

October 3, 2016

**VIA E-MAIL: JULIE.RICH@WICOURTS.GOV**

Chief Justice Patience D. Roggensack  
Justice Shirley S. Abrahamson  
Justice Ann Walsh Bradley  
Justice Annette Kingsland Ziegler  
Justice Michael J. Gableman  
Justice Rebecca G. Bradley  
Justice Daniel Kelly  
c/o Clerk of the Supreme Court  
P.O. Box 1688  
Madison, WI 53701

RE: Comment on Rule Petition 16-01, in the Matter of Amending Wis. Stats.  
§§ 885.16, 885.17, and 906.01

Dear Chief Justice and Justices:

As Wisconsin attorneys with trust and estate litigation practices, we have closely followed the Wisconsin Judicial Council's consideration and development of its proposal to repeal Wisconsin's so-called Dead Man's Statutes, Sections 885.16 and 885.17 of the Wisconsin Statutes. We applaud the Council's efforts. The Council's April 28, 2016 Memorandum in Support concisely collects and highlights the ample authority demonstrating that the time has come for these antiquated and troublesome statutes. The Council and legal commentators, including Professor Daniel D. Blinka,<sup>1</sup> have clearly articulated the case for repeal. In our review, we have seen no argument for retaining these statutes – statutes that our state court judges so uniformly disfavor and must routinely contort themselves to evade. Because only a slavish adherence to tradition and a pessimistically “dark view of human nature”<sup>2</sup> can justify these statutes, we write in support of the Petition.

We write further now only to add our practical concerns as attorneys who must all too often confront these statutes and their myriad effects. The mischief they create is thoroughly discussed in generations of legal commentary. Accordingly, we confine our comments to three less obvious impacts. First, unless repealed, the Dead Man's Statutes stand to burden Wisconsin

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<sup>1</sup> See Blinka, 7 Wis. Prac., Wis. Evidence § 601.3 (3d ed.)

<sup>2</sup> Id.

courts in the years ahead as the anticipated volume of trust and estate litigation dramatically increases. Second, the Statutes and their judicially-prescribed exceptions result in materially higher fees for litigants as their attorneys navigate the complex analyses of the Statutes' scope, waiver, and exceptions. Finally, we believe that the Dead Man's Statutes have a disproportionate impact on smaller trusts and estates, and thus unfairly penalize less wealthy and less sophisticated litigants. The rest of this letter discusses these three impacts.

The Rise of Trust and Estate Litigation. For many judges and attorneys, Wisconsin's Dead Man's Statutes are obscure and rarely, if ever, encountered. While it is true that the Dead Man's Statutes are most frequently encountered in probate and trust litigation, the number of these disputes should only continue their sharp rise. As a result, courts can expect to spend significantly more time hearing and ruling upon the Dead Man's Statutes, or more accurately, "evading their proscriptions."<sup>3</sup> More probate and estate litigation will beget more court resources wasted upon these statutes.

Trust and estate litigation will continue to increase exponentially for two reasons. First, the United States is in the beginning of one of the largest intergenerational transfers of wealth in history. From 2007 to 2061, an estimated 93.6 million estates will transfer some \$59 trillion to subsequent generations.<sup>4</sup> At the projected peak between 2031 and 2045, ten percent (10%) of the country's total wealth will change hands every five years.<sup>5</sup> With this surge logically comes a resulting explosion in conflicts between heirs and beneficiaries and claims of alleged mismanagement of assets by fiduciaries. Simply stated, more money means more disputes arising from the planned dispositions of the deceased.

Second, while more estates will be transferring more money, an even greater percentage of those estates will be touched by Alzheimer's disease and other causes of dementia. Presently, an estimated 5.4 million Americans have Alzheimer's disease, including 1 in 9 (11%) age 65 and older.<sup>6</sup> In Wisconsin this year, an estimated 110,000 adults have Alzheimer's disease, and the Alzheimer's Association predicts an 18% increase in that number by 2025.<sup>7</sup> By 2050, estimates

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<sup>3</sup> Id.

