

# The Deadman's Statutes - Who Is an Interested Party in Wisconsin?

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# THE DEADMAN'S STATUTES—WHO IS AN INTERESTED PARTY IN WISCONSIN?

## I. INTRODUCTION

Much of American law was, and continues to be, created to combat the evils of human nature. Historically, the deadman's statutes<sup>1</sup> were enacted to accomplish just that.<sup>2</sup> It was feared that a surviving witness would falsely testify to a communication or a transaction with a deceased or insane person, whose words or dealings were at issue in a case, in order to benefit himself.<sup>3</sup> At common law, the courts felt that the most efficient safeguard against such a potential evil was complete disqualification from testifying as a witness.<sup>4</sup> Likewise, the deadman's statutes attempt to prevent false testimony by deeming a witness, who has an interest in the outcome of a case, incompetent to testify to any transaction or communication with a deceased or insane person involved in that action.<sup>5</sup>

Although Wisconsin, like many other states, enacted deadman's statutes with the intention to prevent perjury on the witness stand, the statutes have been highly criticized for over two hundred years.<sup>6</sup> Commentators as far back as Jeremy Bentham<sup>7</sup> have expressed disdain for the statutes, labeling them as "blind and brainless."<sup>8</sup> In addition, the Wisconsin courts have frequently

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1. See *infra* notes 14-15.

2. See *Estate of Molay v. Molay*, 175 N.W.2d 254 (Wis. 1970); DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE 342 (2d ed. 2000); RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 159-65 (5th ed. 2001).

3. BLINKA, *supra* note 2, at 342; Shawn K. Stevens, Comment, *The Wisconsin Deadman's Statute: The Last Surviving Vestige of an Abandoned Common Law Rule*, 82 MARQ. L. REV. 281, 282 (1998).

4. See Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Credibility: The Next Step in an Historic Trend*, 47 ALA. L. REV. 145, 147-48 (1995) ("Early common law courts concluded that an interested witness was likely to be untruthful and, therefore, should not be heard."); Stevens, *supra* note 3, at 284.

5. See Stevens, *supra* note 3, at 282 ("While the principle underlying the Deadman's Statute originated at common law, the precept has been completely abolished in our nation's jurisprudence. However, the principle dictating disqualification based on interest still persistently survives in rare instances by statute.") (emphasis added).

6. BLINKA, *supra* note 2, at 340; Stevens, *supra* note 3, at 294.

7. Jeremy Bentham was a criminologist whose theories emerged in the late eighteenth and early nineteenth centuries. See STAN STOJKOVIC & RICK LOVELL, CORRECTIONS: AN INTRODUCTION 37-38 (2d ed. 1997).

8. *State v. Fonk's Mobile Home Park & Sales, Inc.*, 395 N.W.2d 786, 791 (Wis. 1986) (quoting Jeremy Bentham); *Estate of Molay v. Molay*, 175 N.W.2d 254, 259 (Wis. 1970) (quoting Jeremy

expressed their view that the deadman's statutes "rest[] upon an archaic view of the law,"<sup>9</sup> and they, along with the Judicial Council, favored the abolition of the statutes prior to their legislative enactment.<sup>10</sup> The Wisconsin courts were not the only courts to favor abolition. In fact, fifteen states have since replaced their deadman's statutes with the adoption of the rules of evidence,<sup>11</sup> and another four states have simply abolished them.<sup>12</sup>

Because the Wisconsin legislature ignored this trend towards abolition and chose to enact the deadman's statutes over the majority of its courts' and Judicial Council's objection, application of the statutes was and still is required and inevitable in the state of Wisconsin. Due to the immense disdain for the statutes, however, Wisconsin courts have consistently held that the deadman's statutes should be construed as strictly and narrowly as possible.<sup>13</sup> The courts' decision to apply the deadman's statutes as strictly and as narrowly as possible has left many practicing attorneys and legal scholars with one frustrating question: Under the Wisconsin courts' strict

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Bentham); BLINKA, *supra* note 2, at 340.

9. *Estate of Molay*, 175 N.W.2d at 259.

10. BLINKA, *supra* note 2, at 340; *see also* *Estate of Reist v. Reist*, 281 N.W.2d 86, 91 (Wis. 1979) ("The dead man's statute is not looked upon with favor by this court . . ."); *Estate of Molay*, 175 N.W.2d at 259 ("This court has frequently expressed its feeling that this statute rests upon an archaic view of the law . . ."); *Carson v. City of Beloit*, 145 N.W.2d 112, 115 (Wis. 1966) ("This rule is of such long standing one wonders why it continues to plague the trial bar."); *Estate of Stocking v. Stocking*, No. 98-1952, 2000 Wisc. App. LEXIS 740, at \*7 (Wis. Ct. App. Aug. 1, 2000) ("In applying the statute . . . we do so with the knowledge that recent case law expresses disdain for the deadman's statute . . ."). In 1973, the Judicial Council's Rules of Evidence Committee recommended the repeal of the Wisconsin deadman's statutes. Stevens, *supra* note 3, at 296.

