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Dead Man Talking: A Historical Analysis of West Virginia's Dead Man's Statute and a Recommendation for Reform

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# DEAD MAN TALKING: A HISTORICAL ANALYSIS OF WEST VIRGINIA’S DEAD MAN’S STATUTE AND A RECOMMENDATION FOR REFORM

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I. INTRODUCTION

“A legal beginner, as well as a veteran, well knows that, at its best, the Deadman’s Statute is full of snares, traps, and pitfalls, and that we have a rule by a wilderness of uncertain cases as well as rule by an uncertain statute.”¹

“There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound. Add to this, the labyrinthine distinctions created in the application of the complicated statutes defining [the Dead Man’s Statute], and the result is a mass of vain quiddities which have not the slightest relation to the testimonial trustworthiness of the witness[.]” – John Henry Wigmore²

State laws which address the competency of witnesses who wish to testify about transactions with a decedent, commonly known as Dead Man’s Statutes, have frustrated lawyers and judges alike. Once a common form of limiting witness competency, Dead Man’s Statutes have recently been eroded by the enactment of Uniform Rules of Evidence, repealed by state legislatures, and criticized by courts. Only a handful of states still have Dead Man’s Statutes, and of those states each law is different.³ These differences may influence the way in which the Statutes are applied.⁴

This Note will concentrate on the theory behind Dead Man’s Statutes, the history of the Statute in West Virginia, and criticism of the Statute. This Note will also examine common alternatives to Dead Man’s Statutes that other states have adopted and attempt to determine which direction West Virginia should take to better serve the interests of justice and the common good.

The main problems with the Dead Man’s Statute are that it runs contrary to the philosophy underlying the general rule of witness competency and that it stifles potentially valid claims where an honest claimant has only his own testimony upon which to rely. The Statute operates to level the playing field by “sealing the lips” of an interested survivor who wishes to testify about a transaction with a person whose “lips have been sealed” by death.⁵ The problem arises,

¹ Herbert E. Tucker, Colorado Dead Man’s Statute: Time for Repeal or Reform?, Col. Law., Jan. 29, 2000, at 45.
⁴ This Note examines other states’ Statutes insofar as they provide an alternative to West Virginia’s Statute. For a more thorough examination of the nuances of other Statutes, see generally id.
⁵ See Tucker, supra note 1, at 45. This solution to the problem of interested survivors who might commit perjury in order to profit from a decedent’s estate effectively bars testimony by both parties regarding transactions with decedents. See id. These transactions, which may contain
then, when the claimant is honest, yet has only his own testimony on which to rely. Without his own testimony to prove his claim, the honest claimant is left without a remedy.

The honest claimant’s problem is best resolved, therefore, by removing both the bar of the Dead Man’s Statute and the bar of the hearsay rule for parties representing the decedent’s estate.\(^6\) By abolishing the Statute, the Legislature could allow honest claimants the opportunity to prove their claims. By simultaneously enacting a hearsay exception to allow decedents’ representatives to introduce evidence of transactions with the decedents, the Legislature could still prevent fraudulent raids on estates. These measures, then, would allow the finder of fact to determine which is the honest party by using the same faculties that allow them to choose between interested parties in other cases – oath, cross-examination, witness demeanor, and the like.

Section II of this Note will examine the rationale of Dead Man’s Statutes in general, including their philosophy, origins, and decline. Section III will trace the evolution of West Virginia’s Dead Man’s Statute\(^7\) to determine how it is applied by state courts and summarize the current state of the Statute’s application. Section IV examines some of the critiques of Dead Man’s Statutes offered by practitioners and scholars. In an effort to examine possible solutions for West Virginia, section V examines the amendments other states have made to their Dead Man’s Statutes. The final section will recommend that the West Virginia Legislature repeal the Dead Man’s Statute and adopt a hearsay exception that allows surviving parties to introduce into evidence relevant statements made by decedents in good faith and on personal knowledge.

II. DEAD MAN’S STATUTES IN GENERAL

A. A General Background of Witness Competency

To understand the history of Dead Man’s Statutes, one must first understand the general principles underlying witness competency.\(^8\) According to Wigmore, witness disqualification based on interest is a logical fallacy.\(^9\) The syllogism says, “Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; therefore such persons should be totally ex-

\(^6\) This solution to the problem accomplishes the same goal of leveling the playing field by opening lips of both the survivor and the decedent. See Tucker, supra note 1, at 45.

\(^7\) W. VA. CODE § 57-3-1 (2006).

\(^8\) For a complete history of the rules of witness disqualification, see generally Wigmore, supra note 2, § 575.

\(^9\) Id. § 576.
cluded." This syllogism, however, was attacked as false by noted evidence scholars such as Bentham (1827), Lord Denman (1824 – 1854), and Chief Justice Appleton of Maine (1860).

B. The Theory Behind the Abolition of Disqualification by Interest

In response to this criticism, England abolished disqualification by interest for nonparties in 1843, and for parties in 1851. The United States, which typically follows the English legal example, followed suit and before long disqualification by interest was uniformly abolished by the individual states. The rationale behind removing the bar for interested witnesses as articulated by Wigmore is paramount to this Note’s critique of West Virginia’s Dead Man’s Statute:

[T]he tribunal’s opportunity for a careful weighing of a witness’ measure of credit, and the means afforded for doing so by cross-examination and the like, form the safeguards which induce us to take the risk of admitting interested witnesses; we rely on being able to make the proper allowance for the danger; if, then, the tribunal is apt to ignore those safeguards, the reason for admission is much weaker.

The thrust of Wigmore’s argument is that courts have the ability, through cross-examination, knowledge of an interest, and observation of the witness’s demeanor, to determine whether a witness is truthful. These safeguards are just as present in cases where Dead Man’s Statutes apply as in any case where a party has an interest in the outcome.

When the common law in the United States was amended to permit interested persons to testify, many states enacted Dead Man’s Statutes to guard against the temptation for an interested witness to commit perjury against a decedent’s estate in order to collect a profit. The common train of thought was that “death had sealed the lips of the decedent and the statute would seal the lips of the witnesses who would testify regarding conversations or transactions with the decedent.” The argument is compelling, but other countries apparently

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10 Id.
11 Id. § 576; id. § 576 n.1.
12 Id. § 576. The relevant law is commonly referred to as “Lord Denman’s Act.” Id.
13 Id. § 577.
14 Id. §§ 576-77.
15 Id. § 576.
16 Tucker, supra note 1, at 45.
17 Id.
were not convinced of the necessity of such protection. This lack of precedent in foreign jurisdictions makes the phenomenon of Dead Man’s Statutes in the United States all the more puzzling.

C. Recent Trends in the United States and West Virginia

According to an article written in 2000, thirty-four states had enacted some form of Dead Man’s Statute by the end of the 1960’s. Of those thirty-four, only three have not since repealed or amended their Statute. When states adopted their own versions of the Federal Rules of Evidence, particularly Rule 601, many states simultaneously repealed or abrogated their Dead Man’s Statutes. In some cases, courts relied on language in the advisory committee notes or legislative history to find that Rule 601 expressly or impliedly repealed the Dead Man’s Statute. In other states, especially those which require corroborating testimony to render evidence of a transaction with a decedent admissible, courts found that Rule 601 did not abrogate the Dead Man’s Statute because the Statute was not a competency rule. It is noteworthy that the second sentence of Federal Rule 601 effectively preserves the application of Dead Man’s Statutes in federal diversity cases where the forum state still applies the Statute. This application, driven by congressional amendments to the proposed Rule, “runs counter to the trend away from the philosophy of the Dead Man’s act.”

