

**6.02.7. Incompetency of a Witness to Testify to a Transaction or Communication with a Deceased or Person with a Mental Illness [a/k/a Dead Man's Statute] (CPLR 4519)**

**(1) Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be examined as a witness in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest against the executor, administrator or survivor of a deceased person or the committee of a person with a mental illness, or a person deriving his [or her] title or interest from, through or under a deceased person or person with a mental illness, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or person with a mental illness, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his [or her] own behalf, or the testimony of the person with a mental illness or deceased person is given in evidence, concerning the same transaction or communication.**

**(2) A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.**

**(3) No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him.**

**(4) A party or person interested in the event or a person from, through or under whom such a party or interested person derives his [or her] interest or title**

**by assignment or otherwise, shall not be qualified for the purposes of this section, to testify in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate.**

**(5) Nothing contained in this section, however, shall render a person incompetent to testify as to the facts of an accident or the results therefrom where the proceeding, hearing, defense or cause of action involves a claim of negligence or contributory negligence in an action wherein one or more parties is the representative of a deceased or incompetent person based upon, or by reason of, the operation or ownership of a motor vehicle being operated upon the highways of the state, or the operation or ownership of aircraft being operated in the air space over the state, or the operation or ownership of a vessel on any of the lakes, rivers, streams, canals or other waters of this state, but this provision shall not be construed as permitting testimony as to conversations with the deceased.**

### **Note**

This rule reproduces CPLR 4519, except for the title of the statute (“Personal transaction or communication between witness and decedent or person with mental illness”) and the addition of subdivision numbers for easier reference. In 2021, the statute was amended to change the reference to “mentally ill person” to “person with a mental illness. L. 2021, ch. 351, effective August 2, 2021.

The statute, known as the “Dead Man’s Statute,” sets forth an exception to the general rule of competency described in Guide to New York Evidence rule 6.01. It provides, in substance, that a person, or party interested in the event, or predecessor in interest is incompetent to testify to a personal transaction or

communication with a deceased or person with mental illness when such testimony is offered against the representative of the deceased or person with a mental illness.

As explained in *Matter of Zalk* (10 NY3d 669, 678-679 [2008]):

“ ‘The rule of evidence popularly referred to as the Dead Man's Statute’ was enacted by the New York Legislature in 1851, and is ‘widely considered to be the last vestige of the common-law rule which made all interested persons and parties incompetent to testify. After the general rule barring testimony from interested persons was abolished, a new rule was adopted to prevent the living from testifying to certain “personal transactions” with the dead. One of the main purposes of the rule was to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court’ (*Matter of Wood*, 52 NY2d 139, 143-144 [1981] [citations omitted]).”

“Thus, when death or mental illness seals the lips of one of the parties to a transaction, the Dead Man's Statute seeks to achieve adversarial balance by sealing the lips of the surviving party. Transactions or communications between the interested witness and the decedent or mentally ill person must therefore be proven by means other than the testimony of an interested witness, such as documentary evidence and the testimony of disinterested witnesses” (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4519:1).

**Subdivision (1)** of the rule sets forth the basic components of the Dead Man's Statute. The remaining subdivisions address issues arising from application of the statute. For purposes of this note, CPLR 4519, as recited in subdivision (1) of the rule, is broken down into the following five parts:

- The type of proceeding to which the rule applies
- The witness whose testimony the rule precludes
- The party or person the witness is precluded from testifying against
- The substance of the forbidden testimony
- An exception to the rule

The note concludes with a discussion of procedural issues and how the protection of the statute may be waived.

### **The type of proceeding to which CPLR 4519 applies**

CPLR 4519 does not apply in criminal proceedings.

CPLR 4519, as recited in subdivision (1) of the rule, states it applies to: “the trial of an action or the hearing upon the merits of a special proceeding.”

