When the Dead Speak

A Look at Louisiana's "Dead Man Statute"

By Hal Odom, Jr. and Tyler G. Storms

Russell, a building contractor, befriended Sterling, a dirt work contractor, who occasionally did work for Russell. Sterling had recently gone through a divorce and was "hard up" for cash for his business. So Russell, in addition to hiring Sterling for various jobs, gave him a number of cash advances. Some of these were large; according to Russell, they totaled nearly $250,000 over seven years. Then, unfortunately, Sterling fell ill; he passed away within two months. Russell filed a proof of claim against Sterling's succession to recover the loans.[1]

Is there a special evidentiary problem with Russell's claim?

Russell, naturally, would testify that he gave numerous cash advances to Sterling, and he could even produce an informal ledger that logged the loans. Russell's son would corroborate his dad. However, the attorney who handled Sterling's divorce confirmed that, in the community property settlement, there was no mention of debts to Russell; and Sterling's young widow (they had married while Russell was allegedly infusing Sterling's business with cash) claimed to know nothing about the loans. How is Russell to prove his case?

Louisiana's "Dead Man Statute"[2]

Louisiana has a longstanding policy to protect estates from claims that are not well supported.[3] Additional evidentiary requirements, beyond the normal rules of evidence, must be met in order to prove such a claim. The statute, La. R.S. 13:3721, states:

> **§ 3721. Parol evidence to prove debt or liability of deceased person; objections not waivable**
>
> Parol evidence shall not be received to prove any debt or liability of a deceased person against his succession representative, heirs, or legatees when no suit to enforce it has been brought against the deceased prior to his death, unless within one year of the death of the deceased:
>
> (1) A suit to enforce the debt or liability is brought against the succession representative, heirs, or legatees of the deceased;
>
> (2) The debt or liability is acknowledged by the succession representative as provided in Article 3242 of the Code of Civil Procedure, or by his placing it on a tableau of distribution, or petitioning for authority to pay it;
>
> (3) The claimant has opposed a petition for authority to pay debts, or a tableau of distribution, filed by the succession representative, on the ground that it did not include the debt or liability in question; or
>
> (4) The claimant has submitted to the succession representative a formal proof of his claim against the succession, as provided in Article 3245 of the Code of Civil Procedure.
>
> The provisions of this section cannot be waived impliedly through the failure of a litigant to object to the admission of evidence which is inadmissible thereunder.

The next section, R.S. 13:3722, specifies what kind of evidence is required when parol evidence is admissible:

> **§ 3722. Same; evidence required when parol evidence admissible**
>
> When parol evidence is admissible under the provisions of R.S. 13:3721 the debt or liability of the deceased must be proved by the testimony of at least one creditable witness other than the claimant, and other corroborating circumstances.

This section, which was last amended in 1960,[4] almost tracks the familiar language of Louisiana "Statute of Frauds," La. Civ.C. art. 1846: when a writing is not required by law, "If the price or value is in excess of five hundred dollars, the contract [not reduced to writing] must be proved by at least one witness and other corroborating circumstances."

The Dead Man Statute imposes the additional constraint that the witness must be *creditable*. The purpose is to eliminate the possibility of fraud and perjury by witnesses who have a direct pecuniary or proprietary interest in the claim.[5] To preserve this purpose, the courts strictly construe the Dead Man Statute.[6]

Some Judicial Applications

An early case established that a *statement against interest,* attributed to the decedent, was entitled to "some probative value." In *Abunza v. Olivier*,[7] the decedent who "testified" was Mr. Olivier's aunt, a Mrs. Hero, who had loaned Mr. Olivier's mother $3,000 (quite a sum in 1936) and made the mother sign a promissory note. After the mother died, Mr. Olivier accepted her insolvent succession, including the promissory note to Mrs. Hero. Years later, Mr. Olivier and his wife, Ms. Abunza, divorced, and when they litigated their community property, Ms. Abunza argued that he had used community funds to pay off that (separate) note. Mr. Olivier, however, argued that shortly before *her* death, Mrs. Hero had forgiven the note, and even torn it up in his presence. The district court accepted Mr. Olivier's explanation, and Ms. Abunza appealed.