<sup>4</sup> Sean F. Murphy, "Tips to Keep You Out of Fiduciary Litigation", New York Bankers Association, Oct. 2, 2015. [http://www.nyba.com/wp-content/uploads/2015/09/Murphy\\_Tips\\_Litigation.pdf](http://www.nyba.com/wp-content/uploads/2015/09/Murphy_Tips_Litigation.pdf)

<sup>5</sup> "The 'Greater' Wealth Transfer: Capitalizing on the Intergenerational Shift in Wealth", Wealth and Asset Management Services, Point of View, Accenture, 2015. [https://www.accenture.com/us-en/~/\\_media/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Industries\\_5/Accenture-CM-AWAMS-Wealth-Transfer-Final-June2012-Web-Version.pdf](https://www.accenture.com/us-en/~/_media/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Industries_5/Accenture-CM-AWAMS-Wealth-Transfer-Final-June2012-Web-Version.pdf)

<sup>6</sup> 2016 Alzheimer's Disease Facts and Figures, p.17, Alzheimer's Association. [http://www.alz.org/documents\\_custom/2016-facts-and-figures.pdf](http://www.alz.org/documents_custom/2016-facts-and-figures.pdf)

<sup>7</sup> Id. at 20

of the incidents of Alzheimer's disease are projected to more than triple to between 13.8 and 16 million affected Americans.<sup>8</sup> The higher the incidences of Alzheimer's disease and other forms of dementia, the more issues will arise about testamentary capacity and/or susceptibility to undue influence. Such challenges will almost inevitably implicate the Dead Man's Statutes. With demographics suggesting that trust and estate litigation will continue to grow in the future, the Dead Man's Statutes will be a prominent – and in our view undesirable – feature in such litigation.

Litigation Costs. The Dead Man's Statutes are potentially outcome-determinative. As a result, litigants and their attorneys spend significant time and resources researching, strategizing, and ultimately litigating the Dead Man's Statutes' application, exceptions and waiver. The benefits of barring one's opponent from telling the entirety of his or her story are too valuable to pass up. In our experience, tens of thousands of dollars in attorneys' fees can be expended litigating Dead Man's Statute issues, often with uncertain, unpredictable, and unfair results. On the other hand, the Council's proposed new Rule 906.16 would allow impeachment evidence against opposing "interested persons" to be collected and presented at a fraction of that cost. The Dead Man's Statutes only drive up cost of litigating trust and estate disputes. Repeal of these statutes presents a welcomed opportunity to reduce the expenses borne by litigants in such cases.

Disparate Impact on the Less Affluent. Both anecdotally and logically, the Dead Man's Statutes more often play significant roles with smaller estates. More affluent persons often have access to lawyers capable of effectively "bullet-proofing" their estates from challenge; less affluent person often do not. As a result, the generally less affluent people litigating over such estates are more apt to have the disposition of their estate hinge upon the capricious operation of the Statutes. This disparate impact is fundamentally unfair and inconsistent with the goals of an orderly judicial system. It is particularly serious given the constitutional dimensions of testamentary disposition. *See, e.g., In re Ogg's Estate*, 262 Wis. 181, 186-87, 54 N.W.2d 175 (1952) (recognizing constitutional right to make a will and have it enforced).

The disparate impact exists because wealthy testators more often utilize attorneys for their estate plans, with the resulting plans being more complex, orderly, and better documented. This increased formality leaves fewer opportunities for "interested witnesses" to fill in any gaps in the estate plan documents or to attack the circumstances of their execution. Conversely, smaller estates with less sophisticated plans will have more ambiguities, gaps and informal executions. Testimony from "interested persons" may be necessary or helpful to fulfill the intent of the testators with more modest estates.

Moreover, wealthy estates and trusts more often utilize independent, professional trustees and personal representatives. To save costs, testators with less accumulated wealth are more likely to name a beneficiary – a son, daughter, or sibling – as trustee, personal representative, or power of attorney. Some argue that these arrangements more often result in litigation because of

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<sup>8</sup> Id. at 23

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real or perceived errors in administration, self-dealing, and tensions arising from dysfunction between related beneficiaries with a shared history. In resulting breach of fiduciary duty and breach of trust disputes, the beneficiary-fiduciary will often technically be deemed an “interested person” who – under the Statutes – will not be able to rely upon communications and dealings with the testator to defend against his or her alleged conflict of interest, breach of duty of loyalty, or undue influence.

In closing, the Council has made the compelling technical arguments for repeal of the Dead Man’s Statutes. We agree and urge prompt action. As practitioners “in the trenches” we cannot overstate the emotional impact of trust and estate litigation on clients. The subject matter and often fractured relationships involved are intensely personal and the results of these cases can be life altering. Lay people often simplistically view litigation as their “day in court” and they expect to be heard. The Dead Man’s Statutes destroy that opportunity by muzzling litigants from telling their story and depriving the trier of fact of the right to make the sort of credibility judgments available for virtually every other type of factual issue. Clients receive this news from us with confusion, frustration, and a sense of betrayal by the system. Because the Dead Man’s Statutes frustrate the search for truth that clients have a right to expect, we join in urging their repeal.

Very truly yours,

*s/ Jonathan R. Ingrisano*

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