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CPLR 4519: Dead Man's Statute Held Not to Bar Testimony of Potential Distributee Concerning Pedigree Declarations Made by Intestate

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a propensity toward committing the alleged act.⁷⁴ While the interests at stake in a civil action often are less momentous than the possible loss of liberty facing a criminal defendant, it would seem that the rights of a party in a civil suit also may be unfairly prejudiced by the suggestion that he has a propensity toward certain criminal activity. The facts of *Guarisco* are particularly illustrative of such a possibility. After the introduction of Guarisco's 20-year-old conviction, a jury might conclude that a propensity existed toward criminal activity, particularly theft. From this conclusion it might be inferred that defendant had probable cause to believe that Guarisco was shoplifting, thereby undermining one of plaintiff's causes of action.⁷⁵ Such a result would appear harsh, especially in view of the number of years which had passed since plaintiff's criminal conviction.

New York courts traditionally have adhered to the common law doctrine allowing a trial judge broad discretion in establishing the permissible scope of cross-examination.⁷⁶ As recognized in *Sandoval*, the exercise of such discretion can aid in preventing unfair prejudice to a party witness.⁷⁷ The *Guarisco* holding appears to be an abrupt departure from this wise policy, and as such, opens the door to possible unfair prejudice in civil actions. It is hoped that future decisions will reject the *Guarisco* rationale and read CPLR 4513 as permitting the exercise of sound judicial discretion.

CPLR 4519: Dead Man's Statute held not to bar testimony of potential distributee concerning pedigree declarations made by intestate.

Designed to protect decedents' estates from fabricated claims and perjured testimony, CPLR 4519, New York's "Dead Man's Statute," renders an interested witness⁷⁸ incompetent to testify in

⁷⁴ 34 N.Y.2d at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 854; *accord*, *People v. Schwartzman*, 24 N.Y.2d 241, 247, 247 N.E.2d 642, 646, 299 N.Y.S.2d 817, 823, *cert. denied*, 396 U.S. 846 (1969).

⁷⁵ In order to establish a cause of action in malicious prosecution, plaintiff must demonstrate that defendant acted without probable cause in initiating the prosecution. *See* W. PROSSER, *LAW OF TORTS* § 119, at 841 (4th ed. 1971).

⁷⁶ *See* *Langley v. Wadsworth*, 99 N.Y. 61, 1 N.E. 106 (1885); *McQuage v. City of New York*, 285 App. Div. 249, 136 N.Y.S.2d 111 (1st Dep't 1954).

⁷⁷ 34 N.Y.2d at 375, 314 N.E.2d at 416, 357 N.Y.S.2d at 853-54.

⁷⁸ CPLR 4519 provides in pertinent part:

Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . or a person deriving his title or interest from, through or under a deceased person . . . by assignment or otherwise, concerning a

his own behalf with respect to personal transactions or communications⁷⁹ with a now deceased person. A seemingly unrelated evidentiary principle, the pedigree exception to the hearsay rule, permits pertinent hearsay to be admitted in certain instances⁸⁰ in order to

personal transaction or communication between the witness and the deceased person

Competency to testify is dependent to a large extent upon whether a witness may be characterized as an "interested" party within the meaning of the statute. In *Hobart v. Hobart*, 62 N.Y. 80 (1875), the Court, in construing the predecessor to CPLR 4519, defined an interested witness as an individual that "will either gain or lose by the direct legal operation and effect of the judgment, or, that the record will be legal evidence for or against . . . in some other action." *Id.* at 83 (quoting 1 S. GREENLEAF, EVIDENCE § 390 (2d ed. 1844)). See, e.g., *Herrmann v. Jorgenson*, 263 N.Y. 348, 189 N.E. 449 (1934); *In re Will of Eno*, 196 App. Div. 131, 187 N.Y.S. 756 (1st Dep't 1921); *People v. Tuthill*, 176 App. Div. 631, 163 N.Y.S. 843 (1st Dep't 1917). See generally 5 WK&M ¶¶ 4519.01-.23; W. RICHARDSON, EVIDENCE §§ 395-405 (10th ed. J. Prince 1973) [hereinafter cited as RICHARDSON].

