The Wisconsin Deadman's Statute: The Last Surviving Vestige of an Abandoned Common Law Rule

Shawn K. Stevens

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THE WISCONSIN DEADMAN'S STATUTE: THE LAST SURVIVING VESTIGE OF AN ABANDONED COMMON LAW RULE

I. INTRODUCTION

The Wisconsin State Legislature would best serve its constituents, the Wisconsin Bar, and the effective administration of justice if it repealed the State's Deadman's Statute. The Wisconsin Deadman's Statute has been forged into Wisconsin's legislative record as Wisconsin Statutes 885.16. While this Statute is grounded in the historic common

1. Wis. Stat. § 885.16 (1995-96) provides:

No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person 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 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 the party's interest or title, shall be so examined, except as aforesaid.

Section 885.17 of the Wisconsin Statutes extends the Deadman's Statute to transactions a party has had with an agent of the adverse party when that agent is deceased. Section 885.17 provides:

No party, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with an agent or an 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 or her 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
law principle seeking to protect the estates of the deceased from the self-driven interests of the living, its operation has been criticized for creating unjust results.

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. The purpose of this Comment is to highlight the operation of the Wisconsin Deadman's Statute, one of the few of its type remaining, and to suggest that the Wisconsin Legislature follow the lead of the majority of states and abolish the Statute to rid the legal system of its iniquitous effect.

communication of which testimony is so given or to the matters to which such testimony relates.


2. See George R. Currie, Transactions With Deceased Persons, 1948 WIS. L. REV. 491, 492. The justification for the Deadman's Statute is the belief that "it is better public policy to protect the estate from possible fraudulent claims than to allow testimony of the living which cannot be counteracted or refuted by the testimony of the deceased." Kemmerer v. Ecke, 114 N.W.2d 803, 806 (Wis. 1962). The justification also stems from the common-law belief that there would be "a powerful temptation for a party to misrepresent the 'transaction or communication' he had with the deceased party, who obviously could not rebut his testimony." Havlicek/Fleisher Enter., Inc. v. Bridgeman, 788 F. Supp. 389, 396-97 (E.D. Wis. 1992).

3. John D. Wickhem, A Code of Evidence for Wisconsin?, 1945 Wis. L. REV. 77, 82. Then soon to be Wisconsin Supreme Court Justice John D. Wickhem noted that "such statutes have produced an almost endless amount of litigation over their proper construction without the slightest statistical or other evidence that they have prevented the establishment of false claims." Id. His criticism of the Deadman Statute's social value was shared by John Henry Wigmore. In an attempt to contrast the divergent interests being protected and set aside by the operation of the Deadman Statute, he asks "[a]re not the estates of the living endangered daily by the present rule, which bars from proof so many honest claims? Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof?" 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 578, at 821 (James H. Chadbourn rev. 1979). The predominant view surrounding the Deadman's Statute suggests that it defeats more honest claims than it prevents fictitious ones. See St. John v. Lofland, 64 N.W. 930, 931 (N.D. 1895). The restriction frequently "works intolerable hardship in preventing the establishment of a meritorious claim." WIGMORE, supra, § 578, at 822 (citation omitted).


5. There are currently only eleven other states in addition to Wisconsin that have Deadman's Statutes that serve as an absolute bar prohibiting testimony from an interested witness as to transactions with the deceased. See ALA. CODE § 12-21-163 (1997); ARIZ. REV. STAT. § 12-2251 (1997); FLA. STAT. ch. 90.602 (1997); IND. CODE § 34-45-2-4 (1998); LA. REV. STAT. ANN. § 13:3721 (West 1996); MD. CODE ANN., CTS. & JUD. PROC. § 9-116 (1997); N.C. R. EVID. 601(c); S.C. CODE ANN. § 19-11-20 (Law Co-op. 1997); TENN. CODE ANN. § 24-1-203 (1997); WASH. REV. CODE § 5.60.030 (1997); W. VA. CODE § 57-3-1 (1997).

6. Thirty-two states have rejected the Deadman's Statute. The legislative record in
To fully appreciate the need to repeal the Wisconsin Deadman’s Statute, one must fully understand the Statute’s origin and history, its application in both Wisconsin and other states, its effect on litigation, and its interpretation by Wisconsin’s judiciary. Consequently, Part II of this Comment has been devoted to the history of the Deadman’s Statute. Part III will provide an overview of the construction and interpretation of the Wisconsin Deadman’s Statute. Through a detailed hypothetical, Part IV will demonstrate how the application of the Deadman’s Statute can operate to exclude legitimate evidence in litigation. Part V will examine the history of tempered judicial acquiescence to the legislative mandate in Wisconsin. Finally, Part VI will suggest some alternatives that may be adopted to replace the Wisconsin Deadman’s Statute.