11. CARLSON ET AL., *supra* note 2, at 160 & n.1. Alabama, California, Delaware, Iowa, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, and Utah all have replaced their deadman's statutes with the rules of evidence. *Id.*

12. *Id.* Georgia, Kansas, Mississippi, and Missouri all have abolished their deadman's statutes. *Id.*

13. *See Fonk's Mobile Home Park*, 395 N.W.2d at 791 ("Reading the statute strictly . . ."); *Estate of Reist*, 281 N.W.2d at 91-92 ("Because the statute is viewed with disfavor courts have attempted to limit the effect of the statute whenever possible."); *Estate of Christen v. Menning*, 239 N.W.2d 528, 530 (Wis. 1976) ("A strict interpretation is given the dead man's statute."); *Knutson v. Mueller*, 228 N.W.2d 342, 351 (Wis. 1975) ("We have often held for a very strict interpretation of the dead man's statute."); *Estate of Molay*, 175 N.W.2d at 259 ("[T]he courts have merely been able to alleviate the harshness of the rule by insisting upon exceptionally strict rules for its invocation."); *Estate of Stocking*, No. 98-1952, 2000 Wisc. App. LEXIS, at \*8 ("Wisconsin case law clearly provides that the deadman's statute must be strictly construed and, whenever possible, not be applied to bar testimony."); *Drabek v. Rasmussen*, No. 97-1192, 1997 Wisc. App. LEXIS 1085, at \*4 (Wis. Ct. App. Sept. 23, 1997) ("This court begins by noting the long-standing rule that § 885.16 is to be construed as narrowly as possible."); *Hunzinger Constr. Co. v. Granite Res. Corp.*, 538 N.W.2d 804, 807 (Wis. Ct. App. 1995) ("[The deadman's statutes] are 'not looked upon with favor' and must, 'whenever possible,' be strictly interpreted to prevent their use." (quoting *Giese v. Resit*, 281 N.W.2d 86, 91-92 (Wis. 1979))).

interpretation, who is considered an “interested” party for the purpose of being labeled an incompetent witness under the deadman’s statutes?<sup>14</sup>

This Comment analyzes and attempts to simplify the Wisconsin courts’ interpretation of who constitutes an “interested” party for the purpose of being labeled incompetent under the deadman’s statutes. Although there are arguably other aspects of the deadman’s statutes that need analysis, this Comment focuses exclusively on the “interested” party portion of the statutes. Part II of this Comment discusses in detail the Wisconsin deadman’s statutes and lays out, using Wisconsin case law, the courts’ interpretation of who constitutes an interested party for the purpose of being labeled incompetent to testify. Part III then considers the courts’ interpretation of the statutes and discusses the related issues concerning the application of such an interpretation to future cases. Finally, Part IV concludes by demonstrating that under the Wisconsin courts’ interpretation of the deadman’s statutes, an interested party deemed incompetent to testify actually boils down to only three categories of witnesses: (1) a witness who is named as a party to a lawsuit; (2) a witness who stands to immediately and sufficiently gain or lose by the direct legal operation and effect of the judgment; or (3) a witness who is a stockholder, officer, or trustee of a corporation that is a named party to a lawsuit. Although this categorical breakdown has not been recognized in any court decision or legal article, this Comment demonstrates why it is a helpful tool in analyzing the deadman’s statutes in Wisconsin.

## II. THE WISCONSIN COURTS’ INTERPRETATION

### *A. Non-Interested Parties*

In Wisconsin, the deadman’s statutes are codified in sections 885.16<sup>15</sup> and

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14. The term “interested” party is found within the deadman’s statutes. WIS. STAT. §§ 885.16-885.17 (2003). Thus, under the Wisconsin courts’ interpretation, one might grapple with the question of which witnesses are “interested” within the meaning of the statutes.

15. § 885.16. Section 885.16, entitled “Transactions with deceased or insane persons,” provides:

No party or person in [his] own behalf or interest, and no person from, through or under whom a party derives [his] interest or title, shall be examined as a witness in respect to any transaction or communication by [him] personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his or her . . . own behalf, introduce testimony of himself or herself . . . or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such

885.17<sup>16</sup> of the Wisconsin Statutes and are often read together.<sup>17</sup> As expressed within these statutes, “[n]o party or person in [his] own behalf or *interest*, and no person from, through or under whom a party derives [his] *interest* or title, shall be examined as a witness . . . to any transaction or communication . . . with a deceased or insane person.”<sup>18</sup> On their face, the statutes appear to disqualify a witness from testifying if he has a personal interest in the outcome of a case or if a named party to a lawsuit derives a personal interest through that particular witness. Although the above statutory language arguably could render a significant number of potential witnesses incompetent, the Wisconsin courts’ interpretation ultimately achieves the opposite result.<sup>19</sup> In fact, it appears as if the Wisconsin courts’ narrow and strict interpretation of the statutes has resulted in most witnesses being labeled as non-interested parties.<sup>20</sup>

In order to assist in this narrow and strict interpretation of the deadman’s statutes, Wisconsin courts have adopted a test that requires something more than a mere connection to the pending litigation to label a witness as interested and, therefore, disqualified from testifying.<sup>21</sup> Thus, the “true” test that the courts impose to label a witness interested is a finding that the witness

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testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives [his or her] or [its] interest or title, shall be so examined, except as aforesaid.