⁷⁹ The courts construe the words "transactions or communications" broadly to embrace "every variety of affairs If the deceased could contradict, explain or qualify the . . . [evidence], if living, it comes within the rule." *Van Vechten v. Van Vechten*, 65 Hun. 215, 223, 20 N.Y.S. 140, 142 (Sup. Ct. Gen. T. 3d Dep't 1892). In *Kennedy v. Mulligan*, 173 App. Div. 859, 160 N.Y.S. 105 (1st Dep't 1916), the court observed that this liberal interpretation is consistent with the purpose of the statute which is "to retain the equality between the parties which otherwise . . . would have been destroyed by the death of the deceased." *Id.* at 860, 160 N.Y.S. at 106 (quoting *Griswold v. Hart*, 205 N.Y. 384, 395, 98 N.E. 918, 922 (1912)). See *Abbott v. Doughan*, 204 N.Y. 222, 226, 97 N.E. 599, 600 (1912).

It should be noted that CPLR 4519 itself provides for several exceptions to the Dead Man's rule. Thus, the statute does not bar an interested person from testifying when "the executor, administrator, [or] survivor . . . [of the decedent] is examined in his own behalf, or the testimony of the . . . deceased person is given in evidence, concerning the same transaction or communication." CPLR 4519. In *Ward v. Kovacs*, 55 App. Div. 2d 391, 390 N.Y.S.2d 931 (2d Dep't 1977), the Appellate Division, Second Department, construed the latter portion of this language so as to permit an interested party to render himself competent by submitting the decedent's former testimony into evidence. Also exempt from the operation of the statute are stockholders or officers of any bank corporation which is a party to the action. CPLR 4519. Further, the statute permits an otherwise incompetent witness to testify as to the facts of a vehicular accident but not specific conversations with the decedent. See, e.g., *Rost v. Kessler*, 267 App. Div. 686, 49 N.Y.S.2d 97 (4th Dep't 1944). A further limited exception, which is applicable only in Surrogate's Court proceedings, is contained in EPTL § 5-1.1(b)(3) and permits a surviving spouse to prove his contribution to bank accounts held jointly, or property held as tenants by the entirety with the deceased spouse. Finally, in *Nay v. Curley*, 113 N.Y. 575, 21 N.E. 698 (1889), the Court recognized that the statute does not abrogate the common law rule allowing a witness to testify as to the entire transaction after an adverse party has examined him with respect to a portion of the transaction. Thus, if the decedent's representative examines an incompetent witness concerning a transaction or communication with the deceased, "the witness is entitled to state the whole transaction or conversation . . ." *Id.* at 579, 21 N.E. at 699.

⁸⁰ In *Aalholm v. People*, 211 N.Y. 406, 105 N.E. 647 (1914), the Court articulated the three requirements that must be satisfied to bring evidence within the pedigree exception: first, the declarant must be deceased; second, the declarant must have been related by blood or affinity to the family about whom he speaks; and, third, the statement must predate the controversy. *Id.* at 412-13, 105 N.E. at 649. See RICHARDSON, *supra* note 78, § 321. Although the *Aalholm* Court indicated that the declarant's death is an absolute prerequisite to the admission of pedigree, in the earlier case of *Young v. Shulenberg*, 165 N.Y. 385, 59 N.E. 135

prove "family lineage, descent and succession."⁸¹ Relying upon the somewhat ambiguous statement of one commentator,⁸² some authorities have begun to recognize an interrelationship between these two rules of law.⁸³ Recently, in *In re Estate of Berlin*,⁸⁴ the Surrogate's Court, Bronx County, held that the Dead Man's Statute does not bar a potential distributee from giving testimony concerning pedigree declarations made directly by the intestate.⁸⁵

Alleging that she was the sole distributee of Freida Berlin and that as such, she was entitled to receive Berlin's entire estate, Goldie Berkowitz objected to the settlement of the public administrator's account for that estate.⁸⁶ In attempting to establish her relationship with the deceased, the objectant offered documentary and other evidence,⁸⁷ as well as her own hearsay testimony, as to her

(1901), the Court had adopted a more liberal approach, stating: "Before the declarations can be received . . . it must appear that the person making them was a member of the family and that he is *dead, incompetent, or beyond the jurisdiction of the court.*" *Id.* at 388, 59 N.E. at 136 (emphasis added). The *Young* Court found the declarant's absence from the jurisdiction sufficient to satisfy this test, but went on to note that since the declarant was born well over 100 years before the trial, her death would be presumed. *Id.* at 389-90, 59 N.E. at 137.

