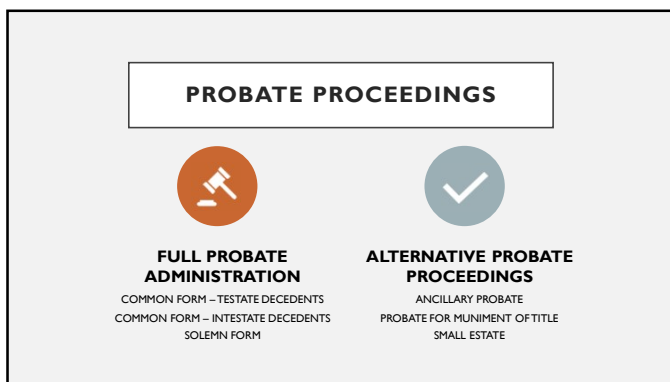
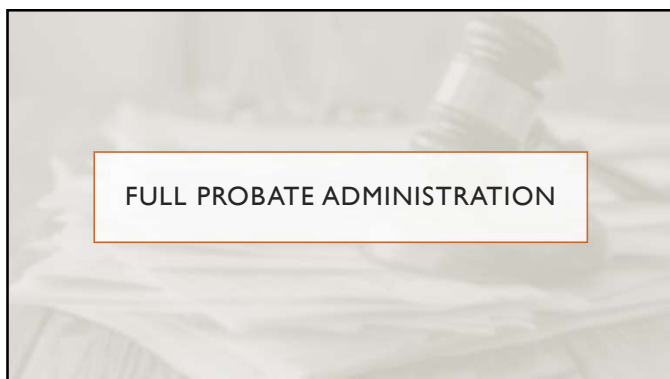


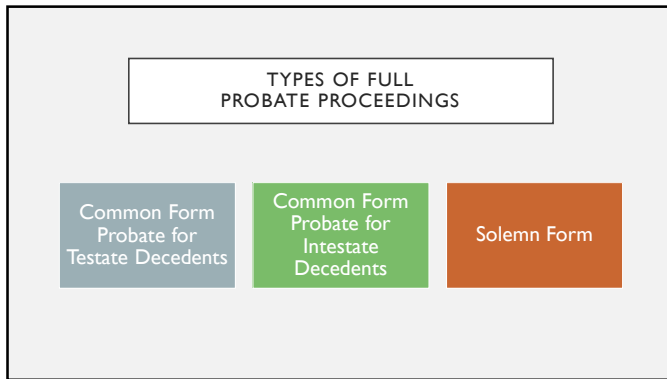
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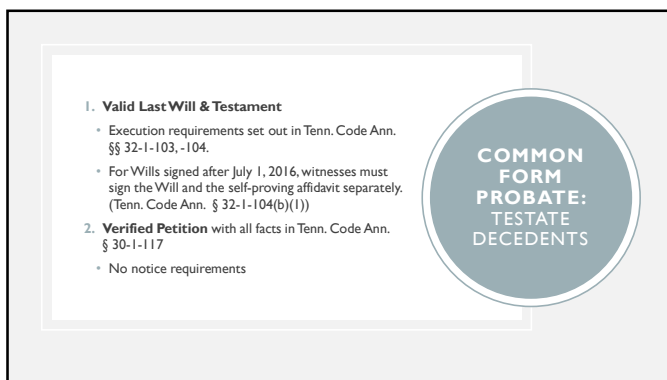
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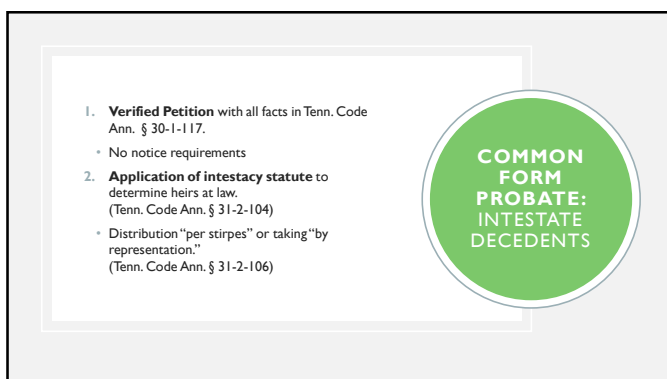
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**SOLEMN
FORM
PROBATE**

When is solemn form used?

