The Maryland Judicial College

Orphans' Court Judges

2022 Continuing Education

EVIDENTIARY ISSUES in ORPHANS' COURT PROCEEDINGS

Fred Franke, Jack Beckett & Deb Howe

Franke Beckett, LLC

Annapolis, Maryland

ATTESTATION CLAUSES AS SUBSTITUTE TESTIMONY

1.0 Background. There are statutory requirements to create a valid Will. In Maryland, those requirements, called "formalities," must be present or the Will is not valid and will not operate. Generally, a valid Will must be (i) in writing, (ii) signed by the testator (or by someone in the testator's presence by the testator's express direction), and (iii) "attested and signed" by 2 witnesses in the testator's physical or, following certain requirements, in the testator's electronic presence. MD. CODE ANN., EST. & TRUSTS § 4-102.[1]

1.1 Burden of Proof. The proponent of a Will bears "[t]he burden of proving the existence of these elements, by a preponderance of the evidence[.]" *Groat v. Sundberg*, 213 Md. App. 144, 152 (2013). In virtually every caveat, the proponent is forced to "prove" the Will. The general deadline for filing a caveat is 6 months.[2] If a ground for challenging the Will is not plead in the

---

[1] This is a very general summary of the formalities required by the statute which, over the years, has generated numerous appellate decisions. *Castruccio v. Est. of Castruccio*, 456 Md. 1 (2017) briefly summarizes some of the nuances of these requirements. Effective April 2022, Md. Code, *Estates and Trusts*, § 4-102 was amended to permit witnesses to be in the "electronic presence" of the testator. See https//fredfranke.com/practice-area/estate-trust-planning/will-creation-and-modification-in-maryland.

[2] MD. CODE ANN., EST. & TRUSTS § 5-207. Md. Rule 6-431(b)(1) reiterates the 6 month rule and (b)(2) carves out possible, but narrow, exceptions: "*Exceptions.* Upon petition filed within 18 months after the death of the decedent, a person entitled to file a petition to caveat may request an extension of time for filing the petition to caveat on the grounds that the person did not have actual or statutory notice of the relevant probate proceedings, or that there was fraud, material mistake, or substantial irregularity in those proceedings. If the court so finds, it may grant an extension."

initial petition to caveat, an amended petition adding an additional ground for relief cannot be filed after the initial time to caveat has run.[3] For this reason, most petitions challenging a Will include all conceivable grounds – including that the Will violated one or more of the required formalities. This forces the proponent to show that every element of MD. CODE ANN., EST. & TRUSTS § 4-102 was satisfied.

1.2 Shifting the Burden of Proof by an Attestation Clause. Although not a requirement to create a valid Will in Maryland, an attestation clause is quite useful if a Will is challenged. This clause recites that the statutory requirements have been followed and it is attested to by the witnesses. A proper attestation clause is prima facie evidence of due execution. Once the presumption of due execution attaches, the burden of proof shifts and the caveator must overcome the presumption of due execution by clear and convincing evidence.[4] *Van Meter v. Van Meter*, 183 Md. 614, 617-18 (1944). It does not, of course, address other grounds for a Will challenge such as lack of capacity, the exercise of undue influence, or that the testator suffering from insane delusions. It goes a long way, however, in establishing that the formalities were followed.

1.3 What is a "Proper" Attestation Clause? A "proper" attestation clause is one reciting all the required formalities. "Attested" simply means that the witnesses vouch for knowing that the statutory formalities were followed. An example of an attestation clause is as follows: "This instrument was signed by the testatrix as her Last Will and Testament in our joint presence, and at her request we have signed our names as witnesses in her presence and in the presence of each other on the date written above."

The reason that a proper attestation clause shifts the burden to the caveator is because the attestation clause recites that each of the elements required for valid execution of the Will was followed: "The rule is well established that an attestation clause reciting facts necessary for the valid execution of a will is prima facie evidence of the due execution of the will, if it bears the genuine signatures of the testator and subscribing witnesses." *Van Meter*, 183 Md. at 617-18. The attestation clause substitutes as presumptive evidence of the witnesses and serves "as a safeguard against the danger of imperfect recollection or deliberate misrepresentation of the facts." *Id.*

---

[3] *Hegmon v. Novak*, 130 Md. App. 703, 712 (2000).

[4] Clear and convincing is a higher standard than preponderance of evidence. *Weisman v. Connors*, 76 Md. App. 488, 502 (1988) (J. Wilner): "The law now recognizes three different, supposedly discrete standards for proving an allegation of fact in court: proof by preponderance of the evidence, proof by "clear and convincing" (or sometimes "clear, cogent, unequivocal, and convincing") evidence, and proof beyond a reasonable doubt. *See generally* E. Cleary, McCormick on Evidence §§ 339-41 (3d ed. 1984); *Addington v. Texas*, 441 U.S. at 423-25, 99 S. Ct. at 1808-09."