West Virginia is one of the few states whose Statute survived the “ground-clearing” attempts of Rule 601. While the language of West Virginia

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18 Wigmore, supra note 2, § 578.
19 Id.
20 Tucker, supra note 1, at 45.
21 Id.
22 “Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with state law.” Fed. R. Evid. 601. State rules of evidence may differ from the language of the Federal rules; however, Rule 601 consistently provides for general competency and any differences among state rules generally are beyond the scope of this Note.
24 Id.
25 Id. In these cases the statute did not disqualify witnesses, but rather excluded uncorroborated testimony relating to transactions with decedents. Id.
27 Id. Preservation of the Dead Man’s Statute in certain diversity cases is but one consequence of applying state-law competency rules.
28 Id.
Rule 601 as it was originally proposed would have abrogated the Dead Man's Statute, the Supreme Court deferred to the State Legislature in light of the perceived "substantive importance" of the law. This decision drew sharp criticism from scholars primarily on two fronts: the Statute differs from other bars on testimony traditionally based "on the ground that the witness' perception, memory, or communications [sic] skills are impaired" and that it "presumes that oath, cross-examination, and the witness' demeanor will be insufficient to enable the trier of facts to detect the insincerity of the survivor witness."

III. A HISTORY OF THE DEAD MAN'S STATUTE IN WEST VIRGINIA

A. The Early Years

The Supreme Court of Appeals of West Virginia first interpreted the Dead Man's Statute in 1878 in Owens v. Owens's Administrator. The Statute at that time provided that

[a] party shall not be examined in his own behalf in respect to any transaction or communication, had personally with a deceased person, against parties, who are the executors, administrators, heirs at law, next of kin or assignees of such deceased person, where they have acquired title to the cause of action from or through such deceased person, or have been sued as such executors, administrators, heirs at law, next of kin or assignees. But when such executors, administrators, heirs at law, next of kin or assignees shall be examined on their own behalf in regard to any conversation or transaction with such deceased person, then the said assignor, or party, may be examined in regard to the same conversation or transaction.

The Court interpreted the Statute's language at that time to prevent an employee of a decedent from testifying on her own behalf against the administrator of the decedent's estate regarding an implied employment contract. The purpose of the Statute, according to the Court, was to "prevent an undue advantage on the

29 Presumably, the proposed language mirrored the first sentence of Federal Rule 601. The Dead Man's Statute is recognized by the West Virginia Supreme Court of Appeals in Cross v. State Farm Mut. Life Ins. Co., 387 S.E.2d 556 (W. Va. 1989), as still valid under West Virginia Rule 601 as it was adopted ("Every person is competent to be a witness except as otherwise provided for by statute or these rules." (emphasis added)).
30 Cleckley, supra note 26, § 6-6(D)(1).
31 Id. at 655.
32 14 W.Va. 88 (1878).
33 Id. at 93 (citing CODE OF W. VA. § 23 ch. 130 (1868)).
34 Id. at Syl. Pt. 1.
living over the dead” and deter dishonest parties from preying on the estates of others.35 Consistent with this purpose, the Court found an employment contract to be a transaction under the Statute and accordingly excluded the plaintiff’s testimony.36

The Supreme Court of Appeals further interpreted the Dead Man’s Statute in 1886 by defining “against” not as “on opposite sides of a suit, but as having opposing interests in the suit, whether on the same side as co-plaintiffs or co-defendants or on opposite sides as plaintiffs and defendants.”37 Later, the Court was asked to determine how the Dead Man’s Statute comported with the common law concept of general witness competency.38 In a case challenging a transfer of stock, the Court allowed the testimony of disinterested witnesses to the transfer.39 In its holding, the Court found that the purpose of the Statute was to broaden the scope of witness competency rather than to narrow it; thus, the Court construed the Statute consistently with that purpose and found that it preserved only a narrow incompetency previously found in the common law.40

Until 1908, West Virginia courts routinely applied these principles to exclude testimony of interested parties when offered against decedents’ estates. The Court was then forced to make a distinction regarding the immediacy of a witness’s interest.41 The Court, recognizing that only statements of interested parties (not third parties) may properly be excluded, settled on a policy that a witness’s interest must be “present, certain, [and] vested.”42 The Court declined to decide whether a party is excluded merely by its nature as a party, but indicated in dicta that only an interested party may be prevented from testifying.43 Shortly thereafter, the Court defined the terms “personal transactions or communications” as used in the Statute. In Freeman v. Freeman,44 the Court implied a broad construction of the Statute and concluded that a “transaction or

35 Id. at 95.
36 Id. at 95-96.
38 Crothers’ Adm’rs v. Crothers, 20 S.E. 927 (W. Va. 1895).
39 Id. at 929.
40 Id.
41 Hudkins v. Crim, 61 S.E. 166 (W. Va. 1908).
42 Id. at 169.
43 Id. (emphasis added). The relevant dicta reads:

“He is not a party, and so we do not have to say whether, if a party, that fact alone would exclude him regardless of any interest. Speaking for myself I do not think so, because under the common law excluding a party as a witness, which has been abolished by the Code with certain exceptions specified in section 23, the party must have an interest in the result of the suit to be promoted by his evidence.” Id.
44 76 S.E. 657 (W. Va. 1912) (overruled by Meadows v. Meadows, 468 S.E.2d 309 (W. Va. 1996)).
communication” meant “every method by which one person can derive any impression or information from the conduct, condition, or language of another.”

In 1916, the West Virginia Supreme Court of Appeals affirmatively recognized the Legislature’s extension of the Dead Man’s Statute beyond cases “arising ex contractu, [and] those in which there may be a judgment for or against the estate of the deceased.” This broadening was counterbalanced shortly thereafter when the Court again limited the application of the Statute by allowing agents of interested parties to testify, as long as the agent did not have a personal interest in the outcome of the proceeding.

B. For Every Action...

A pair of decisions handed down by the Court in the 1930’s prompted the Legislature to amend the Dead Man’s Statute. In Strode v. Dyer, a wrongful death case involving a vehicle accident, the Court excluded the testimony of the defendant driver and his wife because it considered their observations of the movements and actions of the decedent driver’s vehicle to be a “personal transaction” within the meaning of the statute. While the Strode decision drew a great deal of criticism, the Court’s later decision in Willhide v. Biggs finally prompted a much-anticipated change.

Prior to Willhide, the Dead Man’s Statute contained an exception which permitted physicians sued for wrongful death to testify regarding transactions (but not conversations) with the decedent. In Willhide, yet another wrongful death action involving an automobile accident, the Court followed Strode and excluded the testimony of the defendants regarding the movements and actions of the decedent driver’s vehicle prior to the accident. The Court reasoned that it was fully aware that the practical results of the rule laid down in the Strode case may subject it to serious questions and uncertainties, but nevertheless feels that it accords with the weight of au-

45 Id. at Syl. Pt. 5.
46 Lawrence’s Adm’t v. Hyde, 88 S.E. 45, 47 (W. Va. 1916).
48 177 S.E. 878 (W. Va. 1934).
49 Id.
50 188 S.E. 876 (W. Va. 1936).
51 W. Va. CODE § 57-3-1 (1931) (amended 1937) The old statute read:
“[W]here an action is brought for causing the death of any person by a wrongful act, neglect or default under article seven, chapter fifty-five of this Code, the physician sued shall have the right to give evidence in any case in which he is sued; but in this event he can only give evidence as to the medicine or treatment given to the deceased, or operation performed, but he cannot give evidence of any conversation had with the deceased.” Id.
52 Willhide, 188 S.E. at 879.
authority and is the necessary result of our present statutes. Any change should be the result of legislative policy and not of judicial innovation.53