*Id.*

16. § 885.17. Section 885.17, entitled “Transactions with deceased agent,” provides:

No party, and no person from, through or under whom a party derives [his] interest or title, shall be examined as a witness in respect to any transaction or communication by [him] personally with an agent of the adverse party or an agent of the person from, through or under whom such adverse party derives his . . . interest or title, when such agent is dead or insane, or otherwise legally incompetent as a witness unless the opposite party shall first be examined or examine some other witness in his . . . behalf in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates.

*Id.*

17. See *Hunzinger Constr. Co.*, 538 N.W.2d at 808 (stating that the statutes should be read together).

18. § 885.16 (emphasis added).

19. See *infra* notes 21-41 and accompanying text.

20. See *infra* notes 21-41 and accompanying text.

21. *Estate of Reist v. Reist*, 281 N.W.2d 86, 93 (Wis. 1979) (“[T]he interest of the witness must be present, certain and vested, not just a remote or contingent interest.”); BLINKA, *supra* note 2, at 343 (“The contemplated ‘interest’ demands more than some involvement or connection with the litigation.”).

in question will “gain or lose by the direct legal operation and effect of the judgment.”<sup>22</sup> This requires the witness’s interest to be “present, certain and vested, not just a remote or contingent interest.”<sup>23</sup> Application of this test has proved successful in accomplishing a limiting effect of the deadman’s statutes.

To illustrate this limiting effect, the Wisconsin Supreme Court determined, in *Casper v. McDowell*,<sup>24</sup> that an attorney named in a will to assist in its probate, along with executors, trustees, and other agents, are not incompetent to testify to transactions or communications with the deceased or insane.<sup>25</sup> Notwithstanding the possibility that each of the above named witnesses may receive fees or some type of monetary benefit because of their communication or transaction with the deceased or insane person involved in the case, the court did not consider those fees a “sufficient” enough gain by direct legal operation and effect of the judgment to prohibit testimony.<sup>26</sup> The *Casper* court justified this determination by finding it unreasonable that an executor, trustee, or other agent would be tempted to commit perjury on the witness stand because of a service fee.<sup>27</sup> In addition, it made no difference in the eyes of the court if the executor was a lawyer or an entire law firm.<sup>28</sup>

Although discerning who constitutes an executor or a trustee is of little difficulty, the term “other agent,”<sup>29</sup> as used by the court, is quite ambiguous and could potentially include a large variety of people. For example, the courts have held that a copyist,<sup>30</sup> a deliverer of a gift,<sup>31</sup> and a truck driver,<sup>32</sup> all qualify as “other agents” for the purpose of being qualified as competent witnesses to testify to a transaction or a communication with a deceased or insane person.<sup>33</sup> It appears quite evident by the courts’ candid attitude towards the deadman’s statutes that this list of qualified agents is far from exhaustive. Thus, potentially almost any party who rendered a service to a deceased or insane person could be competent to testify to that transaction or

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22. *Estate of Christen v. Menning*, 239 N.W.2d 528, 530 (Wis. 1976) (quoting *Johnson v. Mielke*, 181 N.W.2d 503, 510 (Wis. 1970)); see also *Estate of Reist*, 281 N.W.2d at 93; *Casper v. McDowell*, 205 N.W.2d 753, 756-57 (Wis. 1973); BLINKA, *supra* note 2, at 343.

23. *Estate of Reist*, 281 N.W.2d at 93; see also BLINKA, *supra* note 2, at 344.

24. 205 N.W.2d 753 (Wis. 1973).

25. *Id.* at 756-57.

26. *Id.* at 757.

27. *Id.*

28. *Id.*

29. *Id.* at 756.

30. *Id.* at 756-57 (citing *In re Downing’s Will*, 95 N.W. 876, 880 (Wis. 1903)).

31. *Id.* (citing *Lowry v. Lowry*, 247 N.W. 323, 324 (Wis. 1933)).

32. *Id.* (citing *Renich v. Klein*, 283 N.W. 288, 289-91 (Wis. 1939)).

33. *Id.* at 756-57.

communication because compensation would not be considered a sufficient enough gain to result in perjury on the witness stand.

