HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 523 Evidence
SPONSOR(S): Flores and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 988

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Lammers	Billmeier
2) Judiciary Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 523 repeals section 90.602, F.S., the "dead man's statute," which prohibits an interested person from testifying as to an oral communication with a now deceased or incompetent person. Testimony from interested persons regarding oral communications could now be considered by the trier of fact, if otherwise relevant and admissible under the rules of evidence, instead of being automatically rejected because of the status of the person seeking to introduce the testimony.

In addition to repealing the dead man's statute, this bill also creates a new hearsay exception that allows the introduction of a written or oral statement previously made by an unavailable declarant, when other testimony from the decedent on the same topic had already been introduced.

There is no fiscal impact anticipated from the enactment of this bill.

This bill takes effect July 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Current Law: Dead Man's Statute

Section 90.602(1), F.S., which this bill seeks to repeal, states that no person interested in an action or proceeding against a personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or against an assignee, committee, or guardian of a mentally incompetent person, may testify as a witness regarding any oral communication between the interested person and the person who is deceased or is now mentally incompetent. Section 90.602(2), F.S., states that the above provision does not apply if the deceased or mentally incompetent person's representative, as listed above, testifies on his or her own behalf regarding the communication. Section 90.602(2) further provides that the restriction in s. 90.602(1) does not apply if one of the above-named representatives offers evidence of the subject matter of the oral communication. Subsection (3) defines "mentally incompetent persons" as people who, due to mental incapacity as the result of illness, senility, drug or alcohol abuse, or another cause, are incapable of managing their property or caring for themselves

Section 90.602 is Florida's version of the traditional common law rule of evidence known as the "dead man's statute," providing that "certain interested persons are incompetent to testify in an action against an estate."[1] However, as early as 1874, the Florida Legislature revoked the general common law rule prohibiting any interested person testifying as a witness in a lawsuit.[2] The retention of dead man's statute is an express exception to the modern rule of evidence that an interested witness may testify on his or her own behalf.[3] However, although an interested party may not testify as to oral communications with the deceased or incompetent person, the interested party may testify as to other matters.[4] An "interested person," under the statute, has generally only been regarded as a person with a direct pecuniary interest, by which the person stands to "gain or lose by the direct legal operation and effect of the judgment."[5] A blood or marital relationship, or other close friendship, will not by itself create a prohibited interest.[6]

The main purpose of the prohibition on testimony by an interested party is to protect the decedent's estate from false or fraudulent claims.[7] It was also thought that it would be unfair to the estate of the deceased person to allow an interested party to have the benefit of giving testimony that cannot be contradicted by the other party to the oral communication, who is now deceased or incompetent.[8] However, under s. 90.602, a noninterested party is free to testify concerning oral communications between an interested person and a decedent, and an interested person may testify regarding

---

[1] 24 Fla. Jur. 2d *Evidence and Witnesses* s. 773 (2004).
[2] PROPOSED REPEAL OF F.S. 90.602 AND AMENDMENT TO 90.804(2)(e), White Paper from the Florida Bar, citing Law of February 14, 1874, Ch. 1983, s. 1 (1874) Fla. Laws 39.
[3] *Evidence and Witnesses*, s. 773.
[4] *Id.*
[5] Charles W. Ehrhardt, *Florida Evidence*, s. 602.1 (2001 ed.) at 398.
[6] *Id.* at 399-400.
[7] *Moneyhun v. Vital Industries*, 611 So. 2d 1316, 1320 (Fla. 1st DCA 1993) (citing Charles W. Ehrhardt, *Florida Evidence*, s. 602.1 at 312 (1992 ed.)).
[8] 24 Fla. Jur. 2d *Evidence and Witnesses* s. 774 (2004).

communications between the decedent and any other person.[9] An interested person may also testify as to all of his relevant dealings with the decedent other than oral communications.[10]