Thus, CPLR 4519 applies in all civil actions and has been invoked in administrative hearings (*Matter of Zalk*, 10 NY3d 669 [2008]). It does not apply to pretrial discovery under CPLR article 31 or other preliminary matters that do not result in a decision on the merits (*Matter of Van Volkenburgh*, 254 NY 139 [1930]). Admission of such testimony at these early stages does not constitute a waiver of the rule at trial. (*Id.*)

In Surrogate's Court, the words, "hearing upon the merits of a special proceeding" includes all proceedings "which have for their immediate object an affirmative determination affecting the rights of any party thereto" (*Matter of Christie*, 167 Misc 484, 487 [Sur Ct, Kings County 1938]).

CPLR article 31 applies in Surrogate's Court, but there are additional discovery proceedings specifically applicable in that court in which testimony forbidden by CPLR 4519 may be allowed without creating a waiver of the statute in future hearings and proceedings on the merits. The statute does not apply in pretrial discovery brought under SCPA 1404 (examination of the attesting witness and or attorney drafter); 2211 (examination of an accounting fiduciary); and 2102 (examination of fiduciary dealing with the assets of the estate). In a discovery proceeding under SCPA 2103 (proceeding by fiduciary to discover property withheld or obtain information) a witness's testimony about communications with a decedent is not deemed a waiver of CPLR 4519 (SCPA 2104 [6]). Once an answer asserting ownership is interposed in a discovery proceeding, the proceeding is no longer in an "inquisitorial phase," but becomes a trial on the merits to which CPLR 4519 applies (*Matter of Detweiler*, 121 Misc 2d 453 [Sur Ct, Cattaraugus County 1983]).

CPLR 4519 has been held to apply in an application for a preliminary injunction in which the court decides a party's likelihood of success on the merits (*Matter of Tschernia*, 18 Misc3d 1114[A], 2007 NY Slip Op 52510[U] [Sur Ct, Nassau County 2007]).

The affidavit of an interested person, incompetent to testify under the statute, may not be used to support a motion for summary judgment, but it may be used to defeat such a motion by raising an issue of fact (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]).

### **The witness whose testimony the rule precludes**

By CPLR 4519, as recited in subdivision (1) of the rule, "a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be examined as a witness in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest."

The Court of Appeals has explained that the “true test of the interest of a witness is, that he 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 him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote, or contingent” (*Hobart v Hobart*, 62 NY 80, 83 [1875]). For example, just before testifying, an interested witness who was then incompetent to testify became disinterested and competent by transferring to his sister stock that had created his interest. He no longer had a “present” interest in the proceeding (*Friedrich v Martin*, 294 NY 588 [1945]). It has been held that the interest must be financial (*Tworkowski v Tworkowski*, 181 Misc 2d 1038 [Sup Ct, Kings County 1999]).

Generally, the executor of the estate is not disqualified from testifying under the Dead Man’s Statute. An executor’s commissions are fixed by statute and the fact that the executor will receive them does not make him financially interested in the outcome (*Matter of Wilson*, 103 NY 374 [1886]). If there is, however, a bequest to the executor in the will, or if he or she has a claim against the estate, the executor will be considered an interested party and barred from testifying (*Matter of Green*, 247 App Div 540 [4th Dept 1936]).

Relationship through blood or marriage to an interested party standing alone does not make the relative an interested party (*Laka v Krystek*, 261 NY 126 [1933]).

An interested person or party may not be examined “as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest” (CPLR 4519; *Rousseau v Rouss*, 180 NY 116 [1904]). The witness may testify, however, against his or her own interest or successor’s interest (*Matter of Tremaine*, 156 AD2d 862 [3d Dept 1989]). When respondents are called by their adversary, they are not testifying in their own interest and their testimony is not barred by the statute (*Matter of Hauck*, NYLJ, Dec. 23, 1992 at 25, col 3 [Sur Ct, NY County], *affd* 200 AD2d 405 [1st Dept 1994]). The predecessor in interest of the interested party is also barred from testifying by this section. (*See Abbott v Doughan*, 204 NY 223 [1912] for a discussion of the rationale behind this provision.)

### **The party or person the witness is precluded from testifying against**

The interested person or party may not be called to testify in his or her own behalf or interest “against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his [or her] title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise” (CPLR 4519 [Guide to NY Evid rule 6.02.1 (1)]). These individuals are often referred to as the “protected party.” They have standing to raise the objection (and also the ability to waive it). (*See* section on waiver.)

