

Proposed Amendment to Rule of Evidence 804(b)

Submitted by:

David D. King
Administrative Judge
New Hampshire Circuit Court
One Granite Place
Concord, NH
(603) 271-6418
dking@courts.state.nh.us

Proposed Rule Change:

To amend Rule of Evidence 804(b) to restore an exception to the rule against hearsay for statements made by deceased persons in actions by or against representatives of deceased persons, as shown in Attachment A.

Purpose of Proposed Change:

For nearly 65 years, New Hampshire law gave trial courts hearing actions brought by or against representatives of deceased persons the flexibility to admit statements by the deceased. See Laws 1953, ch. 182 (repealing dead man statute, R.L. 1942 392:25-27, and creating hearsay exception); N.H. R. Evid. 804(b)(5) (2016) (including hearsay exception for deceased person's statements) (amended 2017); N.H. Sup. Ct. Order Adopting Amendments to New Hampshire Rules of Evidence (Apr. 20, 2017) (adopting revised rules which omitted the exception). First as a statutory exception, RSA 516:25 (1994) (repealed 1995 by Laws 1994, 57:1, II (1994 HB 1224)),¹ and then as Rule of Evidence 804(b)(5), the exception to the prohibition on hearsay provided that:

In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided the Trial Judge shall first find as a fact that the statement was made by decedent, and that it was made in good faith and on decedent's personal knowledge.

¹ The legislative history strongly suggests that the repeal of the statutory hearsay exception, which occurred after the exception was codified as part of the Rules of Evidence, was not intended to work a substantive change in the law. See N.H.H.R. Jour. 440 (1994) (report of the Judiciary Committee on HB 1244 noting that the bill "repeals certain RSAs that are now contained in the New Hampshire Rules of Evidence" and was a "house-keeping bill intended to keep procedural rules in one place," i.e. the Rules of Evidence).

This exception was eliminated as part of the 2016 updates to the Rules of Evidence. N.H. Sup. Ct. Order Adopting Amendments to New Hampshire Rules of Evidence (Apr. 20, 2017), Appendix GGG. Based upon our review of the publically available records of the Advisory Committee on Rules and the New Hampshire Rules of Evidence Update Committee, it does not appear that there was any substantive attention given to the elimination of Rule 804(b)(5), except to note that no equivalent provision was found in the Federal Rules of Evidence. The elimination of the longstanding exception for certain statements by deceased persons has created hardship in probate litigation, impeded the truth-seeking function of the Court, and has not been adequately compensated for by the residual exception under Rule 807. Therefore, we propose that Rule 804 be amended to reinstate the exception as shown in Attachment A.

The adoption of the hearsay exception for deceased person's statements was coupled with the repeal of the final version of New Hampshire "Dead Man's" statute, which codified common law prohibitions on introduction of testimony of interested parties in litigation involving decedent's estates in order to protect estates against unscrupulous claimants whose claims could only have been rebutted by the deceased. See R.L. 392:25-27 (1942); see generally Ed Wallis, An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and A Proposal for Change, 53 Clev. St. L. Rev. 75 (2005). Dead Man's statutes were widely criticized as unfair, confusing, and impediments to finding the truth and more than thirty states have repealed their Dead Man's statutes. See id. at 100-03, 105.

In lieu of prohibiting all testimony by interested in parties in cases involving estates, the legislature gave courts the flexibility to admit statements by decedents. The purpose of this hearsay exception "was to prevent injustice to the estates of deceased persons by permitting an executor in certain circumstances to give the deceased's version of a disputed transaction." Chinburg v. Chinburg, 139 N.H. 616, 620 (1995) quoting Yeaton v. Skillings, 100 N.H. 316, 319 (1956). As the Supreme Judicial Court of Massachusetts put it when interpreting a similar provision of their law, the hearsay exception for statements made by a decedent "has been 'liberally construed as remedial legislation designed to mitigate under proper safeguards the hardship often resulting from the loss of evidence by reason of death.'" Shine v. Vega, 709 N.E.2d 58, 66 (Mass. 1999) quoting Berwin v. Levenson, 42 N.E.2d 568, 570 (Mass. 1942). The Connecticut Supreme Court described the exception more lyrically as being intended:

"...to remove the disparity in advantage previously possessed by living litigants as against the representatives of persons whose voices were stilled by death, by permitting the declarations and memoranda of the latter to be received and weighed in the evidential balance as against the assertions of the living."