In 1937, presumably prompted by this language in Willhide, the Legislature amended the Dead Man’s Statute to allow any person sued for wrongful death (not just physicians) to testify regarding transactions (but not conversations) with the decedent:

[W]here an action is brought for causing the death of any person by any wrongful act, neglect, or default under article seven, chapter fifty-five of this code, the person sued or the servant, agent or employee of any firm or corporation sued, shall have the right to give evidence in any case in which he or it is sued, but he may not give evidence of any conversation with the deceased.54

Prior to this amendment, the Statute had not been amended in forty years.55

C. Further Developments: Procedural Refinements and Clarifications

After the West Virginia Legislature amended the Code in 1937, the Court maintained the application of the Dead Man’s Statute to exclude testimony by parties who “have an interest to be affected by the result of the suit or by the force of the adjudication.”56 In Coleman v. Wallace,57 the Court barred the testimony of a decedent’s niece who had filed a claim with the administrator of the decedent’s estate because the niece was an interested party under the test, which is “not whether she may be interested in the question in issue, or may entertain wishes on the subject, or may even have occasion to test the same question in a future suit, but whether the proceeding can be used for evidence in some pending or future suit.”58

Several years after Coleman, the Supreme Court of Appeals turned to the question of when the Dead Man’s Statute may be invoked and when it may

53 Id.
54 1937 W. VA. ACTS 318 (emphasis on changes added). The amendment’s application was not examined by the Supreme Court of Appeals until 2002. See infra text accompanying notes 94-97.
55 Stanley E. Dadisman, The West Virginia Dead Man’s Statute, 60 W. VA. L. REV. 239, 241 (1957-58). Because West Virginia’s legislative history is incomplete at best, the Author of this Note was unable to verify Professor Dadisman’s assertion, or to ascertain legislators’ motives underlying the amendment; this Note accordingly defers to Professor Dadisman’s expertise.
57 Id.
58 Id.
be waived. In a case brought by a decedent’s caretaker against the decedent’s estate to recover money for services rendered by the caretaker, the decedent’s daughter and executor testified about several communications between the decedent and the claimant.\textsuperscript{59} The Court held that the testimony offered by the daughter and executor, who were beneficiaries of the estate, removed the statutory bar to the testimony of the caretaker.\textsuperscript{60} Put more broadly, if a beneficiary or executor testifies in defense of a claim to the estate and about a personal transaction or communication, the statutory bar is waived by the defendant and the claimant may then testify about those same transactions and communications.\textsuperscript{61}

A few years later, in \textit{Holland v. Joyce},\textsuperscript{62} the Court reaffirmed its earlier proposition that testimony by a witness against his or her own interest is not excluded by the statute.\textsuperscript{63}

The Court’s continued focus on evidentiary procedure regarding the Dead Man’s Statute surfaced again in \textit{First National Bank of Ronceverte v. Bell}.\textsuperscript{64} \textit{Ronceverte} involved an action by an administrator of an estate against the decedent’s stepson and nephew to recover assets that they were holding as a \textit{causa mortis} gift.\textsuperscript{65} The administrator-plaintiff moved for summary judgment, alleging that the testimony of the stepson and nephew regarding the \textit{causa mortis} gift would be barred by the Dead Man’s Statute.\textsuperscript{66} The trial court, in denying the motion, found that the administrator had waived his Dead Man’s Statute objection because he relied on the defendant’s answers to interrogatories in his pleadings.\textsuperscript{67} The administrator then made no objection to the defendant’s testimony regarding their conversations with the decedent during pretrial, trial, or in a motion for a directed verdict.\textsuperscript{68} When the administrator raised an objection to the testimony on appeal, however, the Court found the objection to have been waived by the failure to raise the issue at trial.\textsuperscript{69} Thus, the proper time to raise an objection to the competency or admissibility of evidence, such as that supposedly excluded by the Dead Man’s Statute, is “when the evidence is offered for introduction at trial, whether offered in the form of answers to interrogatories, depositions, or ‘live’ testimony from a witness.”\textsuperscript{70}

\textsuperscript{59} \textit{In re} Estate of Thacker, 164 S.E.2d 301 (W. Va. 1968).
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at Syl. Pt. 1.
\textsuperscript{62} 185 S.E.2d 505 (W. Va. 1971).
\textsuperscript{63} \textit{Id.} at Syl. Pt. 2.
\textsuperscript{64} 215 S.E.2d 642 (W. Va. 1975).
\textsuperscript{65} \textit{Id.} A \textit{causa mortis} gift is “[a] gift made in contemplation of the donor’s imminent death.” \textsc{Black’s Law Dictionary} 710 (8th ed. 2004).
\textsuperscript{66} \textit{Ronceverte}, 215 S.E.2d at 644.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.} at 644-5.
\textsuperscript{69} \textit{See id.} at Syl. Pt. 3.
\textsuperscript{70} \textit{Id.} at Syl. Pt. 4.
D. **Judicial Criticism: Streamlining and Limitation**

The Supreme Court of Appeals reiterated its test for the exclusion of testimony again in 1988 when it allowed a plaintiff’s mother to testify that a decedent was the plaintiff’s father.\(^{71}\) Keeping in mind that the statute applies only “to a civil action, suit, or proceeding,”\(^ {72}\) and that the statute was enacted to broaden the scope of witness competency, the Court determined that testimony should be excluded only when three criteria are met:

1. A witness’ testimony is excluded if it relates to a personal transaction or communication with the deceased, insane or lunatic person, and
2. The witness is either a party to the suit or a person interested in its event or is a person through or under whom such party or interested person derives any interest or title by assignment, and
3. The testimony offered must be against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such [deceased] person or the assignee of committee of such insane person or lunatic.\(^ {73}\)

Because the plaintiff’s mother was not an interested party under the test, the Court allowed her to testify against the decedent.\(^ {74}\)

The Court further limited the application of the Dead Man’s Statute a year later in *Wimer v. Hinkle*\(^ {75}\) when it permitted a passenger in a vehicle struck by a decedent driver to testify about the decedent driver’s actions.\(^ {76}\) Both parties agreed that the passenger’s testimony was about a transaction with the decedent and that the testimony was against the interest of the deceased’s representative; thus, the sole issue was whether the passenger was a party of interest.\(^ {77}\) The decedent’s estate claimed that the passenger’s potential interest in a future lawsuit barred her testimony in the current suit; however, the Court found such an interest to be too remote to warrant application of the Statute, especially where the defendant driver himself was permitted to testify.\(^ {78}\) Furthermore, previous cases which had barred testimony of similarly situated persons (usually wives) had been rendered moot by the abolition of the common law concept that

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\(^{72}\) *Id.* at 560.

\(^{73}\) *Id.* at 561.

\(^{74}\) *Id.*

\(^{75}\) 379 S.E.2d 383 (W. Va. 1989).

\(^{76}\) *Id.*

\(^{77}\) *Id.* at 387.