The decedent normally is easily identified, but a missing party not yet determined to be dead may not be protected under the statute (*Jacobs v Stark*, 83

Misc 2d 605, 608 [Civ Ct, NY County 1975] [“the granting of temporary administration to conserve the estate of an absentee is an insufficient adjudication of death to satisfy application of the unambiguous exclusionary statutory rule of CPLR 4519”]).

By the statute, a witness must testify against an individual specified in the statute for the witness’s testimony to be barred. As a result, for example, an attorney testifying in his own behalf in an attorney discipline hearing was not prohibited from testifying about his deceased client’s instructions to retain the monies remaining in the attorney’s escrow account from the sale of her property, as payment for legal services, because he was not testifying against the executor, administrator, or survivor of his client (*Matter of Zalk*, 10 NY 3d 669 [2008]). In so ruling, the Court rejected the holding of the Appellate Division that the attorney’s testimony was against the decedent’s surviving daughters because they stood to be deprived of the monies in the escrow account (*Matter of Zalk*, 45 AD3d 42 [1st Dept 2007]).

Historically, the Dead Man’s Statute protected a person who had been declared by a court to be a “lunatic” and for whom the court had appointed a committee. In *Clark v Dada* (183 App Div 253, 262 [4th Dept 1918]), the Appellate Division held that a person for whom a committee had not been appointed was not protected from the testimony of an interested party even though he had been adjudged insane by a county judge and committed to a hospital for treatment. The Court discussed the many forms of mental illness and noted that, unlike deceased persons, the lips of persons committed to a hospital may not be forever sealed, and they may be able to dispute testimony against them. There was one dissent, arguing that it had been established, at least presumptively, that the hospitalized person was a “lunatic.” While the majority’s solution (no committee, no protection) is draconian and no longer the law, it presages the difficulties future courts would encounter in determining who is protected from testimony of an interested party by reason of mental illness.

The term “committee of a mentally ill person” remains in the Dead Man’s Statute, although in 1993, with the enactment of article 81 of the Mental Hygiene Law (Proceedings for Appointment of a Guardian for Personal Needs or Property Management), a “guardianship system” replaced the law establishing a “committee of a mentally ill person.” In its legislative findings, the legislature found that a “committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary” (Mental Hygiene Law § 81.01). The goal of the Mental Hygiene Law is to find the least restrictive form of intervention needed for the protection of the person for whom a guardian is sought. For example, the order could restrict the guardian to handling the financial affairs for the alleged incapacitated person. It is possible for the alleged incapacitated person to consent to the appointment of a guardian. There are several provisions for the appointment of a guardian, none of which necessarily require a finding of mental illness (*see* SCPA arts 17 [Guardians

and Custodians], 17-A [Guardians of Persons Who Are Intellectually Disabled and Developmentally Disabled]; *see* CPLR 1202 [Appointment of Guardian Ad Litem]).

Thus, an objection pursuant to CPLR 4519 brought by an article 81 guardian or any guardian authorized by the law of this state may not end the inquiry into whether the incapacitated party is a protected party because of mental illness. Although the guardian should have standing to raise that objection, the question of whether or not the person is mentally ill for purposes of CPLR 4519 may *yet* have to be resolved by the court in which the objection is raised. Persons allegedly with a mental illness still may be competent to testify rather than have their lips sealed. (See Guide to NY Evid rule 6.01, Note, second paragraph *et seq.*, for discussion of mental illness and competency to testify; Jerome Prince, Richardson on Evidence § 6-126 at 338 [Farrell 11th ed 1995] [“The question (of the applicability of CPLR 4519) is further complicated by the fact that mental illness does not, per se, render one incompetent as a witness. See § 6-105. Perhaps the applicability of the statute should depend upon the testimonial competency of the mentally ill person. If the mentally ill person is competent to testify, there is no need to invoke the rationale of the statute, i.e., to create an equality of disadvantage by silencing one party when the other has been silenced by mental illness or death”].)