In addition to lawyers, executors, trustees, and other agents, Wisconsin courts have also qualified employees of parties to a lawsuit, even employees of some corporate parties to a lawsuit, to testify as witnesses to transactions or communications with a deceased or insane person involved in the litigation.<sup>34</sup> The only employees, it seems, deemed incompetent to testify under the court's interpretation are the employees explicitly listed within section 885.16 of the deadman's statutes.<sup>35</sup> Thus, employees of parties named in a lawsuit, whether the party is a corporation or not, are competent to testify as witnesses unless that employee is a "stockholder, officer or trustee of a corporation."<sup>36</sup> Any other employee interest, although potentially present because of the relationship that exists between an employee and his employer, is considered too remote by the courts to disqualify the employee as a witness under the statutes.<sup>37</sup>

The courts do not stop there in their attempt to restrict the application of the deadman's statutes. They further restrict the statutes by qualifying relatives of parties to a lawsuit as competent witnesses for the purpose of testifying to transactions or communications with a deceased or insane person.<sup>38</sup> Accordingly, the courts have qualified as competent witnesses the spouse of a party to a lawsuit,<sup>39</sup> the mother of a party to a lawsuit,<sup>40</sup> and even the daughter, who was an heir to the estate, of a party to a lawsuit.<sup>41</sup> Again, the courts concentrate on the remoteness and uncertainty of the above witnesses' interests to justify their exemption from the deadman's statutes.<sup>42</sup>

If the spouse of a party to a lawsuit, or the daughter who stands as heir to the estate of a party to a lawsuit, is deemed by the courts to have an uncertain

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34. See *Carson v. City of Beloit*, 145 N.W.2d 112, 114-15 (Wis. 1966) (allowing the testimony of a nurse employed by the defendant in the case to testify to transactions or communications with the deceased); *Hunzinger Constr. Co. v. Granite Res. Corp.*, 538 N.W.2d 804, 806 (Wis. Ct. App. 1995) (allowing testimony of the employees of a company named in the action).

35. See WIS. STAT. § 885.16 (2003) ("And no stockholder, officer or trustee of a corporation . . . shall be so examined . . ."); *Hunzinger Constr. Co.*, 538 N.W.2d at 807-08 (recognizing that section 885.16 listed the employees that the "drafters of the dead man's statutes desired to disqualify . . . with unmistakable clarity").

36. § 885.16.

37. See *Hunzinger Constr. Co.*, 538 N.W.2d at 808.

38. See *BLINKA*, *supra* note 2, at 344-45.

39. *Estate of Reist v. Reist*, 281 N.W.2d 86, 93 (Wis. 1979) (citing *Estate of Christen v. Menning*, 239 N.W.2d 528, 530-31 (Wis. 1976)).

40. *Estate of Komarr v. Buban*, 228 N.W.2d 681, 685 (Wis. 1975).

41. *Estate of Nale v. O'Dell*, 213 N.W.2d 552, 555 (Wis. 1974).

42. *Estate of Reist*, 281 N.W.2d at 93; *Estate of Komarr*, 228 N.W.2d at 685; *Estate of Nale*, 213 N.W.2d at 555.

interest or too remote an interest deriving from that particular party, then who actually has an interest in the outcome of a case that labels them as an incompetent witness? Surprisingly enough, the Wisconsin courts have actually labeled some witnesses as incompetent and, therefore, disqualified them from testifying. Thus, these next witnesses must have had an interest in the outcome of the case that was even more certain and less remote than a witness who stands as heir to the estate of a party to a lawsuit. In addition, these next witnesses' potential gains or losses must have been sufficient enough to render them a candidate for perjury on the witness stand.

### *B. Interested Parties*

In contrast to the long and broad list of non-interested parties stated in Part II.A of this Comment, the list of witnesses deemed to have an interest in the outcome of a case sufficient to label them as incompetent is quite short and seemingly limited to those people explicitly addressed in the statutes. Therefore, it seems that the most efficient place to begin a search for the type of person that the courts consider an interested party is within the text of the deadman's statutes.

Section 885.16 begins with the language “[n]o party . . . [in his] own behalf or interest . . . shall be examined as a witness in respect to any transaction or communication . . . with a deceased or insane person.”<sup>43</sup> Essentially, these “parties” would always stand to “gain or lose by the direct legal operation and effect of the judgment”<sup>44</sup> because they are named parties to a lawsuit; they are the reason that a case is in court. In short, these are the most probable candidates to possess “the motivation to lie, distort, or mislead” on the witness stand because they have an obvious personal interest in the outcome of the case.<sup>45</sup> Therefore, these are the vast majority of the people that courts have been less reluctant to deem incompetent to testify to a conversation or a transaction with a deceased or insane person.

To illustrate, one court labeled a deceased woman's husband, who requested to testify to an agreement between him and the decedent concerning allocation of marital property, interested and therefore disqualified.<sup>46</sup> In addition, courts have disqualified testimony from a witness claiming joint ownership in an account with the deceased<sup>47</sup> and a witness claiming to be the

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43. WIS. STAT. § 885.16 (2003) (emphasis added).

44. *Estate of Christen*, 239 N.W.2d at 530; see also *supra* note 22 and accompanying text.

45. BLINKA, *supra* note 2, at 342.

46. *Estate of Stocking v. Stocking*, No. 98-1952, 2000 Wisc. App. LEXIS 740, at \*8 (Wis. Ct. App. Aug. 1, 2000) (barring testimony of the husband because he was a named party to the lawsuit with an obvious interest in the outcome of the case).