1.4 ***The Relaxing of Attestation Clause Requirements.*** Although the *Van Meter* Court conditioned the presumption of due execution on a detailed attestation clause, the Court of Appeals, over time, has adopted a more relaxed approach. In *Slack v. Truitt*, 368 Md. 2 (2002), the testator handwrote a one-page Will and handed it separately to two witnesses to sign. The first witness to sign it testified that she could not recollect whether when presented to her, the testator had already signed the document. The second witness who was approached later testified that it was signed by the testator when he presented it to her. Both signed beneath the words "Witnessed By." In *Slack*, both witnesses testified that the testator had them witness the document separately but in his presence. The Court determined that a presumption of due execution attached to the Will. *Slack*, 368 Md. at 17-18: "The will was found in testator's home after his death, duly signed and witnessed; this shows that the testator thought it was a valid will… Accordingly, we hold that there is not clear and convincing evidence to overcome the presumption of due execution that attaches to the will, and, therefore, the will was entitled to probate as a validly executed will."

In *Castruccio v. Estate of Castruccio*, 456 Md. 1 (2017)[5], the Court found the presumption of due execution with an "admittedly imperfect" attestation clause that failed to recite all the elements necessary for valid execution. The *Castruccio* Court found that there was sufficient evidence from the Will itself and from the "surrounding circumstances" to trigger the presumption. In that case, as with *Slack*, the testimony of the witnesses was that they saw the testator sign the document. The caveator's primary complaint, however, was that the witnesses' signatures did not appear on the same page as that of the testator and that there was conflicting evidence of whether that page was "attached" or "affixed" to the Will. The Court found this was not a requirement of valid execution: “Regardless of whether the last two pages (or any of the pages, for that matter) were physically connected, it is clear from 'the papers themselves' that they were intended to form a single document constituting the 2010 Will. at the attestation clause and witness signatures need not be on the same page as that of the testator or attached to the Will." *Castruccio*, 456 Md. at 29.

1.5 ***The Steiner Case.*** A recent Court of Special Appeals case, *Estate of Steiner*, 255 Md. App. 275 (2022) (J. Meredith) explored what would likewise create a prima facie proof of due execution in the absence of a complete attestation clause and in the absence of any witness testimony. The importance of the *Steiner* case is that it applied the evidentiary consequences of an attestation clause when that clause was quite imperfect.

---

[5] *Castruccio* was argued and won by our law firm. We did **not**, however, have any role in creating the Will under dispute which Will was done years before our involvement as fiduciary litigators. Although the attestation clause was flawed in that case, other factors triggered the presumption which was instrumental in having the Will upheld.

In *Steiner*, there was a Will and a codicil. Ms. Steiner was being treated for metastatic cancer when she executed both documents. The codicil was executed four months after the Will. She died less than three months after the execution of the codicil.

Both the Will and the codicil were do-it-yourself jobs. The Will was created by the testatrix using a typed "RocketLawyer.com" form. The Will left her only child, the caveator, a bequest of a life estate in her real property, $15,000 cash from a safe deposit box, and half of her residuary estate. Other property, including the other half of the residuary estate, went to the testatrix's granddaughter. The granddaughter was the caveator's daughter and a personal representative of Ms. Steiner's estate under her Will.

The codicil was handwritten in block letters on two sheets of notepaper which revoked the life estate rights to her son, eliminated the $15,000 cash bequest, and removed the son as a recipient of half of the residuary. On the second page of the codicil following the various changes to her Will were the words: "In Witness Whereof, I have subscribed my name below, this 5th day of June, 2020." Below this clause was a signature line entitled "Testator's Signature" and two signature lines thereafter entitled "Witness Signature." Each of those lines contained respectively the testatrix's signature and the signatures of the purported witnesses.

Ms. Steine's son challenged the codicil but not the Will stating that by the time the codicil was executed his mother was not mentally competent or coherent. He also claimed fraud based on the allegation that he did not believe that she was physically present when the two witnesses signed the codicil which, of course, was one of the formalities prior to the 2022 statutory amendment permitting electronic presence.[6]

1.6 ***The Steiner Court Extended the Common Law Further.*** In *Steiner*, the Court extended the *Slack* and *Castruccio* holdings. The *Steiner* Court addressed a case with no corroborating testimony and an imperfect attestation clause. It held that the mere fact that the codicil appeared to be a testamentary document and that it evidenced the testatrix's signature and that of the two witnesses to the document would be sufficient to shift the burden of proof.

