distributees of the decedent.¹⁷ The common law views the interest of a distributee as vesting on the date of the decedent’s death, thus making a purported renunciation by a distributee ineffective.¹⁸

A case often cited for this proposition is *In re Aievoli’s Will*,¹⁹ a probate proceeding in which objections to probate were filed by a beneficiary who was both a legatee and distributee. The proponent objected to the beneficiary’s testimony at trial on the basis of the Dead Man’s Statute. The beneficiary argued that he was not incompetent to testify under the statute because he had executed a document under which he purportedly waived his rights as a legatee and distributee.

The trial court ruled that the document did not amount to such a waiver, found the beneficiary incompetent, and his testimony was stricken. In affirming on appeal, the Second Department observed that the proponent did not argue that the beneficiary’s purported waiver was ineffective in releasing the beneficiary’s interest as a distributee. However, the court explained, in dicta, that, even if the beneficiary could waive his intestate share, he nevertheless would have been incompetent to testify at trial under the Dead Man’s Statute, since his testimony would have benefited someone who succeeded to his interest.²⁰

Surrogate Nathan Sobel’s decision in *In re Fienga*²¹ provides a helpful historical examination of the renunciation statute and a rationale for the distinc-

tion drawn between renunciations of a legacy and those of an intestate share. The court explained:

[P]rior to any statute, a legatee or devisee could always renounce his testamentary disposition. A distributee could not. The theory was that a testamentary disposition was regarded as an “offer” by the testator which the legatee or devisee could accept or reject. A distributive share in intestacy on the other hand vested by force of law in the distributee at date of death. An attempt by the distributee to relieve himself of his vested share or to shift it to others occasioned possible gift tax consequences [and] the vested share remained subject to the claims of the renouncing distributee’s creditors. In contrast, because a testamentary disposition was an “offer” which the legatee or devisee could accept or reject, a renunciation of a testamentary disposition had no gift or creditor consequences.²²

Therefore, in light of the foregoing, a distributee could not utilize a renunciation in order to eliminate his or her incompetence to testify under the Dead Man’s Statute, as the distributee was deemed to be a person “from, through or under . . . whom . . . an interested person derives his interest or title by assignment or otherwise.”²³ Curiously, despite the enactment of legislation dealing with renunciations, discussed below, a number of treatises and commentaries continue to acknowledge this view.²⁴

Does the Distinction Continue?

The common-law distinction between a renouncing legatee and a renouncing distributee may have been rendered obsolete by virtue of the provisions of New York’s renunciation statute, EPTL 2-1.11. In pertinent part, the statute requires that an effective renunciation of an interest in an estate be made within nine months of the decedent’s death.²⁵ The statute makes no distinction between a renunciation by a

Nevertheless, the debate as to the import of a distributee's renunciation continues.

legatee and a distributee.²⁶ Indeed, the statute specifically provides that a renunciation has the same effect with respect to the renounced interest as though the renouncing person had predeceased the decedent.²⁷

Renunciations Within the Nine-Month Period

Section 2-1.11 of the EPTL appears to place a legatee and a distributee who renounce within nine months of the decedent's date of death on equal footing in that it allows each of them to "reject" the vesting of title.²⁸ Since title never vests, neither should be deemed someone "from, through or under whom" a "person interested in the event . . . derives his interest or title by assignment or otherwise."²⁹ This suggests that common law principles regarding vesting of an intestate share no longer apply to a distributee who renounces within the statutory period, thus clearing the way for a distributee's testimony, even in the face of the Dead Man's Statute.³⁰

Nevertheless, despite the foregoing, the debate as to the import of a distributee's renunciation continues. As mentioned above, many of the leading commentators continue to cite pre-statutory opinions, like *In re Aievoli's Will*, for the proposition that a distributee's renunciation does not cure his or her incompetence under the Dead Man Statute.³¹ On the other hand, more than one commentator has questioned the durability of these opinions. Professor Vincent Alexander, author of McKinney's Practice Commentaries, states the following:

