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RECENT CASES

THE DEAD MAN'S STATUTE— INTERESTED PARTIES MAY BE BARRED

*Jackson v. Wheeler*¹

Michael Matajewski executed and recorded a general warranty deed conveying his interest in a parcel of land in Clark County, Missouri to his son, Lyle Matajewski, reserving a life estate in himself. Thirteen years later Michael executed and recorded a quitclaim deed conveying the same parcel to one of his daughters, Josephine Jackson, and himself as joint tenants with right of survivorship. About two years after the quitclaim was recorded, Michael filed an action to set aside the original deed, alleging that Lyle had breached a promise to care for Michael given as consideration for the conveyance. Michael obtained a default judgment after service by publication failed to bring Lyle to the hearing. Michael died within a year after the default judgment was granted. Less than two months after Michael's death, Lyle moved to set aside the default judgment. Two of Michael's daughters, as co-administratrices of Michael's estate, were substituted as plaintiffs; the two individually, along with Michael's other children, were joined as additional plaintiffs. Josephine Jackson was permitted to intervene and was made a defendant. Lyle answered Michael's original petition, denying the existence of an oral agreement between Michael and Lyle and praying that the court quiet title in Lyle. Josephine filed a petition to set aside the original deed and quiet title in herself.²

At trial, Josephine offered testimony regarding both the consideration for the deed to Lyle and Michael's desire that Josephine rather than Lyle ultimately own the property.³ Josephine was disqualified from testifying as to any transactions or conversations with Michael prior to his death by operation of the "Dead Man's Statute"⁴ and because her testimony was

1. 567 S.W.2d 363 (Mo. App., D. St. L. 1978).

2. *Id.* at 365.

3. *Id.* at 366.

4. RSMo § 491.010 (1969) provides:

Witness' interest does not disqualify—exceptions. —No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility; provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action

ruled to be both hearsay and conclusory. Josephine appealed from a directed verdict for Lyle, asserting, *inter alia*, that her testimony was excluded by a misapplication of the Dead Man's Statute. The Missouri Court of Appeals, St. Louis District, disagreed and affirmed, holding that Josephine's testimony was properly barred by the statute.⁵ The court's rationale is questionable and its decision is decidedly against a current trend toward limiting the application of the Dead Man's Statute.

The Dead Man's Statute operates to protect those parties claiming under the deceased where the offered witness is the "other" party to a contract or cause of action at issue and on trial.⁶ Thus, when a contract between the deceased and the witness is not at issue nor on trial, a determination as to whether the statute will disqualify a witness requires that the court find the witness and the deceased to be adverse parties to the cause of action at issue and on trial. In finding that Josephine, Lyle, and the administratrices were all parties to the same cause of action with the deceased, the court characterized the cause of action in terms of the question "Who owns the land?" Had the court narrowed the scope of its definition in terms of the question "Was the conveyance from Michael to Lyle void for lack of consideration?", the court could have avoided applying the

shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided, and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator; provided further, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are, and when made, and no farther.

5. 567 S.W.2d at 365. The court noted further that much of the offered testimony was hearsay and "rife" with conclusions as to Michael's intentions. *Id.* at 367.

6. At early common law, nearly all parties to a lawsuit or non-parties with a direct, present, or vested interest in the outcome of litigation were incompetent to testify. 3 B. JONES, *THE LAW OF EVIDENCE* § 762 (5th ed. 1958). Legislatures recognized that disqualification of parties — who are usually in the best position to testify as to relevant issues — was an unnecessary limitation on the production of evidence. The current statute is the end result of legislative attempts to abolish the common law disqualification for interest. RSMO ch. 144, § 1 (1866). See Boyer, *The Surviving Witness: His Competency in Missouri*, 7 U.K.C. L. REV. 231, 233-36 (1939). This Missouri statute qualifies interested adverse parties to testify *unless* one of the original parties to the contract or cause of action at issue and on trial is dead or insane. The disqualification of witnesses now is an exception to the general rule that all interested parties are competent to testify,

statute to that part of Josephine's testimony pertaining to issues beyond the scope of that cause of action.⁷