> Nor did the lack of corroborating testimony from the two subscribing witnesses preclude the presumption of due execution from attaching to the Codicil. Although this case differs in that regard from *Slack* and *Castruccio*, where attesting witnesses testify, the Court of Appeals has recognized that, even when

---

[6] Prior to the 2022 amendment, remote witnessing was authorized by emergency orders by Maryland Governor Hogan during the Covid-19 epidemic. The statute sets out specific procedures that must be followed if remote witnesses are being used. *See* MD. CODE, EST. & TRUSTS § 4-102 (c), (d), and (e).

> attesting "witnesses are unable to testify or recollect, it is proper to apply the presumption of due execution" because "if subscribing witnesses were required to recollect all the formalities prescribed by the statutory requirements, few Wills would be immune from attack, particularly after the passage of many years."

Steiner, 255 Md. App. at 303 (quoting *Slack*, 368 Md. at 15-16).

Thus, even with a lack of corroborating testimony, the codicil established a prima facie case that all the statutory requirements for executing a testamentary instrument were satisfied. The *Steiner* Court held that the caveator did not put forward sufficient evidence—testimony from a medical expert that the testatrix did not have capacity when she signed the will for example—to rebut the presumption. *Steiner* is the logical extension of *Slack* and *Castruccio*.

THE ADMISSIBILITY OF SURROUNDING CIRCUMSTANCE EVIDENCE

2.0 Basic Will Interpretation Rules – Overview. The plain meaning rule is shorthand for the basic rule of Will interpretation that generally excludes evidence of the testator's intent except from the Will itself.[7] A strict rendering of this rule directs courts to not receive evidence about the testator's intent apart from, in addition to, or in opposition to the legal effect of the language written in the Will.[8] This characterization of the plain meaning rule is incomplete. Instead, the words used by the testator in the Will is interpreted within the context of the circumstances surrounding the testator when the Will is executed: "Th[e] expressed intention of a testator must be gathered from the language of the entire will particularly from the clause in dispute, read in the light of the surrounding circumstances at the time the will was made." *Castruccio v. Estate of Castruccio,* 239 Md. App. 345, 355-6 (2018) *certiorari denied* 463 Md. 149 (2019) (internal references omitted and emphasis added). [9]

---

[7] Because the plain meaning rule often excludes consideration of evidence of the testator's intent, the Restatement (Third) of Property: Wills and Other Donative Transfers distinguishes between a testator's actual intent and his attributed intent: "The donor's intention is sometimes referred to in this Restatement as the donor's actual intention, in order to contrast it with the intention that is attributed to the donor by an applicable constructional preference or rule of construction." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 cmt. a (2003).

[8] John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 521 (1982) (citing 4 GEORGE E. PALMER, THE LAW OF RESTITUTION, § 20.1, at 158 (1978)): "[The plain meaning] rule, which hereafter we will call the 'no-extrinsic-evidencerule,' prescribes that courts not receive evidence about the testator's intent 'apart from, in addition to, or in opposition to the legal effect of the language which is used by him in the will itself.'"

[9] This is another case in the series of *Castruccio* cases in the appellate court argued and won by the Firm of Franke Beckett, LLC. It upheld the importance of courts examining extrinsic evidence of the circumstances surrounding a testator as an aid to understanding the testator's intent as expressed in the Will.

The theoretical underpinning of the rules of Will construction is to determine and follow the testator's intent: "[T]he intention of the testator is the polar star, and must prevail, if consistent with the rules of law[.]" *Walters v. Walters*, 3 H. & J. 201, 205 (1811). The general principles for construing a will are well established: "When construing a will, the paramount concern of the court is to ascertain and effectuate the testator's expressed intent…[T]he search is not for the testator's presumed [intention] but for his [or her] *expressed intention*… Generally, that intent is gathered from the four corners of the will, with the words of the will given their plain meaning and import." *Pfeufer v. Cyphers*, 397 Md. 643, 649 (2007) (internal references omitted). The search for the testator's express intent, however, has always been sought giving full consideration of the testator's surrounding circumstances.

2.1 The Contours of Surrounding Circumstances Evidence. Maryland common law has always held that to understand or explain the words that a testator has written, a Court may consider evidence of the circumstances that surrounded the execution of the will. *Castruccio v. Estate of Castruccio*, 239 Md. App. 345, 363 (2018); s*ee also LeRoy v. Kirk*, 262 Md. 276, 279 (1971). The pertinent "surrounding circumstances" are established by extrinsic evidence to let the Court place itself "in the traditional place, behind the armchair of the testator as he contemplated the disposition he wished to be made to the objects of his bounty." *Marty v. First Nat. Bank of Balt.,* 209 Md. 210, 217 (1950). The circumstances surrounding the testator are used to explain, clarify, or deduce the intent, motives or purpose of the will. *See Hebden v. Keim*, 196 Md. 45, 49 (1950) (reviewing ages of testatrix and brother and clauses from brother's will to infer animosity in the relationship to determine that testatrix intended to direct $8,000 under the residuary clause rather than to distribute it as a specific bequest to her brother's estate).