On appeal, Ms. Abunza argued that her ex-husband's testimony should be disregarded, as it "involves a declaration against interest of a deceased person, which is the weakest kind of evidence." The Supreme Court disagreed, and affirmed in a statement that would be quoted several times in the jurisprudence:

> While mindful of the fact that a declaration against interest by a deceased is the weakest kind of testimony, it is admissible and does have some probative value. It must, of course, be scrutinized with great care, since it can be so easily fabricated, but this concerns [the] weight of the proof rather than its competency.

Curiously, the Supreme Court did not cite the Dead Man Statute, or any other statute or cases, for this proposition. However, it has been quoted on several occasions to resolve the issue presented. It was used to admit the "testimony" whereby the decedent forgave a loan to his niece in *Wall v. Murrell*,[8] and whereby another decedent forgave a loan to his nephew in *Arledge v. Bell*.[9]

The upshot of these cases seems to be that if the decedent loaned money to a family member, courts may be inclined to believe that family solidarity prevailed and that the decedent generously forgave the debt before passing away.

Another case attempted to clarify who is a *creditable witness* for purposes of R.S. 13:3722. In *Savoie v. Estate of Rogers*,[10] the decedent was a tax preparer, Rogers, who had advised two of his clients, the

Savoies, that they owed over $9,000 in capital gains taxes for the year 1977; in early 1978, the Savoies made installment payments of $9,230 to Rogers. It transpired, however, that Rogers had defrauded the Savoies: he never filed their return or forwarded their payments to the IRS; in fact, the Savoies owed only $352 in taxes for 1977. In June 1978, Rogers committed suicide, and the Savoies filed a claim against his estate. In support, they offered their own testimonies — mother and son — as creditable witnesses to satisfy R.S. 13:3722. The district court rejected this, reasoning that a creditable witness must be one "who does not share the claimant's interest in the outcome."[11]

The Supreme Court, however, disagreed, finding that the related witnesses "may testify on behalf of each other."[12] As a result, the court reinstated the Savoies' claim and remanded for a determination of damages.[13] The test, in essence, is whether the claimants assert a joint interest in the claim or whether each has a separate claim. If they assert a joint claim, then each is deemed a "claimant" for purposes of R.S. 13:3722. However, if they assert separate claims and have joined in the suit merely for the sake of convenience, this does not disqualify them from serving as the creditable witness.[14]

The rationale of *Savoie v. Estate of Rogers* was applied to turn away claims against the decedents' estates in *Financial Corp. v. Estate of Cooley*[15] and *Succession of Kinchen*.[16]

Other cases have honed the finer points of the statute. In *Succession of Bearden*,[17] the court found that sending a letter to the attorney for a co-executor of the decedent's estate did not satisfy R.S. 13:3721(4)'s requirement of a claim "to the succession representative." In *Succession of Marcotte*,[18] the court similarly found that sending a letter to the succession administrator before the estate was actually under administration failed to satisfy R.S. 13:3721(4).

In *Halpern v. Jonathan Ferrara Gallery Inc.*,[19] the court strictly construed "within one year of the death of the deceased," disallowed the parol testimony and reversed the judgment, even though the underlying claim, for breach of contract, may have been timely. The court commented that the Dead Man Statute "is not meant to end a case but to restrict the type of evidence that may be used."[20]

Back to Russell and the late Sterling

Russell filed a timely claim against Sterling's estate, and the matter went to trial. The court allowed Russell to offer his version of the decedent's testimony; this was consistent with the implication of *Abunza* and its progeny, especially considering that there was no family relationship between the two men.