1. Nuncupative Will – *Brown v. Harris*, 68 Tenn. 386 (Tenn. 1876), or
2. Desire to resolve any possible objections or force a contest.

Differences from common form:

1. Requires contest to be presented when Will offered for probate or never.
2. Notice to interested parties

Requirements:

1. A valid Last Will & Testament, proved by witnesses' testimony
2. Verified Petition with all facts in Tenn. Code Ann. § 30-1-117
3. Hearing on Verified Petition, with appropriate notice

7

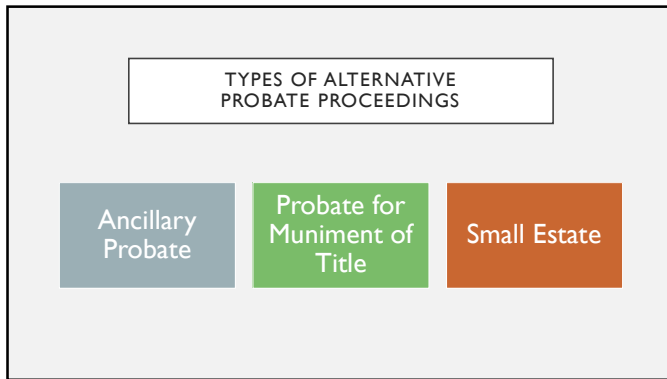
**FULL PROBATE ADMINISTRATION
PRACTICES**

- **Statute of limitations?**
 - Only for Will Contests – 2 years from order admitting Will to probate (Tenn. Code Ann. § 32-4-108)
 - Bar for filing claims against estate - 1 year after date of death
- **Claims against an Estate**
 - Notice to creditors (Tenn. Code Ann. § 30-2-306)
 - When does a claim need to be filed in an estate?
 - When does an administrator need to be named to accept a claim against the Estate?
- **Closing an Estate** - Accountings/Distributee Statements/Motions to Close
- **Reopening an Estate**

8

**ALTERNATIVE PROBATE
PROCEEDINGS**

9



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- "A Will duly probated in another state may be admitted and recorded in any county in which the testator left any estate." (Tenn. Code Ann. § 32-5-101)
- May be in common form or solemn form
- Court's duty is to examine certifications and authentications. *In re: De Franceschi's Estate*, 70 S.W.2d 513 (1933).
- Typically used only for real estate, because distribution of personal property is subject to probate of the Will in another state. (Tenn. Code Ann. § 32-5-103)

ANCILLARY
PROBATE

11

PROBATE
FOR
MUNIMENT
OF TITLE

- Typically used to demonstrate title to real estate.
- Tenn. Code Ann. § 32-2-111:
"... any will, when duly proven ... may be admitted to probate for the limited purpose of establishing a muniment of title to real estate and personal property, without the necessity of granting letters testamentary or otherwise proceeding with administration."
- **Requirements:**
 1. Verified Petition filed with all facts in Tenn. Code Ann. § 30-1-117, but also including:
 2. Legal description of property
 3. Request that Will be proved and ordered for recording.
- Estate is not administered, no letters issued


12

Requirements: Tenn. Code Ann. §§ 30-4-102 - 104

1. 45-day waiting period
2. Less than \$50,000 in property and *no real property*
3. Petition for Limited Letters of Administration of a Small Estate filed by an adult heir (must comply with Tenn. Code Ann. § 30-1-117(a)) and,
 - If testate decedent and small estate is to be distributed pursuant to Will, either file Petition to Probate Will as a Muniment of Title or file original Will with affidavits
 - Petition also needs to include: itemized list of property of decedent, value of each item of property, identity of each creditor of decedent and amount owed to each creditor.