A Court is precluded from looking at extrinsic evidence when such evidence is used to contradict, overturn, or change the actual words of the will. *Jones v. Holloway*, 183 Md. 40, 46-47 (1944).[10] Where the language is plain and unambiguous, such language cannot be contradicted by extrinsic evidence. Surrounding circumstance evidence that does not contradict the words used in a Will, however, is admissible to give the context to what the words meant. Indeed, this document construction principle transcends Will construction cases: "The meaning –

[10] See also Edgar G. Miller, The Construction of Wills In Maryland § 40 (1919) ("The general rule is that extrinsic evidence is not admissible to show that a testator's intention was different from that which his will discloses. Where the language of a will is plain and unambiguous, such language must govern; and therefore extrinsic evidence is not admissible to show that the testator meant something different from what his language imports.").

or ambiguity – of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (O'Connor, J.).[11]

2.2 The Castruccio Case. One recent Maryland appellate decision addressing the surrounding circumstances rule is *Castruccio v. Estate of Castruccio*.[12] In that case, the Will had one clause leaving the decedent's residuary estate to his wife but another clause stating that his wife forfeits her bequest if at his death she did not have "a valid Will filed with the Register of Wills for Anne Arundel County …" *Castruccio*, 239 Md. App. at 349.

The extrinsic evidence of the surrounding circumstances in *Castruccio* included testimony from the decedent's lawyer and one of his employees, the efforts that the decedent made to get his wife to prepare a Will assuring that she would not leave assets to certain members of her family, the decedent's distaste for his wife's nephews, and other evidence outside of what was written in the Will. The *Castruccio* Court upheld the reliance on extrinsic evidence to determine the meaning of the will: "Many, many Maryland cases have stated or applied the proposition that, to understand or explain the words that a testator has written, a court may consider evidence of the circumstances that surrounded the execution of the will." *Id.* at 363.

ATTORNEY-CLIENT PRIVILEGE

3.0 The Attorney-Client Privilege – Background. The attorney-client privilege, codified at CJP § 9-108, generally precludes disclosure of confidential communications made by a client to his attorney for the purpose of obtaining legal advice.[13] The client holds the privilege, and therefore may waive it.[14] As a general rule, the attorney-client privilege survives the client's death.[15] The U.S. Supreme Court upheld the posthumous application of the common law attorney-client privilege against the argument that the privilege should not prevent disclosure of

---

[11] The case turned on whether nicotine is a "drug" and thereby susceptible to regulation by the federal Food and Drug Administration. The court held that it was not a drug within the context of either the statute granting the FDA regulatory authority over drugs, or other federal statutes unrelated to the FDA regulatory authority. Justice Sandra Day O'Connor's point is that language does not exist in a vacuum.

[12] 239 Md. App. 345 (2018).

[13] *See, e.g., E.I du Pont de Demours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 414 (1998).

[14] *See, e.g., Blanks v. State*, 406 Md. 526, 539-40 (2008).

[15] *Zook v. Pesce*, 438 Md. 232, 241 (2014) (citing *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998). *Swidler* decided that an interview of Deputy White House Counsel Vincent W. Foster, Jr. with his lawyer shortly before Mr. Foster's death was privileged).

confidential communications where the client has died and the information is relevant to a criminal proceeding:

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanished altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

Swidler, 524 U.S. at 407.

3.1 The Testamentary Exception to the Attorney-Client Privilege. Maryland recognizes the "testamentary exception" to the attorney-client privilege: "It may be laid down as a general rule of law, gathered from all the authorities, that, unless provided otherwise by statute, communication by a client to the attorney who drafted his will, in respect to that document, and all transactions occurring between them leading up to its execution, are not, after the client's death, within the protection of the rule as to privileged communications, in a suit between the testator's devisees and heirs at law, or other parties who all claim under him." *Zook*, 438 Md. at 243 (quoting *Benziger v. Hemler*, 134 Md. 581 (1919)). A well-recognized exception to the general rule is the "testamentary exception" which permits disclosures from the drafting attorney in disputes among the client's heirs.[16]

3.2 The Rationale for the Exception. The attorney-client privilege, of course, belongs to the client, not the attorney. As such, the client may waive the privilege. The rationale for this exception is that "in the context of a contested estate, such disclosure 'helps the court carry out the decedent's estate plan'" *Zook*, 238 Md. at 242 (quoting Edward J. Imwinkelried, *The New Wigmore, A Treatise On Evidence: Evidentiary Privileges* § 6.13.2(b) (Richard D. Friedman ed., 2nd Ed. 2010)). As the purpose of this exception is to help "carry out the decedent's estate plan," the Court of Appeals has conditioned its applicability on whether the communications would clarify the testator's "donative intent."[17] In estate planning context, the client's waiver is implied:

---

[16] *Id. See also Zook v. Pesce*, 91 A.3d 1114 (Md. 2014).