Why this result has never been corrected by subsequent decisions or by explicit legislative action is a mystery. An argument in opposition to *Aievoli* might be based on § 2-1.11(d) of the Estates, Powers & Trusts Law, which provides that a person who duly renounces a distributive share is to be treated

as having predeceased the decedent. The increase in the other distributees' shares, therefore, should not be deemed to flow from the renouncing distributee.³²

Similarly, *Richardson on Evidence* remarks, "It should be noted, however, that EPTL 1.11 may be interpreted to change the ruling in *Matter of Aievoli*."³³

In sum, it is not certain that a distributee's renunciation within the statutory period will render the distributee competent to testify at trial under the Dead Man's Statute.

Renunciations Outside of the Nine-Month Period

A distributee who is incompetent to testify under the Dead Man's Statute will face even more uncertainty when a renunciation is attempted outside of the nine-month "deadline" imposed by EPTL 2-1.11(b)(2). Under EPTL 2-1.11(h), the statute provides that it "shall not abridge the right of any beneficiary or any other person to assign, convey, release or renounce any property or interest therein arising under any other section of this chapter or other statute or under common law."³⁴ As Surrogate Roth explains, paragraph (h) "may be invoked only in those situations which the statute did not contemplate, such as . . . where a witness orally renounces on the stand in order to avoid the exclusion of his or her testimony under CPLR 4519, the dead man's statute."³⁵

Clearly, paragraph (h) would be helpful to a legatee who seeks to renounce after the statutory nine-month period, since the common law does not restrict a legatee's ability to renounce.³⁶ However, it seems that it may not be helpful to distributees who find themselves in the same situation for the converse reason: the common law does not afford a distributee the ability to renounce.

What's a Distributee to Do?

As Weinstein, Korn & Miller's treatise *New York Civil Practice* laments, "Reconciliation of the legatee-devisee

cases may leave the reader slightly unsettled."³⁷ Indeed, even with the enactment of a statute that explicitly allows distributees to renounce their interest in an estate, questions abound regarding its relation to the Dead Man's Statute. Legislative action may be warranted. ■

1. CPLR 4519.
2. While the Dead Man's Statute is most often invoked in Surrogate's Court proceedings, it is applicable in any action or proceeding when testimony by a "person interested" regarding a transaction or communication with a decedent is offered at trial.
3. CPLR 4519.
4. A party or person is interested in the event has been defined as someone who "will either gain or lose by the direct legal operation and effect of the judgment" (Prince, *Richardson on Evidence*, 11th ed., § 6-124(a) (quoting *Hobart v. Hobart*, 62 NY 80, 83 (1875))).
5. One testifies in one's own behalf when one benefits from one's own testimony (Prince, *Richardson on Evidence*, 11th ed., § 6-125).
6. See CPLR 4519.
7. See, e.g., *Sepulveda v. Aviles*, 308 A.D.2d 1, 10, 762 N.Y.S.2d 358 (1st Dep't 2003) (internal quotation marks and citations omitted).
8. See generally Alexander, McKinney's Practice Commentary, CPLR 4519 (2007).
9. 40 NY Jur. 2d § 1231 (2007) ("Generally, if a witness releases his or her interest and thereby removes himself or herself from the class of persons deemed disqualified from testifying, the limitations of the dead man's statute are thereby overcome.") (citing *In re Wilson's Will*, 103 N.Y. 374 (1886); *In re Keegan's Will*, 114 N.Y.S.2d 217 (Sur. Ct., Westchester Co. 1952)).
10. Alexander, McKinney's Practice Commentary, CPLR 4519 at 4519:2(c) (2007).
11. See 25A Carmody-Wait 2d § 149:566; Alexander, Practice Commentary, CPLR 4519 at 4519:2(c) (2007).
12. See *In re Fienga*, 75 Misc. 2d 233, 347 N.Y.S.2d 150 (Sur. Ct., Kings Co. 1973).
13. CPLR 4519.
14. See, e.g., 25A Carmody-Wait 2d § 149:566.
15. Prince, *Richardson on Evidence*, 11th ed., § 6-124(b) (citing *In re Lefft Estate*, 44 N.Y.2d 915, 408 N.Y.S.2d 1 (1978); *In re Wilson Estate*, 103 N.Y. 374 (1886); *Loder v. Whelpley*, 111 N.Y. 239 (1888)); see 25A Carmody-Wait 2d § 149:566; 40 NY Jur. 2d § 1231 (2007).
16. *In re Fienga*, 75 Misc. 2d at 233-34.
17. *Id.*
18. *Id.*
19. 272 A.D. 544, 74 N.Y.S.2d 29 (2d Dep't 1947).
20. See also *In re Bourne's Estate*, 206 Misc. 378, 133 N.Y.S.2d 192 (Sur. Ct., Suffolk Co. 1954).
21. 75 Misc. 2d at 233-34.
22. *Id.*

