

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 988

SPONSOR: Judiciary Committee and Senator Campbell

SUBJECT: Evidence/Deceased/Incompetent Person

DATE: April 27, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	Fav/CS
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The Committee Substitute for Senate Bill 988 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 committee substitute 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 declarant on the same topic had already been introduced by an adverse party.

This committee substitute substantially amends section 90.804, Florida Statutes, and repeals section 90.602, Florida Statutes.

II. Present Situation:

Dead Man’s Statute

The “Dead Man’s Statute” codified in s. 90.602, F.S., provides that no person interested in an action or proceeding may testify as a witness 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, 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), F.S., further provides that the restriction in s. 90.602(1), F.S., does not apply if one of the above-named representatives offers evidence of the subject matter of the oral communication. Subsection (3) of s. 90.602, F.S., 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, F.S., is Florida's version of a traditional common law rule of evidence known as the "Dead Man's Statute," which declares 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 traditional common law rule prohibiting any interested person testifying as a witness in a lawsuit.² The retention of the 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 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, F.S., a non-interested party is free to testify concerning oral communications between an interested person and a decedent, and an interested person may testify regarding 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 estate from false or fraudulent claims.¹¹ 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

¹ 24 Fla. Jur. 2d Evidence and Witnesses s. 773 (2004).

² Real Property, Probate, and Trust Law Section of The Florida Bar, *Proposed Repeal of F.S. 90.602 and Amendment to 90.804(2)(e)* (undated) (citing Law of February 14, 1874, Ch. 1983, section (1874) Fla. Laws 39).

³ Fla. Jur., *supra* note 1.

⁴ *Id.*

⁵ Charles W. Ehrhardt, Florida Evidence, s. 602.1 at 398 (2001 ed.).

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).

⁹ Ehrhardt, Florida Evidence, s. 602.1, at 401 (2001 ed.).

¹⁰ *Id.*

¹¹ *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.)).

giving testimony that cannot be contradicted by the other party to the oral communication, who is now deceased or incompetent.¹² However, under s. 90.602, F.S., a non-interested party is free to testify concerning oral communications between an interested person and a decedent, and an interested person may testify regarding communications between the decedent and any other person.¹³ An interested person may also testify as to all of his relevant dealings with the decedent other than oral communications.¹⁴

The class of persons “protected” from the testimony of interested persons is listed in s. 90.602(1), F.S.: 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.¹⁵ 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.¹⁶

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

Section 90.602, F.S., has been described as a “trap for the unwary.”¹⁷ The dead man’s statute has long been widely criticized by commentators, practitioners, and even courts.¹⁸ The Law Revision Council Notes of 1976 accompanying s. 90.602, F.S., note that preliminary drafts of this section had eliminated the 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.¹⁹ 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.”²⁰ 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.²¹

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.²² For instance, the statute can easily be waived,

¹² 24 Fla. Jur. 2d *Evidence and Witnesses* s. 774 (2004).

¹³ Ehrhardt, *Florida Evidence*, s. 602.1, at 401.

¹⁴ *Id.*

¹⁵ *Id.* at 402 (citing *Mathews v. Hines*, 444 F.Supp. 1201, 1206 (M.D. Fla. 1978)).

¹⁶ *Id.* at 402.

¹⁷ 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).

¹⁸ 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).

¹⁹ McCormick, *Evidence* § 65 (2d ed. 1972); see also Wigmore, *Evidence* § 578 (1940).

²⁰ Section 90.602, F.S.A.

²¹ Ehrhardt, *Florida Evidence*, s. 602.1 at 395.