Dinan v. Marchand, 903 A.2d 201, 211 (Conn. 2006) quoting Doyle v. Reeves, 152 A. 882, 884 (Conn. 1931)

The New Hampshire exception for statements of the deceased was limited to cases involving litigation by or against the decedent's representatives. Evid. 804(b)(5) (2016) (amended 2017); Chinburg, 139 N.H. at 619-20 (declining to apply exception to suit brought by decedent's executrix but in her personal capacity). The exception applied equally to statements proffered by the estate or by a party adverse to the estate. Sullivan v. Dumaine, 106 N.H. 102, 106 (1964). Moreover, a deceased person's statements could only be admitted "based upon certain guarantees of truthfulness." Yeaton, 100 N.H. at 319. If the trial court found that the statement "(a) was not made by the decedent; or (b) was not made in good faith; or (c) was not made on decedent's personal knowledge," it could not be admitted. Sullivan, 106 N.H. at 106.

A number of states, including those whose evidentiary rules otherwise mirror the Federal Rules, retain the exception for statements of a deceased person in rule or statute. See David F. Binder, *Hearsay Handbook*, § 43.1 (4th ed. 2022). Examples of other state's rules are listed in Attachment B.

By removing the explicit exception for statements by deceased persons, New Hampshire has effectively adopted a one-sided Dead Man's Statute – living parties may testify freely about their transactions with the deceased, while the deceased's representative may only introduce statements by the deceased that fall within one of the other hearsay exceptions. The "catch-all" or residual exception to hearsay under Rule 807 does not sufficiently mitigate against this unfairness because it specifically requires that the proffered statement have "equivalent circumstantial guarantees of trustworthiness" as one of the enumerated hearsay exceptions. N.H. R. Evid. 807(a)(1). The most common types of statements which the former exception was intended to cover, i.e. statements about transactions between the deceased person and others, generally will not have the same indicia of trustworthiness (e.g. spontaneity, special motivation to be accurate) as other statements exempt from the hearsay rule. In the Chinburg case, for example, the deceased's wife filed a bill in equity seeking a constructive trust in her favor over the proceeds of her husband's life insurance policy. 139 N.H. at 617. She sought to admit statements made repeatedly by the deceased, over a twenty-two month period, and in the context of discussions about providing for his wife's financial security the he intended to, and believed he had, designated her as the beneficiary. Id. at 618. These statements were corroborated by evidence that the husband had twice requested that his father, who had sold him the policy and was a listed beneficiary, send the policy to him. Id. The Supreme Court upheld the trial court's exclusion of the husband's statements under the catch-all exception based on the lack of equivalent circumstantial guarantees of trustworthiness. Id. at 619. The Chinburg case, and the dearth of reported cases upholding the

admission of hearsay under the catch-all exception,² strongly suggest that Rule 807 is not an adequate substitute for a specific hearsay exception for statements of deceased persons.

Given that it is not clear that the drafters of the restyled Rules of Evidence specifically considered this substantive change and its implications for litigation, particularly in the probate context, we believe that the Committee should explicitly address the issue. The proposed amendment restores the longstanding New Hampshire exception for statements by deceased persons to the rules of evidence. We propose slightly modifying the text of the exception to make it easier to comprehend, consistent with the restyling of the New Hampshire and Federal rules, as well as to add specific requirement that the court find the statement was made under circumstances indicating trustworthiness. This latter change is based on the wording of West Virginia's exception for statements by the deceased. W. Va. R. Evid. 804(b)(5). It makes explicit the trustworthiness analysis implied by the former rule's requirements for "good faith" and "personal knowledge." See Yeaton, 100 N.H. at 319. It is also consistent with the general "New Hampshire principle of necessity and the appearance of trustworthiness" as justification for admission of hearsay statements. N.H. R. Evid. 804, comm. n. (describing purpose of former residual exception before its transfer to Rule 807).