Notes:

- No notice to creditors is published; no claims can be filed.
- Bond is required.
- Conversion to full probate estate is possible.

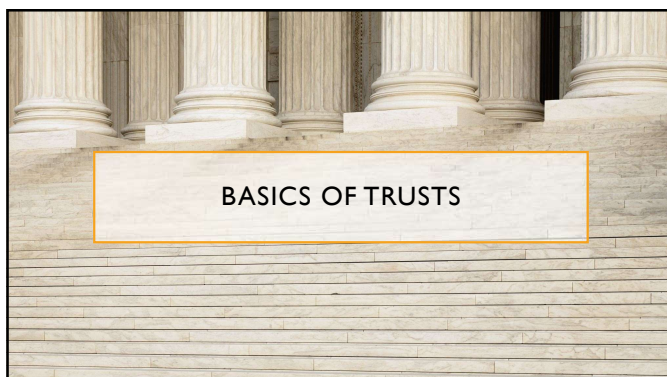


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OTHER PROBATE POINTERS

- **Survival of actions** – Tenn. Code Ann. §§ 20-5-102 – 105: All civil actions except those affecting the character of the plaintiff survive.
- **Substituting parties for a decedent during litigation** – Within 90 days of the filing of a suggestion of death of a party, any party may file a motion for substitution of the proper parties. (Tenn. R. Civ. P. 25.01)
 - The time requirement within which a motion for substitution must be filed is triggered by the suggestion of death. See *Williams v. Williams*, No. E2012-00162-COA-R3-CV-2012 WL 3986328, at *2 (Tenn. Ct. App. Sept. 12, 2012).
- **Wrongful death actions** should be filed against the personal representative of decedent's estate in appropriate court.
 - Personal representative also has authority to bring an action, but does so for the statutorily entitled beneficiaries, not for the benefit of the decedent's estate.

14



BASICS OF TRUSTS

15

WHAT IS A TRUST?

No definition in the Tennessee Uniform Trust Code.

IRS definition: "In general, a trust is a relationship in which one person holds title to property, subject to an obligation to keep or use the property for the benefit of another."
<https://www.irs.gov/charities-non-profits/definition-of-a-trust>

16

WHO IS INVOLVED?

CREATED BY?

• Grantor/Settlor/Testator

CREATED FOR?

• Beneficiaries

ADMINISTERED BY?

• Trustee

17

WHY ARE TRUSTS CREATED?

- Probate avoidance
- Creditor protection
- Control over assets
- Beneficiary concerns
- Tax benefits
- Other specific reasons, like special needs trust or charitable trust

18

HOW ARE TRUSTS CREATED?

- Trust Agreement
- Will
- Court Order
- Constructive Trust

19

WHAT TYPES OF TRUST EXIST?

- Inter-Vivos – created during grantor's lifetime
- Testamentary – created by will
- Revocable – grantor retains control
- Irrevocable – grantor gives up control
- Variations – charitable, special needs, asset protection, generation-skipping, spendthrift, directed, silent

20

WHAT PROVISIONS GOVERN TRUSTS?

- Trust instrument and revisions
- Tennessee Uniform Trust Code (Tenn. Code Ann. § 35-15-101)
- Common law
- Federal tax regulations
- Court orders
- Non-judicial Settlement Agreements

21

WHAT FIDUCIARY DUTIES GOVERN THE TRUSTEE?

- Trustee have numerous duties detailed in the Tennessee Uniform Trust Code:
- See Tenn. Code Ann. §§ 35-15-801 to -813
- A few examples are:
 - duty to administer trust
 - duty of loyalty
 - duty to inform and report
 - duty of impartiality
- Trustees are required by law to fulfill these duties