⁸¹ E. FISCH, *NEW YORK EVIDENCE* § 973 (2d ed. 1977). The pedigree exception may be invoked only when pedigree is directly in issue. For instance, if a claimant must establish that he is the heir-at-law of a decedent, pedigree evidence is admissible. *See Eisenlord v. Clum*, 126 N.Y. 552, 27 N.E. 1024 (1891). Where pedigree merely is a tangential issue, however, pedigree evidence will not be admitted at trial. *See People v. Lammes*, 208 App. Div. 533, 534-35, 203 N.Y.S. 736, 738 (4th Dep't 1924) (pedigree not admissible to establish age in rape case). *See generally* E. FISCH, *NEW YORK EVIDENCE* §§ 973-82 (2d ed. 1977); Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271 (1952).

⁸² 5 WK&M ¶ 4519.22, wherein it is stated that: "[o]ther forms of hearsay should also be permitted if they meet a hearsay exception." *See* note 97 *infra*. There is no hearsay exception which in itself removes the testimonial prohibition of the Dead Man's Statute. *See id.* CPLR 4517, however, permits a party's *former testimony* to be admitted into evidence even if that person is incompetent by virtue of the evidence Dead Man's Statute:

In a civil action, if a witness' testimony is not available because of . . . death . . . or because he is incompetent to testify by virtue of section 4519, his testimony, taken or introduced in evidence at a former trial . . . may be introduced in evidence by any party upon any trial of the same subject-matter in the same or another action between the same parties or their representatives, subject to any objection to admissibility other than hearsay.

CPLR 4517. *See Fleury v. Edwards*, 14 N.Y.2d 334, 200 N.E.2d 550, 251 N.Y.S.2d 647 (1964), in which the Court set out the basic rules governing the admissibility of former testimony. Not only must the subject matter at the subsequent trial be substantially the same as that at the first trial, but the party against whom the hearsay is being admitted must have had an opportunity to cross-examine the witness at the former trial. *Id.* at 339, 200 N.E.2d at 553, 251 N.Y.S.2d at 651.

⁸³ *See Phyllis D. v. Salvatore D.*, 79 Misc. 2d 6, 7, 358 N.Y.S.2d 920, 922 (Family Ct. Kings County 1974); note 97 *infra*.

⁸⁴ 91 Misc. 2d 666, 398 N.Y.S.2d 334 (Sur. Ct. Bronx County 1977).

⁸⁵ *Id.* at 668, 398 N.Y.S.2d at 336.

⁸⁶ *Id.* at 666, 398 N.Y.S.2d at 335.

⁸⁷ N.Y.L.J., Oct. 3, 1977, at 32, col. 1, *reprinted, as abridged, in* 91 Misc. 2d 666, 398

conversations with the decedent, raising the question of the admissibility of such testimony in view of the provisions of CPLR 4519.⁸⁸ Surrogate Gelfand ruled that, notwithstanding the provisions of Section 4519, objectant Berkowitz was competent to testify concerning the pedigree declarations of the deceased.⁸⁹ Finding that "[t]estimony as to a conversation between decedent and objectant is no more subject to being perjurious than would be conversations objectant testified to with other deceased . . . persons," the court concluded that application of the Dead Man's Statute in this instance would impose an unreasonable limitation upon the pedigree exception.⁹⁰ Brushing aside fears that this holding would open the floodgates to falsified claims, Surrogate Gelfand went on to hold that the objectant's testimony must be corroborated by other independent pedigree evidence.⁹¹