47. *Johnson v. Mielke*, 181 N.W.2d 503, 510 (Wis. 1970) (barring testimony because the



beneficiary of the decedent's remaining account because of their obvious interest in the outcome of the case.<sup>48</sup> Although the interests of the above witnesses do not appear to be much more certain or much less remote than the witnesses qualified to testify, as discussed in Part II.A, these witnesses are distinguished because they are "parties" to the lawsuit attempting to testify on their "own behalf."<sup>49</sup> Therefore, it appears that the courts are more willing to find a witnesses' interest in the outcome of a case sufficient enough to disqualify him from testifying on the stand if that witness is also a named party to the lawsuit, which is precisely what a portion of the deadman's statute requires.<sup>50</sup>

Even if the witness is not a party to the lawsuit, the courts have, in some limited situations, disqualified a witness as an interested party pursuant to the deadman's statutes. However, the disqualification seems limited to a "person" testifying based upon his "*own . . . interest*"<sup>51</sup> in the outcome of the case that renders him an immediate gain or loss according to the final judgment.<sup>52</sup> For example, a non-party witness who stood to avoid tax liability if the appellant prevailed in the lawsuit was disqualified from testifying because "he had a direct monetary interest in the outcome of [the] case."<sup>53</sup> Thus, it appears that a non-party's "own interest" in the outcome of a case, so long as it is sufficient monetarily, will satisfy the "gain or loss by the direct legal operation and effect of the judgment" test because the gain or loss comes immediately upon final judgment.<sup>54</sup> It is worthy to note, for later purposes, that the court did not base the witnesses' disqualification on the fact that the witness was a "person from, through or under whom" the appellant "deriv[ed its] interest,"<sup>55</sup> but a person that will "gain or lose by the direct legal operation and effect of the judgment."<sup>56</sup>

Along with "person[s]" or "part[ies]" testifying on their "own behalf or

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witness was a named party to the lawsuit claiming ownership of certain assets of the deceased).

48. *Estate of Kemmerer v. Ecke*, 114 N.W.2d 803, 805 (Wis. 1962) (barring testimony of the witness because she was named as a party to the lawsuit).

49. WIS. STAT. § 885.16 (2003); *see supra* note 15.

50. *See* §§ 885.16-885.17.

51. § 885.16 (emphasis added).

52. *See Estate of Beyer v. Wis. Dep't of Revenue*, No. 84-1156, 1986 Wisc. App. LEXIS 3129, at \*8-9 (Wis. Ct. App. Jan. 28, 1986) (barring testimony of a witness not named in the lawsuit because of the witness's *own interest* in the outcome of the case).

53. *Id.* at \*9.

54. *See id.* (quoting *Johnson v. Mielke*, 181 N.W.2d 503, 510 (Wis. 1970)).

55. § 885.16.

56. *Estate of Beyer*, No. 84-1156, 1986 Wisc. App. LEXIS 3129, at \*9 (quoting *Johnson v. Mielke*, 181 N.W.2d 503, 510 (Wis. 1970)). The importance of the distinction between the reasoning behind the witness's disqualification becomes more apparent in Part III of this Comment.

interest,”<sup>57</sup> as mentioned above, courts are also willing to disqualify a “stockholder, officer or trustee of a corporation” from testifying to transactions or communications with a deceased or insane person.<sup>58</sup> However, the courts limit the exclusion of employee witnesses to those explicitly enumerated within section 885.16 because the original drafters of section 885.16 specifically named “with unmistakable clarity” the employees that they thought should be disqualified from testifying.<sup>59</sup> Based upon this unmistakable clarity by the original drafters, the courts seem to have interpreted the list of disqualified employees as an exhaustive list. Ultimately, this interpretation prevents any confusion in determining which employee witnesses will be disqualified from testifying to any transaction or communication with a deceased or insane person based upon his position within the corporation.

Although determining which witness testifying as an employee will be disqualified based upon his position within a corporation is done without much difficulty, that does not automatically render every other employee a qualified witness. The reason is that an employee not disqualified based upon his position in a corporation could potentially be disqualified because he is a witness with a sufficient interest in the outcome of a case. Therefore, to be thorough, every aspect of a witness’s motivation for testifying should be considered before deeming him qualified or disqualified from testifying to a communication or transaction with a deceased or insane person.

To be thorough, however, one must be able to place the witness into a category of either an interested party or a non-interested party with sufficient confidence in that placement. Dividing witnesses into one of these categories based upon the Wisconsin courts’ interpretation of what constitutes an interested party is not difficult when factually similar cases have already been decided. Deciding where a particular witness will fit within these categories for future cases, however, could prove to be more difficult.

### III. APPLICATION OF THE COURTS’ INTERPRETATION

The courts’ interpretation of who constitutes an interested witness has been laid out above, but is it possible to apply such an interpretation to a specific fact situation? Will it aid in determining which witnesses will be qualified or disqualified to testify to a transaction or communication with a deceased or insane person prior to the deadman’s statutes’ objection? The

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57. § 885.16.

