

COURT OF COMMON PLEAS OF PHILADELPHIA  
ORPHANS' COURT DIVISION

Estate of Catherine Hines, Deceased  
O.C. No. 554 DE of 2002  
Control No. 04135

OPINION

Introduction

The issue raised in the motion in limine filed by Linda Tucker, the co-administrator of the Estate of Catherine Hines, deceased, is whether two claimants, Milton Johnson and Marilyn Howell, should be precluded from testifying under the Dead Man's Rule, 42 Pa.C.S.A. § 5930 concerning claims asserted against the Hines estate by Johnson for services rendered to the decedent prior to her death. In response, Milton Johnson argues that the co-administrator waived this rule when she filed a Petition for a Citation to Show Cause Why Milton Johnson's Claim and Amended Claim should not be stricken. For the reasons set forth below, this court concludes that the dead man's rule was not waived, and Milton Johnson must therefore be precluded from testifying. On the present record, it is not possible to decide whether Marilyn Howell's testimony is likewise barred under the dead man's rule on the issue of Milton Johnson's claim for compensation for services rendered. Since a key issue under the dead man's rule is whether Ms. Howell's interest is adverse to the Hines estate, the Court must hear testimony on this issue and determine whether Ms. Tucker's assertion of collusion between Ms. Howell and Mr. Johnson is true.

Background

Catherine Hines died on October 5, 2002 at the age of 77. She and Milton Johnson had been companions for twenty-five years. For many years, they resided at

2026 South 21<sup>st</sup> Street, Philadelphia together with Catherine's grandchild, Marilyn Howell.<sup>1</sup> It is conceded that Catherine raised Marilyn as her daughter and she was so regarded by Catherine's family.<sup>2</sup> On May 24, 2002, Milton Johnson and Marilyn Howell were named co-guardians of Catherine Hines after a hearing on a petition for adjudication of her incapacity that they had filed.<sup>3</sup> Prior to this order, a personal injury action had been filed against St. Agnes Medical Center and other defendants on behalf of Ms. Hines for injuries she allegedly incurred due to an overdose of coumadin. This legal action was ultimately settled for the sum of \$476,107.76 which was approved by court order dated May 21, 2003.<sup>4</sup>

After Ms. Hines's death, her two granddaughters, Linda Tucker and Marilyn Howell were appointed co-administrators of her estate by the Philadelphia Register of Wills. On January 22, 2003, Milton Johnson filed a Notice of Claim in the Orphans' Court Division stating that the Estate of Catherine Hines owed him \$490,800. Milton Johnson subsequently filed an amended claim on August 14, 2003 stating that he was owed \$885,825.00 by the estate plus an "additional undetermined amount."

On August 21, 2003, Linda Tucker, as co-administrator of the Estate of Catherine Hines, filed a petition for a citation directed against Milton Johnson to show cause why his claim and amended claim should not be stricken. Ms. Tucker noted that in his notice of claim, Milton Johnson had failed to give any basis for his first claim but that that he had sent a letter dated August 8, 2003 that outlined the varying rationales for the \$885,825 claim including contractual, quantum meruit, reimbursement and palimony

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<sup>1</sup> See Motion in Limine and Answer, ¶¶1-2, 6-7.

<sup>2</sup> Motion in Limine and Answer, ¶ 2.

<sup>3</sup> Ex. A, Motion in Limine.

<sup>4</sup> Motion in Limine and Answer, ¶¶ 4 & 9.

claims as well as claims based on injuries suffered by Milton Johnson while caring for Ms. Hines.<sup>5</sup> Ms. Tucker emphasized that except for the alleged reimbursement costs, all of these claims could have been asserted while Catherine Hines was alive. She also asserted that Milton Johnson lacked any legal entitlement to these claims since, inter alia, he was legally married to another person.

Milton Johnson responded to this petition to strike his claim by filing an answer with new matter. In addition to responding to the specific averrals in Ms. Tucker's petition, he argued that the petition was procedurally defective for various reasons. First, it had been filed by only one of the two co-administrators of the estate. He also argued that the petition was defective because the proper procedure for adjudicating the claim would be through an audit and the filing of an account which would permit a court adjudication so that the personal representative could make distribution without liability.<sup>6</sup> This court agreed that the petition was procedurally premature and by order dated December 10, 2003, the petition to strike the claim was dismissed and the personal representatives were ordered to file an account.

