

STORAGE NAME: h1597s1.cjcl

DATE: April 11, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 1597

RELATING TO: Evidence

SPONSOR(S): Representative Thrasher

STATUTE(S) AFFECTED: s. 90.803, F.S.

COMPANION BILL(S): SB 1830 by Senator Horne (i)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) CIVIL JUSTICE & CLAIMS YEAS 8 NAYS 1

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I. SUMMARY:

CS/HB 1597 would amend s. 90.803, F.S. This section provides hearsay exceptions under circumstances where the availability of the declarant is immaterial. CS/HB 1591 would broaden the scope of evidence admissible under the "former testimony" exception to the hearsay rule.

In appropriate cases, CS/HB 1597 would lessen the costs of litigation.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

1. **Hearsay** - Hearsay evidence is inadmissible in civil and criminal proceedings. Section 90.801(c), F.S., defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 90.801(a) defines "statement" as "[a]n oral or written assertion," or as "[n]onverbal conduct . . . if it is intended . . . as an assertion." Absent an exception to the hearsay rule, former testimony, if offered to prove the truth of assertions made therein, would not be admissible at trial. Hearsay evidence is not considered to be as reliable as testimony given under oath, because the trier of fact cannot observe the demeanor of the witness. The right of confrontation, contained in the Sixth Amendment of the federal constitution, was designed to allay this concern. In *Pointer v. Texas*, 380 U.S. 400 (1965), and *Douglas v. Alabama*, 380 U.S. 415 (1965), the Supreme Court of the United States determined that the Fourteenth Amendment applies the Confrontation Clause to the states.
2. **Former Testimony** - Former testimony has been partially excepted from the hearsay rule. The Florida Statutes actually contain two exceptions for former testimony. The first applies irrespective of the declarant's availability. It is narrowly crafted. The second applies only when the declarant is unavailable to testify. It allows the introduction of a considerable range of hearsay evidence.
 - a. **Declarant's Availability Immaterial** - Section 90.803, F.S., contains several hearsay exceptions that do not require the declarant to be unavailable. Paragraph (22) provides for the admissibility of "[f]ormer testimony given by the declarant at a civil trial, when used in a retrial of said trial involving identical parties and the same facts."
 - b. **Declarant Unavailable** - Several hearsay exceptions apply to situations where the declarant is unavailable to testify. According to s. 90.804(1), F.S., unavailability occurs when the declarant is exempted from testifying by a court ruling, refuses to testify despite a court order, suffers from memory failure which prevents testimony, has died, suffers from a physical or mental illness which precludes testimony, or is not amenable or susceptible to process. Paragraph (2)(a) creates an exception for former testimony. This exception is modeled after that contained in the Federal Rules of Evidence. It allows the court to admit evidence concerning:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is not offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
3. **The Federal Rules of Evidence** - The Federal Rules of Evidence, at Rule 804, contain a "former testimony" exception. The federal exception only applies when the declarant is unavailable. Because the federal rules place great weight

on the meaning conferred by observing the demeanor of the witness, they prefer live testimony in all cases where the declarant is available.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 1597 would amend s. 90.803, F.S. As mentioned earlier, this section provides hearsay exceptions under circumstances where the availability of the declarant is immaterial. Specifically, CS/HB 1591 would amend paragraph (22) of s. 90.803, F.S., which contains the former testimony exception. It would broaden the scope of evidence admissible under this exception.

1. Expansion of the "Former Testimony" Exception:

- a. **Extension to Different Proceedings** - CS/HB 1597 would extend the former testimony exception to civil proceedings other than those to which it currently applies: retrials involving the same parties and facts. It would also apply the exception to certain testimony given in depositions. In these respects, CS/HB 1597 would bring s. 90.803, F.S., (where the declarant's availability is immaterial), into conformity with s. 90.804, F.S. (where the declarant must be unavailable) and Rule 804 of the Federal Rules of Evidence.
- b. **Extension to Statements of Agents and Employees** - CS/HB 1597 would allow the admission of former testimony given by agents or employees of the person, whose fault is at issue in the action, concerning matters within the scope of the agency or employment relationship. Currently, these types of statements do not fall within either former testimony exception in Florida's evidence code or within Rule 804 of the Federal Rules of Evidence.
- c. **Extension to Authorized Statements** - CS/HB 1597 would allow the admission of former testimony which was authorized by a person whose fault is at issue in the action. Such statements are not currently admissible under the former testimony exceptions in Florida's evidence code or under Rule 804 of the Federal Rules of Evidence.
- d. **Extension to Statements by Co-conspirators** - CS/HB 1597 would allow courts to admit the former testimony of certain co-conspirators, if the testimony is given during the course of, and in furtherance of, the conspiracy. Presently, this type of evidence is not admissible under either former testimony exception in Florida's evidence code or under Rule 804 of the Federal Rules of Evidence.