58. § 885.16; *see also* *Hunzinger Constr. Co. v. Granite Res. Corp.*, 538 N.W.2d 804, 808 (Wis. Ct. App. 1995).

59. *Hunzinger Constr. Co.*, 538 N.W.2d at 808.

short-ended answer is yes, but that answer is quite optimistic because there are indeed some remaining questions. Although the courts' interpretation of who constitutes an interested witness is a little ambiguous, it is quite consistent and is therefore not impossible to apply to a set of facts.

The courts have and still do begin almost every discussion of the deadman's statute with a statement similar to the following: "case law expresses disdain for the deadman's statute, and requires courts to construe it narrowly and restrict its application whenever possible."<sup>60</sup> In addition, the test requiring a "gain or los[s] by the direct legal operation and effect of the judgment,"<sup>61</sup> along with a requirement of more than "just a remote interest," has remained virtually unchanged throughout the years.<sup>62</sup> This consistency throughout the years can be a helpful tool in determining which witnesses will be disqualified under the deadman's statutes, based upon particular circumstances, because it is the backbone for what seems to be every interpretation of how the statutes should be applied.<sup>63</sup>

Although the courts are consistent in applying the above test to determine whether the deadman's statutes are applicable, they are inconsistent in specifying whether the test applies to a witness testifying on his own behalf or interest, a witness through which the party derives his or her own interest, or both categories of witnesses.<sup>64</sup> Perhaps the test is meant to be broken into two separate tests: one test would apply to a witness testifying on his own behalf or interest, and the other test would apply to a witness through whom the party derives his or her own interest.

In theory, determining how and under what circumstances the aforementioned test or tests apply to a witness would be extremely relevant in deciding whether or not to put a witness on the stand to testify to a transaction or communication with a deceased or insane person. However, in reality, it appears to be of no concern in Wisconsin because the courts seem to ultimately disregard the portion of the deadman's statutes that disqualifies from testifying a "person from, through or under whom a party derives [his] interest."<sup>65</sup> Instead, the courts seem to concentrate solely on the portion of the

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60. *Estate of Stocking v. Stocking*, No. 98-1952, 2000 Wisc. App. LEXIS 740, at \*7 (Wis. Ct. App. Aug. 1, 2000); *see also supra* note 15.

61. *Johnson*, 181 N.W.2d at 510.

62. *See supra* notes 21-23 and accompanying text.

63. *See supra* Part II.A-B and accompanying notes.

64. Wisconsin Statutes section 885.16 prohibits testimony from a witness testifying on his own behalf or interest. It also prohibits testimony from a witness through which a party derives his own interest. These appear to be two distinct categories of disqualified witnesses. *See supra* note 15.

65. WIS. STAT. § 885.16 (2003); *see supra* Part II.B. Of the small number of cases that did disqualify a witness as interested, not one of them did so on the basis that the witness was a "person from, through or under whom a party derives [his] interest." *Id.*

deadman's statutes that disqualify parties or persons testifying on their own behalf or interest and the portion that disqualifies stockholders, officers, or trustees of a corporation testifying to transactions or communications with a deceased or insane person.<sup>66</sup>

As laid out in Part II.A of this Comment, lawyers, executors, trustees, other agents, most employees of a party, and relatives are usually not considered incompetent to testify to transactions or communications with a deceased or insane person. To justify the witnesses' qualifications, the courts rationalize that "the interests of employees in the litigation are too remote,"<sup>67</sup> or state that "[a]s to the daughter's competency as a witness, she . . . had no direct interest in her mother's claim,"<sup>68</sup> and "an attorney named to assist in the probate of a will [does not receive] a sufficient enough 'gain . . . by the direct legal operation and effect'" to be deemed incompetent.<sup>69</sup>

In determining whether or not these witnesses were competent to testify, the courts only appeared to concentrate on the witnesses' own interest. This is not to say that questioning the witnesses' own interest is wrong; in fact, it is what the beginning of the deadman's statutes require. However, according to the statutes, the inquiry is not supposed to end there. Further into section 885.16, the statute disqualifies a witness "from, through or under whom a party derives [his] interest or title."<sup>70</sup> Despite this portion of the statute, courts disregard it and find the above witnesses competent because their interests are too remote or because they would not sufficiently gain or lose from the direct legal operation or effect of the judgment.<sup>71</sup> Perhaps the daughter's interest in the outcome of her mother's case is too remote to deem her incompetent, which is also questionable, but would not the mother derive an interest in the testimony of her daughter so as to disqualify her under the portion of the deadman's statutes prohibiting testimony from a person through whom a party derives her interest? Moreover, it logically stands that an employer as a party to a lawsuit would derive some sort of interest in the testimony of his employee as a witness, especially if the employee wanted to remain on good terms with his employer. Why would these people have less of a "motivation to lie, distort, or mislead"<sup>72</sup> on the stand when people they care about or fear could benefit from false statements concerning a transaction or communication with a deceased or insane person?