\(^{78}\) *Id.* at 388. The defendant was permitted to testify about his transaction (but not conversation) with the decedent because, as a defendant in a wrongful death case, he is specifically exempted by the Dead Man’s Statute. W. Va. CODE § 57-3-1 (2006).
if one spouse was incompetent to testify, that incompetence was imported to the other spouse.\textsuperscript{79}

The Court continued to clarify the definition of “interested party” when it found that testimony adverse to the interests of insurance beneficiaries fell under the guise of the statute.\textsuperscript{80} The Court found that testimony offered by a witness which is adverse to the interest of insurance beneficiaries is considered “against the executor [or] administrator.”\textsuperscript{81} The Court also permitted insurance agents to testify regarding their conversations with the decedent because an agent is not an interested person “solely on account of his or her interests as an agent.”\textsuperscript{82} The Court’s theory in allowing the agents to testify was that the credibility of the agents as witnesses was for the jury to determine.\textsuperscript{83} Consistent with its policy of narrowing the scope of the Statute, the Court further clarified the definition of “interested party” by allowing a witness to testify about a transaction with a decedent if the testimony is against the witness’s pecuniary interest to the degree that “a reasonable person would not have made the statements unless he or she believed them to be true.”\textsuperscript{84}

E. Recent Developments: Further Limitation and Reaction to the MPLA

The Court continued to refine the intricacies of the Dead Man’s Statute through the end of the twentieth century by handing down two important decisions: one procedural, the other substantive. The procedural effect of the Statute was reinterpreted in Martin v. Smith,\textsuperscript{85} where the Court held that the “mere taking of a deposition of a witness who is incompetent to testify under the Dead Man’s Statute by an adverse party for purposes of discovery” does not waive the incompetence, unless offered as evidence.\textsuperscript{86} The substantive decision, Meadows v. Meadows,\textsuperscript{87} redefined “transaction” and overruled two prior decisions, Kuhn v. Shreeve\textsuperscript{88} and Freeman v. Freeman.\textsuperscript{89} The new definition in Meadows narrowed the concept of a “transaction” to exclude unilateral observations and in-

\textsuperscript{79} Id. at 388.
\textsuperscript{81} Id. at Syl. Pt. 1.
\textsuperscript{82} Id. at Syl. Pt. 2.
\textsuperscript{83} Id. at 562.
\textsuperscript{85} 438 S.E.2d 318 (W. Va. 1993).
\textsuperscript{86} Id. at Syl. Pt. 2.
\textsuperscript{87} 468 S.E.2d 309 (W. Va. 1996).
\textsuperscript{88} 89 S.E.2d 685 (W. Va. 1955) (excluding testimony regarding the payment of a promissory note given by a decedent as a transaction).
\textsuperscript{89} 76 S.E. 657 (W. Va. 1912) (excluding testimony regarding the mental capacity of a testator as a transaction).
clude only "a mutuality or concert of action," and allowed a witness to use communications to explain bases for "opinion[s] regarding the mental competency of the deceased" as long as the communications are not offered for truth. Moreover, the Court determined that "the language of the Dead Man's Statute should be strictly construed and limited to its narrowest application."

In 2002, the Court recognized the problems presented when the Dead Man's Statute and the Medical Professional Liability Act ("MPLA") were construed together to prohibit testimony by a doctor regarding a conversation with a now-deceased patient, and in Hicks v. Ghaphery ruled that the Dead Man's Statute was inapplicable in wrongful death, medical malpractice actions. This decision was fueled by a prevailing feeling that doctor-patient conversations are a necessary part of the medical treatment process and that their exclusion would lead to "open season insofar as physicians are concerned when their patient dies." Indeed, in carving out the exception to the Dead Man's Statute, the Court reasoned that

[I]t would be patently unfair to exclude evidence of a patient's complaints regarding their symptoms and ailments and their decisions as to what type of treatment they wished to undergo. In some cases, a patient's subjective description of their ailments may be the sole basis for a physician's diagnosis and treatment.

This exception marks the latest in a line of cases which have eroded the effects of the Dead Man's Statute over the past few decades and left West Virginia's common law in a state of flux and confusion.

F. Summary – Where West Virginia is Now

The Dead Man's Statute in West Virginia is limited to civil cases, but extends to transactions with, in addition to decedents, insane persons and luna-

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90 Meadows, 468 S.E.2d at 315.
91 Id. at Syl. Pt. 2.
92 Id. at 314.
94 571 S.E.2d 317 (W. Va. 2002).
95 Id. at Syl. Pt. 8. Under the Dead Man's Statute, doctors sued for wrongful death are permitted to testify regarding transactions, but not conversations, with now-deceased patients. W. Va. Code § 57-3-1.
96 Hicks, 571 S.E.2d at 327.
97 Id. at 329. In its reasoning, the Court relied not on the language of the Dead Man's Statute, but rather on the comprehensive nature of the MPLA, which was enacted after the Dead Man's Statute was last amended and has its "own set of rules of evidence and of practice and procedure [that] govern actions falling within its parameters." Id.
tics who are deemed incapable of testifying. It renders incompetent interested persons who wish to testify about a personal transaction against the decedent's "heir at law, administrator, next of kin, assignee, legatee, advisee, survivor of such person, assignee or committee of such insane or lunatic person." The Statute explicitly provides an exception for defendants in wrongful death actions to testify regarding transactions, but not conversations, with the decedent, and has been held inapplicable in medical malpractice actions under the MPLA. Moreover, the Statute's bar is waivable if the interested party's testimony is not objected to before or at trial. Most importantly, the general test articulated by the Supreme Court of Appeals regarding testimony under the Dead Man's Statute was articulated in Moore v. Goode:

(1) A witness' testimony is excluded if it relates to a personal transaction or communication with the deceased, insane or lunatic person, and (2) The witness is either a party to the suit or a person interested in its event or is a person through or under whom such party or interested person derives any interest or title by assignment, and (3) The testimony offered must be against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such [deceased] person or the assignee of committee of such insane person or lunatic.

While the common law is constantly in flux, the recent trend in West Virginia is to read the Statute narrowly and limit its application.

98 CLECKLEY, supra note 26, at 6-6(D)(1).
99 Id.
100 W. VA. CODE § 57-3-1.
"[W]here an action is brought for causing the death of any person by any wrongful act, neglect, or default under article seven, chapter fifty-five of this Code, the person sued or the servant, agent or employee of any firm or corporation sued, shall have the right to give evidence in any case in which he or it is sued, but he may not give evidence of any conversation with the deceased." Id.
101 Hicks, 571 S.E.2d 317. For discussion, see supra text accompanying note 94.
103 375 S.E.2d 549 (W. Va. 1988). For discussion, see supra text accompanying notes 71-74.
104 For further discussion, the seminal source on evidence in West Virginia is Professor Franklin CLECKLEY'S HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS. See generally CLECKLEY, supra note 26.
IV. THE PROBLEM WITH THE DEAD MAN’S STATUTE

A. A History of Criticism

The bulk of criticism heaped on Dead Man’s Statutes by the most noteworthy of scholars seems insurmountable, and begins with West Virginia’s own Franklin Cleckley.