²² Waldman, *supra*, note 17 at 28.

either intentionally or unintentionally, and many practitioners inadvertently waive the statute out of ignorance of its proper use.²³ 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.²⁴ One court has found that a signature on a check with the notation "loan" was sufficient to allow the interested party to testify.²⁵ 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.²⁶ By choosing to testify, the protected person makes the content of the oral communication an issue for the jury.²⁷ In 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.²⁸ The absence of a timely objection also waives the protection of the dead man's statute.²⁹ Furthermore, it has been held that a waiver of the statute for any purpose constitutes a waiver of the statute for all purposes³⁰ and for all further proceedings in the same action.³¹ However, merely filing a lawsuit does not waive the protection of the statute.³²

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.³³ 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.³⁴

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.³⁵

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

²³ Michael D. Simon & William T. Hennessey, *Estates, Trusts, and Guardianship: 1998 Survey of Florida Law*, 23 NOVA L. REV. 119, 145 (1998).

²⁴ *Briscoe v. Fla. Nat'l Bank of Miami*, 394 So. 2d 492, 494 (Fla. 3d DCA 1981).

²⁵ *SunBank/Miami N.A. v. Saewitz*, 579 So. 2d 255, 256 (Fla. 3d DCA 1991).

²⁶ Ehrhardt, *Florida Evidence*, s. 602.1 at 403.

²⁷ *Id.* at 403-04.

²⁸ Ehrhardt, *Florida Evidence*, s. 602.1 at 403.

²⁹ *In re Valdes' Estate*, 384 So. 2d 37, 37 (Fla. 3d DCA 1980).

³⁰ *Briscoe*, 394 So. 2d at 494.

³¹ *Id.*; 24 Fla. Jur. 2d *Evidence and Witnesses* s. 804 (2004).

³² Ehrhardt, *Florida Evidence*, s. 602.1, at 405.

³³ *Id.* at 394-95.

³⁴ Daniel J. Capra, *Advisory Committee Notes to the Federal Rules of Evidence that May Require Clarification*, 182 F.R.D. 268 (1998).

³⁵ *Farley v. Collins*, 146 So. 2d 366, 370 (Fla. 1962).

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.³⁶

The federal evidence code does not contain a dead man's statute,³⁷ and the Advisory Committee on the Federal Rules of Evidence has 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 did not have such a statute,³⁸ and many of the states that do have these statutes have greatly modified them to permit testimony by interested persons.³⁹ In 1998, only twelve states still had the strictest form of the statute, which bars all testimony by an interested person,⁴⁰ and by 2000, only seven states had a complete bar to such testimony.⁴¹

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."⁴² Except as otherwise provided by statute, hearsay evidence is inadmissible in court.⁴³ "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.⁴⁴ 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.⁴⁵ 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.⁴⁶

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.⁴⁷ 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.

³⁶ Ehrhardt, *Florida Evidence*, s. 602.1 at 407.

³⁷ *Id.* at 397.

³⁸ Herbert E. Tucker, *Colorado Dead Man's Statute: Time for Repeal or Reform?* 29-JAN Colo. Law. 45, 48 (2000).

³⁹ PROPOSED REPEAL OF F.S. 90.602 AND AMENDMENT TO 90.804(2)(e).

⁴⁰ 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).

⁴¹ Tucker, *Colorado Dead Man's Statute* at 29-JAN Colo. Law. at 48.

⁴² Section 90.801(1)(c), F.S.

⁴³ Section 90.802, F.S.

⁴⁴ 23 Fla. Jur. 2d *Evidence and Witnesses* s. 269 (2004).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Cf. Ehrhardt, *Florida Evidence*, s. 803 at 697.

III. Effect of Proposed Changes:

This committee substitute will entirely repeal s. 90.602, F.S., the Dead Man's Statute, and create 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 by an adverse party, shall not be excluded as hearsay. The hearsay exception only applies in actions brought against a person in control of the assets of a deceased person or a person in control of the assets of an incompetent person or the incompetent person.

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.⁴⁸

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Creditors of a decedent may have greater success in proving claims against an estate.

C. Government Sector Impact:

None.

⁴⁸ Real Property, Probate, and Trust Law Section of The Florida Bar, *Proposed Repeal of F.S. 90.602 and Amendment to 90.804(2)(e)* (undated).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