These states is either void of provisions governing the interests of a witness or has provisions that expressly allow testimony from an interested witness as to communications with the deceased. See Cavanah v. Martin, 590 P.2d 41, 42 (Alaska 1979) (noting that Alaska has completely eliminated the common law disqualification of a witness based upon interest); Davis v. Hare, 561 S.W.2d 321, 322 (Ark. 1978) (noting that the Arkansas Deadman’s Statute was expressly repealed by the state’s adoption of the Uniform Rules of Evidence); CAL. EVID. CODE § 1261 (West 1997) (permitting testimony from an interested witness); CONN. GEN. STAT. § 52-172 (1996) (permitting testimony from an interested witness); DEL. R. EVID. 601 (superseding the Delaware’s Deadman’s Statute and permitting testimony from an interested witness); GA. CODE ANN. § 24-9-1 (1997) (permitting testimony from an interested witness); Hew v. Aruda, 462 P.2d 476, 479 (Haw. 1969) (noting the absence of a Deadman’s Statute in Hawaii); 735 ILL. COMP. STAT. 5/8-101 (West 1997) (permitting testimony from an interested witness); IOWA CODE § 622.3 (1997) (permitting testimony from an interested witness); Scott v. Farrow, 391 P.2d 47 (Kan. 1964) (most recent case applying the Deadman’s Statute to prevent testimony from an interested witness in Kansas); KY. REV. STAT. ANN. § 421.210 (repealed 1992); ME. REV. STAT. ANN. tit. 16, ch. 1 (repealed 1977); MASS. GEN. LAWS ch. 233, § 65 (1997) (permitting testimony from an interested witness); MINN. R. EVID. 616 (superseding Deadman’s Statute and permitting testimony from an interested witness); MISS. CODE ANN. § 13-1-7 (repealed 1991); MO. REV. STAT. § 491.010 (1997) (permitting testimony from an interested witness); MONT. R. EVID. 601 (abolishing the state’s Deadman’s Statute and permitting testimony from an interested witness); NEB. REV. STAT. § 25-1202 (repealed 1975); NEV. REV. STAT. § 48.075 (1997) (permitting testimony from an interested witness); N.H. REV. STAT. ANN. § 516:25 (repealed 1994); Estate of Bergman v. Gunn, 761 P.2d 452, 455 (N.M. Ct. App. 1988) (noting that New Mexico’s Deadman’s Statute was repealed in 1973); N.C. GEN. STAT. § 8-49 (1997) (permitting testimony from an interested witness); N.D. R. EVID. 601 (superseding North Dakota’s Deadman’s Statute and permitting testimony from an interested witness); Johnson v. Porter, 471 N.E.2d 484, 487 (Ohio 1984) (holding that Ohio’s adoption of Rule 601 effectively abrogated the state’s Deadman’s Statute); OKLA. STAT. tit. 12, § 2601 (1997) (abolishing the state’s Deadman’s Statute and permitting testimony from an interested witness); OR. REV. STAT. § 40.310 (1995) (permitting testimony from an interested witness); R.I. GEN. LAWS § 9-17-12 (1996) (permitting testimony from an interested witness); S.D. CODIFIED LAWS § 19-16-34 (Michie 1997) (permitting testimony from an interested witness); TEX. REV. CIV. STAT. ANN. art. 3716 (repealed 1983); UTAH R. EVID. 601 (permitting testimony of an interested witness); VA CODE ANN. § 8.01-397 (Michie 1997) (permitting testimony from an interested witness); WYO. STAT. ANN. § 1-12-102 (Michie 1997) (permitting testimony from an interested witness).
II. HISTORY OF THE STATUTE

The disqualification of a witness based on an interest he or she may have in the outcome of litigation has been abandoned everywhere except in connection with the Deadman’s Statute. While the Deadman’s Statute has been repealed in most jurisdictions, it still retains a lingering existence in others. The Deadman’s Statute often makes opposing parties and interested witnesses completely “incompetent to testify against the estate of a dead person.” The underlying objective of preventing such testimony is the Statute’s effort to ensure equality in the civil litigation arena.

The rationale supporting the continued existence of the Deadman’s Statutes is based upon “a dark view of human nature.” This rationale is rooted in the philosophy that “if the lips of one party to a transaction have been sealed by death, it is only fair that the other party’s be sealed by law.” Consequently, society moved to counter its distrust of interested witnesses, with respect to their standing with a deceased adversary, as early as the seventeenth century. Conditioned by the early rationale, the legislative initiative that followed seemed entirely justified,

8. See id. Of the eighteen states that currently retain some form of a Deadman’s Statute, seven offer exceptions to the general rule prohibiting an interested witness’s testimony and as such are somewhat limited in their effect. See Colo. Rev. Stat. § 13-90-102 (1997) (interested adverse witness may testify as to any communications she had with the deceased where a member of the deceased’s family is present and is capable of testifying as to the same communication); Idaho Code § 9-202 (1997) (interested witness may testify as to any agreement or communication with the decedent in writing); Mich. Comp. Laws Ann. § 600.2166 (West 1997) (permitting an interested witness to testify as to any communications she had with the deceased if her testimony is supported by material evidence tending to corroborate her claim); N.J. Stat. Ann. § 2A:81-2 (West 1997) (permitting an interested witness to testify as to any communications she had with the deceased if her testimony is supported by clear and convincing proof); N.Y. C.P.L.R. 4519 (McKinney 1997) (permitting an interested witness to testify as to any facts of any automobile, aircraft, or boating accident in which both she and the decedent were involved and where the interested witness is claiming negligence); 42 Pa. Cons. Stat. Ann. § 5930 (West 1997) (permitting an interested witness to testify as to any communications she had with the deceased if the action or proceeding is by or against surviving or remaining partners, joint promisors, or joint promisees); Vt. Stat. Ann. tit. 12, § 1602 (1997) (permitting an interested witness to testify as to any memoranda or declarations of the deceased relevant to the matter in issue when the interested witness is suing in tort).
13. See Wigmore, supra note 3, § 575, at 802.
if not absolutely necessary. In 1726, the following observation was recorded:

[F]or men are generally so short-sighted, as to look to their own private benefit, which is near them, rather than to the good of the world, which, though on the sum of things really best for the individual, is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it. It is also easy for persons, who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence; and therefore the law removes them from testimony, to prevent their sliding into perjury; and it can be no injury to truth to remove those from the jury, whose testimony may hurt themselves, and can never induce any rational belief.  

This common law principle was codified in Wisconsin in 1858 as the first "Deadman’s Statute."

Although the Wisconsin Deadman’s Statute has been amended during the 140 years since its enactment, there has been no change in its ultimate purpose. The rationale underlying the Wisconsin Deadman’s Statute is “so ingrained a part of judicial and professional habits of thinking,” that it has yet to be completely abandoned. The Statute has continuously survived philosophical assaults, but has withstood constitutional challenges under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. Undaunted by its traumatic history, the Deadman’s Statute survives in Wisconsin today with the same resilience it has exhibited over the last century.