[17] *Id.* at 243 ("[I]n a dispute between putative heirs or devisees under a will or trust, the attorney-client privilege does not bar admission of testimony and evidence regarding communication between the decedent and any attorneys involved in the creation of the instrument, provided that the evidence or testimony tends to help clarify the donative intent of the decedent.")

> We think it [the waiver] as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its objects, and in direct conflict with the reason upon which it is founded.

Glover v. Patten, 165 U.S. 394, 406-8 (1897) (quoting, in part, from *Blackburn v. Crawfords*, 70 U.S. 175 (1865)).

3.3 The Testamentary Exception Extends to "Will Substitutes." Although the name of the exception implies that it is available only in disputes regarding wills or codicils, in *Zook* the Court of Appeals concluded that the exception applied to a "living trust" that was, in effect, a will substitute.[18]

3.4 Privilege Waiver in the Absence of the Exception. If the testamentary exception (or some other recognized exception) does not apply, then the privilege will generally remain in effect absent a waiver.

3.5 Waiver by Personal Representative. At common law, a personal representative[19] of an estate may waive the privilege on behalf of a deceased under certain circumstances. Very broadly, this may occur in circumstances where the waiver would operate in the interest of the client, his estate, or persons claiming under him, and would not damage the client's reputation.[20]

3.6 Case Law on the Exercise of a Waiver by the Personal Representative. Modern cases focus on whether invoking the privilege would serve to obscure evidence of the decedent's intent, or perhaps whether the parties seeking to invoke the privilege are doing so as a purely

---

[18] *Zook*, 438 Md. at 251.

[19] Some authority suggests that in addition to the Personal Representative, the heirs-at-law may waive the privilege. "Waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent," 67 A.L.R. 2d 1268, §§ 3, 4 (1959).

[20] *See* n. 32, *supra*.

tactical measure to avoid disclosure.[21] However, there is no clear or bright-line rule that permits a personal representative to waive the privilege under *all* circumstances.[22]

3.7 Extent of a Waiver by the Decedent. Disclosure of otherwise-privileged communications by the client to third parties can result in a complete, "subject matter waiver" of the privilege.[23] However, the better-reasoned authorities recognize that partial or limited disclosure of such communications in a non-adversarial context does not result in a blanket subject matter waiver.[24]

HEARSAY RULE

4.0 The State of Mind/Intent Exception to the Hearsay Rule. Most US jurisdictions have adopted Federal Rule of Evidence 803(3), or a version of it, which sets out an exception to the hearsay rule to permit declarations of intention. Maryland adopted the federal rule as Md. Rule 803(b)(3). It provides that a statement by an out-of-court declarant is not inadmissible under Rule 5-802 (the hearsay rule) if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or

---

[21] *See, e.g. Matter of Estate of Thomas*, 179 A.D. 3d 98 (N.Y. App. Div. 4th 2019) (permitting the respondent/ executor to waive attorney-client privilege, thereby allowing decedent's attorney to testify that the decedent had transferred shares of stock to the respondent prior to death and consequently such stock was not an estate asset); *Matter of Bassin*, 28 A.D.3d 549, 550 (N.Y. App. Div. 2nd 2006) (executor/son permitted to waive privilege and allow attorney to testify as to donative intention behind deed); *Mayorga v. Tate*, 203 A.D.2d 11 (N.Y. App. Div. 2nd 2002).

[22] *See In re Miller*, 584 S.E.2d 772 (N.C. 2003) (wife/executrix not permitted to waive attorney-client privilege in the context of a pre-trial murder investigation in which the husband/decedent was apparently a suspect).

[23] *Harrison v. State*, 276 Md. 122, 136-37 (1975).

[24] *In re Von Bulow*, 828 F.2d 94, 103 (2nd Cir. 1987) (disclosure of certain attorney-client communications in a book published and promoted by the litigant waived the privilege only as to those communications, but did not extend to unpublished communications that took place between litigant and his attorneys); *see also Baehr v. Creig Northrop Team*, 2015 WL 13598388 at *1 (D. Md. 2015) (relying on *In re von Bulow*).

believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Md. Rule 5-803(b)(3).[25]

This is a true exception: it permits a third party to testify as to what the declarant said about his or her plan or intention, including in the case of testamentary documents, a memory or belief about what the declarant intended by a then-existing document.