Linda Tucker, as co-administrator, filed her account on March 3, 2004. Objections were subsequently filed by Marilyn Howell and Green Acres Health System. A hearing on the claim of Milton Johnson was scheduled for September 28, 2004. In anticipation of that hearing, Ms. Tucker filed a motion in limine, to preclude the testimony of claimants Milton Johnson and Marilyn Howell under the dead man's rule, 42 Pa.C.S.A. § 5930.

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<sup>5</sup> Administrator's Petition for citation to strike the claim of Milton Johnson, ¶¶ 17-18.

<sup>6</sup> The propriety of this procedural approach was emphasized by Milton Johnson when he responded to Ms. Tucker's petition to strike his claim by seeking a formal account by the personal representatives of the Hines estate.

## Legal Analysis

The Pennsylvania Dead Man's Rule is typically invoked to preclude testimony concerning transactions involving deceased parties or individuals. The parameters of this rule are set forth in 42 Pa.C.S.A. § 5930, which provides:

§5930. Surviving Party as witness, in case of death, mental incapacity, etc.

Except as otherwise provided in this subchapter, in any civil action or proceeding, where any party to a thing or contract in action is dead, or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased or lunatic party, shall be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy, unless the action or proceeding is by or against the surviving or remaining partners, joint promisors, or joint promisees, of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors or joint promisees and the other party on the record, or between such surviving or remaining partners, promisors or promisees and the person having an interest adverse to them, in which case any person may testify to such matters; ...or, unless the issue or inquiry be *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy is between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses.

42 Pa.C.S. §5930.

The rationale behind the dead man's rule, the Pennsylvania Supreme Court has observed, "is to prevent the injustice that would result from permitting a surviving party to a transaction to testify favorably to himself and adversely to the interest of the decedent, when the decedent's representatives would be hampered in attempting to refute the testimony or be in no position to refute it, by reason of the decedent's death." Estate of Hall, 517 Pa. 115, 129, 535 A.2d 47, 53 (1987). See also Punxsutawney Mun. Airport Auth. v. Lellock, 2000 Pa. Super. 18, 745 A.2d 666, 670 (2000) ("the law should not permit the surviving party to testify since he could lie and attempt to testify favorably to himself and adversely to the deceased party, knowing the other party is incapable of

contradicting the fallacious testimony’). The party invoking the dead man’s rule has the burden of proving the incompetency of the witness under that rule. Estate of Rider, 487 Pa. 373, 377, 409 A.2d 397, 399 (1979).

To establish the disqualification of a witness, Pennsylvania courts typically require satisfaction of three conditions which must be proved: “(1) the deceased must have had an actual right or interest in the matter at issue, i.e. an interest in the immediate result of the suit; (2) the interest of the witness—not simply the testimony-- must be adverse; and, (3) a right of the deceased must have passed to a party of record who represents the deceased’s interest.” Hendrickson Estate, 388 Pa. 39, 45, 130 A.2d 143, 146-47 (1957). A key question in applying this test is whether the witness has an interest that is adverse to the interests of the decedent’s estate, or as the Pennsylvania Supreme Court more succinctly observed, “will the witness gain or lose as the direct legal operation and effect of the judgment, or will the record be legal evidence for or against him in some other action?” Hendrickson Estate, 388 Pa. at 45 n.6, A.2d at 146 n.6. In Hendrickson Estate, for instance, the court concluded that a daughter who asserted a claim against her father’s estate for a diamond ring that her mother had allegedly given to the claimant had an interest adverse to estate and thus the daughter/claimant was incompetent to testify under the dead man’s rule. The Supreme court thus concluded: “Appellant’s testimony was properly excluded and such exclusion related not only to testimony as to transactions between appellant and her deceased father, but also as to any matter occurring before her father’s death which had any bearing on the ring transaction.” Id., 388 Pa. at 46, 130 A.2d at 147.