The class of persons "protected" from the testimony of interested persons is listed in s. 90.602(1): the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or the assignee, committee, or guardian of a mentally incompetent person. However, these persons are only protected if they are involved in the lawsuit in a representative capacity for the decedent's estate, rather than in an individual capacity.[11] Further complications arise when adverse parties both fall within the "protected" and "interested" classes. In such cases, Professor Ehrhardt believes that the best practice, consistent with the drafters' intent that this statute should only apply to protecting estates and not to will contests, is not to apply the statute when both sides fall within the interested and protected categories.[12]

Need for Reform: Problems with the Dead Man's Statute

Section 90.602 has been described as a "trap for the unwary."[13] The dead man's statute has long been widely criticized by commentators, practitioners, and even courts.[14] The Law Revision Council Notes of 1976 accompanying s. 90.602 note that preliminary drafts of this section had eliminated this "dead man's statute" because the practical effect of such a statute was that if a survivor has rendered services to the deceased without an outside witness or admissible written evidence, the survivor has no recourse should the deceased person's estate decline to pay.[15] The notes indicate that the provision was adopted "since there is generally no opposing testimony to meet the allegation of the interested claimant and fraud and hardship could result if the surviving party [were] permitted to testify concerning the oral communication."[16] Another argument accepted in support of retaining the section was that the elderly population of Florida needed a way to protect their estates against unscrupulous claimants.[17]

Although the statute has the "salutary purpose" of protecting a decedent's estate from false and fraudulent claims or defenses that cannot be independently corroborated, the statute has numerous exceptions and restrictions, and even a plain reading of the statute does not answer the many questions that surround its application.[18] For instance, the statute can easily be waived, either intentionally or unintentionally, and many practitioners inadvertently waive the statute out of ignorance of its proper use.[19] If a party introduces tangible evidence or writings on the subject matter that the interested party wishes to present oral testimony about, the party will be deemed to have waived the protection of the dead man's statute.[20] One court case has found that a signature on a check with the notation "loan" was sufficient to allow the interested party to testify.[21] Another way in which waiver of the statute often occurs is where the protected party, such as the executor of the estate, testifies regarding the oral communication between the decedent and an interested person.[22] By choosing to testify, the protected person makes the content of the oral communication an issue for the jury.[23] In

[9] Ehrhardt, *Florida Evidence*, s. 602.1, at 401.
[10] *Id.*
[11] *Id.* at 402 (citing *Mathews v. Hines*, 444 F.Supp. 1201, 1206 (M.D. Fla. 1978)).
[12] *Id.* at 402.
[13] Glenn J. Waldman, *Dead Man Talking—Requiem for Summary Judgment Under Florida's "Dead Man's" Statute*, 78-APR FLA. B.J. 28, 31 (2004).
[14] C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 246 (1991).
[15] McCormick, *Evidence* § 65 (2d ed. 1972).; *see also* Wigmore, *Evidence* § 578 (1940).
[16] Section 90.602, F.S.A.
[17] Ehrhardt, *Florida Evidence*, s. 602.1 at 395.
[18] Waldman, *Dead Man Talking*.
[19] Michael D. Simon & William T. Hennessey, *Estates, Trusts, and Guardianship: 1998 Survey of Florida Law*, 23 NOVA L. REV. 119, 145 (1998).
[20] *Briscoe v. Fla. Nat'l Bank of Miami*, 394 So. 2d 492, 494 (Fla. 3d DCA 1981).
[21] *SunBank/Miami N.A. v. Saewitz*, 579 So. 2d 255, 256 (Fla. 3d DCA 1991).
[22] Ehrhardt, *Florida Evidence*, s. 602.1 at 403.
[23] *Id.* at 403-04.

that situation, the interested person is also allowed to testify because the statute is not meant to allow one party to present their version of the facts without allowing the interested person to do the same.[24] The absence of a timely objection also waives the protection of the dead man's statute.[25] Furthermore, it has been held that a waiver of the statute for any purpose constitutes a waiver of the statute for all purposes[26] and for all further proceedings in the same action.[27] However, merely filing a lawsuit does not waive the protection of the statute.[28]