23. CPLR 4519; *see also In re Aievoli's Will*, 272 A.D. 544.
24. *See* 9 Warren's Heaton on Surrogate's Court Practice § 116.05[2][b] ("The Dead Man's Statute has been applied differently . . . to the disclaiming distributee [as compared to the disclaiming legatee]. Waiver of his rights in the estate by a distributee has been deemed to have enlarged the proportionate share of the other distributees and consequently the disclaiming distributee has been held to be a person from, through, or under whom the interest of the other distributees is derived."); 40 NY Jur. 2d § 1231 (2007) (citing *In re Aievoli's Will*, 272 A.D. 544 and *In re Bourne's Estate*, 206 Misc. 378); 25A Carmody-Wait 2d § 149:566 (citing *In re Bourne's Estate*); 2 Harris NY Estates: Probate Admin. & Litigation § 19:187 (2006) (citing *In re Aievoli's Will*).
25. EPTL 2-1.11(a)(2), (b)(2).
26. EPTL 2-1.11(a)(1), (b).
27. EPTL 2-1.11(d).
28. *See* EPTL 2-1.11(a)(1), (b).
29. *See* CPLR 4519.
30. *See, e.g.,* Prince, Richardson on Evidence, 11th ed., § 6-124(b).
31. *See* 9 Warren's Heaton on Surrogate's Court Practice § 116.05[2][b] ("The Dead Man's Statute has been applied differently . . . to the disclaiming

distributee [as compared to the disclaiming legatee]. Waiver of his rights in the estate by a distributee has been deemed to have enlarged the proportionate share of the other distributees and consequently the disclaiming distributee has been held to be a person from, through, or under whom the interest of the other distributees is derived."); 40 NY Jur. 2d § 1231 (2007) (citing *In re Aievoli's Will*, 272 A.D. 544, 374 N.Y.S.2d 29 (2d Dep't 1947) and *In re Bourne's Estate*, 206 Misc. 378, 133 N.Y.S.2d 192 (Sur. Ct. Suffolk Co. 1954)); 25A Carmody-Wait 2d § 149:566 (citing *In re Bourne's Estate*); 2 Harris NY Estates: Probate Admin. & Litigation § 19:187 (2006) (citing *In re Aievoli's Will*).

32. Alexander, McKinney's Practice Commentary, CPLR 4519 at 4519:2(c) (2007).
33. Prince, Richardson on Evidence, 11th ed., § 6-124(b).
34. EPTL 2-1.11(h).
35. *In re Chofeng Lin Fee*, N.Y.L.J., Oct. 19, 1992, p. 29, (Sur. Ct., N.Y. Co.).
36. *See generally id.*
37. 1 Weinstein, Korn & Miller – New York Civil Practice: CPLR 4519.12 (Matthew Bender 2006).