In her motion in limine, Linda Tucker, as co-administrator of the Hines Estate, argues that Milton Johnson, likewise, should be precluded from testifying as to his claims based on a contract, promise or relationship with the decedent. In response, Milton Johnson concedes that he is unable to claim the status of a common law spouse but he asserts a “claim for services rendered to Catherine and accepted by her under a theory of express contract to care for her and a quantum meruit theory.”<sup>7</sup> He does not deny the general applicability of the dead man’s rule as to his testimony on this issue. Instead, he argues that this rule was waived when Linda Tucker filed a Petition directed against him for a Citation to Show Cause Why the Claim and Amended Claim of Milton Johnson should not be stricken.<sup>8</sup> Because the issues raised by this motion differ as to Milton Johnson and Marilyn Howell, they will be analyzed separately in terms of each claimant.

A.The Dead Man’s Rule Was Not Waived as to Milton Johnson Who Shall Be Precluded From Testifying As to His Claims Against the Hines Estate

Pennsylvania Courts have concluded, as Milton Johnson suggests, that the dead man rule may be waived. Typically, however, such waiver occurs where the estate representative has sought discovery or testimony of the surviving adverse party. Perlis v. Kuhns, 202 Pa. Super. 80, 195 A.2d 156 (1963). As the Superior Court observed, the “rule exists for the protection of the dead man’s estate, but his representative may elect to waive the disqualification of the adverse party and take his testimony on cross-examination or by deposition or interrogatories, or by introducing as evidence, as it did in this case, Bloom’s statement in the pre-trial conference that he had not paid Cohen the \$35,000 debt.” Flagship First National Bank of Miami Beach v. Bloom, 288 Pa. Super.

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<sup>7</sup> Johnson’s 7/30/04 Memorandum at 6.

<sup>8</sup> See Johnson’s 7/30/04 Memorandum of Law at 7.

347, 353, 431 A.2d 1082, 1085 (1981). The basis for this waiver where the estate requests depositions, interrogatories or testimony from the adverse party is succinctly explained:

The very use of depositions or interrogatories requires the adverse party to give testimony in a way sanctioned by the Pennsylvania Rules of Civil Procedure. Pa.R.C.P. 4001-4025. These rules include written interrogatories as (sic.) depositions. Pa.R.C.P. 4004. This is the equivalent of placing him on the witness stand. As stated in *Cox v. Gettys*, supra, and quoted by the court below: “Any other construction of the statute would enable one party to search the conscience of his adversary, drag to light his private papers and other evidence, and then repudiate the result, if the experiment proved unsatisfactory.” Perlis v. Kuhns, 202 Pa. Super. at 84, 195 A.2d at 158-59.

A central inquiry under this analysis of waiver, therefore, is whether the estate has engaged in the equivalent of placing the adverse party on the witness stand. Johnson argues that “[w]hile Linda Tucker as co-administrator did not formally notice the deposition of Milton Johnson or propound interrogatories under the Rules of Civil Procedure, she performed an equivalent act by causing the Court to issue a citation directed to Milton Johnson to show cause why his claim should not be stricken, in effect requiring him to plead facts to support his claim, supported by a verification under penalties of perjury and a sworn statement.”<sup>9</sup> An analysis of the petition for a citation that Ms. Tucker filed, however, reveals that it does not seek testimony from Milton Johnson but instead seeks a determination that his claim is without legal basis. It references the specific claims set forth in the amended claim and asserts that they might all have been asserted against Catherine Hines during her lifetime. It argues that no contract existed for the payment of services to Mr. Johnson and that he had no entitlement to payments as a common law spouse or on a palimony theory. Mr. Johnson properly responded to this petition that it was procedurally defective since the “proper

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<sup>9</sup> Johnson’s 7/30/04 Memorandum of Law at 8.

time and method of adjudicating the merits of a claim is at the audit of the account.”<sup>10</sup> Although Milton Johnson attached a sworn statement by Milton Johnson to his answer to the petition for a citation, that sworn statement had not been requested by Ms. Tucker’s petition.<sup>11</sup> The statement was, in essence, voluntary surplusage. This court in dismissing Ms. Tucker’s petition ordered the administrators to file an account, with the understanding that the merits of Mr. Johnson’s claim would be best analyzed within that context.