2. **Reliability Indicators** - CS/HB 1597 would require the presence of two reliability indicators. First, the former testimony would have to be given by a declarant (or by the associates of the declarant listed above), whose fault is at issue and who has exhibited a belief in the truth of the statement. Second, the party against whom the former testimony was offered must have had an opportunity to develop the testimony by direct examination, cross examination, or redirect examination, unless the testimony comprised a statement against interest.

3. **Would Only Apply to Civil Trials** - According to CS/HB 1597, the former testimony exception would be available only where the testimony is offered "in a civil trial to establish the degree of fault of the person, or to establish the authenticity of documentary evidence relevant to the fault of such person."
4. **Could Affect Section 90.804(2)(a), F.S.** - Although CS/HB 1597 was designed to broaden the former testimony exception located at s. 90.803(22), F.S., it could affect the former testimony exception located at s. 90.804(2)(a), F.S. Section 90.804(2)(a), F.S., applies only if the declarant is unavailable. However, s. 90.803(22), F.S., applies whether or not the declarant is available. If CS/HB 1597 extends the exception located at s. 90.803, F.S., beyond the scope of the exception provided at s. 90.804(2)(a), F.S., the bill could result in the expansion of both exceptions.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. CS/HB 1597 would allow courts to admit a slightly greater range of evidence in civil proceedings.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

NA.

(2) what is the cost of such responsibility at the new level/agency?

NA.

(3) how is the new agency accountable to the people governed?

NA.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

NA.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

NA.

- (2) Who makes the decisions?

NA.

- (3) Are private alternatives permitted?

NA.

- (4) Are families required to participate in a program?

NA.

- (5) Are families penalized for not participating in a program?

NA.

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

NA.

(2) service providers?

NA.

(3) government employees/agencies?

NA.

D. SECTION-BY-SECTION RESEARCH:

Section 1: Amends s. 90.803, F.S.; applies the former testimony hearsay exception to various civil proceedings; permits the admission of former testimony which meets certain requirements.

Section 2: Provides an effective date of July 1, 1997.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

The change which would be made by CS/HB 1597 might reduce litigation costs in appropriate cases.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, It would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

1. **Key Issues** - This subsection uses a question format to stimulate debate about the bill under review.

a. **Question Presented** - *Should the Legislature broaden the "former testimony" exception to the hearsay rule in circumstances where the declarant's availability is immaterial?*

b. **Other Policy Considerations:**

(1) Is testimony taken in depositions sufficiently reliable to come in under this exception to the hearsay rule?

(2) Should this hearsay exception be expanded to cover statements by predecessors in interest?

(3) Is there a valid reason for distinguishing between the former testimony exception which applies when the declarant is unavailable, and the former testimony exception which applies irrespective of the declarant's availability? If so, which of the two exceptions should be broader in scope?

2. **Technical Consideration** - The bill allows the admission of former testimony if such testimony "is the statement of a person whose fault is an issue in the action." It is not clear from the language of the bill whether the "action" referred to is the previous action, in which the testimony was given, or the current action, in which the former testimony is offered.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Committee Substitute - At the April 10, 1997 meeting of the Committee on Civil Justice and Claims, members adopted one amendment. The amendment to HB 1597 would allow the admission of former testimony only if such testimony would not be inadmissible pursuant to the court's discretion under s. 90.402, F.S., or s. 90.403, F.S. Section 90.402 provides that only relevant evidence is admissible. Section 90.403, F.S., provides that "[r]elevant evidence is inadmissible if its probative value is outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. At the sponsor's request, HB 1597 was made into a committee substitute.

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

Prepared by:

Legislative Research Director:

Charles R. Boning