In a case decided after the enactment of article 81, *Tworowski v Tworowski* (181 Misc 2d 1038 [Sup Ct, Kings County 1999]), the court permitted co-guardians of the person and property appointed by Supreme Court to claim the protection of the Dead Man’s Statute against a claim that the alleged protected person was not mentally ill. The court apparently did not rely entirely on the order’s underlying determination of mental illness because the court made its own separate finding of mental illness. The court discussed the prior history of the “committee of a mentally ill person,” noting in particular that a

“ ‘[c]ommittee’ is not a term which has been interpreted strictly in decisions on the applicability of CPLR 4519. Courts have decided that the privilege may apply to the judicially appointed guardian ad litem of a person hospitalized for mental illness where a committee did not exist. (*Matter of Musczak*, 196 Misc 364 [Sur Ct, NY County 1949]; *Matter of Harkavy*, 184 Misc 742 [Sur Ct, NY County 1945].) In addition, Vincent C. Alexander notes that ‘[a]lthough expansion of the scope of CPLR 4519 probably should be resisted as a general matter, on this issue the purpose of the statute is surely served by a liberal reading of the term “committee.” ’ (Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C4519:3, at 173.) The husband’s mental insufficiencies are well documented, including the significant impairment of his memory. The statute is designed to protect the interests of a person such as the husband and his coguardians and they are entitled to its benefit.” (*Tworowski v Tworowski* at 1040.)

The protection from testimony by an interested party or person concerning a personal transaction or communication extends to “a person deriving his title or interest from, through or under a deceased person or mentally ill person.” For example, in *Pope v Allen* (90 NY 298 [1882]), the Court held that the Dead Man’s Statute protected both the deceased conveyor of title to land (“from” whom the land was conveyed to the interested party) and the deceased person who had conveyed to him (“through” whom it was conveyed) and “under” whom it was conveyed by both of the predecessors in title.

The statute has been held to protect a successor trustee from testimony by interested persons concerning transactions with the original trustee, now deceased (*Brundige v Bradley*, 294 NY 345 [1945]).

In *Ward v New York Life Ins. Co.* (225 NY 314 [1919]), the Court held that a beneficiary of an insurance policy, named by the insured, does not claim “from, through or under” the insured because the deceased insured did not have an interest in the proceeds of the policy during his lifetime and, therefore, the claim of the beneficiary was from the insurance company not the decedent. This decision prompted much criticism but has never been reversed. (*See Alexander*, Practice Commentaries, CPLR C4519:3.)

In *Poslock v Teachers’ Retirement Bd. of Teachers’ Retirement Sys.* (88 NY2d 146 [1996]), the Court affirmed an Appellate Division ruling that distinguished *Ward* because the retirement benefits in question (with exception of the life insurance proceeds) belonged to the decedent during his lifetime and he had the ability to manage them. The protection of the statute was therefore available to prevent an interested party from testifying about communications with the decedent about the lump sum benefits from the pension. In keeping with *Ward*, the Court also held that the protection of the statute did not apply to communications concerning the life insurance portion of the death benefits.

### **The substance of the forbidden testimony**

Subdivision (1) dictates that the interested person or party shall not be examined “concerning a personal transaction or communication between the witness and the deceased person or mentally ill person.”

In *Clift v Moses* (112 NY 426, 435 [1889]), the Court explained:

“It has been held with general uniformity that the section prohibits not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negating the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from



its surroundings and permitting the survivor to testify to what on its face may seem an independent fact, when in truth it had its origin in or directly resulted from a personal transaction.”

*Griswold v Hart* (205 NY 384, 395 [1912]) excluded “the testimony of an interested witness to any knowledge which he has gained by the use of his senses from the personal presence of the deceased.” (See *Hadley v Clabeau*, 140 Misc 2d 994 [Sup Ct, Cattaraugus County 1988], *affd* 161 AD2d 1141 [4th Dept 1990] [in a dispute over a faulty deed description, the widow of deceased-seller was barred by statute from testifying to her observation of her husband taking measurements along a natural boundary as evidence of the property he intended to convey].)

*On the other hand*, in an action against the representative of a deceased joint tenant of joint savings accounts the Appellate Division held that the surviving joint tenant could testify to her intent in opening the account. The Court found that her testimony was to the fact of her intent, not a communication with the decedent (*Brezinski v Brezinski*, 84 AD2d 464 [4th Dept 1982]).