14. Id. at 810 (quoting BARON GILBERT, EVIDENCE 119 (1726)).
15. See Currie, supra note 2, at 491.
16. See id.; see also current statutory text, supra note 1. For a discussion of the history of the statute, see FRANK L. MALLARE, WISCONSIN CIVIL TRIAL EVIDENCE 12 n.80 (1967).
19. See Ford v. Ford, 126 N.W.2d 573, 576 (Wis. 1964) (noting that in spite of the criticisms by eminent legal authorities throughout the years, our legislature has not seen fit to abolish the statute).
III. CONSTRUCTION AND INTERPRETATION OF THE STATUTE

Because the few Deadman’s Statutes that remain vary widely in their scope, it would be difficult to make any “valid generalization” defining the exact consequences of their operation. While the form and language of the remaining statutes are diverse, there is also a noticeable divergence in the policy perspectives and attitudes that are articulated in the judicial decisions interpreting them. What is certain, however, is the unjust effect the Deadman’s Statutes have in preventing the testimony of an interested witness.

The effect the Wisconsin Deadman’s Statute has had in preventing testimony is far more severe than the effect of similar statutes in other states. In some states, an interested witness may be permitted to testify only if his or her testimony is corroborated by other evidence. In other states, testimony by the witness may be permitted if it falls within certain enacted exceptions. In Wisconsin, however, the application of the Deadman’s Statute applies as an absolute bar to an interested witness’s testimony. There are only eleven other states that have enacted Deadman’s Statutes with such a prohibitive effect.

20. See MARTIN, supra note 7, at 138.
21. See id.
22. See id.; see also EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 31 (2d ed. 1989).
23. See MCCORMICK, supra note 17, at 143; See, e.g., IDAHO CODE § 9-202 (1997) (interested witness may testify as to any agreement or communication with the decedent in writing); MICH. COMP. LAWS ANN. § 600.2166 (West 1997) (permitting an interested witness to testify as to any communications she had with the deceased if her testimony is supported by material evidence tending to corroborate her claim); N.J. STAT. ANN. § 2A:81-2 (West 1997) (permitting an interested witness to testify as to any communications she had with the deceased if her testimony is supported by clear and convincing proof).
24. Of the nineteen states that currently retain some form of a Deadman’s Statute, seven offer exceptions to the general rule prohibiting an interested witness’s testimony and, as such, these seven statutes are somewhat limited in their effect. See COLO. REV. STAT. § 13-90-102 (1997) (interested adverse witness may testify as to any communications she had with the deceased where a member of the deceased’s family is present and is capable of testifying as to the same communication); N.Y. C.P.L.R. 4519 (McKinney 1997) (permitting an interested witness to testify as to any facts of any automobile, aircraft, or boat accident in which both her and the decedent were involved and where the interested witness is claiming negligence); 42 PA. CONS. STAT. ANN. § 5930 (West 1997) (permitting an interested witness to testify as to any communications she had with the deceased if the action or proceeding is by or against surviving or remaining partners, joint promisors, or joint promisees); VT. STAT. ANN. tit. 12 § 1602 (1997) (permitting an interested witness to testify as to any memoranda or declarations of the deceased relevant to the matter in issue when the interested witness is suing in tort).
25. See statutory text, supra note 1.
26. See supra note 5 and accompanying text.
Whether the Wisconsin Deadman’s Statute prohibits the testimony of an interested witness depends on three considerations. The Statute prohibits a witness’s testimony if (1) the witness has the specified interest contemplated by the Statute, (2) the witness’s testimony relates to a transaction or communication by him or her personally with the deceased, and (3) the opposing party derives a specified interest in the action through the deceased. If all three of the conditions are answered in the affirmative, then the witness will be deemed incompetent to testify.

A. Interested Party or Person

Under the rationale supporting Wisconsin Deadman’s Statute, there is no prohibition as to testifying against one’s own interest in an action. The Statute, rather, provides that no party or person in his or her own behalf or interest “shall be examined as a witness in respect to any transaction or communication by [him or her] personally with a deceased...person.”

The test to determine whether witnesses shall be disqualified because of their interest is whether they “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 [them] in some other action.” The interest analyzed must also be present, certain and vested at the time of litigation, and may not be contingent or remote. Although a person

28. See BLINKA, supra note 11, at 255; see also MALLARE, supra note 16, at 12.
30. See, e.g., Habrich v. Bent, 227 N.W. 877, 879 (Wis. 1929); Seals v. Seals, 81 S.E. 613, 614 (N.C. 1914); Heeber v. Summerlin, 372 So. 2d 518, 519 (Fla. Dist. Ct. App. 1979); Cambell v. Cambell, 22 N.E. 620, 621 (Ill. 1889) (the interested witness will not be deemed incompetent on the ground of interest if the interest is in doubt); Lowry v. Lowry, 247 N.W. 323, 324 (Wis. 1933) (mere fact of being a party to an action does not render a survivor incompetent); St. John v. Lofland, 64 N.W. 930, 931 (N.D. 1895) (noting that it was not the purpose of the legislatures to exclude all evidence merely because the witness from whose lips it came had engaged in communication with the deceased person).
31. See statutory text, supra note 1; see also Belden v. Scott, 27 N.W. 356, 357 (Wis. 1886) (noting that the personal transaction or communication contemplated by the statute means a transaction or communication face to face, or by the parties in the actual presence and hearing of each other).
32. In re Novak (Moran) v. Cook, 193 N.W. 1000, 1000 (Wis. 1923).
33. See BLINKA, supra note 11, at 255-56; MALLARE, supra note 16, at 13. Parties such as executors, administrators, or trustees are not necessarily deemed incompetent witnesses by virtue of their interest in the outcome of the litigation. See Anderson v. Laugen, 99 N.W. 437 (Wis. 1904) (noting that in probate proceedings, a party named as executor will not be deemed to have an interest in the litigation to the extent that it renders her incompetent to
may ultimately be affected by a judgment, "the disqualifying interest must be ascertained according to the particular facts of the case and the nature of the testimony sought to be elicited." Consequently, when evaluating the nature of the testimony, it must be shown that the testimony itself will actually further the witness's own interest.

B. Transaction or Communication

The Wisconsin Deadman's Statute provides that no person may testify with respect to any transaction or communication by him or her personally with a deceased or insane person. Both the language of the Statute and the cases interpreting it require that the transaction or communication that occurs between a witness and the deceased be face-to-face.