Dead Man’s statutes manifest the cynical view that a party will be untruthful when the party cannot be directly contradicted and the unrealistic assumption that jurors, knowing the situation, will believe anything they hear in these circumstances. . . . Dead Man’s statutes, surviving relics, likely have led to more miscarriages of justice than they have prevented.105 Cleckley recognizes that this criticism is not confined to West Virginia. “Universally condemned by the giants of evidence law, . . . the typical statute, like the one in West Virginia, condemns the honest survivor to a frequently insuperable task of trying to prove a valid claim without his or her own testimony.”106

Cleckley’s criticism of West Virginia’s Dead Man’s Statute is neither new nor unfounded. As early as 1933, scholars in West Virginia found the Statute problematic.107 This early criticism was based on the idea that the Statute “bars honest claims of the living more often than it protects the estates of the dead”108 and prompted a proposal that the Legislature abolish the Dead Man’s Statute and enact a hearsay exception.109 Again, the general rationale for recommending such a change was that “[a]ny skepticism concerning the evidence should go to its weight and should not be a ground for its exclusion.”110 Thus, changing the law would not advantage any party in particular, rather, “it would permit the jury to know that which it must now only surmise.”111

A few short years later, in response to a seemingly unjust result in Strode v. Dyer, where the Court prohibited the defendant in a wrongful death action from testifying about the movements of the decedent driver’s vehicle (in

105 Id.
106 Id.
108 Id. at 175-76.
109 Id. at 176. (“Consequently the adoption of the following uniform statute is urged: ‘A declaration, whether written or oral, of a deceased or insane person shall not be excluded from evidence as hearsay if the court finds that it was made and that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.’” Id. (citing The Law of Evidence § 35 (Yale Univ. Press 1927))).
110 Id. at 176.
111 Id.
other words, from giving his rendition of the facts), critics again clamored for change. The rationale for the change was again the same: permit all persons to testify and allow the jury to determine whether the testimony is credible. This time, however, the critics were hesitant to suggest complete abolition of the Statute. Instead, they settled on a complicated revision which allowed interested parties to testify in rebuttal of testimony offered by the opposing party and specifically prevented interested parties from testifying regarding oral trusts, agreements or contracts where the temptation to commit perjury is greatest.

West Virginia’s Dead Man’s Statute has not been amended since 1937, yet as early as 1958 the Statute’s antiquity alone prompted Stanley Dadisman, a professor at the West Virginia University College of Law, to reexamine the Statute. Professor Dadisman’s article parallels this Note insofar as it examines the history and theory of Dead Man’s Statutes in general and surveys other jurisdictions for a viable alternative for West Virginia. Much has changed since that article was written, though, such as the adoption of the Federal Rules of Evidence and the repeal or abrogation of Dead Man’s Statutes in most jurisdictions. Because of these changes, this Note is better equipped to examine subsequent development of the Dead Man’s Statute in West Virginia and nationally and to recommend the most appropriate alternative. Professor Dadisman’s article, then, serves as an appropriate historical perspective from which to accomplish these goals. Dadisman’s thesis may be summed up as follows:

[w]hen the history of the statute is understood, when its application has been found to be impractical, when commentary and survey findings point out its weaknesses and demerits, and when curative and remedial legislation in other jurisdictions has been tried, tested and found to be satisfactory, the question may be pondered why the statute is so firmly rooted and so stubbornly retained.

The criticisms (many of which have been discussed above) heaped on Dead Man’s Statutes, including Justice Southerland’s majority opinion in Funk v.

112 177 S.E. 878 (W. Va. 1935). For a complete discussion, see supra text accompanying note 48.
114 Id. at 261.
115 Id. at 263-70.
117 Id. at 249.
United States, 118 led the Professor Dadisman to reexamine West Virginia’s Statute and propose a number of solutions, some of which this Note will discuss below.

Criticism of the Statute by West Virginia scholars does not end with Dadisman’s article; however, the remainder of the literature merely reiterates prior arguments and, thus, would add little to this Note’s analysis. Of particular note, however, is the endorsement of a hearsay exception by a student author writing nearly a decade after Dadisman. 119 The other relevant critique is little more than an afterthought to an analysis of recent case developments suggesting that the Supreme Court of Appeals restricted the application of the Dead Man’s Statute in a number of cases to prompt the Legislature to reform the Statute. 120

B. The Greater Weight of the Evidence

Statutes have not escaped the meticulous denigration of such noteworthy scholars as McCormick (“In seeking to avoid injustice to one side, the statutory drafters ignored the equal possibility of creating injustice to the other.”) 121 and Wigmore (“As a matter of policy, this survival of a part of the now discarded interest qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the professions with a profuse mass of barren quibbles over the interpretation of mere words.”) 122, and numerous courts (“To assume that [by abolishing Dead Man’s Statutes] many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness.”). 123 Only Weinstein manages to shine a sliver of positive light amid other criticisms: “[c]ommentators have been virtually unanimous in their condemnation on the grounds that they encourage litigation, prevent the enforcement of many honest claims, and are ineffective to prevent perjury by witnesses whose interest does not fall within the statutory ban. Probate judges, on the other hand, seem to favor such statutes to prevent unscrupulous raids on estates.” 124

118 Id. (citing 290 U.S. 371, 380 (1933) (“Whatever was the danger that an interested witness would not speak the truth - and the danger never was as great as claimed - its effect has been minimized almost to a vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances.”)).


121 MCCORMICK ON EVIDENCE § 65 (5th ed. 1999).

122 WIGMORE, supra note 2, § 578.

123 Corbett v. Kingan, 166 P. 290 (Ariz. 1917) (quoting St. John v. Lofland, 64 N.W. 930 (N.D. 1895)).

124 WEINSTEIN’S FEDERAL EVIDENCE § 601.05 (2005).
McCormick’s evaluation of Dead Man’s Statutes yields some new insight, particularly into the adoption of statutes in the first place. He suggests that legislators, when attempting to solve the problem of witness disqualification by interest, balked at the “seductive argument” that permitting an interested survivor to testify about a transaction with a decedent would result in an injustice. At the time, a small concession purportedly to protect decedents’ estates seemed minimal; however, that concession has since been ingrained in many states’ jurisprudence. McCormick argues that the concession was a mistake even when it was made because the interest of the witness would be obvious enough for a jury to hear the testimony cautiously, especially in light of a “searching cross-examination.” Moreover, an interested party could circumvent the Dead Man’s Statute by employing a third party to commit perjury at trial whereas an honest claimant would be considerably less likely to stoop to such a low.

C. Critiquing Dead Man’s Statutes in Light of Wigmore’s Theory of Witness Competency

The objections to the Dead Man’s Statute are the same objections which led to the abolition of disqualification by interest nearly 150 years ago:

(1) That the supposed danger of interested persons testifying falsely exists to a limited extent only; (2) That, even so, yet, so far as they testify truly, the exclusion is an intolerable injustice; (3) That no exclusion can be so defined as to be rational, consistent, and workable; (4) That in any case the test of cross-examination and the other safeguards for truth are a sufficient guaranty against frequent false decision.

While the fourth criticism may be lacking because the dead man’s testimony is unavailable to contradict the interested party, “since the deceased opponent is a party, he would have been by hypothesis a potential liar equally with the disqualified survivor. . . .”

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125 McCormick, supra note 121.
126 Id.
127 Id.
128 Id.
129 Wigmore, supra note 2, § 578.
130 Id.
D. Specific Complaints

While general criticisms may show that the Dead Man’s Statute is unpopular, they do not inform a practical approach to amend or abolish the Statute. It is here that a compilation of specific criticisms provided by Herbert E. Tucker in a 2000 article becomes helpful.\textsuperscript{131} Some of the specific criticisms may be gleaned from the general criticisms, such as that the Statutes are philosophically unsound in assuming that people are generally dishonest and that the Statutes are unjust because they stifle potentially valid claims.\textsuperscript{132} Other criticisms are more procedural, such as that Statutes present an incomplete bar to potentially interested witnesses, that they fail to accomplish what they purport to accomplish, hinder fact finding, undermine the jury’s role, and create undue delay and confusion at trial.\textsuperscript{133}

There are, however, counterarguments to these critiques. Statutes may be said to be philosophically sound because witnesses with an interest in the litigation may have an incentive to lie and that honest claims may still be proven by third-party testimony.\textsuperscript{134} Any ineffectiveness or incompleteness may be remedied by tweaking the Statute or through the common law and all evidentiary rules impede fact finding to some degree.\textsuperscript{135} The other procedural concerns are also easily dispatched: the fact-finding role of the jury is not undermined if the jury is not sophisticated enough to deal with possibly complex issues raised by Dead Man’s Statutes and litigation will not be delayed because competent attorneys will resolve problematic issues before trial.\textsuperscript{136}

To most evidentiary scholars, these counterarguments lack credibility. In particular, Professor Roy Ray of Southern Methodist University summarized these critiques in his seminal article in the *Ohio State Law Journal*:\textsuperscript{137}

(1) The statutes are based upon a fallacious philosophy, \textit{i.e.}, that the number of dishonest men is greater than the number of honest ones; and that self-interest makes it probable that men will commit perjury. These assumptions run contrary to all human experience.