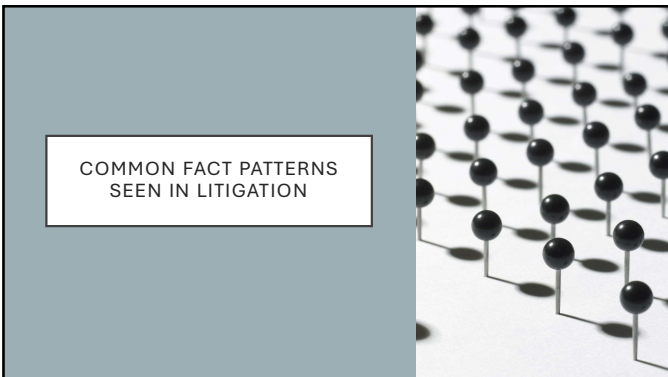
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ESTATE AND TRUST ADVERSARY PROCEEDINGS



23

COMMON FACT PATTERNS SEEN IN LITIGATION



24

THE HEAD OF THE FAMILY

- Typically operated a business centered around that person
- Lack of succession planning
- Children dependent on parent or employed by business, but unable to operate it
- Children realize funds are likely finite
- Conflict can appear in trust context, especially with discretionary distributions
- Litigation over validity terms of will/trust, especially if one child is favored or one child is named as fiduciary

25

- Tension when parent remarries and then passes
- Beneficiaries may be a mix of biological and stepchildren
- Animosity relating to marriage may transfer over to and influence conflict
- Especially problematic in trust situation where step-parent is named as primary beneficiary with discretionary distributions during his/her life and biological children are remainder beneficiaries
- Difficult if all assets are left to new spouse, and new spouse intends to benefit his/her biological children from prior marriage upon death

THE BLENDED FAMILY

26

THE ELDEST CHILD/THE CHILD IN CHARGE

- Seen when there was one child who tended to be in charge during the parents' life
- Oftentimes the oldest child
- Common for the child to be involved in parent's business
- Child is typically named as fiduciary
- Sometime child steps into shoes of parents and "parents" other siblings
- Creates issues when oldest child seeks fees
- Also when child has influence over discretionary distributions to other children
- Difficult regarding an on-going business – child receiving salary, can be slow to wind up business or give up control

27

THE CAREGIVER

- Centers on the family member who cared for parent
- Oftentimes involved a slow decline in cognitive or physical health
- Can involve a catastrophic injury
- One child takes on the burden and responsibility – parent moves in or is in a facility near that child
- Resentment builds towards other siblings who aren't as involved
- Parent passes and child feels entitled to compensation or preference regarding personal property – difficult for discretionary distributions
- Ripe for a contest if parent makes changes to trust to favor that child

28

THE INTRUDING STRANGER

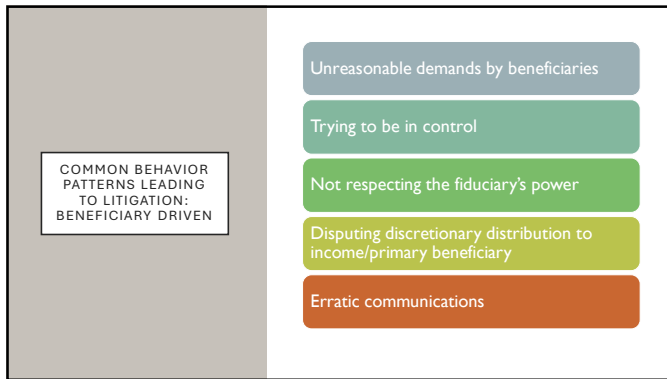
- Person enters elderly parent's life - often is a caregiver, neighbor, new "friend"
- Children are often completely unaware of this new relationship
- Person steadily increases contact and control over parent - leads parent to believe children do not care
- Parent can be turned against or completely cut off of children
- Parent changes terms of trust to favor the stranger
- Stranger involved in changes i.e. hires attorney, drives parent, attends meetings etc.
- Stranger is often named as trustee and children are disinherited
- Classic will/trust contest - can involve criminal conduct