Even with the testimony and some corroborating evidence (Russell's son backed up his dad, and they had some writings), the court found Russell's version of Sterling's testimony simply not credible. Perhaps given their established business dealings, the court probably felt that the money advanced to Sterling was for contract work performed in the course of business. The court rejected Russell's claim, and Sterling's estate was saved from a $250,000 claim.

Practice Pointers

Always be aware of evidentiary rules outside the La. Code of Evidence, both when evaluating claims and defending them. Do not assume that a hearsay exception alone will allow evidence against an estate following one year after the decedent's death.

This statute gives great protection to estates, but it does leave the door open. As a practical matter, claims against estates requiring parol evidence should be treated as one would treat a tort, in terms of prescription. Do not delay, and line up your evidence other than parol. In cases like *Abunza*, *Wall*, *Harper* and *Halpern*, documents like promissory notes, checks and invoices were not enough to prove the claim. In *Savoie*, the tax preparer's receipts were admitted and corroborated the claimants' testimony.

Finally, the statute affects claims for debts or liabilities of the decedent. It can affect the amount of an estate available to heirs and legatees, but it should not impact the claims of heirs and legatees based on other issues, such as the validity or interpretation of a will. Before the dead try to speak, remember this statute is an important tool for creditors and succession representatives.

FOOTNOTES

1. This scenario is based on an actual, yet unreported, case. The names have been altered, of course.

2. This is the term used in the jurisprudence, not in the statute itself. The authors regret the lack of gender neutrality, but would note that in virtually every case we have reviewed, the deceased person was indeed a man.

3. Earlier law provided that parol evidence was "incompetent and inadmissible to prove any debt or liability on the part of a party deceased[.]" 1906 La. Acts No. 207; 1926 La. Acts No. 11, § 1.

4. 1960 La. Acts No. 32, § 1.

5. Savoie v. Estate of Rogers, 410 So.2d 683 (La. 1981); Harper v. J.B. Wells Estate, 575 So.2d 894 (La. App. 2 Cir. 1991).

6. Smith v. Anderson, 563 So.2d 380 (La. App. 1 Cir. 1990), *writ denied*, 567 So.2d 105 (1990); Succession of Bearden, 27,007 (La. App. 2 Cir. 11/3/95), 658 So.2d 746, *writ denied*, 95-1901 (La. 11/3/95), 662 So.2d 11.

7. 230 La. 445, 88 So.2d 815 (1956).

8. 280 So.2d 865 (La. App. 3 Cir.), *writ denied*, 282 So.2d 517 (1973).

9. 463 So.2d 856 (La. App. 2 Cir. 1985).

10. 410 So.2d 683 (La. 1981).

11. Savoie v. Estate of Rogers, 394 So.2d 704 (La. App. 3 Cir. 1981).

12. 410 So.2d at 686.

13. Ultimately, each of the Savoies recovered $5,493 from the estate. Savoie v. Estate of Rogers, 422 So.2d 1323 (La. App. 3 Cir. 1984).

14. George W. Pugh & James R. McClelland, Developments in the Law – Evidence, 43 La. L. Rev. 413, 437 (Nov. 1982).

15. 447 So.2d 594 (La. App. 3 Cir. 1984); *see also*, Succession of Campbell, 2019-91 (La. App. 3 Cir. 10/2/19), 280 So.3d 979.

16. 2006-0926 (La. App. 1 Cir. 3/28/07), 2007 WL 914639.

17. 27,007 (La. App. 2 Cir. 6/21/95), 658 So.2d 746, *writ denied*, 95-1901 (La. 11/3/95), 662 So.2d 11.

18. 449 So.2d 732 (La. App. 3 Cir. 1984).

19. 2019-1066 (La. App. 4 Cir. 12/30/20), 2020 WL 8455534, *writ denied*, 21-00285 (La. 4/13/21), 313 So.3d 1253.

20. *Id.* at 6, citing Williams v. Collier, 249 So.2d 298 (La. App. 1 Cir.), *writ ref'd*, 259 La. 775, 252 So.2d 669 (1971).

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