(2) The statutes create an intolerable injustice by preventing proof of honest claims and defenses. In seeking to avoid the \textit{possibility} of injustice to one side, they work a \textit{certain} injustice

\textsuperscript{131} Tucker, \textit{supra} note 1 at 46.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 46-47.
\textsuperscript{134} \textit{Id.} at 47.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.}
to the other. It is difficult to understand why all the concern is for the possibility of unfounded claims against the estate. Why is there no concern for loss by the survivor who finds himself unable to prove his valid claim against decedent's estate? Surely a litigant should not be deprived of his claim merely because his adversary dies. It cannot be more important to save dead men's estates from false claims than it is to save living men's estates from loss by lack of proof.

(3) The statutes are psychologically unsound. They do not disqualify many persons who are vitally interested in the outcome of the suit but who have no direct pecuniary interest such as spouses of parties, close relatives, or officials of corporate parties. On the other hand, they often disqualify certain totally disinterested persons or persons with only a slight pecuniary interest. The pecuniary interest limitation is unsound.

(4) The statutes fail to accomplish their purported purpose since they suppress only a small part of the opportunities for perjured testimony. They block the testimony of the witness only as to certain subjects, leaving him free to testify falsely as to other matters if he sees fit to do so. Furthermore, a witness who will not stick at perjury will not hesitate to suborn perjury by getting a third person to testify as to those matters as to which his own testimony is barred.

(5) The statutes impede the search for truth. The real hazard in shaping any exclusionary rule is that the jury cannot be expected to make sensible findings when it is deprived of substantial parts of available evidence bearing on the issue in dispute. The great danger thus lies in suppression of truth.

(6) The statutes underestimate the efficacy of cross-examination in exposing falsehood, and the abilities of the judge and jury to separate the false from the true. These safeguards have proved adequate in other situations involving the testimony of parties and interested persons. Why not here?

(7) The statutes burden the parties with uncertainties and appeals. For a hundred years or more, our courts have been struggling with the interpretation of these statutes. The result is a labyrinth of decisions which have often brought confusion rather than clarity. The statutes continue to mystify able judges
and lawyers in endless complexities of interpretation and application.\textsuperscript{138}

These criticisms, which Professor Ray summarized from a number of scholars, judges, and practitioners, represent the spectrum of viable criticism of Dead Man’s Statutes. Thus, Professor Roy’s article has been referenced by countless authors who have followed in his path in the continuous battle for the abolishment of these arcane laws.

V. WHAT OTHER STATES ARE DOING

Most states have abolished their Dead Man’s Statute by express repeal or through abrogation by the Rules of Evidence. Of the remaining states, Dead Man’s Statutes vary in scope and effect. A recent article by Ed Wallis in the CLEVELAND STATE LAW REVIEW surveyed nine of these states, including West Virginia, in a general attempt to initiate considerations for reform.\textsuperscript{139} While an analysis of the effect of Dead Man’s Statutes in other jurisdictions may be generally beneficial, it is not pertinent to this Note’s analysis of West Virginia’s Dead Man’s Statute and recommendation for reform and, thus, is best left to Mr. Wallis’s article.

Evidentiary scholars have consistently considered three viable methods to handle testimony by interested survivors: corroborating evidence, judicial discretion, and a hearsay exception. States are generally divided among these groups in some form or another; however, some jurisdictions do not address the problem at all, and yet others have retained their Dead Man’s Statute.\textsuperscript{140} While some scholars, such as Professor Ray,\textsuperscript{141} argue for the outright repeal of these Statutes, the result of such repeal, without more, may be beneficial\textsuperscript{142} but is generally impractical and accordingly left out of this Note.\textsuperscript{143} To determine the best manner for West Virginia to proceed with its Dead Man’s Statute, this Note will examine the three major alternatives found in the United States in order of least

\textsuperscript{138} Id. at 107-08.

\textsuperscript{139} Wallis, supra note 3.

\textsuperscript{140} See generally id.

\textsuperscript{141} Ray, supra note 137, at 109. See also Brown, supra note 119 at 338.

\textsuperscript{142} Professor Ray’s analysis may, however, be helpful and can be found at Ray, supra note 137, at 109.

\textsuperscript{143} In an article advocating the repeal of Wisconsin’s Dead Man’s Statute (which is still in effect), the Author proffers three alternatives: 1) abolition of the Statute, which would create a void that “could be easily filled with the current version and scope of [the] general rule of competency;” 2) adoption of a hearsay exception; and 3) amendment of the Statute to allow interested parties to testify, but allowing the interest to be shown to attack a witness’s credibility. Shawn K. Stevens, \textit{The Wisconsin Deadman’s Statute: The Last Surviving Vestige of an Abandoned Common Law Rule}, 82 MARQ. L. REV. 281 (1998). The Author advocated the third alternative, but his mention of the other alternatives shows their viability. Id. Nonetheless, this Note will discuss only the three major alternatives to the Dead Man’s Statute and choose the most desirable.
permissive (and, thus, least drastic change) to most permissive (and, accordingly, most drastic change).

A. Judicial Discretion

The model for the judicial discretion approach is Arizona, whose statutory language has permitted the court to read-in the judicial discretion requirement:

In an action by or against personal representatives, administrators, guardians or conservators in which judgment may be given for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party, or required to testify thereto by the court. The provisions of this section shall extend to and include all actions by or against the heirs, devisees, legatees or legal representatives of a decedent arising out of any transaction with the decedent.¹⁴⁴

Unlike other states, such as West Virginia, who have interpreted their Dead Man’s Statutes narrowly to limit their scope, Arizona interprets its language broadly to conclude that “testimony regarding transactions with or statements by the deceased is within the sound discretion of the trial court.”¹⁴⁵ In other words, a witness is required by the court to testify when the court overrules an objection to the witness’s testimony.¹⁴⁶

The judicial discretion standard purportedly does not rest entirely upon the baseless whims of the trial judge; rather, it is informed by the judge’s sense that exclusion of the testimony would result in injustice or the judge’s finding that extrinsic evidence corroborates the proffered testimony.¹⁴⁷ The exact standard for the amount of corroborating evidence sufficient to merit admission is elusive at best. While a number of different standards have been applied,¹⁴⁸ the general consensus is a minimal requirement of “relevant evidence from which a reasonable mind might draw a conclusion.”¹⁴⁹

Ideally, the Arizona approach satisfies both those who favor and those who oppose the Dead Man’s Statute. It excludes applicable transactions as an

¹⁴⁷ Id. (citing Gleeson, 138 P. 544).
¹⁴⁸ Id.
¹⁴⁹ Id. (citing In re Mustonen, 635 P.2d 876)
essential safeguard against the raiding of decedents' estates and satisfies critics of the Statutes who bemoan the plight of honest claimants whose only evidence is the very transactions the Statutes exclude. A close look at the standard by which this discretion is reviewed, however, reveals that this option may be actually little more than a corroboration approach where the judge, rather than the jury, determines whether a survivor's testimony has been corroborated. Partly because this option is essentially a glorified corroboration approach and partly because of other foreseeable difficulties in applying such a standard, this Note does not endorse such an approach for West Virginia.  