However, when third persons are present during the communication between the interested witness and the decedent, the scope of the permissible testimony may be expanded. In such cases, while the interested witness will still be incompetent, the third person disinterested witness will be able to testify as to the communication witnessed between the interested witness and the decedent.

Most interesting, however, is the Statute's allowance of testimony from an interested witness about a conversation he or she overheard between the decedent and a third person. In this situation, the interested witness will be competent to testify about the conversation so long as he or she did not participate in, or otherwise influence, the communication.

testify as to conversations with the deceased); see also In re Novak (Moran), 193 N.W. at 1000; In re Will of Williams, 41 N.W.2d 191, 197 (Wis. 1950).

34. MALLARE, supra note 16, at 14.
35. See id.; see Habrich, 227 N.W. at 879.
36. See statutory text, supra note 1.
37. See BLINKA, supra note 11, at 257. Conversations between the witness and the deceased, whether "on the telephone or in person, are simple instances of communications or transactions under the statutes." Id. Generally, all that is necessary is that they occurred within the presence or hearing of both the decedent and survivor. See Belden v. Scott, 27 N.W. 356, 357 (Wis. 1886); see also MALLARE, supra note 16, at 16.
38. An interested witness may also testify as to any conversations she had with a third person, even if the testimony raises an inference that certain acts were done by the deceased. See Brader v. Brader, 85 N.W. 681, 683 (Wis. 1901). But cf. Johnson v. Mielke, 181 N.W.2d 503, 509 (Wis. 1970) (suggesting that an interested witness may not testify as to conduct between himself and the deceased which may provide the basis for an inference that a transaction occurred).
Interested witnesses are also generally competent to testify as to ob-
servations they make of the deceased's conduct, their knowledge of the
affairs of the deceased, and the circumstances of any event that involves
the deceased. Interested witnesses will be deemed competent and
their testimony will be admitted so long as they did not directly “par-
ticipate in any course of conduct with the deceased” or otherwise “in-
fluence the actions of the deceased.”

This interpretation would permit interested survivors, seeking the
value of services they had rendered to the decedent, to testify as to the
nature and value of the services performed, but would prevent them
from testifying as to the actual negotiations with the decedent that led
to the performance.

C. Objections

Unless there is a proper objection to the competency of an inter-
ested witness made by the party seeking to invoke the protection of the
Deadman’s Statute, the Statute will have no effect on the litigants. The party that would object to an interested witness’s testimony about
his or her communications with the deceased would be, under the Wis-
consin Deadman’s Statute, the “opposite party,” or the party who de-

d""""rives title or sustains liability to the cause of action “from, through or

under such deceased” person. Unless the opposite party properly ob-
jects, the interested survivor will be deemed competent to testify. To
be proper, the objection must be addressed to the competency of the

witness.

D. Waiver

The Wisconsin judiciary, as a result of its distaste for the Deadman’s Statute, has created strict rules that an opposite party must adhere to in

N.W. 741, 742 (Wis. 1919); McHatton v. Estate of McDonnell, 165 N.W. 468, 469 (Wis.

1917); Anderson v. Laugen, 99 N.W. 437, 438 (Wis. 1904); Brader, 85 N.W. at 683; Wollman

v. Ruehle, 80 N.W. 919, 920 (Wis. 1899).

40. See MALLARE, supra note 16, at 17.

41. Id.

42. Id.; see also Havlicek/Fleisher, 788 F. Supp. at 397.

43. See generally Belden, 27 N.W. at 356.

44. See Reist v. Reist, 281 N.W.2d 86, 92 (Wis. 1979); see also Molay v. Molay, 175

N.W.2d 254, 259 (Wis. 1970).

45. See statutory text, supra note 1.


47. See Carson v. City of Beloit, 145 N.W.2d 112, 115 (Wis. 1966).
order to receive the Statute's benefit. Those protections offered to an opposite party may be waived if he or she improperly objects to the testimony or otherwise "opens the door." The first way that the protections afforded by the Wisconsin Deadman's Statute may be waived is if the objection is not precisely worded. To be valid, the objection must be addressed, not to the admissibility of the evidence, but to the competency of the witness. An objection to admissibility on the grounds that the testimony pertains to a transaction or communication with the deceased will not be a proper objection. The same is true even when the objecting party correctly cites the Statute number. Unless the objection is precisely addressed to the competency of the witness, it will be insufficient to invoke the Deadman's Statute.

The second way that an opposite party might waive the protection of the Statute is if he or she opens the door through a proffer of testimony or other evidence concerning a transaction or communication with the deceased. If the counsel for an opposite party questions an interested witness as to a transaction or communication the party had with the deceased, the benefit of the Deadman's Statute is waived and the door is deemed opened. The counsel for the interested witness will then be permitted to use his or her own questioning to draw out all the details of the particular transaction or communication. It must be remembered, however, that the scope of the newly permitted testimony will be limited to the breadth of that introduced by the opposite party.

48. See BLINKA, supra note 11, at 259; see also Hunzinger Constr. Co., v. Granite Resources Corp., 538 N.W.2d 804, 807 (Wis. Ct. App. 1995) (noting that because the Deadman's Statute is not looked upon with favor, courts must strictly interpret the statute whenever possible to prevent its use).

49. See BLINKA, supra note 11, at 259.

50. See id.

51. See Carson, 145 N.W.2d at 115.

52. See Reist v. Reist, 281 N.W.2d 86, 92 (Wis. 1979).

53. See id.

54. See id.

55. It is a well established principle that "if counsel for the opposite party questions [an interested] witness as to any part of the transaction or communication with the deceased... the benefit of the statute is waived and the door is opened whereby counsel for the [interested] party may proceed by further questioning to bring out all details of the particular transaction or communication." Johnson v. Mielke, 181 N.W.2d 503, 508-09 (Wis. 1970).