### **An exception to the rule**

Testimony is barred “except where the executor, administrator, survivor, committee or person . . . deriving title or interest is examined in his own behalf, or the testimony of the person with a mental illness or deceased person is given in evidence, concerning the same transaction or communication” (CPLR 4519; Guide to NY Evid rule 6.02.1 [1]).

Based on that exception, the Appellate Division has ruled that an interested party may introduce the testimony of the decedent given at a pretrial deposition and then testify at trial to the matters described by the decedent (*Tepper v Tannenbaum*, 65 AD2d 359 [1st Dept 1978]; *Ward v Kovacs*, 55 AD2d 391 [2d Dept 1977]).

In addition to the introduction of a pretrial deposition, the exception for the introduction in evidence of the “testimony of the mentally ill person or deceased person . . . concerning the same transaction or communication” may allow the “use of an interested witness's testimony from a former proceeding or deposition in which the witness and the decedent were adverse parties and the subject matter was essentially the same, thereby insuring that an adequate opportunity for relevant cross-examination of the witness was afforded. Such former testimony is hearsay, but it may fall within one or another hearsay exception for the testimony of a witness who has become unavailable for some reason, here the incompetency of the witness due to the adverse party's death.” (Alexander, Practice Commentaries, CPLR C4519:5 [b].)

Unfortunately, a witness who is incompetent to testify pursuant to the Dead Man's Statute is not listed, among witnesses considered unavailable to testify, in

CPLR 4517, as there required for the admission of former testimony in a civil proceeding, or in CPLR 3117, as there required for the admission of depositions in a civil proceeding. Both statutes, however, allow an application to the court for a finding of “exceptional circumstances” to permit the admission of otherwise inadmissible hearsay testimony. Until 2000, CPLR 4517’s list included incapacity under the Dead Man’s Statute in the list, but it was inadvertently omitted when the statute was amended. Another possible route around the hearsay problem is the common-law rule on the admissibility of prior testimony of an unavailable witness, which has been held to coexist with the statutory rule (*Fleury v Edwards*, 14 NY2d 334 [1964]). No case, however, holds that incapacity under the Dead Man’s Statute was part of the common law (*see* Guide to NY Evid rule 8.36, Prior Testimony in a Civil Proceeding).

**Subdivision (2)** of the rule exempts from application of the statute a stockholder or officer of a banking corporation that might be considered an interested party. This exemption is limited to stockholders in banking corporations. A stockholder of a corporation other than a banking corporation is considered a person interested in the event and may be barred from testifying against a protected party (*Friedrich v Martin*, 294 NY 588 [1945]; *Andrews v Reiners*, 112 App Div 378 [2d Dept 1906]).

**Subdivision (3)** of the rule states that the possible imposition of costs or the award of costs does not make a witness “interested” under the statute.

**Subdivision (4)** of the rule prohibits an “interested party,” as described in the subdivision, from testifying to “personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate.” This 1935 addition to the Dead Man’s Statute was passed by the legislature to address issues raised in *Matter of Carroll* (153 Misc 649 [Sur Ct, NY County 1934], *decree mod* 247 App Div 11 [1st Dept 1936], *mod* 274 NY 288 [1937]). As explained by Alexander in the Practice Commentaries to CPLR 4519:

“The *Carroll* court observed that without statutory modification, persons who would take certain property under the terms of A's will in the event of B's invalid exercise of a power of appointment given by A lacked standing to bar testimony by B's appointees regarding their dealings with the now-deceased B on the issue of the validity of B's exercise of the power. The persons who would take in the case of default were deemed to derive their property from A, rather than B. This created the potential for jury confusion and inconsistent results in cases in which appointees might be named in B's will as beneficiaries of property not covered by the power of appointment. With respect to the same will, such appointee-beneficiaries could

testify to transactions with B on the issue of the validity of the exercise of the power of appointment but not on the issue of the validity of the will in general. The statutory language changes this result by prohibiting interested witnesses from testifying in their own behalf with respect to personal transactions or communications with the now-deceased donee of a power of appointment in probate proceedings involving the will in which the power of appointment was exercised” (CPLR C4519:3).