In *Jackson*, the court failed to recognize that even if Josephine is a party to the cause of action or the lawsuit with the deceased, her testimony should not be barred unless both her *interest* in the litigation and her *testimony* are *adverse* to the deceased. Since one of the statute's stated purposes is to provide mutuality by protecting the *deceased*,⁸ it follows that only testimony adverse to the *deceased's* interest should be excluded.⁹ The distinction between adverse testimony and adverse interest can be a confusing one. In *Jackson* the court recognized that asking whether the deceased would question the testimony does not complete the analysis; if it did, *any* testimony offered by *any* witness would be barred if such testimony were adverse to the deceased.¹⁰ A court need also characterize the witness' interest as adverse to that of the deceased. The court in *Jackson* summarily stated that Josephine's interest was adverse¹¹ without

7. Partial disqualification is permitted under the transactions proviso. *Weiermueller v. Scullin*, 203 Mo. 466, 101 S.W. 1088 (En Banc 1907). The transactions proviso was not intended to render the surviving party incompetent for all purposes, but only to the extent that his testimony might be subject to question by the other party if living. *Hill v. Johnson*, 178 S.W.2d 801 (K.C. Mo. App. 1944).

8. The various rationales that have been advanced are: (1) to promote equality in the ability to produce testimony, *Freeman v. Berberich*, 332 Mo. 831, 60 S.W.2d 393 (1933); *Ess v. Griffith*, 139 Mo. 322, 329, 40 S.W. 930, 931 (1897); (2) to protect estates from claims created through perjured testimony, 2 J. WIGMORE, EVIDENCE § 578 (3d ed. 1940); (3) to place the parties on equal footing—if the lips of one are sealed by death, the law seals the lips of the other, *In re Trautmann's Estate*, 300 Mo. 314, 322, 254 S.W. 286, 288 (1923); and (4) to eliminate any incentive to delay litigation in the hope that one party will die and leave the survivor's testimony uncontradicted, Note, *The "Dead Man's Statute" in Missouri*, 23 WASH. U.L.Q. 343, 345 (1938).

9. Early cases often did not explicitly set forth the statute's adverse interest requirement. Perhaps it was assumed unnecessary to explain that the "other" party to the contract or cause of action in issue and on trial must also have an interest adverse to that of the deceased. *McKee v. Downing*, 244 Mo. 115, 124 S.W. 7 (1909); *Meier v. Thiemann*, 90 Mo. 433, 2 S.W. 435 (1886). More recent decisions specifically mention the requirement by describing the disqualification as that of an "adverse" party. *Flanagan v. DeLapp*, 533 S.W.2d 592 (Mo. En Banc 1976); *Bildner v. Giacoma*, 522 S.W.2d 83 (Mo. App., D. St. L. 1975); *In re Estate of Tomlinson*, 493 S.W.2d 402 (Mo. App., D. Spr. 1973).

10. 567 S.W.2d at 366, citing *American Ins. Co. v. McMichael*, 238 F. Supp. 154 (E.D. Mo. 1964), *rev'd on other grounds*, 351 F.2d 665 (8th Cir. 1965).

11. See note 9 and accompanying text *supra*. Although the court in *Jackson* did characterize Josephine's interest as adverse, 567 S.W.2d at 366, its sole reason for doing so was that Josephine was a defendant. Adverse parties are not necessarily limited to those who are nominally aligned against one another in the positions of plaintiff and defendant. *Forrister v. Sullivan*, 231 Mo. 345, 132 S.W. 722 (1910). Rather, "adverse party" applies to "any party, whether plaintiff or defendant, whose interests are actually adverse to those of another party to the action who appears in the capacity of the decedent's executor, administrator, heir

discussion or analysis. It concentrated instead on the question of whether Josephine's interest was a present one.¹² Since the statute disqualifies only those interested parties who would not be disqualified but for their supposed motive for perjury and the inability of the deceased to answer or defend his adverse position,¹³ only adverse testimony from a party with a present adverse interest should be excluded. If the witness' interest is not adverse to the decedent there is no reason to apply the statute. The court's emphasis on the *present* interest requirement without reference to the *adverse* interest requirement led to the erroneous conclusion that the statute disqualifies parties for their present interest alone — the very circumstance the statute was enacted to abolish.¹⁴