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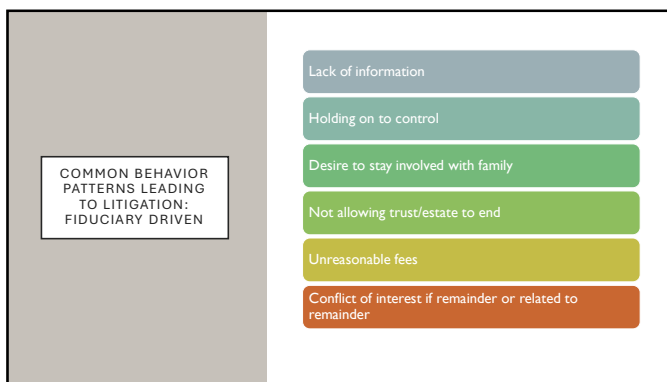
COMMON BEHAVIORS LEADING TO CONFLICT



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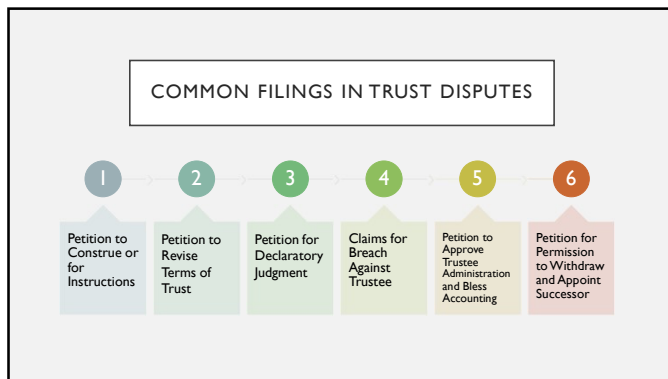
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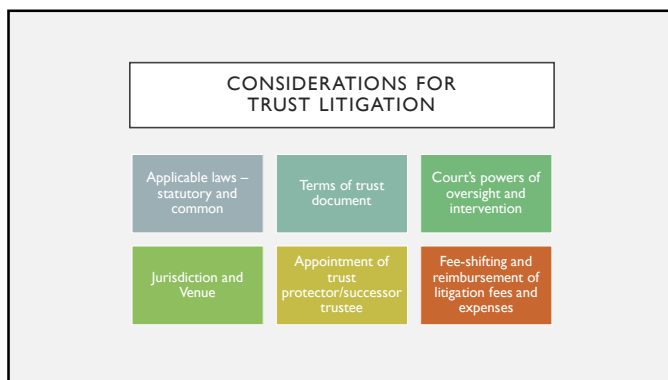
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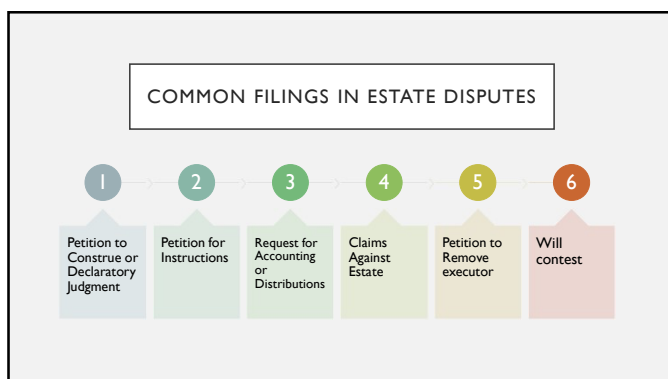
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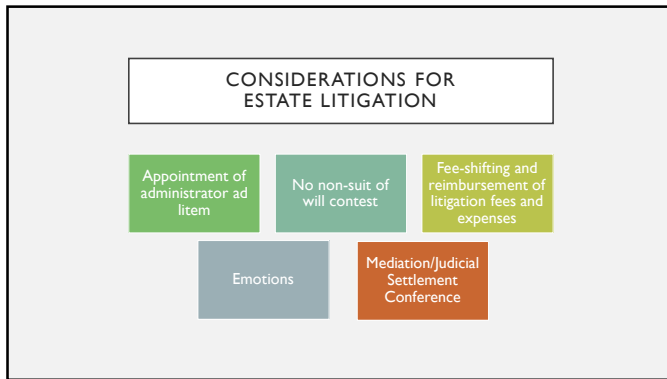
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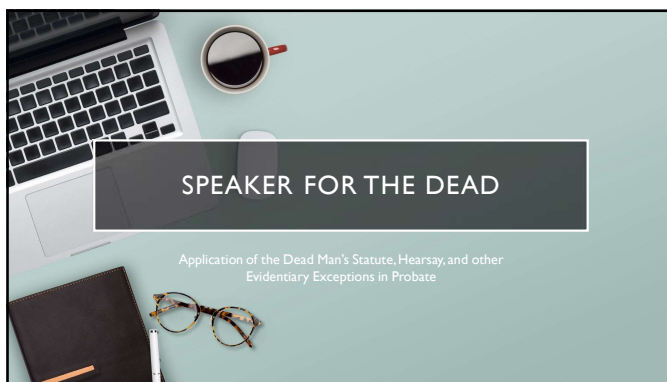
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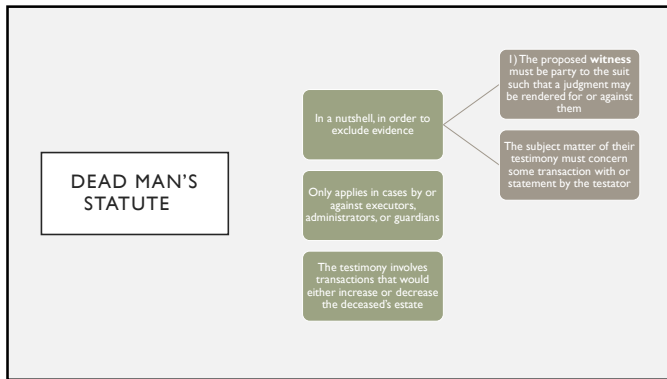