4.1 The History of the Exception. The "state of mind" exception to the general hearsay rule is informed by two early Supreme Court cases, neither relating to wills or trusts. Those cases, however, explain why the Rule has its tortured syntax ("but not including…unless it relates to…"). The first case, *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), established a broad exception to permit hearsay as to statements made by a decedent as to something that person planned to do in the future to prove, or tend to prove, that the person did exactly what he or she said that he or she would do. *Hillmon* was an insurance fraud case where a woman claimed her husband died in a certain remote location thereby entitling her to the death benefits from several policies. The insurance company acknowledged that someone had, in fact, died in that remote location but that it was not Mr. Hillmon but a Mr. Walter. As evidence, the insurance company wanted to introduce letters from Mr. Walter saying he planned to go to that remote location. The evidence was held admissible to demonstrate that Mr. Walter probably went to the remote location – a very broad exception to the hearsay rule.[26] The second case, *Shepard v. U.S.*, 290 U.S. 96 (1933), involved a murder trial where the defendant, Dr. Shepard, was charged with poisoning his wife. The evidence sought to be used was the testimony of the deceased wife who said that she had some liquor from a bottle immediately before she became ill that tasted odd and, further, that "Dr. Shepard has poisoned me." These statements were inadmissible: "Declarations, of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if this distinction were ignored."[27]

The *Hillmon* situation involved a forward-looking statement of intent: Mr. Walter said he was going somewhere, so he probably went there after making the statement. Evidence Rule 803(3)

---

[25] The federal Rule 803(3) was rewritten in 2011 from the original version of 1975 for stylistic, not substantive, reasons. See Comment to 803. Maryland retains the 1975 version. The importance of the origin of the Rule is that both Maryland and federal cases provide interpretation guidance..

[26] In some instances, the proponent wants to introduce forward-looking hearsay to prove someone else did something which raises thorny due process issues. See Lynn McLean, *"I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker – and the Role of the Due Process Clause*, 32 Cardozo L. Rev. 373 (2010).

[27] *Id.* at 106. Nor did the statements qualify as a dying declaration under the facts of the case.

carves out these forward-looking statements of intent as a general hearsay rule exception, not just an exception because the statement relates to a testamentary instrument. This exception, of course, applies equally to showing testator or settlor intent.[28]

Evidence Rule 803(3) appears to permit, however, backward-looking declarations of intent if these declarations relate to the terms of the declarant's Will. This is at variance with the Shepard-type prohibition which may well end the hearsay exception as to a testator's statements. Backward-looking statements related to the declarant's Will were carved out based on expediency, not logic."[29]

4.2 The Temporal Scope of the Maryland Exception. The "state of mind" exception involves three "temporal" periods: forward-looking, present-looking, and backward-looking.[30]

4.3 Forward-looking Application of the Exception. Forward-looking state of mind is a statement of intent to prove the declarant's future action as demonstrated by the *Hillmon* case. There is no "corroboration" requirement—i.e., there is no requirement to prove that the future action have been completed by the declarant.[31]

4.4 Present-looking Application of the Exception. This is a statement offered to prove the declarant's then-existing condition. This may be the broadest category, in that it permits a wide range of statements reflecting the declarant's contemporaneous thoughts and feelings. Such statements may not be truly "hearsay" at all, in that they do not relate to the "testimonial" capacities of the declarant. A statement of the declarant's present state of mind may be the

---

[28] *In re Sayewich's Estate*, 413 A.2d 581 (N.H. 1980); *Engle v. Siegel,* 377 A.2d 892 (N.J. 1977). Both cases permitting the scrivener to testify as to what the testator wished to accomplish in his Will as long as this testimony did not contradict the terms of the Wills.

[29] The Advisory Committee Notes for the 1972 proposed Rule 803(3) gives the game away: "The carving out, from the exclusion mentioned in the preceding paragraph, of declarations related to the execution, revocation, identification, or terms of the declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic."

[30] *Figgins v. Cochrane*, 174 Md. App. 1, 26 (2007), *aff'd* 403 Md. 392 (2008) ("The state of mind exception (or bundle of closely related exceptions) has not been fully explored by the case law. As the scant handful of cases dealing with it reveal, the exception, when fully parsed out, may actually be an omnibus provision, arguably covering three different temporal focuses. Those three focuses embrace the three tenses: past, present, and future.")