Although the court in *Jackson* did not explicitly set forth the substantive rights of the parties, an examination of these rights is essential to a proper determination of the parties' alignment for purposes of section 491.010. Consistent with the statute's protection of the deceased and those claiming under him, those who derive their interest from the deceased are also protected. Commonly, an interest is derived by assignment, letters of administration, and descent.¹⁵ In *Jackson*, all parties derived an interest from their deceased father.¹⁶ The statute appears to contemplate that a party must derive a right of action or defense from the deceased rather than a mere interest to be afforded protection.¹⁷ The administratrices and the other heirs at law who were made plaintiffs were within the statute's protections. However, Josephine's claim as intervenor and Lyle's defense were based upon two different deeds from the deceased. Whether the grantee in a deed can be afforded the same protection that the deceased's heirs, assignees, or personal representatives enjoy would seem to depend

EVIDENCE § 777 at 1444 (5th ed. 1958). In *Gillespie v. Ringhausen's Estate*, 364 S.W.2d 633 (K.C. Mo. App. 1963), the plaintiff, who sought to be declared owner of bonds by virtue of a gift from the deceased testator, was deemed an adverse party to both the testator's estate and the residuary beneficiary (then deceased) of the will.

12. The court correctly pointed out that the nature of the witness' interest must be examined rather than the content of the witness' testimony. 567 S.W.2d at 366. The court proceeded to complete its analysis by finding that Josephine's interest was a present interest, citing 58 AM. JUR. WITNESSES § 288, *Fisher v. Cox*, 312 S.W.2d 775 (Mo. 1958), and *Beckers-Behrens-Gist Lumber Co. v. Adams*, 311 S.W.2d 70 (St. L. Mo. App. 1958), as authority for the requirement that the interest be a present one at the time the witness is called to testify.

13. See authorities cited note 8 *supra*.

14. See authorities cited and text accompanying note 6 *supra*.

15. 3 B. JONES, THE LAW OF EVIDENCE § 777 at 1445 (5th ed. 1958).

16. All parties in *Jackson* were Michael's children and so heirs at law; to the extent that they were heirs, they shared an interest in the deceased's estate.

17. Courts have generally adhered to the common law test to determine if the interest is sufficient to disqualify a witness. But if the witness is not the survivor to the contract or cause of action in issue and on trial, his interest will not disqualify him. See Comment, *supra* note 8, at 350-51.

on whether the deed itself is at issue and on trial¹⁸ and whether the claim or defense relied upon is adverse to the deceased.¹⁹

In *Jackson*, Lyle's defense was unquestionably adverse within the meaning of section 491.010 inasmuch as the deceased filed a lawsuit against him originally. Josephine's claim as intervenor, however, was not adverse to that of the plaintiffs for all purposes under the statute. To the extent that Josephine based her claim to quiet title in herself on the quitclaim from Michael, her claim was adverse to that of the estate and its administratrices.²⁰ Any of Josephine's testimony regarding the quitclaim would be properly excluded since the deceased was the other party to the contract.²¹ On the other hand, Josephine ultimately based her claim on the same ground as did the plaintiffs—the failure of consideration for the deed to Lyle from the deceased. To this extent, Josephine's testimony was improperly barred since her claim and that of the administratrices, who derived their interest from the deceased, were identical.²²

Rather than bar all of Josephine's testimony, the court could have selected a means to avoid section 491.010 to at least some degree. As previously noted, the court could have characterized the cause of action at issue and on trial in terms of adverse interests so as to allow Josephine to testify as to those interests she shared with the deceased.²³ This approach is acceptable under the statute's transactions proviso, which can render a witness incompetent for some purposes, but not necessarily for all purposes.²⁴ Alternatively, the court could have avoided barring Josephine's

18. The statutory requirement that the contract be in issue and on trial has been held to be "co-extensive with every occasion where such instrument [or cause of action] may be called into question." *Chapman v. Dougherty*, 87 Mo. 617, 626 (1885).