Because of the numerous restrictions on the application of the statute, the protection it offers is relatively minor, and the statute often leads to the harsh result of denial of a person's valid claim against an estate because the only available proof is prohibited by the statute.[29] It has even been stated that:

> [f]or every piece of fraudulent testimony screened out by the Dead Man's statute, there are probably three or more meritorious claims that are dismissed because of the failure of proof. Moreover, the Dead Man's statutes are so complicated that they give rise to much wasteful litigation as to their precise meaning.[30]

As the Florida Supreme Court has recognized, the exclusion of testimony often works a greater injustice by preventing recovery on legitimate claims than it prevents by thwarting false claims.[31]

Addressing the difficulties involved in interpreting and applying s. 90.602, Professor Ehrhardt has concluded that:

> courts should narrowly construe the statute so as to disqualify as little testimony as possible. Judges and juries are as capable of weighing the conflicting evidence and determining the credibility of witnesses in probate matters as they are in tort or criminal suits. All the considerations that generally are considered by fact-finders are appropriate in probate matters. Only testimony that is worthy of belief will be credited; all of the facts and circumstances will be considered in determining which party's version of the events will be believed.[32]

The federal evidence code does not contain a dead man's statute,[33] and the Advisory Committee on the Federal Rules of Evidence recommended forbidding the application of state law dead man's statutes in diversity cases. As of January 2000, thirty-one states and the District of Columbia do not have such a statute,[34] and many of the states that do have these statutes have greatly modified them to permit testimony by interested persons.[35] In 1998, only twelve states still had the strictest form of the statute, which bars all testimony by an interested person,[36] and by 2000, only seven states had a complete bar to such testimony.[37]

---

[24] Ehrhardt, *Florida Evidence*, s. 602.1 at 403.
[25] *In re Valdes' Estate*, 384 So. 2d 37, 37 (Fla. 3d DCA 1980).
[26] *Briscoe*, 394 So. 2d at 494.
[27] *Id.*; 24 Fla. Jur. 2d *Evidence and Witnesses* s. 804 (2004).
[28] Ehrhardt, *Florida Evidence*, s. 602.1, at 405.
[29] *Id.* at 394-95.
[30] Daniel J. Capra, *Advisory Committee Notes to the Federal Rules of Evidence that May Require Clarification*, 182 F.R.D. 268 (1998).
[31] *Farley v. Collins*, 146 So. 2d 366, 370 (Fla. 1962).
[32] Ehrhardt, *Florida Evidence*, s. 602.1 at 407.
[33] *Id.* at 397.
[34] Herbert E. Tucker, *Colorado Dead Man's Statute: Time for Repeal or Reform?*, 29-JAN Colo. Law. 45, 48 (2000).
[35] PROPOSED REPEAL OF F.S. 90.602 AND AMENDMENT TO 90.804(2)(e).
[36] Shawn K. Stevens, *The Wisconsin Dead Man's Statute: The Last Surviving Vestige of an Abandoned Common Law Rule*, 82 MARQUETTE L. REV. 281, 286 (1998).
[37] Tucker, *Colorado Dead Man's Statute* at 29-JAN Colo. Law. at 48.

Hearsay

"Hearsay" is, generally, "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."[38] Except as otherwise provided by statute, hearsay evidence is inadmissible in court.[39] "The hearsay rule does not prevent a witness from testifying as to what he or she has heard," but it does restrict the witness's ability to prove facts by reference to extrajudicial statements.[40] The three primary reasons for forbidding hearsay testimony are 1) the declarant is not testifying under oath; 2) the trier of fact cannot observe the declarant's demeanor; and 3) the declarant is not subject to cross-examination.[41] The risk of allowing out-of-court statements into evidence is thought to be less when the declarant is in court and can be cross-examined regarding the statements.[42]

Currently, s. 90.803, F.S., lists twenty-three hearsay exceptions which do not depend upon the availability of the declarant as a witness. These hearsay exceptions are thought to provide information of sufficient trustworthiness and reliability, so that the lack of in-court testimony does not require the evidence to be excluded.[43] Section 90.804, F.S., provides a more limited list of four hearsay exceptions which apply when a declarant is unavailable, either because of a privilege against testifying, lack of memory, death or then-existing illness or infirmity, refusal to testify, or an inability to procure the person's presence at the hearing.