56. See id.

57. See BLINKA, supra note 11, at 259.

58. See id.
IV. APPLICATION OF THE STATUTE

The application of the Deadman's Statute causes injustice by preventing valid claims from being pursued. The Statute, in preventing a plaintiff from testifying as to any communications he or she may have had with the decedent, discourages him or her from bringing claims if the communication is essential to prove them. Because such claims will never be filed, however, it is difficult to estimate the number of legitimate claims that are ultimately precluded because of the Deadman's Statute. What is certain is that many clients are ultimately discouraged from bringing their claims because of the Statute. For every piece of fraudulent testimony excluded by the Deadman's Statute, there are a great deal more meritorious claims that are dismissed because of the failure of proof.\(^5^9\)

The following hypothetical demonstrates the harsh effect of the Statute on what would otherwise constitute a legitimate claim. In this hypothetical, the decedent is the owner of a very successful corporation that manufactures and sells nationwide certain household cleaners. The company has been very successful and has developed a comprehensive national manufacturing, marketing, and distribution system for its products. The would-be plaintiff is the decedent's daughter, Jennifer. Jennifer is married to a dermatologist and the couple has founded a successful dermatology practice treating patients for their skin ailments.

A few years ago, Jennifer and her husband developed a chemical that showed incredible potential for treating skin ailments. After a great deal of research and refinement, they used the chemical to develop a skin care product that could be sold to consumers. The product was so effective in treating skin ailments that it had the potential to completely revolutionize the industry. Although Jennifer and her husband had stumbled across the opportunity of a lifetime, they lacked the means to market their product on a national scale.

Knowing that her father's company had the means to produce, market, and distribute the product, Jennifer and her husband approached her father with their discovery. They offered to provide her father's company with their research in exchange for a share of the profits if the product was successful. Jennifer's father was extremely excited about

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59. See Daniel J. Capra, Advisory Committee Notes: A Trap for the Unwary?, 218 N.Y.L.J. 8, 3 (1997); see also St. John v. Lofland, 64 N.W. 930, 931 (N.D. 1895) (noting that "there are more honest claims defeated by the Deadman's Statutes than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses").
his daughter's proposal and its potential for success.

Over dinner, Jennifer's father toasted the proposal and promised his daughter and son-in-law that in exchange for their idea, he would give them one-third of any profits that the product would yield. No contracts were signed, let alone sought, because this agreement was to be forged on the sacred trust that is expected between a daughter and her father. Jennifer had no reason to doubt her father's seemingly principled assurances.

Jennifer and her husband quickly turned over the countless years of research that led to their discovery. Her father's company promptly accepted the information and relied on it extensively as it prepared to manufacture and market the new product. Soon thereafter, it was unveiled.

The product was an immediate success. The company's profits doubled in the first year. Within two years, the new skin care product became the company's leading seller. After three years, nearly ninety percent of the company's sales were derived directly from the formula that Jennifer had given to her father. The profits were in the millions.

Neither Jennifer nor her husband, however, had been compensated for their idea. After waiting for nearly three years, Jennifer asked her father when she might receive her portion of the extraordinary profits. Her father then told her that her compensation was to be her inheritance. Pursuant to her father's will, both Jennifer and her brother were to receive equal shares from his estate. Jennifer's brother, however, had never assisted in the product development.

Jennifer felt defrauded. After failing to reach a settlement with her father that recognized the time and effort that both she and her husband had devoted to developing the product, Jennifer decided to sue him for the share of profits that he had promised. After Jennifer filed suit, her father declared that she had betrayed her family and removed her as a beneficiary under his will. Two weeks later, Jennifer's father unexpectedly passed away.

With her father deceased, Jennifer is left with few options. Although she and her husband contributed countless years to the development of a product that was fraudulently taken from them, they will forever be prohibited from telling their story to a jury. Jennifer will never be able to tell a jury that her father had promised to compensate her. Neither will Jennifer's husband be permitted to testify because

60. See statutory text, supra note 1.
he, like Jennifer, has a direct interest in the outcome of the litigation. Supra note 3, § 576, at 820. The criticism has been based on the recognition that the Deadman's Statute is a crude, technical, and unjust method of disqualifying an interested witness. See id. § 578, at 823.

66. See WIGMORE, supra note 3, § 576, at 820. The criticism has been based on the recognition that the Deadman's Statute is a crude, technical, and unjust method of disqualifying an interested witness. See id. § 578, at 823.
illegitimately recover untold riches from the estates of the deceased. What the defenders fail to consider, however, is the even stronger motivation for people to speak the truth when doing so will prove, or at least further, their legitimate claims. There is a consensus among scholars that in the great majority of cases the witness will be honest, no matter how interested. In those cases where the witness is dishonest, however, the falsehood of the testimony will generally be detected and will deceive none. In this respect, the rationale fails to give deference to the greatest attribute of our judicial system: the role of the fact-finder.

It is quite obvious from a rational inquiry that in certain situations a survivor might be tempted to fabricate a story. In such situations, however, one should realize that a jury, too, could recognize that such testimony is to be approached cautiously.

The Deadman's Statute was the target of criticism even before it was codified in Wisconsin. Some critics as early as the early 1800s believed the refusal to allow the testimony of an interested witness to be not only blind, but brainless as well. Over time, the criticism grew so widespread that were the rule still grounded exclusively in common law,

67. To assume that, without the Statute, many false claims would be established by perjury is “to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness.” St. John v. Lofland, 64 N.W. 930, 931 (N.D. 1895).

68. See WIGMORE, supra note 3, § 576, at 814. Jeremy Bentham suggested that if we truly do not believe that interested men can be honest, then we must also believe that:

[t]here is no such thing as the fear of God; no such thing as regard for reputation; no such thing as fear of legal punishment; no such thing as ambition; no such thing as the love of power; no such thing as filial; no such thing as parental, affection; no such thing as party attachment; no such thing as party enmity; no such thing as public spirit, patriotism, or general benevolence; no such thing as compassion; no such thing as gratitude; and no such thing as revenge.

Id. § 576, at 812 (quoting 7 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 393 (Bowring’s ed. 1827)).

69. See id. § 576, at 814. One court has noted that in the legal armory, there is a weapon—the sword of cross examination—whose repeated thrusts will make it difficult, if not entirely impossible, to keep an interested witness’s false testimony from being detected by the jury. St. John, 64 N.W. at 931.