It is suggested that the *Berlin* court improperly failed to distinguish between two separate principles of law and thereby reached an erroneous conclusion as to objectant Berkowitz' competency to testify. At common law, all persons having a pecuniary interest in a particular cause were incompetent to give evidence as witnesses at the trial of that cause.⁹² When this harsh common law doctrine was abolished by statute,⁹³ the legislature deemed the enactment of a Dead Man's Statute necessary "to prevent the living from perjuring themselves to the disadvantage of the dead . . ."⁹⁴ In light of

N.Y.S.2d 334 (Sur. Ct. Bronx County). The decedent's attorney was called to testify as to declarations decedent had made concerning the composition of her family. The attorney's testimony led to the conclusion that the objectant was the only remaining distributee. Although an objection to the attorney's testimony had been interposed on the ground that it constituted hearsay, the testimony was admitted under the pedigree exception. *Id.*

⁸⁸ 91 Misc. 2d at 668, 398 N.Y.S.2d at 336.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 668-69, 398 N.Y.S.2d at 336. Interestingly, independent evidence of pedigree normally is required only when the declarant is not the person with whom a family relationship is sought to be established. See *Young v. Shulenberg*, 165 N.Y. 385, 59 N.E. 135 (1901).

⁹² 2 J. WIGMORE, EVIDENCE §§ 575-76 (3d ed. 1940) [hereinafter cited as WIGMORE]. Professor Wigmore articulated the rationale underlying the common law rule in the following syllogism:

Total exclusion from the stand is the proper safeguard against 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 excluded.

Id. § 576, at 686.

⁹³ Ch. 379, §§ 351-352, [1848] N.Y. Laws.

⁹⁴ SECOND REP. 268. See WIGMORE, *supra* note 92, § 578 (citing *Owens v. Owens*, 14 W. Va. 88 (1878)). The *Owens* court explained that abolition of the Dead Man's Statute "would place in great peril the estates of the dead, and would in fact make them an easy prey for

this historical evolution, it is clear that the Dead Man's Statute deals with the competency of a witness to testify and not the admissibility of any particular evidence.⁹⁵ In contrast, the pedigree exception to the hearsay rule is concerned solely with the admissibility of evidence.⁹⁶ Thus, while the pedigree doctrine may lead to a finding that certain testimony is admissible into evidence, the rule is not relevant to a determination whether a particular person may properly give the evidence. Unfortunately, the *Berlin* court apparently did not perceive this distinction, and instead commingled the question of admissibility with the issue of competency.⁹⁷ Had the surro-

the dishonest and unscrupulous." *Id.* at 95. Despite the potential for injustice created by the Dead Man's Statute's exclusion of possibly probative evidence, many positive and just results may be produced by the operation of the statute. *See, e.g., In re Estate of Sheehan*, 51 App. Div. 2d 645, 378 N.Y.S.2d 141 (4th Dep't 1976) (mem.) (legatee who forced decedent to sign codicil was not permitted to testify as proponent of codicil).

⁹⁵ *See* 5 WK&M ¶ 4519.04; RICHARDSON, *supra* note 78, § 395.

⁹⁶ *See* RICHARDSON, *supra* note 78, §§ 319-20. Lord Chancellor Erskine in *Vowles v. Young*, 33 Eng. Rep. 247 (1806) explained the rationale behind admitting pedigree evidence: Courts of Law are obliged in cases of this kind to depart from the ordinary rules of evidence; as it would be impossible to establish descents according to the strict rules, by which contracts are established, and subjects of property regulated; requiring the facts from the mouth of the witness, who has the knowledge of them. In cases of pedigree therefore recourse is had to a secondary sort of evidence: the best the nature of the subject will admit; establishing the descent from the only sources that can be had.

Id. at 249, *quoted in In re Estate of Berlin*, 398 N.Y.S.2d 334, 335 (Sur. Ct. Bronx County 1977). *See, e.g., In re Estate of Glaser*, 151 Misc. 778, 273 N.Y.S. 860 (Sur. Ct. Richmond County (1934)). It should be noted that pedigree evidence is also admissible to prove a negative proposition, such as the fact that a particular individual had no children. *See Washington v. Bank for Sav.*, 171 N.Y. 166, 63 N.E. 831 (1902).