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66. See *supra* Part II.A.

67. *Hunzinger Constr. Co. v. Granite Res. Corp.*, 538 N.W.2d 804, 807 (Wis. Ct. App. 1995).

68. *Estate of Nale v. O'Dell*, 213 N.W.2d 552, 555 (Wis. 1974).

69. *Casper v. McDowell*, 205 N.W.2d 753, 757 (Wis. 1973) (internal quotations omitted).

70. § 885.16.

71. See *supra* notes 60-63 and accompanying text.

72. BLINKA, *supra* note 2, at 342.

Even when the court had a perfect opportunity to find a witness incompetent because a named party derived its interest through that witness, it found the witness incompetent based upon the witness's own interest in the outcome of the case.<sup>73</sup> In this situation, the party was the Wisconsin Department of Revenue, and it called as its witness to testify to a transaction with the deceased a man who stood to be relieved of a gift tax if the department won.<sup>74</sup> Although finding the man incompetent because he "stood to 'gain or lose by the direct legal operation and effect of the judgment'"<sup>75</sup> was justifiable, the court did not even touch upon the fact that the Wisconsin Department of Revenue derived a serious interest in that witness's testimony. When does the portion of the deadman's statutes, barring the testimony of a witness from, through, or under which a party derives his personal interest, actually come into play?

Perhaps when the "courts unabashedly [took] the position that [the deadman's statutes'] effect should be limited wherever possible,"<sup>76</sup> they meant that the portion of the statutes disqualifying a "person from, through or under whom a party derives [his] interest or title"<sup>77</sup> should be disregarded. This is not an unheard of position to take. For example, Alabama courts interpreted their deadman's statute, which is similar to Wisconsin's deadman's statutes, to disqualify only a witness who was either a party to the action or personally interested in the outcome of the case prior to the statute's abrogation.<sup>78</sup> Arguably, the Wisconsin courts would be stepping on the legislature's toes if they admitted outright that they were limiting a legislatively enacted statute by disregarding a portion of it, but technically the courts may not think that they have anything to admit.<sup>79</sup>

The courts have held that they would disqualify a witness that was a "stockholder, officer or trustee of a corporation" as interested when his or her employer is a named party in the action.<sup>80</sup> It is quite evident that an employer would derive an interest through the testimony of its stockholders, officers, and trustees, especially since these employees are essentially the corporation itself. However, the only reason that the courts have admitted to recognizing

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73. Estate of Beyer v. Wis. Dep't of Revenue, No. 84-1156, 1986 Wisc. App. LEXIS 3129, at \*9 (Wis. Ct. App. Jan. 28, 1986).

74. *Id.* at \*3.

75. *Id.* at \*9 (quoting Johnson v. Mielke, 181 N.W.2d 503, 510 (Wis. 1970)).

76. Estate of Molay v. Molay, 175 N.W.2d 254, 259 (Wis. 1970).

77. WIS. STAT. § 885.16 (2003).

78. Colquitt & Gamble, *supra* note 4, at 156.

79. See *infra* notes 81-82 and accompanying text.

80. § 885.16; Hunzinger Constr. Co. v. Granite Res. Corp., 538 N.W.2d 804, 808 (Wis. Ct. App. 1995).

these witnesses as witnesses through which a party (i.e. the employer) derives its interest, is because the statutes explicitly disqualify them.<sup>81</sup> Thus, the courts may argue that technically they do not ignore the possibility that a witness may be deemed interested because a party to a lawsuit derives the interest through him. This is a weak argument, however, because it still disregards the portion of section 885.16 that does not specifically list who is considered a "person from, through or under whom a party derives [his] interest" found in the beginning of the statute.<sup>82</sup>

In addition to ultimately disregarding a portion of the deadman's statutes, Wisconsin courts, like the Alabama courts prior to the Alabama statute's abrogation, have arguably narrowed the witnesses deemed incompetent to testify to those witnesses that will immediately gain or lose a sufficient amount from the direct legal operation and effect of the judgment. To illustrate, the Wisconsin courts have found time and time again that a spouse, child, or parent of a party is competent to testify to a transaction or communication with a deceased or insane person because their interest in the outcome of the case is too remote or speculative.<sup>83</sup> However, why would a parent's interest in her child's case or a spouse's interest in his wife's case be too remote or speculative? Just because neither witness is immediately "gain[ing] or los[ing] from the direct legal operation and effect of the judgment,"<sup>84</sup> does not make their interests too remote. Again, it seems logical that these people are the types of witnesses that would lie on the stand to benefit their loved ones. These witnesses also appear to be the types of people that the deadman's statutes meant to bar from testifying. For this reason, one could speculate that the Wisconsin courts have ultimately disregarded how remote a witness's interest is in the outcome of the case when determining competency under the deadman's statutes. Instead, the courts appear to have concentrated solely on whether the witness will immediately "gain or lose by the direct legal operation and effect of the judgment."<sup>85</sup>

In further support of this speculation, case law reveals that the witnesses whom the court has disqualified as interested under the deadman's statutes are parties to the lawsuit.<sup>86</sup> This is not hard to justify because parties to a lawsuit

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81. § 885.16; *see also Hunzinger Constr. Co.*, 538 N.W.2d at 808.