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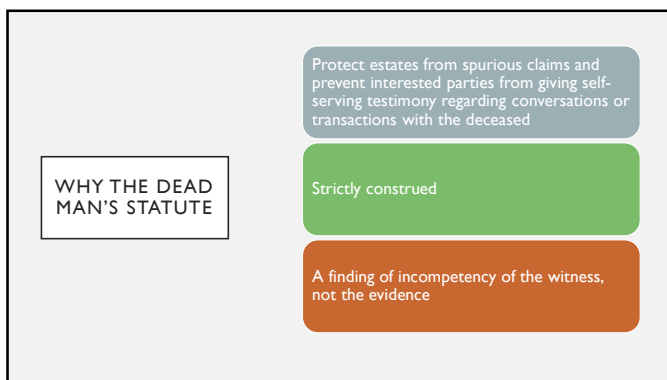
TENNESSEE'S DEAD MAN'S STATUTE

- TCA 24-1-203:
- In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.

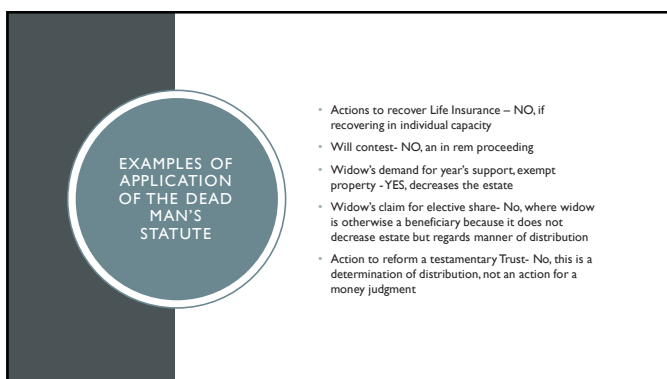
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41



42

EXAMPLES OF APPLICATION OF THE DMS

• **Mitchell v. Johnson**, 646 S.W.3d 754 (Tenn App. 2021)

Does the DMS exclude testimony by the decedent's attorneys in fact in an action filed by Administrator against decedent's attorneys in fact for breach of fiduciary duty and undue influence?

Yes, because the testimony involves transactions with the decedent that would increase or decrease the estate.