Both Ms. Tucker and Mr. Johnson invoke Lorah Estate, 2 Fid. Rep. 2d 34 (O.C. Bucks Cty. 1981), but ultimately that case, which distinguished between a request for a more specific itemization of a claim against an estate and formal discovery, is more helpful to the administrator’s position. In Lorah Estate, the Orphans’ court refused to extend the means of waiving the deadman’s rule to a request for a more specific itemization of a claim. While conceding that the rule would be waived if the estate had requested depositions or directed interrogatories, it concluded that the rule was not waived when the estate requested a claimant to provide an itemized statement in support of her claim. There is another case that supports this distinction that was cited by neither party. In the Estate of Davis, 465 Pa. 94, 348 A.2d 134 (1975), the Pennsylvania Supreme Court concluded that where a claimant asserted a claim against an estate based on an alleged oral contract between herself and the decedent, the estate did not waive the dead man’s rule when it requested a sworn specific statement of her claim, ostensibly to

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<sup>10</sup> Johnson’s 11/3/03 Answer and New Matter at ¶¶ 30-31.

<sup>11</sup> In her 8/4/2004 letter brief, Ms. Tucker argues that no verification was required for the reply to her petition because such a reply to a petition for a citation was not a pleading under the Pennsylvania Rules of Civil Procedure. Pennsylvania Rule of Civil Procedure 206.3, however, requires a verification for both a petition and an answer thereto. This point, however, is tangential and not relevant as to waiver of the dead man’s rule.

set forth, inter alia, the date of the alleged contract. Clearly, in the instant case, Ms. Tucker's petition for a citation was not a request for discovery or testimony by Milton Johnson. Instead, it asserts the failure of Milton Johnson to set forth a viable legal claim. As either a premature request for an adjudication or as a request for a more specific statement of the legal basis of Johnson's claim, the estate's petition would not constitute waiver of the dead man's rule. Consequently, Milton Johnson is precluded under the dead man's rule from testifying as to the basis of his claim against the estate for payment for services rendered to Catherine Hines during her lifetime. This conclusion, however, does not preclude Milton Johnson from establishing his claim by means other than his own testimony. See, e.g., Estate of Rider, 487 Pa. 373, 379, 409 A.2d 397, 400 (1979(Dead man's rule applies only to testimony and not to documents or written evidence presented by adverse surviving party)).

2. The Dead Man's Rule Does Not Apply to Preclude Testimony by Marilyn Howell

In arguing that Marilyn Howell, the decedent's granddaughter should be precluded from testifying under the dead man's rule, the co-administrator appears to be focusing on two different areas of testimony: first, as to the claim of Milton Johnson and second, as to Marilyn Howell's personal claim under a theory of equitable adoption (i.e. that she should inherit as if she were the adopted daughter of the decedent). By letter dated May 24, 2004, Ms. Howell, through her counsel, stated that she had decided to abandon this claim. The sole issue before this court, therefore, is whether she is precluded under the Dead Man's rule from testifying as to Milton Johnson's claim.<sup>12</sup>

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<sup>12</sup> It thus appears unnecessary to address whether the *devisavit vel non* exception applies. In arguing that Ms. Howell should not be precluded from testifying under the dead man's rule, Milton Johnson invokes the "devisavit vel non" exception set forth in 42 Pa.C.S.A. § 5930. Under the *devisavit vel non* exception to

This issue cannot be decided in a factual vacuum. As previously discussed, a key inquiry in determining whether a witness is precluded from testifying under the Dead Man's rule is whether that person has an adverse interest to the estate. In so doing, a key question is "will the witness gain or lose as the direct legal operation and effect of the judgment or will the record be legal evidence for or against him in some other action?" Hendrickson Estate, 388 Pa. 39, 45 & n.6, 130 A.2d 143, 147 & n. 6 (1957).