82. § 885.16; *see also supra* note 15 (supplying the statute in its entirety, which reveals the portion of the statute specifically listing who is disqualified as a witness from, through or under whom a party derives its interest and the portion of the statute that does not specify).

83. *See supra* notes 38-42 and accompanying text.

84. *See Johnson v. Mielke*, 181 N.W.2d 503, 510 (Wis. 1970).

85. *See Johnson*, 181 N.W.2d at 510; *see also supra* note 22.

86. *See supra* notes 43-46 and accompanying text.

will always immediately “gain or lose by the direct legal operation and effect of the judgment.”<sup>87</sup> Not to mention, these are the witnesses that are expressly disqualified from testifying within the deadman’s statutes’ text.<sup>88</sup>

In addition, courts have disqualified beneficiaries or heirs who claimed rights over the deceased person’s property<sup>89</sup> and a witness who stood to avoid tax liability based upon the outcome of the case because of his potential for gain upon final judgment.<sup>90</sup>

All of the above witnesses stood to immediately “gain or lose from the direct legal operation and effect of the judgment.”<sup>91</sup> At the end of the case, upon final judgment, each of these witnesses would have walked away immediately benefited or indebted due to that judgment. None of these witnesses would have had to wait for his or her spouse, child, mother, or employer, to die, transfer, or award them something before benefiting or not benefiting from the “legal operation and effect of the judgment.”<sup>92</sup> Consequently, it seems not to be the remoteness of the witness’s interest that prevents the courts from disqualifying a witness as “interested” pursuant to the deadman’s statutes. Instead, the qualification or disqualification seems to turn upon whether the witness would immediately and sufficiently<sup>93</sup> “gain or lose by the direct legal operation and effect of the judgment.”<sup>94</sup>

#### IV. CONCLUSION

As noted in Part III of this Comment, the Wisconsin courts’ interpretation of who constitutes an interested party for the purpose of being labeled incompetent under the deadman’s statutes is a little ambiguous, but workable. Although it has yet to be recognized, a bright line rule for discerning who is disqualified from testifying as a witness to any transaction or communication with a deceased or insane person in Wisconsin is available, and it can be found in the old Alabama interpretation of its deadman’s statute.<sup>95</sup>

Once one gets passed the “cumbersome” wording<sup>96</sup> of the Wisconsin

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87. See *Johnson*, 181 N.W.2d at 510; see also *supra* note 22.

88. See *supra* note 15 for statutory text.

89. BLINKA, *supra* note 2, at 343.

90. *Estate of Beyer v. Wis. Dep’t of Revenue*, No. 84-1156, 1986 Wisc. App. LEXIS 3129, at \*9 (Wis. Ct. App. Jan. 28, 1986).

91. See *Johnson*, 181 N.W.2d at 510; see also *supra* note 22.

92. See *Johnson*, 181 N.W.2d at 510; see also *supra* note 22.

93. See *supra* Part II.A (noting that a witness’s gain must be sufficient enough to cause concern that he will commit perjury on the witness stand).

94. See *Johnson*, 181 N.W.2d at 510; see also *supra* note 22.

95. Colquitt & Gamble, *supra* note 4, at 156.

96. *Estate of Christopherson v. Neugart*, 650 N.W.2d 52, 59 (Wis. Ct. App. 2002).

deadman's statutes and analyzes the Wisconsin courts' interpretation of these statutes and their reasoning for doing so, the rule is evident. With the exception of a "stockholder, officer or trustee of a corporation," which is unavoidable under the statutes,<sup>97</sup> in Wisconsin, the deadman's statutes "only close[] the mouth of a survivor who is either a party-witness or a beneficiary directly interested in the result of the action."<sup>98</sup> Stated differently, the Wisconsin deadman's statutes label as interested and, therefore, incompetent: (1) a person who is a named party to a lawsuit; (2) a person who immediately and sufficiently stands to gain or lose from the direct legal operation and effect of the judgment; or (3) a stockholder, officer, or trustee of a corporation named as a party to a lawsuit.

Whether the courts will ever admit that they have limited the deadman's statutes to a few disqualified witnesses is uncertain. And whether the legislature will realize how hated and limited the deadman's statutes have become and either abrogate them or make them less limiting by amendment is also uncertain. What is certain, however, is that the Wisconsin courts will continue to criticize the deadman's statute and, as a result, will continue to interpret them as narrowly and as strictly as they possibly can. Therefore, it is also certain that the majority of surviving witnesses to a transaction or communication with a deceased or insane person will not be labeled incompetent and, thus, disqualified from testifying. As a result, when people ask themselves: In Wisconsin, who is an interested party under the deadman's statutes?, the short-ended answer is hardly anyone.

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97. WIS. STAT. § 885.16 (2003).

98. Colquitt & Gamble, *supra* note 4, at 156.

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