B. Corroborating Evidence

The second alternative to the Dead Man's Statute is to permit interested survivors to testify only when their testimony can be corroborated by other witnesses. This approach removes discretion from the trial judge and entrusts it to the jury, by way of instruction, to determine whether a witness's testimony has been sufficiently buttressed. One state that employs the corroboration requirement is Texas. In 1988, the Court of Appeals of Texas recognized in Parham v. Wilbon a change in the substantive law brought about by the adoption of Texas Rule of Evidence 601(b). Texas's old Dead Man's Statute provided as follows:

In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent.

The modification under Rule 601(b) extends the scope of admissible evidence where the testimony is corroborated:

In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless called

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150 Other problems with the judicial discretion approach and reasons for rejecting it will be discussed infra Part VI.A.

151 746 S.W.2d 347 (Tex. App. 1988).

152 Id. at n.1 (citing TEX. REV. CIV. STAT. ANN. Art. 2302 (Vernon 1879) (recodified at Art. 3716 (Vernon 1925)) (repealed 1986)).
at the trial to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action of a person interested in the event thereof.\textsuperscript{153}

The extent of corroboration necessary to render such testimony admissible must only "tend to confirm and strengthen the testimony of the witness and show the probability of its truth."	extsuperscript{154} According to the Texas court, the new law "prohibits only uncorroborated oral statements made by the decedent and otherwise allows evidence about transactions with the deceased party regardless of who called the witness to testify."\textsuperscript{155}

While Texas is but one example of a state that employs this technique, other states that use the technique disagree on what constitutes corroboration.\textsuperscript{156} In some jurisdictions, the corroborative testimony does not need to be sufficient to support a judgment.\textsuperscript{157} One scholar argues for the adoption of a corroboration requirement with a "clear and convincing" standard.\textsuperscript{158} This standard, the argument goes, would provide ample protection to decedents' estates because it would presume the interested survivor's statement to be false without sufficient corroboration.\textsuperscript{159} Furthermore, according to some proponents, third parties are permitted to testify in all proceedings, thus temptation to induce perjury by third parties would be no greater than that which already exists.\textsuperscript{160} Despite these compelling arguments, most evidentiary scholars reject this alternative in favor of the more permissive hearsay exception.\textsuperscript{161}

\textsuperscript{153} Id. at 349 (citing Tex. R. Evid. 601(b) (2005) (emphasis on changes added)).

\textsuperscript{154} Id. at 350 (citing Bobbitt v. Bass, 713 S.W.2d 217 (Tex. App. El Paso 1986)).

\textsuperscript{155} Id. (citing 1 R. Ray, Texas Law of Evidence Civil and Criminal § 324 (Tex. Prac. Supp. 1986)).

\textsuperscript{156} For a complete analysis of the different standards of corroboration, see generally C.T. Drechsler, Annotation, Corroboration Required Under Statute Prohibiting Judgment Against Representative of Deceased Person on Uncorroborated Testimony of His Adversary, 21 A.L.R.2d. 1013 (2005).

\textsuperscript{157} Rosinski v. Whiteford, 184 F.2d 700, 701 (D.C. Cir. 1950).

\textsuperscript{158} Wallis, supra note 3, at 104.

\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} The reasons for this rejection will be discussed infra Part VI.A.
C. The Hearsay Exception

The hearsay exception, which is employed in Ohio, New Hampshire, and California, among others, allows trial judges to admit decedents' statements into evidence in certain types of cases even where the statement may otherwise be considered hearsay. California's exception is but one example:

(a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear. (b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

The New Hampshire rule is more clear and provides as follows:

In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether written or oral, shall not be excluded as hearsay provided the Trial Judge shall first find as a fact that the statement was made by the decedent, and that it was made in good faith and on the decedent's personal knowledge.

This exception operates in conjunction with Rule 601 of Evidence to admit testimony by both parties regarding transactions with the decedent.

As an Ohio Court of Appeals recognized in Bilikam v. Bilikam, the adoption of Ohio's Rule of Evidence 601 effectively repealed the Dead Man's Statute. Ohio's Rule 601, which "varies significantly from Federal Evidence Rule 601," provides for general competency of witnesses except for a few

162 OH. Evid. R. 804(b)(5).
163 N. H. R. Evid. 804(b)(5).
164 CAL. EVID. CODE §§ 1227, 1261.
165 Id. at § 1261.
166 N. H. R. Evid. 804(b)(5).
167 441 N.E.2d 845 (Ohio App. 10th D. 1982).
168 Id. at 851.
169 Id. at 849.
exceptions expressly provided for within the rule itself. The Staff Note included in the rules is instructive:

One of the purposes of Federal Evidence Rule 601 was to preserve statutes such as the dead man’s statute in state matters in those states where such a statute existed. Ohio has chosen to eliminate the exclusion. Rule 601 supersedes R.C. 2317.03, the dead man’s statute. . . . Concomitantly, Rule 804(b)(5) provides that the statements formerly excluded by the dead man’s statute are exceptions to the hearsay rule.

The language of Ohio Rule of Evidence 804(b)(5) differs from both New Hampshire and California, yet accomplishes a similar purpose:

(5) Statement by a deceased, deaf-mute, or incompetent person.
The statement was made by a decedent, or a deaf-mute who is now unable to testify, or a mentally incompetent person where (a) the estate or personal representative of the decedent’s estate, or the guardian or trustee of the deaf-mute or incompetent person is a party, and (b) the statement was made before the death or the development of the deaf-mute condition or the incompetency and (c) the statement is offered to rebut testimony by an adverse party on a matter which was within the knowledge of the decedent, deaf-mute, or incompetent person.

One of the holdings in Bilikem, however, was that 804(b)(5) applied only to the party “substituted for the decedent,” not the party “opposing the decedent.” Therefore, parties may invoke the hearsay exception only to contradict testimony proffered by interested parties regarding transactions with decedents.

Regardless of how the hearsay exception is worded, the general effect is to level the playing field by allowing both interested survivors and their opponents to offer into evidence transactions with and statements of decedents. McCormick best explains the hearsay exception:

Both [corroboration and discretion] have reasonably apparent drawbacks which are avoided by a third type of statute. The third statutory scheme sweeps away the disqualification entirely.

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170 OH. EVID. R. 601. These exceptions include, among others, children and other persons unable to understand court proceedings, spouses in criminal cases when certain conditions are met, and certain law enforcement personnel. Id.

171 Bilikem, 441 N.E.2d at 849 (citing the Staff Note to OH. EVID. R. 804(b)(5)).

172 OH. EVID. R. 804(b)(5).

173 441 N.E.2d at 851. The other result was to uphold the repeal of the Dead Man’s Statute by Rule 601. Id.
and allows the survivor to testify without restriction, but seeks to minimize the danger of injustice to the decedent’s estate by admitting any relevant writings or oral statements by the decedent, both of which would ordinarily be excluded as hearsay.  

The simplicity of this approach and the soundness of its logic have caused the majority of states and scholars to endorse it as the most effective manner of addressing the issues which originally gave rise to the Dead Man’s Statute.

VI. CONCLUSION

A. Which Method Best Suits West Virginia?

Most analysts reject both the judicial discretion and the corroboration approaches. While some consider the drawbacks of these approaches to be “reasonably apparent,” a short discussion is necessary if this Note is to reject them in favor of the hearsay exception.