43

EXAMPLES OF APPLICATION OF THE DEAD MAN'S STATUTE

• **Holliman v. McGrew**, 343 S.W.3d 68 (Tenn.App. 2009)

Does the DMS preclude admission of testimony from notes of conversations with the decedent in a wrongful death action?

* No, in this case, because the testimony was offered by the opposing party.

Could the DMS preclude admission of testimony in another wrongful death case?

* The Court seems to think it is possible. May actually be more likely in a personal injury case rather than a wrongful death case because a personal injury recovery is an asset of the estate.

44

EXAMPLES OF APPLICATION OF THE DMS

Chumbler v. McClure, 505 F.2d 489, 490-91 (6th Cir. 1974)

• The Sixth Circuit applied Tennessee's Dead Man's statute in a medical malpractice action and held the trial court did not err in excluding all testimony on the alleged lack of informed consent by the plaintiff-appellant concerning his drug treatment where such testimony would inevitably relate to conversations with the deceased doctor or to transactions involving the doctor.

45

EXAMPLES OF
APPLICATION
OF THE DMS

• **Estate of Haire v. Webster, 2024 WL 733248 (Tenn.App. Feb. 22, 2024)**

Does the DMS exclude testimony by bank employees regarding the employees' interactions with the decedent in a lawsuit alleging bank breached its duties to the decedent by disbursing funds out of decedent's accounts following her death?

No, the DMS did not apply because the lawsuit involved non-probate bank accounts and did not increase or decrease the decedent's estate.

Trial Court also held DMS did not apply to statements from bank employees because they were not officers.

46

CAN THE DEAD
MAN'S STATUTE
BE WAIVED?

✓ Yes

If the objecting party calls the witness to testify (perhaps even about matters not prohibited by the statute) case law says the DMS is waived and the witness may be questioned about any matter.

Certainly, the DMS can be waived by calling the witness to testify about the excludable transaction.

Failure to object to the testimony of a witness will waive the DMS.
Can you waive by taking deposition?
Be very clear in questioning of witness so as to not waive.

47

WHAT TO DO IF THE
COURT ALLOWS IN
TESTIMONY OVER
OBJECTION

• **Leffew v. Mayes, 685 S.W. 2d 288 (Tenn.App. 1984)**

The objection is not waived by the subsequent cross-examination about the transaction testified to on direct over objection.

48

OTHER EVIDENTIARY RULES DEALING WITH STATEMENTS OF A DECEDENT

Hearsay exceptions commonly used in probate related matters to admit statements of a decedent and/or to prove facts about the decedent.

49

HEARSAY- EXCEPTIONS COMMONLY USED IN PROBATE

- TRE 803- Declarant **Available** or Unavailable:
- (2) Excited Utterance
- (3) Then Existing Mental, Emotional, or Physical Condition
- (4) Statements for Purposes of Medical Diagnosis and Treatment
- (6) Records of Regularly Conducted Activity
- (8) Public Records and Reports
- (9) Records of Vital Statistics

50

HEARSAY- EXEMPTIONS COMMONLY USED IN PROBATE

- (12) Marriage, Baptismal, and Similar Certificates
- (13) Family Records- family Bibles, genealogies, engravings, inscriptions
- (14) Records of **Documents** Affecting an Interest in Property
- (16) Statements in Ancient Documents Affecting an Interest in Property- in existence 30 years or more
- (19) Reputation Concerning Personal or Family History- community consensus
- (20) Reputation Concerning Ancient Boundaries
- (23) Judgment as to Personal or Family History or Boundaries

51

T.R.E. 804
HEARSAY
EXCEPTIONS;
DECLARANT
UNAVAILABLE

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- **(2) Statement Under Belief of Impending Death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.
- **(4) Statement of Personal or Family History.** A statement made before the controversy arose (A) concerning the declarant's own birth, adoption, marriage, divorce, or legitimacy; relationship by blood, adoption, or marriage; ancestry; or other similar fact of personal or family history; even though the declarant had no means of acquiring personal knowledge of the matter asserted; or (B) concerning the foregoing matters, and death also, of another person if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

52

MODERN
TECHNOLOGY

Ancestry Documents

DNA tests

53
