

## The Dead-Man's Act Under the *Gunn*

Rick Lesser  
Bollman, Lesser & McGlynn, LLP  
582 N. Oakwood  
Lake Forest, IL 60045  
(847) 295-8800

In a claim against a decedent's estate or heirs, the Dead-Man's Act forbids testimony as to any "conversation with the deceased ... or to any event which took place in the presence of the deceased...." 735 ILCS 5/8-201. The purpose of the Act is to level the playing field and prevent fraud by not allowing un rebuttable testimony.

But is testimony that an event or conversation did not take place also barred? In *Smith v. Haran*, 273 Ill.App.3d 866, 875-78, 652 N.E.2d 1167 (1995), the First District Appellate Court ruled, over an articulate dissent, that testimony about a "nonevent" was not barred by the Act. In *Smith*, a promissory note was found among the decedent's financial records. Her estate brought suit against the promissory to collect the note, but the promissory testified that there was no actual consideration for the note, the money was never received. The *Smith* court found that the testimony was not barred by the Act because "the decedent's failure to give the Harans money does not qualify as an 'event' under the Act." The *Smith* court relied upon an earlier decision in *Hartman v. Townsend*, 169 Ill.App.3d 111, 523 N.E.2d 199 (1988), in which the court had found that "negative" testimony was not barred by the Act.

The Illinois Supreme Court recently overruled that portion of the *Smith* decision. *Gunn v. Sobucki*, \_\_\_ Ill.2d \_\_\_, 2005 WL 2456986 (October 6, 2005). *Gunn*, an attorney, had been going through a divorce in 1979 when he transferred possession of a coin collection to his friend Sobucki. This was no ordinary coin collection; the coins weighed about 1,000 pounds and were contained in 36 lock boxes and a suitcase. This pocket change was worth litigating over. *Gunn* gave Sobucki a notarized bill of sale stating that Sobucki had paid \$30,000 for the collection. *Gunn* moved to Florida, got divorced and life went on without his coin collection.

Flash forward to 2000. Sobucki died and *Gunn* demanded that Sobucki's widow return the coin collection. When the widow refused, *Gunn* initiated an action for replevin. He asserted that Sobucki had never actually paid the \$30,000 that the bill of sale was a sham document intended to conceal the coin collection from his wife during the divorce and that Sobucki was just holding the coins for him because it's humid in Florida. Slip Op. at 2.

The replevin action was tried in our circuit court, McHenry County, Judge Michael Sullivan presiding. Judge Sullivan was bound by the *Smith* decision and allowed *Gunn* to testify that no actual consideration was paid. The circuit court then ruled for *Gunn*, finding a failure of consideration, and ordered the coin collection returned to him. Sobucki's widow then appealed and the Second District, declining to follow *Smith*, reversed. The Second District wisely stated:

The proposition that the Act does not apply to a "nonevent" is not logical. Testifying to the negative about any event turns it into a

“nonevent”. ‘There was no sale’ (nonevent) is merely the negative of ‘There was a sale’ (event). *Gunn v. Sobucki*, 352 Ill.App.3d 785, 788, 817 N.E.2d 588 (2004)

Gunn then appealed and, fortunately, the Illinois Supreme Court resolved this conflict between the First and Second Districts. The Court determined that “the distinction drawn by the *Smith* majority between positive testimony that an event occurred and negative testimony that it had not occurred was ‘nothing more than a semantic exercise’ and should be rejected.” Indeed, following the purpose of the Act, the distinction between an event and a nonevent was mere sophistry. The transaction, if it took place, would have occurred in the decedent’s presence, and the decedent could have refuted the claim were he present at trial. The “event” at issue was the payment; whether or not it occurred was a “detail” of the event. Slip Op. at 4.

The Court determined that the Act’s dual purposes -- equalizing the footing among the parties and preventing fraudulent claims against estates -- are best served by abolishing the distinction between an event and a nonevent. Slip Op. at 4. In so doing, the Court returned us to what had been the law for over 100 years before *Smith*. See, *Lockwood v. Onion*, 56 Ill. 506, 508 (1870) (testimony that money was not received from a decedent is barred by the Act). The guiding principal behind the Act is that if the deceased or disabled person could have refuted adverse testimony about a conversation or event, the adverse testimony is barred, unless it fits into one of the express exceptions.

Unfortunately, the *Gunn* Court did not stop there. Instead of simply remanding the case to Judge Sullivan for retrial without the disputed testimony, the Supreme Court analyzed the other testimony and evidence in the case and gave its own view as to how that testimony should be interpreted by the trial court. The Supreme Court stated that, “it is not our intention to prejudge the case” but the majority decision did just that. As a result, four justices, led by Chief Justice Thomas, specially concurred, agreeing with the conclusion but disagreeing with the majority opinion’s lengthy *sotto voce* hint to the trial court. The concurring opinion was clearly right and the majority opinion’s overly helpful analysis mars an otherwise commendable decision.

And, as you may have expected, Gunn’s explanation that the bill of sale was intended to conceal the coin collection from his wife in the divorce had unexpected consequences. Gunn was and is (for the moment) an Illinois attorney. The Supreme Court directed the clerk to forward a copy of the decision to the ARDC to determine whether disciplinary action should be taken against him. Like the Act, he’s now under the *Gunn*.