The problems with the judicial discretion approach have led one scholar to label it a “common law nightmare.” This label was likely prompted by the uncertainty with which litigants might approach a trial where the Dead Man’s Statute is at issue. Trial courts may hesitate to exercise this discretion without bright-line rules, which in turn causes cases to be appealed, which in turn causes appellate courts to create bright-line rules that limit discretion. Often times, because the “injustice” that prompted the judge to allow testimony must have been proven by persons other than the survivor, “the judge’s discretion could be used only to receive evidence that came in under the ordinary Dead Man’s Statutes.” Moreover, judicial discretion may be abused to the degree that the judge, rather than the jury, impermissibly assumes the role of the finder of fact. In light of these concerns, New Hampshire amended its Statute several times and finally did away with its judicial discretion approach in 1953. While New Hampshire’s rejection of this approach should not itself be dispositive, it does indicate that the solution was found unworkable in at least one jurisdiction. When New Hampshire’s rejection is considered together with the scholarly criticism presented above, however, rejection of this approach is the only logical conclusion.

174 MCCORMICK, supra note 121, § 65.
175 Id.
176 Wallis, supra note 3, at 105.
177 Tucker, supra note 1, at 48. This phenomenon already may have occurred in Arizona as discussed supra, Part V.A.
178 Ray, supra note 137, at 110-11.
179 Id. at 111.
Scholars are also generally consistent in their criticism of the corroboration approach. Most importantly, "[t]he philosophy behind such statutes is similar to that underlying the average Dead Man Rule – the assumption that uncorroborated claims are of such doubtful validity that all must be rejected." 180 Furthermore, if the claimant has third-party testimony available, he is less likely to need his own; the claimant without third-party testimony is still out-of-luck. 181 Such a rule would be problematic, especially where an honest litigant is defending a claim. 182 Perhaps the biggest problem is determining how much evidence is sufficient to corroborate the survivor’s testimony; the absence of a workable and consistent definition would almost certainly result in increased litigation. 183

Endorsement of the hearsay exception is logical, philosophically sound, firm, and longstanding. As early as 1922 a group of judges, attorneys, and intellectuals performed a study, sponsored by the Commonwealth Trust Fund of New York, in an effort to reform evidentiary rules. 184 The Committee’s study, performed in Connecticut (a state which, at that time, had no Dead Man’s Statute and permitted decedents’ statements via a hearsay exception), surveyed judges and members of the Bar and found that the Dead Man’s Statute did not protect against false claims; rather, it hindered the search for truth. 185 As a result, the Committee endorsed the hearsay exception approach as the best solution to the problem of the Dead Man’s Statute:

No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay, provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was made in good faith and on personal knowledge. 186

180 Id.
181 Id.
182 Id.
183 Id. See also Tucker, supra note 1, at 48.
184 WIGMORE, supra note 2, § 578a.
185 Id. WIGMORE includes a complete transcription of the Committee’s report.
186 Id.
The Committee then recommended this change to the American Bar Association’s Committee on the Improvement of the Law of Evidence, which voted heavily in favor of adopting it.

The hearsay exception, which was employed in Connecticut and recommended by the Commonwealth Fund Committee, was recommended for adoption in West Virginia as early as 1933. The West Virginia revision was seen as beneficial mostly because “it would merely permit the jury to know that which it must now only surmise,” and because “[a]ny skepticism concerning the evidence should go to its weight and should not be a ground for its exclusion.” The approach, which has yet to be adopted, was suggested again in West Virginia in 1958, and again preferred in 1967.

Professor Ray also endorsed the hearsay exception because it guards against both raids on decedents’ estates and the injustice that may result from traditional Dead Man’s Statutes. By allowing the decedent’s statements, the lips of the dead are no longer sealed, thus the original reason for the rule is lacking. Also, the hearsay exception rests on similar, if not more, justification than other hearsay exceptions.

Perhaps the most compelling reason for endorsing the hearsay exception is that it, more so than the judicial discretion and corroboration approaches, is consistent with Wigmore’s theory of witness competency:

[T]he tribunal’s opportunity for a careful weighing of a witness’ measure of credit, and the means afforded for doing so by cross-examination and the like, form the safeguards which induce us to take the risk of admitting interested witnesses; we rely on being able to make the proper allowance for the danger; if, then, the tribunal is apt to ignore those safeguards, the reason for admission is much weaker.

The hearsay exception leaves to the jury (not the judge as is the case with judicial discretion) the opportunity to decide for itself (rather than be directed by statute as is the case with corroboration) whether the interested survivor is telling the truth. Juries are intelligent enough to hear the testimony of interested

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187 Id.
188 For further discussion of the hearsay exception, see supra Part V.C.
189 Peters, supra note 107.
190 Id. at 176-77 (emphasis added).
191 Dadisman, supra note 116, at 250.
192 Brown, supra note 119, at 340.
193 Ray, supra note 137, at 113.
194 Id.
195 Id.
196 WIGMORE, supra note 2, § 576.
persons cautiously; thus, as is the case with generally interested parties, juries are able to hear all potentially interested testimony and decide for themselves how credible it is.\[^{197}\] The allowance of decedents’ statements, which would otherwise be excluded as hearsay, then acts as a “cross-examination,” or at least a rebuttal, of interested testimony sufficient to balance the scale such that it no longer favors one party over another.

B. The Bottom Line – A Recommendation for Reform

As has been made evident, the state of the Dead Man’s Statute in West Virginia (and in other jurisdictions which have retained their Statutes) is difficult to grasp, even for advanced scholars. Moreover, the rationale behind the Statutes has proven to be outdated and philosophically ill-founded. In light of the theories of witness competency advanced by some of the most noteworthy evidence scholars, and the recent trend of states who have abolished their Statutes without complaint of perjury-ridden attacks on the estates of the dead, it is time for the West Virginia Legislature to make a change.

Based on this Note’s analysis of the different alternatives available throughout the United States, the most popular, sensible, and readily applicable alternative is the hearsay exception proffered by the Commonwealth Fund Committee in 1922.\[^{198}\] While a number of states have found modifications to this alternative to be both desirable and effective, the majority of states who have adopted this simple solution have found it suitable. Therefore, this Note recommends that the West Virginia Legislature\[^{199}\] abolish the Dead Man’s Statute and adopt the hearsay exception put forth by the Commonwealth Fund

\[^{197}\] Cf. McCORMICK, supra note 121.
\[^{198}\] See supra text accompanying note 186.
\[^{199}\] The outright adoption of a hearsay exception by the West Virginia Legislature may present constitutional issues because it could be construed to conflict with the Supreme Court of Appeals’ rule-making authority. W. Va. Const. art. VIII § 3 (“The court shall have the power to promulgate rules for all cases . . .”). Such has not been the case, however, in Colorado, where the state legislature repealed its Dead Man’s Statute in 2002 and enacted in its place a hybrid statute requiring the trial judge to determine whether a statement has been sufficiently corroborated. COLO. REV. STAT. § 13-90-102 (2006) (“Subject to the law of evidence, in any civil action by or against a person incapable of testifying, each party and person in interest with a party shall be allowed to testify regarding an oral statement made by a person incapable of testifying if: (a) The statement was made under oath at a time when such person was competent to testify; (b) The statement is corroborated by material evidence of an independent and trustworthy nature; or (c) The opposing party introduces evidence of related communications. . . .”). Although this statute is not expressly a hearsay exception, it may be read to impinge on the court’s rule-making authority; however, it has yet to be challenged as such and remains valid, meaning that a similar approach may be acceptable in West Virginia.
Committee and endorsed by such noteworthy scholars as Wigmore, McCormick, and West Virginia’s own Franklin Cleckley.  

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