70. See WIGMORE, supra note 3, § 576, at 813.

71. See BLINKA, supra note 11, at 254; see Havlicek/Fleisher Enter., Inc. v. Bridgeman, 788 F. Supp. 389, 398 (E.D. Wis. 1992) (suggesting that “it is preferable for a jury to weigh the credibility of a witness’s testimony rather than suppress [it] altogether”).

72. See BLINKA, supra note 11, at 255. This view of the statute was subsequently endorsed by the Wisconsin Supreme Court. Not finding any rational basis for the statute, the court proclaimed that not allowing a witness who has an interest in a controversy to testify is simply “archaic.” See Molay v. Molay, 175 N.W.2d 254, 259 (Wis. 1970).
the recognition of "its pernicious effect would long ago have dictated its abolition."\textsuperscript{73}

The Wisconsin Supreme Court later addressed both criticisms of the Statute and the need for its reform in its opinion in \textit{Estate of Molay}.\textsuperscript{74} In \textit{Molay}, the court declared that the skewed rationale supporting the Statute is founded upon an archaic view of the law.\textsuperscript{75} Although the court conceded that there is a certain unfairness in permitting a witness to give one version of a transaction when the other party's mouth is stopped in death, it reaffirmed its position that such defenses were simply not compelling enough to justify the continued existence of the Statute. The court suggested that the more realistic effect of the Statute is to endanger the estates of the living by barring honest claims.\textsuperscript{76}

While bound to the dictates of the legislative mandate, the Wisconsin judiciary has enforced the Statute's directives with "aversion and avoidance."\textsuperscript{77} The courts' reluctance\textsuperscript{78} to liberally enforce the Statute is founded on the belief that "[i]n seeking to avoid injustice on one side," the legislature has blindly "ignored the equal possibility of injustice to the other."\textsuperscript{79} Left with the arduous task of ensuring that justice is promoted, the courts have continued to urge the Statute's repeal.\textsuperscript{80} But despite the level of criticism that the Statute has received, the Wisconsin legislature "has seen fit to neither abolish nor effectively to amend the Statute."\textsuperscript{81} Consequently, courts have been able only to alleviate some of the harshness of the Statute by insisting upon exceptionally strict rules for its invocation.\textsuperscript{82}

The Wisconsin Supreme Court has declared that the Deadman's Statute is to be strictly interpreted.\textsuperscript{83} In limiting the effect of the Statute

\textsuperscript{73} See \textit{Molay}, 175 N.W.2d at 259; see also \textit{St. John}, 64 N.W. at 931 (noting that the Deadman's Statute "should not be extended beyond [its] letter" when doing so would add another witness to the list of those whom the statute renders incompetent).

\textsuperscript{74} See \textit{Molay}, 175 N.W.2d at 254.

\textsuperscript{75} See \textit{id.} at 259.

\textsuperscript{76} See \textit{id.}

\textsuperscript{77} BLINKA, supra note 11, at 253.

\textsuperscript{78} \textit{Molay}, 175 N.W.2d at 259.

\textsuperscript{79} MCCORMICK, supra note 17, at 143.

\textsuperscript{80} See \textit{State v. Fonk's Mobile Home Park and Sales, Inc.}, 395 N.W.2d 786, 791 (Wis. Ct. App. 1986); see also \textit{Molay}, 175 N.W.2d at 259.

\textsuperscript{81} See \textit{Ford v. Ford}, 126 N.W.2d 573, 576 (Wis. 1964).

\textsuperscript{82} See \textit{Molay}, 175 N.W.2d at 259-60; \textit{Reist v. Reist}, 281 N.W.2d 86, 91-92 (Wis. 1979); see also \textit{Hunzinger Constr. Co. v. Granite Resources Corp.}, 538 N.W.2d 804, 807 (Wis. Ct. App. 1995).

\textsuperscript{83} See \textit{Reist}, 281 N.W.2d at 91-92.
where possible, the Wisconsin judiciary has attempted to diminish its negative impact on legitimate claims. A long line of decisions by the Wisconsin Supreme Court have made the operation of the Statute dependent upon a precisely-worded objection. And although highly restrictive, this requirement has been followed.

The courts' ability to rid the legal system of the Statute's unfair result, however, is extremely limited. It is well established that a court's construction of a statute can never be so strict as to be arbitrary rather than fair. Nor can the interpretation of the court completely destroy or severely impair the operation of a constitutional statute.

In 1973, frustrated by its limited ability to restrain the effect of the Deadman's Statute, the judiciary prompted the Judicial Council's Rules of Evidence Committee to recommend the repeal of the Deadman's Statute as a circumscribed relic of an obsolete principle. The reason for the proposal was the growing criticism of the belief that it is better public policy to protect the estate from possible fraudulent claims than to allow testimony from the living. The Rules of Evidence, as approved in 1973, left the ultimate determination to the legislature. The legislature, however, refused to repeal the statute. Consequently, the Wisconsin Deadman's Statute, existing since 1858, still retains its title as the last surviving vestige of the common law rule in Wisconsin.

VI. AMENDMENT

In recent years, lawmakers have shown a growing discomfit with Deadman's Statutes. As the illegitimacy of the Statute begins to manifest itself, and as more critics begin to speak of its iniquitous effects, liberalizing changes will continue to sweep the nation. Many states have already amended their Deadman's Statutes, and others have abolished

84. See Molay, 175 N.W.2d at 259.
85. See id.
86. See Larson v. Dahlstrom, 8 N.W.2d 48, 52 (Minn. 1943).
87. See id.
89. See Kemmerer v. Ecke, 114 N.W.2d 48, 52 (Wis. 1943).
90. See Knutson v. Mueller, 228 N.W.2d 342, 351 n.28 (Wis. 1975), rev'd on other grounds, Village of Shorewood v. Steinberg, 496 N.W.2d 57 (Wis. 1993).
91. See Currie, supra note 2, at 507; see also Ford v. Ford, 126 N.W.2d 573, 576 (Wis. 1964).
92. See Kemmerer, 114 N.W.2d at 805-06.
93. See McCORMICK, supra note 17, at 143.
94. See id.
the Statute altogether. In addition, many distinguished organizations, such as the Commonwealth Fund Committee, the American Bar Association, the Commissioners on Uniform State Laws, and the Advisory Committee on the Federal Rules of Evidence, have also advocated the statute's abolition. Even the American Law Institute proposed to abolish the Deadman's Statutes through its Model Code of Evidence:

It is the judgment of the Institute that such statutes have produced an almost endless amount of litigation over their proper construction without the slightest statistical or other evidence that they have prevented the establishment of false claims against the estates. This [Rule] drops out of the law of evidence the last vestige of the notion that interests should disqualify a witness from testifying.