[31] *Gray v. State*, 137 Md. App. 460, 499–500 (2001) ("Sufficiency of evidence to prove a fact and admissibility of evidence to prove that fact are not the same thing. As Professor John McCormick has noted: 'The matter of admissibility of declarations of state of mind to prove subsequent conduct is a far different question than of the sufficiency of these statements, standing alone, to support a finding that the conduct occurred...'"), *rev'd on other grounds*, 368 Md. 529.

ultimate operative legal fact (e.g. was a transfer intended by the declarant to be gratuitous?), meaning that the statement will be the primary, or only, source of evidence.[32]

4.5 Backward-looking Application of the Exception. These are statements of memory or belief to prove the fact remembered or believed. They are not included in the exception, unless they relate to the "execution, revocation, identification, or terms of declarant's will." Because this exception is based on "practical grounds" rather than "logic," it should follow that the exception should be expanded to apply to all "will substitutes" (e.g. revocable trusts, account titling, beneficiary designations).[33]

Two Maryland cases illustrate the admissibility of backward-looking statements. In one case, the decedent had executed a Will with a charitable bequest to be used for a particular purpose and the remainder of her estate going to a different charity. Before her death, her lawyer discovered that the charity was not equipped to utilize the funds for that purpose. In a conversation with the lawyer, the testatrix stated that if the charity could not use the funds as she wrote in her Will, then she wanted the funds to go to her residuary legatee. The lawyer's testimony was admissible, and the Will was interpreted to have the specific charitable bequest lapse.[34]

The other Maryland case followed suit. In that case, the decedent left a bequest in his will to a charity and then he later made a gift to the same institution. The issue was whether the subsequent gift adeemed the bequest in the will. The testimony sought to be excluded was that of a friend who said that the decedent declared years after making the subsequent charitable gift, that he did not need to change his will because the charitable institution would understand that the gift that he had made was adeeming the bequest in the will.[35]

---

[32] *Figgins v. Cochrane*, 174 Md. App.1, 32 (“’ The *substantive law often makes legal rights and liabilities hinge upon the existence of a particular state of mind* or feeling. Thus, such matters as the intent to steal or kill, or the intent to have a certain paper take effect as a deed or will, or the maintenance or transfer of the affections of a spouse may come into issue in litigation. When this is so, *the mental or emotional state of the person becomes an ultimate object of search. It is* not *introduced* as evidence from which the person's earlier or later conduct may be inferred but *as an operative fact upon which a cause of action or defense depends.’”)* (quoting McCormick on Evidence (4th Ed. 1992), § 274, 227–28)(Emphasis in Court of Special Appeals decision.).

[33] “It should follow “because the case law is not definite. *See Ebert v. Ritchey*, 54 Md. App. 388 (1983) (applying state-of-mind exception to statements regarding joint bank accounts); *Figgins*, 174 Md. App. at 28 (classifying *Ebert* as a "backwards-looking" case); *but cf. D.A.R. v. Goodman,* 128 Md. App. 232, 238 (1999) (implying that *Ebert* related to forward-looking statements of intent). See footnote 44 for the basis for the exception of 803(3) being on “practical grounds of necessity” not on “logic.”

[34] *National Society of Daughters of American Revolution v. Goodman*, 128 Md. App. 232 (1999).

[35] *Yivo Institute for Jewish Research v. Zalenski*, 386 Md. 654 (2005).

DEAD MAN'S STATUTE

5.0 The Dead Man's Statute in General. The Dead Man's Statute purportedly seeks to "equalize the position of the parties by imposing silence on the survivors as to transactions with or statements by the decedent or at least by requiring those asserting claims against a decedent's estate to produce testimony from disinterested persons." *Reddy v. Mody*, 39 Md.App. 675, 679, 388 A.2d 555, 558-9 (1978). The Dead Man's Statutes have been widely disapproved by scholars and judges.[36] Indeed, most jurisdictions have abandoned the dead man's statute.[37] Maryland, however, has retained its statute.

5.1 History of Dead Man's Statutes. At early Common Law, an interested party – anyone with a stake in the outcome of the proceedings – was viewed as inherently untrustworthy and therefore was rendered incompetent to testify:

> The theory of disqualification by interest was merely one variety of the general theory which underlay the extensive rules of incompetency at common law. It was reducible in its essence to a syllogism, both premises of which, though they may now seem fallacious enough were accepted in the 1700s as axioms of the truth: total exclusion from the stand is the proper safeguard against false decision, whether the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the events of the cause are specially likely to speak falsely; therefore such persons should be totally excluded.

John H. Wigmore, Evidence § 576 at 810 (Chadbourn Rev. 1979). Dead man's statutes constitute part of these more general witness incompetency rules, one designed "to close the mouth of an interested survivor." Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Creditability: The Next Step in an Historic Trend*, 47 Ala. L. Rev. 145 (1995).