**Subdivision (5)** of the rule covers the type of testimony (“facts of an accident or the results therefrom”) by a witness in personal injury or wrongful death cases that does not render the witness incompetent to testify under the statute (*Rost v Kessler*, 267 App Div 686, 687 [4th Dept 1944]). In *Rost*, the “fact” was the identity of the driver of the car and the Appellate Division held that the defendant should have been permitted to testify that the decedent was the driver since the testimony did not require the recitation of a communication with the decedent.

### **Procedural issues**

The party objecting to the competency of a witness under the Dead Man’s Statute has the burden of proving incompetency (*Stay v Horvath*, 177 AD2d 897, 899 [3d Dept 1991] [“the party claiming that a witness is a person ‘interested in the event’ (CPLR 4519) carries the burden of proving that the witness’s testimony is subject to this statutory exclusion” (citations omitted)]; *Matter of Mead*, 129 AD2d 1008 [4th Dept 1987]).

The objection must be to the competency of the witness, not to the competency of the testimony because the testimony may be relevant, but the witness not competent to give that testimony (*Hoag v Wright*, 174 NY 36, 39 [1903]; *Matter of Farley*, 91 Misc 185, 196 [Sur Ct, Clinton County 1915]).

An objection to the competency of a witness must be timely. The testimony of the witness, given without objection, will not be stricken (*Matter of Maijgren*, 193 Misc 814 [Sur Ct, Monroe County 1948]).

An objection must be made to each transaction; but failure to object to one transaction does not bar objections to subsequent transactions (*Matter of Johnson*, 17 Misc 2d 489, 490 [Sur Ct, NY County 1959] [“The fact that objection had not been made earlier in the testimony and the consequent waiver of the incompetency of the witness at that time did not extend to later testimony and did not preclude objection to further transactions”]).

CPLR 4519 does not bar documentary evidence against a deceased’s estate but the evidence must be authenticated by a non-interested party (*Acevedo v Audubon Mgt.*, 280 AD2d 91, 95 [1st Dept 2001]).

By a separate statute, in a right-of-election case, while a spouse may not testify in support of his or her right of election filed against the estate, the spouse is not disqualified from testifying to his or her contribution to jointly held property that is claimed as a testamentary substitute (EPTL 5-1.1 [b] [3]; 5-1.1-A [b]).

## **Waiver**

A “protected party” may waive the provisions of CPLR 4519 only at a trial of an action or hearing on the merits of a special proceeding (*Matter of Van Volkenburgh*, 254 NY 139 [1930]). The “protected party’s” waiver may be made in any one of five ways:

1. by expressly stating a waiver;
2. by failing to object (*Ralley v O’Connor*, 71 App Div 328 [1st Dept 1902]);
3. by introducing prior testimony of the decedent or person with a mental illness about the transaction or communication (CPLR 4519);
4. by testifying in his or her behalf about the transaction or communication CPLR 4519. In this instance, however, the waiver is limited. “By introducing such testimony, the [protected party] does not ‘open the door’ to any or all personal transactions with the decedent. Rather, the waiver of the statute is limited to the ‘personal transaction’ in issue. (*Martin v Hillen*, 142 NY 140.)” (*Matter of Wood*, 52 NY2d at 145); or
5. by examining the witness regarding the transaction or communication (*Nay v Curley*, 113 NY 575 [1889]; *Matter of Dunbar*, 139 Misc 2d 955 [Sur Ct, Bronx County 1988]; *Matter of Smith*, 84 AD2d 664 [3d Dept 1981]).

## **References**

For further commentary on the intricacies of the Dead Man’s Statute, see Alexander, Practice Commentaries CPLR 4519 and Prince, Richardson on Evidence § 6-121 *et seq.* (Farrell 11th ed 1995). For a discussion of the Dead Man’s Statute as it is specifically applied in Surrogate’s Court proceedings, see 2 Harris, New York Estates: Probate Administration and Litigation (6th ed Thomson-Reuters) and Warren’s Heaton, Surrogate’s Court Practice (7th ed LexisNexis).