Concerned with the developing trend against the Deadman’s Statutes in 1922, the Legal Research Commonwealth Trust Fund of New York established a Committee to issue an opinion as to the wisdom and legitimacy of preserving the Deadman’s Statutes. The Committee focused its analysis on a Connecticut statute that permitted interested witnesses to testify as to communications with a deceased. The Committee questioned three hundred judges and trial lawyers who had experience with the statute, and asked whether the amended version caused injustice or aided in ascertaining the truth. The poll found that eighty-nine percent of the judges, and a majority of the trial lawyers, favored the Connecticut statute over the probative statutes of other states.

The survey's findings were deemed a "rather convincing argument to allay the apprehension of those who believe that the removal of the prohibition of the statute would assist in the recovery of unjust claims." Impressed by the Connecticut study, the American Bar As-

95. See, e.g., KY. REV. STAT. ANN. § 421.210 (repealed 1992); ME. REV. STAT. ANN. tit. 15, § 1 (repealed 1977); MISS. CODE ANN. § 13-1-7 (repealed 1991); NEB. REV. STAT. § 25-1202 (repealed 1973); TEX. REV. CIV. STAT. ANN. art. 5716 (repealed 1983).
96. See MARTIN, supra note 7, at 139.
97. See Currie, supra note 2, at 506.
98. See WIGMORE, supra note 3, § 578a, at 824-26.
99. See id. at 826.
100. See id.
101. Currie, supra note 2, at 505-06. The Committee adopted the conclusion that the Deadman’s Statute did not offer a protection against false claims, but rather created “an obstruction to the thorough investigation of the truth.” WIGMORE, supra note 3, § 578a, at 825.
sociation recommended the following solution:

That the [Deadman's Statutes] be abrogated by the adoption of a statute like that of Connecticut, which removes the disqualification of the party as a witness and permits the introduction of declarations of the decedent, on a finding by the trial judge that they were made in good faith and on [the] decedent's personal knowledge.

The trend, gaining momentum on a national scale by the 1930's, did not escape notice in Wisconsin. On February 22, 1940, the State Bar Association approved a recommendation of the Junior Bar Association of Milwaukee that the Wisconsin Deadman's Statute be repealed. The recommendation suggested that a new statute, to take the place of the Deadman's Statute, read as follows:

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

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

The recommendation was then referred to the legislative committee of the State Bar Association to be presented to the legislature. The proposal, however, failed legislative scrutiny, and the Deadman's Statute survived.

103. McCormick, supra note 17, at 143 n.4.
104. It is notable that some states began to repeal their Deadman's Statutes much earlier. Rhode Island, for example, repealed its Deadman's Statute in 1896. See R.I. R. Evid. 601 advisory committee's note.
105. Currie, supra note 2, at 506.
106. See id.
107. Id. There are currently four other states that have adopted provisions with similar language. See Cal. Evid. Code § 1261 (West 1997); Mass. Gen. Laws ch. 233, § 65 (1997); S.D. Codified Laws § 19-16-34 (Michie 1997); Utah R. Evid. 601.
108. See Currie, supra note 2, at 506.
109. See id. at 506-07.
In 1972, the rationale supporting the necessity of the remaining Deadman's Statutes was directly assaulted at the national level.\textsuperscript{110} The drafters of Rule 601 of the Federal Rules of Evidence initially proposed to eliminate the grounds for disqualifying a witness on the basis of "interest" at the federal level.\textsuperscript{111} The drafters believed that these matters should be left to the jury because the jury was best suited to determine witness credibility.\textsuperscript{112} The drafter's approach suggested that the Deadman's Statute was inconsistent with the developing trends of modern evidence law.

The Rule of Competency proposed by the Advisory Committee was initially drafted as a single sentence.\textsuperscript{113} The Rule provided that "[e]very person is competent to be a witness except as otherwise provided in these rules."\textsuperscript{114} The Committee intended to eliminate those ancient and outdated rules of incompetency, such as the Deadman's Statute.\textsuperscript{115} The Advisory Committee's Note to Rule 601 reasoned that because the remaining Deadman's Statutes were too dissimilar to support a general claim as to their effectiveness, the proposed Rules would not provide for their continued existence.\textsuperscript{116} Accordingly, the Note also declared that the remaining Deadman's Statutes were to have no effect in diversity cases.\textsuperscript{117}

Congress, however, was unwilling to authorize the abolition of the state statutes. Because of a fear that they would be impermissibly tampering with established state-policy,\textsuperscript{118} Congress adopted the Federal Rules only after adding a second sentence to Rule 601.\textsuperscript{119} The additional sentence provided that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law."\textsuperscript{120} This Congressional maneuver effectively ended the Advisory Committee's campaign to slice through the stubborn grasp of the Deadman's rationale and ensure the discontinued use

\textsuperscript{110} See MARTIN, supra note 7, at 138.
\textsuperscript{111} See FED. R. EVID. 601 advisory committee's note; see Capra, supra note 59, at 3.
\textsuperscript{112} See Bridgeman, 788 F. Supp. at 398.
\textsuperscript{113} See FED. R. EVID. 601 advisory committee's note.
\textsuperscript{114} Id.
\textsuperscript{115} See Capra, supra note 59, at 3.
\textsuperscript{116} See FED. R. EVID. 601 advisory committee's note.
\textsuperscript{117} See id.
\textsuperscript{118} See Capra, supra note 59, at 3.
\textsuperscript{119} See FED. R. EVID. 601.
\textsuperscript{120} Id.
of the statutes at the national level.