19. Clearly, if *A* conveys to *B* and *B* later dies, *A* is disqualified from testifying as to the deed. *Baker v. Baker*, 363 Mo. 318, 251 S.W.2d 31 (1952). If, prior to his death, *B* conveys to *C*, the question of whether *C* is also disqualified would seem to depend on whether the interest derived from *B* is in issue and on trial. See note 18 *supra*. In *Danciger v. Stone*, 278 Mo. 19, 210 S.W. 865 (1919) and *Davis v. Wood*, 161 Mo. 17, 61 S.W. 695 (1901), the courts determined that those claiming under a deceased grantor or grantee could not testify regarding contracts or transactions with the deceased in a manner tending to attack, explain, or modify the title conveyed. In *Golden v. Tyer*, 180 Mo. 196, 79 S.W. 143 (1904), the court held that when a party alleges a claim to title independent of a deed with a deceased, he is not incompetent because the deed is not in issue and on trial.

20. Josephine's claim to quiet title in herself was clearly adverse to plaintiff's claim to quiet title in Michael's estate.

21. RSMO § 491.010 (1969). See notes 4 & 18 *supra*.

22. To the extent that the parties share an interest, the interest is not adverse and the statute should not apply. See notes 9-12 and accompanying text *supra*.

23. See note 7 and accompanying text *supra*.

24. The scope and application of the transactions and administration provisos are set out in Comment, *Waiver of the Missouri Dead Man's Statute*, 39 MO. L. REV. 218, 219-24 (1974).

testimony at all by looking to the statute's administration proviso which applies when one of the parties to the action is the deceased's personal representative. The administration proviso operates to disqualify a witness for all purposes only when the deceased and the witness are both parties to the *contract* at issue and on trial.²⁵ The only *contract* to which the deceased and Josephine were both parties is the quitclaim. The quitclaim was at issue and on trial as required by the courts to the extent that it was called into question.²⁶ The only question as to the validity of the quitclaim was whether or not the deceased had any title to convey when it was executed. The court thus could have concluded that the suit was not in fact based on a contract that was in issue and on trial as between Josephine and the deceased and that her testimony should not have been totally barred.²⁷

The statute only disqualifies surviving parties with an interest adverse to the deceased; there are no similar limitations on those claiming through the deceased.²⁸ Thus the application of the statute can sometimes serve to defeat mutuality by placing the disqualified survivor at a disadvantage to rather than on a parity with those claiming under the deceased. The court in *Jackson* attempted to obviate this inherent inequality—if Josephine had not been disqualified, she would have had an advantage over Lyle, who was disqualified. The court failed to recognize that the statute may often contemplate protection of those claiming through the deceased at the expense of those parties with interests adverse to that of the deceased.

Due to repeated criticisms²⁹ of the statute and a reluctance to apply it strictly when its purposes would be frustrated, the trend has been to avoid the statute's application, resulting in the exclusion of less testimony.³⁰

25. *Grimm v. Gargis*, 303 S.W.2d 43 (Mo. 1957); *Brewer v. Blanton*, 555 S.W.2d 383 (Mo. App., D. Spr. 1977). Note that the administration proviso disqualifies the witness for all purposes rather than merely to the extent the deceased would question the testimony offered. The administration proviso has been strongly criticized. *Flanagan v. DeLapp*, 533 S.W.2d 592 (Mo. En Banc 1976), *citing Kersey v. O'Day*, 173 Mo. 560, 73 S.W. 481 (1903). *See also* Comment, *Waiver of the Missouri Dead Man's Statute*, 39 MO. L. REV. 218, 224 (1974).

26. *Chapman v. Dougherty*, 87 Mo. 617, 626 (Mo. 1885). *See also* text accompanying note 18 *supra*.

27. If the contract to which Josephine was the surviving party was not in issue and on trial, she should not have been disqualified.

28. *McKee v. Downing*, 224 Mo. 115, 124 S.W. 7 (1909); *Poague v. Mallory*, 208 Mo. App. 395, 235 S.W. 491 (K.C. 1921).