⁹⁷ *See* 91 Misc. 2d at 668-69, 398 N.Y.S.2d at 335-36. The exact question presented in *Berlin* never has been addressed by the Court of Appeals. In two early lower court cases, however, it was held that an alleged distributee may not by her testimony seek to establish a common law marriage with an intestate. *See In re Brush*, 25 App. Div. 610, 49 N.Y.S. 803 (1st Dep't. 1898); *In re Estate of Cooke*, 195 Misc. 468, 85 N.Y.S.2d 104 (Sur. Ct. Queens County 1949).

More recently, the Family Court, Kings County, by way of dictum in *Phyllis D. v. Salvatore D.*, 79 Misc. 2d 6, 358 N.Y.S.2d 920 (Family Ct. Kings County 1974), stated that "hearsay which is admissible as an exception to the hearsay rule should be allowed as a substitute for testimony otherwise barred by the dead-man's statute." *Id.* at 7, 358 N.Y.S.2d at 922-23 (citing 5 WK&M ¶ 4519.22). Weinstein, Korn, and Miller indicate that "[o]ther forms of hearsay should also be permitted [as a substitute for barred testimony] if they meet a hearsay exception." In support of this proposition, the authors point to a case admitting the former testimony of a plaintiff at a second trial held after the defendant had died. *See Dean v. Halliburton*, 241 N.Y. 354, 150 N.E. 141 (1925). Former testimony differs, however, for Dead Man's Statute purposes from other forms of hearsay in two respects. First, CPLR 4517 expressly recognizes that a witness may be rendered unavailable as a result of the operation of the Dead Man's Statute, and thus seems to sanction introduction of the former testimony of a now incompetent witness. *See* CPLR 4517. Second, by definition, the former testimony of the witness had to be given at a time when the Dead Man's Statute did not

gate analyzed separately the two issues, it is submitted, he would have been led to the conclusion that the testimony offered was admissible in the abstract, but that CPLR 4519 rendered the objectant, Goldie Berkowitz, incompetent to testify with respect to such evidence.

Surrogate Gelfand offered a dual justification for his decision; he reasoned that application of 4519 would limit unreasonably the scope of the pedigree exception,⁹⁸ and that the testimony of the interested witness as to the intestate's declarations was no more likely to be perjurious than testimony concerning the declarations of any other deceased or unavailable person.⁹⁹ Clearly, the court's concern with unduly restricting the pedigree rule stems from its failure to consider separately the competency and admissibility questions and thus seems unpersuasive. Somewhat more compelling is the *Berlin* court's observation that perjury is just as likely to occur in situations not within the ambit of the Dead Man's Statute as in circumstances covered by the statute. Such a consideration, however, more properly is evaluated in determining the wisdom of adopting a Dead-Man's-Statute-like principle,¹⁰⁰ since the legislature has enacted CPLR 4519, this consideration no longer is relevant and should be disregarded by the courts, whose function now is to apply the statute in accordance with its terms and the pertinent case law.¹⁰¹ By not giving application to section 4519, it is submitted,

render him incompetent. Thus, the former trial either was held prior to the decedent's death, at which time the decedent had an opportunity to examine the witness, *see* note 82 *supra*, or involved a waiver of the statute. *See* *Dean v. Halliburton*, 241 N.Y. 354, 150 N.E. 141 (1925).

It is suggested that authors Weinstein, Korn and Miller did not intend to enunciate a general rule that evidence admissible under any hearsay exception is not barred by the Dead Man's Statute. Rather, the context of the section in which the quote appears makes it clear that the authors are discussing only *substitutes* for testimony. *See* 5 WK&M ¶ 4519.23. Hence, in addition to the former testimony exception, the authors point out that an interested witness will be permitted to authenticate a business record of a debt of a decedent on the ground that the authentication testimony does not involve a transaction with the decedent. *See* *William L. Mantha Co. v. DeGraff*, 266 N.Y. 581, 195 N.E. 209 (1935) (mem.). Thus, in contrast to the *Berlin* situation, there are independent grounds, other than the mere existence of a hearsay exception, for holding the Dead Man's Statute inapplicable when former testimony or the authentication of business records is involved.