Today, however, most states have wholly accepted the comment to the Rule recommending the abolition of the Deadman’s Statute. Unwilling to support injustice by preventing honest claimants from proving their case, these states have either substantially amended their Deadman’s Statutes to permit testimony from an interested witness, or have abolished the Statutes altogether. However, the Wisconsin Legislature has been unmoved by the growing support advocating the repeal of the Deadman’s Statute. If legislators and citizens rethink the strategy with respect to the continued existence of a relic such as the Deadman’s Statute, however, the legal system—that citizens, attorneys and legislators defend as being fair and just—will be far more capable of fulfilling its promises.

A. Proposals for Amendment

One option available to Wisconsin is to follow the lead of thirty-two other states and reject the Deadman’s Statute altogether. If Wisconsin abolishes the Deadman’s Statute, no more legitimate claims will be absolutely barred. Such an approach would be entirely consistent with the opinion that it is preferable for a jury to weigh the credibility of a witness’s testimony rather than suppress it altogether. The void created by the absence of a Deadman’s Statute could be easily filled with the current version and scope of Wisconsin’s general rule of competency.

A second alternative would be to reintroduce the proposal submitted by the Junior Bar Association of Milwaukee as endorsed by Wisconsin Supreme Court Justice George R. Currie almost fifty years ago. Four other states have repealed their Deadman’s Statutes and adopted in their place nearly identical measures. There can be no conceptual uncertainty or impractical risk in adopting language that has effectively promoted the administration of justice in other states for

121. See MARTIN, supra note 7, at 138.
122. See WIGMORE, supra note 3, "579, at 826.
123. See supra note 6 and accompanying text.
125. If the references to the Wisconsin Deadman’s Statutes were removed, the statute would provide that “[e]very person is competent to be a witness except as... provided by these rules.” Wis. STAT. § 906.01 (1997).
126. See Currie, supra note 2, at 506.
127. See CAL. EVID. CODE § 1261 (West 1997); MASS. GEN. LAWS ch. 233, § 65 (1997); S.D. CODIFIED LAWS § 19-16-34 (Michie 1997); UTAH R. EVID. 601.
nearly one hundred years.\textsuperscript{128} A third alternative, and probably the most effective, would be to follow the lead of Illinois.\textsuperscript{129} Moved by a proposal that was more concerned with the fair administration of justice than the preservation of an iniquitous principle, the Illinois legislature adopted a statute that effectively ended the Deadman’s reign. The new Statute placed the inquiry of competency on the shoulder of common sense and provided that: “No person should be disqualified as a witness in any action or proceeding . . . by reason of his or her interest in the event thereof, as a party or otherwise, . . . but such interest . . . may be shown for the purpose of affecting the credibility of such witness.”\textsuperscript{130}

Both Minnesota and Missouri have experienced success with similar provisions concerned not with whether the witness is interested, but whether the witness’s interest creates a bias that the jury should consider.\textsuperscript{131}

The statute in Illinois has never been deemed an outrageous mistake and has yet to be condemned. The statute, instead, continues to ensure that all legitimate claimants deserving to be heard will have their day in court. The Illinois legislators who stood behind the passage of this statute have certainly satisfied their oaths by having refused to deny their constituents the justice and equity that they deserve.

VII. CONCLUSION

The Wisconsin Deadman’s Statute has survived for over 140 years as a legislative mandate protecting the estates of the deceased from the fraudulent claims of the living.\textsuperscript{132} As early as 1848, however, the Wisconsin Judiciary began to recognize the inherent injustice in absolutely preventing all persons of an “interested” class from testifying.\textsuperscript{133} The realization within the Wisconsin courts was wholly consistent with the trends beginning to manifest themselves across the nation. But as many

\textsuperscript{128} See, e.g., MASS. GEN. LAWS ch. 233, § 65 (1997)(enacted in 1902).

\textsuperscript{129} See 735 ILL. COMP. STAT. 5/8-101 (West 1997).

\textsuperscript{130} Id.

\textsuperscript{131} The enactment of Rule 616 in Minnesota superceded the state’s Deadman’s Statute and provides that “[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.” MINN. R. EVID. 616. Missouri’s section 491.010(1) provides that “[n]o person shall be disqualified as a witness in any civil suit or proceeding . . . by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility.” MO. REV. STAT. § 491.010 (1997).

\textsuperscript{132} See Currie, supra note 2, at 491-92.

\textsuperscript{133} See generally id.; see also Molay v. Molay, 175 N.W.2d 254, 259 (Wis. 1970).
state legislatures began to abandon Deadman's Statutes because of their flawed rationale and cruel results, the Wisconsin legislature refused to budge.\textsuperscript{134}

The continued legislative endorsement of the last surviving vestige of an abandoned common law rule should be recognized as a dangerous practice. The evolution of law ensures that only those laws best suited to protect society's interest will survive. Many states have addressed the concerns posed by the Deadman's Statute; most have rejected its flawed precept.\textsuperscript{135} Wisconsin has always been noted for its progressivism. Closing the door on the Deadman's Statute may indeed breathe new life into a judicial system that, to this day, remains haunted by the shadowy grasp of the dead. The trends advocating the repeal of the Statute have been numerous and consistent. In any undertaking, it is ultimately society that a lawyer represents. Few are in a better position to recognize the injustices that result from the strict adherence to a flawed rationale. And few are better suited to advocate its change.

When the Wisconsin Legislature revisits the issue, the only relevant inquiry should be whether the chances of obtaining the truth are greater from the admission of a witness, or from his or her absolute exclusion.\textsuperscript{136} The answer to this question is found in the reasoning that presents it; had the Deadman's Statute been grounded exclusively in the common law, the recognition of its pernicious effect would have long ago dictated its abolition.\textsuperscript{137}

\textbf{SHAWN K. STEVENS}

\textsuperscript{134} \textit{See} Ford v. Ford, 126 N.W.2d 573, 576 (Wis. 1964).

\textsuperscript{135} \textit{See supra} note 6, and accompanying text.

\textsuperscript{136} \textit{See} WIGMORE, \textit{supra} note 3, at 826.

\textsuperscript{137} \textit{See} Molay, 175 N.W.2d at 259.