29. *See, e.g.*, 2 J. WIGMORE, EVIDENCE § 578 (3d ed. 1940); *Flanagan v. DeLapp*, 53 S.W.2d 592 (Mo. En Banc 1976), *citing Kersey v. O'Day*, 173 Mo. 560, 73 S.W. 481 (1903).

30. Early decisions held that the death of a party to the contract or cause of action barred all adverse survivors, regardless of whether they had an interest in the suit. *Lawhon v. St. Joseph Veterinary Laboratories*, 312 Mo. 157, 252 S.W. 44 (En Banc 1923); *Edmonds v. Scharff*, 279 Mo. 78, 213 S.W. 823 (1919); *Green v. Ditsch*, 143 Mo. 1, 44 S.W. 799 (1898); *Banking House of Wilcoxson & Co. v. Rood*, 132 Mo. 256, 33 S.W. 816 (1896).

Wagner v. Binder, 187 S.W. 1128 (Mo. 1916), expressly overruled this construction and began the trend of avoidance, holding that the purpose of the

Jackson v. Wheeler is significant because the court chose to apply the statute when grounds were available to avoid it.

The *Jackson* decision, aside from failing to utilize the opportunities to avoid the Dead Man's Statute, has by its efforts to apply the statute further confused the requirements for its application. If literally followed, the decision could lead to some questionable conclusions. The first is that parties have sufficient adverse interest to invoke the statute if they are simply aligned as plaintiff and defendant.³¹ The second is that a present interest alone may be sufficient to disqualify a witness from testifying.³² This conclusion cannot be reconciled with the legislative effort behind the statute to abolish the disqualification for interest that existed at common law.³³ Further, the court's decision to give the term "cause of action" its broadest possible definition could lead other courts to conclude that if one party to a lawsuit is deceased, all other parties to the lawsuit are disqualified.³⁴

In addition to these questionable conclusions, the decision provides an excellent example of the inherent inequalities of a statute that was supposedly enacted to provide equality.³⁵ Judicial pleas for legislative reform have gone unanswered;³⁶ commentators continue to question³⁷ whether the statute serves a purpose which at least one Missouri court has opined to be impossible to attain.³⁸ Nevertheless the statute remains unaltered.

statute was not to disqualify witnesses but to qualify them. Thus a witness who would be incompetent at common law is made competent by the statute *unless* disqualified by the provisos. *Bernblum v. Traveler's Ins. Co.*, 340 Mo. 1217, 105 S.W.2d 941 (En Banc 1937); *Signaigo v. Signaigo*, 205 S.W. 23 (Mo. En Banc 1918); *Clark v. Thias*, 173 Mo. 628, 73 S.W. 616 (1903).

Courts have further limited the disqualifying provisos by not disqualifying the surviving adverse party when the deceased is also survived by a co-plaintiff or co-defendant, *Breit v. Bowland*, 231 Mo. App. 433, 100 S.W.2d 599 (K.C. 1936); Comment, *supra* note 6, at 245; and by either manipulating or drawing careful distinctions between the meanings of "party to the contract" and "party to the cause of action." See *Zumwalt v. Forbis*, 349 Mo. 752, 163 S.W.2d 574 (1942) in which the court held that even though the offered witness was a party to a deed with the deceased grantor, the "cause of action" in issue was whether the first deed was properly delivered; the second grantee was not a party to that cause of action.

The most significant effort to avoid the statute is the judicially created doctrine of waiver whereby those protected by the statute must make timely and specific objections to and careful use of discovery devices and examination techniques to preserve their protection. For a thorough discussion of waiver, see Comment, *Waiver of the Missouri Dead Man's Statute*, 39 MO. L. REV. 218 (1974).

31. See note 11 *supra*.

32. See note 12 *supra*.

33. See note 6 and accompanying text *supra*.

34. See notes 7 & 30 and accompanying text *supra*.

35. See notes 6 & 28 and accompanying text *supra*.

36. See note 25 *supra*.

37. See Comments, *supra* note 6; *supra* note 8; *supra* note 25.

38. In *Freeman v. Berberich*, 332 Mo. 831, 845, 60 S.W.2d 393, 400 (1933), the court pointed out that "absolute equality . . . is a shibboleth impossible of attainment."