As a witness testifying as to Milton Johnson's claim against the estate, Marilyn Howell might offer testimony adverse to the estate but her interests would not necessarily thereby be adverse to the estate since she is already an intestate heir herself with a stake in the Hines Estate. In fact, courts have typically permitted a witness to testify about the contracts of others with a decedent where the witness has no interests affected by the claim. In the Pavlinko Estate, 399 Pa. 536, 160 A.2d 554 (1960), for instance, the Pennsylvania Supreme Court concluded that where claimants sought compensation for services rendered to decedent as memorialized in a contract that was transcribed by their daughter--the scrivener, the daughter was competent to testify despite the dead man's rule because she personally had no interest adverse to the decedent's estate. Likewise, in Visscher v. O'Brien, 274 Pa. Super. 375, 383, 418 A.2d 454, 458 (1980), the court concluded that where the decedent had entered into an oral agreement with a real estate

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the dead man's rule, those asserting an interest in an estate either by will or operation of the intestacy statute are competent to testify concerning disposition of estate property. Estate of McClain, 481 Pa. 435, 444-45, 392 A.2d 1371, 1375 (1978)(The devisavit vel non exception to the Dead Man's Rule "renders the witness' testimony competent where the controversy over the decedent's property is between the parties respectively claiming such property 'by devolution on the death of the owner'"). The purpose for this exception is to render "all parties competent in order that the proper tribunal can reach a well-informed determination of the appropriate disposition of the decedent's property in accordance to his wishes." Id., 481 Pa. at 445, 392 A.2d at 1375. By allowing the parties to testify to determine the decedent's intention, "the exception seems merely to recognize that, in cases where parties claim decedent's property by reason of his death, the interests of the parties, while certainly adverse to each other, are not really adverse to the interests of the decedent's estate." Id. Marilyn Howell, as the decedent's granddaughter, is a beneficiary of the estate and as such, the devisavit vel non exception is applicable as to her claim vis a vis other intestate heirs.

broker for commissions upon the sale of the decedent's property, a second broker was competent to testify as to decedent's scheme to deprive the first broker to this commission because the second broker had no interest in the outcome of this dispute.

A case that Milton Johnson invokes as factually on point is Edmundson's Estate, 259 Pa. 429, 437, 103 A. 277, 279 (1918). In Edmundson's Estate, the Pennsylvania Supreme court permitted testimony by the daughter of decedent concerning her oral contract with the decedent that benefited the daughter of the witness. The daughter/witness, Carrie Stadtfeld had conveyed property to her mother, Mrs. Edmundson, with an oral agreement that Mrs. Stadtfeld's daughter, Carrie Cotton, would be entitled to the \$3,333.01 that her father had invested in the property. After the death of Mrs. Edmundson, her other children challenged this claim. The Pennsylvania Supreme Court, however, concluded that Mrs. Stadtfeld could testify as to this oral contract with her deceased mother because the beneficiary of the contract was Carrie Cotton and the witness thus had no adverse interest to the estate. As the court explained:

This claim is based on the parol contract and is made by Mrs. Cotton against the decedent's estate, and Mrs. Stadtfeld can have no interest in having it sustained. She is not a party to the litigation nor interested in sustaining the claim. Her interest is, therefore, not adverse to the estate. On the contrary, her interest is adverse to the claim if she be a residuary legatee and if it be allowed and paid it cannot increase but will reduce her share in her mother's estate. It being apparent, therefore, that Mrs. Stadtfeld had no interest in the claim and hence no interest adverse to the estate of the decedent, we think she was a competent witness for the claimant.  
Edmundson's Estate, 259 Pa. 429, 437, 103 A. 277, 279 (1918).

Similarly, Marilyn Howell, in testifying as a witness to Milton Johnson's claim would not have an interest adverse to the estate unless the co-administrator can establish her allegation that Ms. Howell would personally benefit if Milton Johnson succeeds with his claim. Otherwise, as an intestate heir, Ms. Howell's testimony would go against her

own interest since to the extent that Milton Johnson establishes his claim, the estate available for distribution to the intestate heirs will decrease.

At this point, however, the exact facts remain unclear. It will be necessary therefore to analyze the applicability of the dead man rule in the context of each specific question or on a clearer record as to the exact relationship between Ms. Howell and Milton Johnson.

BY THE COURT:

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John W. Herron, J.