⁹⁸ 91 Misc. 2d at 667-68, 398 N.Y.S.2d at 335-36.

⁹⁹ *Id.* at 668, 398 N.Y.S.2d at 336.

¹⁰⁰ *See, e.g.*, C. McCORMICK, LAW OF EVIDENCE § 65 (2d ed. E. Cleary 1972).

¹⁰¹ Prior to the enactment of CPLR 4519 in 1963, the Advisory Committee on Practice and Procedure recommended the abolishment of the "Dead Man's Statute," SECOND REP. 268, finding that:

The statute achieves . . . protection of the dead against possible injustice to their estates through perjury accepted by naive triers of fact, at the expense of the honest living whose mouths are stopped from proving valid claims. It has created enormous

the *Berlin* court inadvertently may have engaged in an unwarranted act of judicial legislation.

CRIMINAL PROCEDURE LAW

CPL § 20.20(2)(b): Criminal jurisdiction exercised over out-of-state assault committed aboard an in-flight aircraft.

Section 20.20(2)(b) of the CPL provides that a New York court may exercise jurisdiction over a criminal offense in which no criminal conduct occurred in the state if "[t]he statute defining the offense is designed to prevent the occurrence of a particular effect in this state and the conduct constituting the offense committed was performed with intent that it would have such effect."¹⁰² This potentially broad jurisdictional grant is limited by CPL § 20.10(4) which defines a "particular effect" as "a materially harmful impact upon the governmental processes or community welfare of a particular jurisdiction."¹⁰³ Despite the restrictive effect of this definition, the New York City Criminal Court, Queens County, in *People v.*

difficulty in litigation and has been condemned as unfair in operation and unsound in principle by every modern student of the law of evidence.

Id. As a result of fervent opposition, the committee later withdrew this recommendation. See RICHARDSON, *supra* note 78, § 396. Professor McCormick, a noted commentator on the law of evidence, also had recommended that the statute be eliminated. According to McCormick, if the interested witness is permitted to testify, a "searching cross-examination," along with an observation of the witness' demeanor on the stand, will furnish a sufficient basis for evaluating the witness' credibility. In rejecting the statute's positive aspects, Professor McCormick stated that "[o]ne who would not balk at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story." C. McCORMICK, LAW OF EVIDENCE § 65 (2d ed. E. Cleary 1972).

It would appear that the Dead Man's Statute is disfavored by the New York courts. See *Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307, 291 N.E.2d 129, 338 N.Y.S.2d 882 (1972), wherein the Court, faced with an accounting malpractice situation, permitted evidence excludable at trial under CPLR 4519 to be utilized to defeat a motion for summary judgment; *Ward v. Kovacs*, 55 App. Div. 2d 391, 390 N.Y.S.2d 931 (2d Dep't 1977), wherein an interested plaintiff introduced into evidence the deceased defendant's deposition taken prior to trial and was then permitted to testify regarding transactions with the decedent covered in the deposition. One commentator reasoned that decisions such as *Phillips* reflect a "reluctance of the higher courts in this state to impose the bar of the statute if there is any possibility that it may be averted." 5 WK&M ¶ 4519.06. Although courts thus may seek to limit the provisions of CPLR 4519 whenever possible, the courts in *Phillips* and *Ward* did not deny completely the statute's applicability. In *Phillips*, the court ruled that the statute contains language rendering it applicable only at the actual trial, while in *Ward* the court merely construed an express exception in the statute. See, e.g., *Nay v. Curley*, 113 N.Y. 575, 21 N.E. 698 (1889). In contrast to the decision in *Berlin*, however, the Court of Appeals in *Phillips*, stated that "[u]pon a trial, the full policy of the Dead Man's Statute will be given unstinting application." 31 N.Y.2d 307, 315, 291 N.E.2d 129, 133, 338 N.Y.S.2d 882, 888 (1972).

¹⁰² CPL § 20.20(2)(b). See generally 1 M. WAXNER, NEW YORK CRIMINAL PRACTICE ¶ 1.2[1] (1976 & Supp. 1977).

¹⁰³ CPL § 20.10(4).