For all the foregoing reasons, I respectfully request that the Committee consider amending the Rules of Evidence as shown in Attachment A. I do not request expedited processing of this request.

² Our searches turned up only a single case in which the application of the residual exception was upheld, State v. Knowles, 132 N.H. 130, 133 (1989).

Attachment A

Amend New Hampshire Rule of Evidence 804 as follows (deletions are in ~~strikethrough~~ format; additions are in **[bold and brackets]**):

Rule 804. Exceptions to the Rule Against Hearsay - When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had - or, in a civil case, whose predecessor in interest had - an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) ~~Other Exceptions. (Transferred to Rule 807)~~ **[Statement of a Deceased Person. In an action, suit, or proceeding by or against the representatives of a deceased person, a statement made by the deceased person:**

(1) in good faith;

(2) based upon personal knowledge; and

(3) under circumstances indicating that it is trustworthy.]

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused - or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did so intending that result.

Attachment B

State	Cite	Text
California	Cal. Evid. Code § 1261 (West)	<p>(a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear.</p> <p>(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.</p>
Connecticut	Conn. Gen. Stat. Ann. § 52-172 (West)	<p>In actions by or against the representatives of deceased persons, and by or against the beneficiaries of any life or accident insurance policy insuring a person who is deceased at the time of the trial, the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence. In actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of such trustee or receiver, shall be received in evidence.</p>
Florida	Fla. Stat. Ann. § 90.804(2)(e) (West)	<p>(2) Hearsay exceptions.--The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:</p> <p>...</p> <p>(e) Statement by deceased or ill declarant similar to one previously admitted.--In an action or proceeding brought against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or against a trustee of a trust created by a deceased person, or against the assignee, committee, or guardian of a mentally incompetent person, when a declarant is unavailable as provided in paragraph (1)(d), a written or oral statement made regarding the same subject matter as another statement made by the declarant that has previously been offered by an adverse party and admitted in evidence.</p>

State	Cite	Text
Massachusetts	Mass. Gen. Laws Ann. ch. 233, § 65 (West)	In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.
Missouri	Mo. Ann. Stat. § 491.010 (West)	In any such suit, proceeding or probate matter, where one of the parties to the contract, transaction, occurrence or cause of action, or his agent in such matter, is dead or is shown to be incompetent, and the adverse party or his agent testifies with respect thereto, then any relevant statement or statements made by the deceased party or agent or by the incompetent prior to his incompetency, shall not be excluded as hearsay, provided that in trials before a jury, the trial judge shall first determine by voir dire examination out of the hearing of the jury that the declarant would have been a competent witness and that his alleged statement or statements would have been admissible in evidence if he were available to testify.
Ohio	Ohio Evid. R. 804(b)(5)	<p>(B) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:</p> <p>...</p> <p><i>(5) Statement by a Deceased or Incompetent Person.</i> The statement was made by a decedent or a mentally incompetent person, where all of the following apply:</p> <p>(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;</p> <p>(b) the statement was made before the death or the development of the incompetency;</p> <p>(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.</p>

State	Cite	Text
Rhode Island	R.I. R. Evid. 804(c)	(c) Declaration of Decedent Made in Good Faith. A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.
South Dakota	S.D. Codified Laws § 19-19-804(b)(5)	(b) Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: ... (5) Decedent's statements. In actions, suits, or proceedings by or against the representatives of deceased persons including proceedings for the probate of wills, any statement of the deceased whether oral or written shall not be excluded as hearsay, provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.
Virginia	Va. Code Ann. § 8.01-397 (West)	In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party.

State	Cite	Text
West Virginia	W. Va. R. Evid. 804(b)(5)	<p>(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:</p> <p>...</p> <p>(5) <i>Statement of a Deceased Person.</i> In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased--whether oral or written--shall not be excluded as hearsay provided the trial judge shall first find as a fact that the statement:</p> <p>(A) was made by the decedent; and</p> <p>(B) was made in good faith and on decedent's personal knowledge; and</p> <p>(C) was made under circumstances that indicate it was trustworthy.</p>