5.2 The Maryland Dead Man's Statute. The Dead Man's Statute provides:

---

[36] John H. Langbein, *Substantial Compliance with the Wills Act,* 88 Harv. L. Rev. 489, 501 (1975) ("[T]he dead man statutes are widely condemned among commentators and practitioners. To Wigmore, 'The exclusion is an intolerable injustice,' since 'cross-examination and other safeguards for truth are a significant guarantee against false decision.' As long ago as 1938 the American Bar Association's Committee on the Improvement of the Law of Evidence voted disapproval of dead man statutes by the margin of forty-six to three, following a national survey of professional and judicial opinion.").

[37] Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man Statutes and a Proposal for Change*, 53 Clev. St. L. Rev. 75 (2005-6). Mr. Wallis lists 32 states that have expressly rejected the dead man's statute. Footnote 9. See Appendix for a more up to date and comprehensive list. The Appendix lists 30 jurisdictions as not recognizing or repealing the statute. The remaining jurisdictions either recognize it fully or with some degree of limitation.

> A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent person, may not testify concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead, unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement.

MD. CODE ANN., CTS. & JUD. PROC. § 9-116.

5.3 The Maryland Narrow Application of the Statute. The Dead Man's Statute may have the purpose of equalizing the playing field but it is narrowly construed because it is an exception to the general rule permitting evidence to be heard: "The statute is an exception to the general rule that all witnesses are competent to testify … and is strictly construed 'in order to disclose as much evidence as possible' without ignoring the purpose of the statute. … In close cases involving the Dead Man's Statute, Maryland precedent consistently has favored the admission of testimony." *Walton v. Davy,* 86 Md. App. 275, 285, 586 A.2d 760, 765 (1991).[38]

5.4 The Statute Applies to a Limited Category of Witnesses. By its own terms, the Dead Man's Statute restricts only the testimony of *parties*, not all witnesses.[39] A "party" is one with an interest in the property sought or a person having a direct pecuniary and proprietary interest in the outcome of the case.[40]

5.5 The Statute Only Applies to Certain Types of Cases. Moreover, the Dead Man's Statute applies only in cases where the outcome will tend to increase or diminish the estate of a decedent by establishing or defeating a cause of action by or against the estate.[41] For example, the Dead Man's Statute will not apply in a dispute over the proper payee of life insurance

---

[38] The general rule is that persons with an interest in the matter at issue are not excluded as a witness. MD. CODE ANN., CTS. & JUD. PROC. § 9-101.

[39] *Reddy v. Mody*, 39 Md. App. 675, 682 (1978) ("Except in very unusual cases, the persons excluded from testifying are not those with an interest of any sort, but rather traditional real parties in interest and their representatives.") .

[40] *Id.* (citing *Trupp v. Wolff*, 24 Md. App. 588 (1975)).

[41] *Reddy v. Mody*, 39 Md. App. 675, 679 ("The testimony meant to be excluded by the Statute is only testimony of a party to a cause which would tend to increase or diminish the estate of the decedent by establishing or defeating a cause of action by or against the estate.") (1978).

proceeds if the judgment would not result in the estate receiving the life insurance proceeds.[42] Therefore, the Dead Man's Statute does not usually apply in a will caveat, but may apply in a case where the validity of a non-probate arrangement (e.g. beneficiary designation) has been challenged, and the outcome could increase or decrease the value of the estate.

5.6 The Definition of "Transaction" When Applying the Statute. Maryland courts have limited the definition of "transaction" to include only testimony that the decedent could contradict with his or her own knowledge, if he or she were living.[43] In some cases, this interpretation means that the scope of a "transaction" for Dead Man's Statute purposes will be broader than the common definition of "transaction." For example, a party could not testify as to her understanding that she was to be reimbursed by the decedent for funds the party advanced to an attorney on behalf of the decedent. This was because the decedent, if alive, could have contradicted the party's testimony. This was the case even though the party was not, in a conventional sense, purchasing or procuring anything from the decedent.[44]

The Dead Man's Statute does not, however, bar admission of all testimony or documentary evidence that relates in any way to a "transaction." A party could introduce letters from a decedent that related to the purported transaction at issue, even if the party could not testify as to the transaction itself or any statement made by the decedent.[45] A party could testify about payments made to third parties, but could not testify that such payments were made pursuant to an agreement with the decedent. [46] In both situations, the decedent could not contradict the evidence at issue based on his or her own knowledge, so the evidence was not barred by the Dead Man's Statute.

---

[42] *See e.g. Sheeler v. Sheeler*, 207 Md. 264, 269 (1955).

[43] *Ridgely v. Beatty*, 222 Md. 76 (1960).

[44] *Boyd v. Bowen*, 145 Md. App. 635 (2002).

[45] *Stacy v. Burke*, 259 Md. 390 (1970).

[46] *Ridgely v. Beatty*, 222 Md. 76 (1960).