HB 523

This bill will entirely repeal s. 90.602, the dead man's statute, and creates a new hearsay exception, s. 90.804(2)(e), F.S. The new hearsay exception provides that, if a declarant is unavailable as a witness, any written or oral statement by the deceased or ill declarant, similar in subject matter to a statement by the declarant previously admitted into evidence, shall not be excluded as hearsay.

The new hearsay exception will allow the estate to present rebuttal evidence to counteract the testimony of a person bringing a claim against the estate. This bill will allow claimants to assert claims against an estate and attempt to prove those claims by means of all relevant and probative evidence, allowing the trier of fact to consider and evaluate all of the relevant evidence and weigh the credibility of witnesses.[44]

C. SECTION DIRECTORY:

Section 1. Repeals s. 90.602, F.S.

Section 2. Creates s. 90.804(2)(e), F.S., providing that a written or oral statement by an unavailable declarant may be entered into evidence if the statement is on the same subject matter as another statement made by the declarant that has been previously entered into evidence.

Section 3. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

[38] Section 90.801(1)(c), F.S.
[39] Section 90.802, F.S.
[40] 23 Fla. Jur. 2d *Evidence and Witnesses* s. 269 (2004).
[41] *Id.*
[42] *Id.*
[43] Cf. Ehrhardt, *Florida Evidence*, s. 803 at 697.
[44] PROPOSED REPEAL OF F.S. 90.602 AND AMENDMENT TO 90.804(2)(e).

1. Revenues:

   None.

2. Expenditures:

   No anticipated fiscal impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   No anticipated fiscal impact.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

No direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   Article v, s. 2(a), Fla. Const., requires the Supreme Court of Florida to adopt rules for the practice and procedure of Florida courts. Although the Legislature has jurisdiction to enact substantive law, matters of procedure are within the exclusive jurisdiction of the supreme court, and the court may strike down laws that conflict with court rules. The Florida Evidence Code contains elements that are both substantive and procedural, although the supreme court does not generally define which portions are substantive and which are procedural.[45] Typically, the supreme court conducts a review of the evidence statutes and adopts the laws passed by the Legislature, in an opinion stating that such statutes are adopted "to the extent they are procedural."[46]

   However, determining whether a statute is substantive or procedural is a difficult issue, as Justice Adkins noted in 1973:

   > [S]ubstantive law creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights. Substantive rights are those existing for their own sake and constituting the normal legal order of society, i.e., the rights of life, liberty, property and reputation. Remedial rights arise for the purpose of protecting or enforcing substantive rights.

[45] *In re Amendments to the Florida Evidence Code*, 782 So. 2d 339, 341-42 (Fla. 2000).
[46] *Id.* at 342.

> We have said that "practice" means the method of conducting litigation involving rights and corresponding defenses or the manner in which the power to adjudicate or determine is exercised. It has also been said that "practice" is the method of conducting litigation.
>
> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure."
>
> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.[47]

It appears that states have addressed the substance vs. procedure issue as it relates to the Dead Man's statute in both ways: some states have repealed their statutes, while other states have enacted rules superceding the statute.[48] Furthermore, the nineteen states that still have a dead man's rule have retained it as a statute, rather than an evidentiary or procedural rule,[49] which indicates that this statute is better viewed as substantive law, rather than procedural. This bill could raise constitutional concerns if the supreme court finds it to be procedural.

B. RULE-MAKING AUTHORITY:

This bill does not delegate rule-making authority to any administrative agency.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A.

[47] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 65-66 (Fla. 1972) (Adkins, J., concurring) (citations omitted).
[48] Robin L. Beardsley, *The Dead Man's Statute: State Legislatures and Courts Conflict*, 25 AM. J. TRIAL ADVOC. 217, 220-21 (2001).
[49] Tucker, *Colorado Dead Man's Statute*, 29-JAN Colo. Law. at 48.