

Senate Bill 288

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Creates exception to prohibition on use of hearsay as evidence. Allows introduction of hearsay statement as evidence if declarant is unavailable as witness and person against whom statement is offered engaged or acquiesced in wrongdoing that caused declarant to be unavailable.

A BILL FOR AN ACT

1
2 Relating to hearsay; creating new provisions; and amending ORS 40.465.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 40.465 is amended to read:

5 40.465. (1) "Unavailability as a witness" includes situations in which the declarant:

6 (a) Is exempted by ruling of the court on the ground of privilege from testifying concerning the
7 subject matter of a statement;

8 (b) Persists in refusing to testify concerning the subject matter of a statement despite an order
9 of the court to do so;

10 (c) Testifies to a lack of memory of the subject matter of a statement;

11 (d) Is unable to be present or to testify at the hearing because of death or then existing physical
12 or mental illness or infirmity; or

13 (e) Is absent from the hearing and the proponent of the declarant's statement has been unable
14 to procure the declarant's attendance (or in the case of an exception under subsection [(3)(b)]
15 **(2)(b)**, (c) or (d) of this section, the declarant's attendance or testimony) by process or other rea-
16 sonable means.

17 *[(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack
18 of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the
19 declarant's statement for the purpose of preventing the witness from attending or testifying.]*

20 *[(3)]* **(2)** The following are not excluded by ORS 40.455 if the declarant is unavailable as a wit-
21 ness:

22 (a) Testimony given as a witness at another hearing of the same or a different proceeding, or
23 in a deposition taken in compliance with law in the course of the same or another proceeding, if the
24 party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor
25 in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or re-
26 direct examination.

27 (b) A statement made by a declarant while believing that death was imminent, concerning the
28 cause or circumstances of what the declarant believed to be impending death.

29 (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary
30 or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.
New sections are in **boldfaced** type.

1 render invalid a claim by the declarant against another, that a reasonable person in the declarant's
 2 position would not have made the statement unless the person believed it to be true. A statement
 3 tending to expose the declarant to criminal liability and offered to exculpate the accused is not ad-
 4 missible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

5 (d)(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy,
 6 relationship by blood or adoption or marriage, ancestry, or other similar fact of personal or family
 7 history, even though the declarant had no means of acquiring personal knowledge of the matter
 8 stated; or

9 (B) A statement concerning the foregoing matters, and death also, of another person, if the
 10 declarant was related to the other by blood, adoption, or marriage or was so intimately associated
 11 with the other's family as to be likely to have accurate information concerning the matter declared.

12 (e) A statement made at or near the time of the transaction by a person in a position to know
 13 the facts stated therein, acting in the person's professional capacity and in the ordinary course of
 14 professional conduct.

15 **(f) A statement offered against a party that has engaged or acquiesced in wrongdoing**
 16 **that caused the declarant to be unavailable.**

17 [(f)] (g) A statement not specifically covered by any of the foregoing exceptions but having
 18 equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the state-
 19 ment is offered as evidence of a material fact; (B) the statement is more probative on the point for
 20 which it is offered than any other evidence which the proponent can procure through reasonable
 21 efforts; and (C) the general purposes of the Oregon Evidence Code and the interests of justice will
 22 best be served by admission of the statement into evidence. However, a statement may not be ad-
 23 mitted under this paragraph unless the proponent of it makes known to the adverse party the in-
 24 tention to offer the statement and the particulars of it, including the name and address of the
 25 declarant, sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes
 26 apparent that the statement is probative of the issues at hand, to provide the adverse party with a
 27 fair opportunity to prepare to meet it.

28 **(3) A statement is not admissible under the provisions of this section if the declarant is**
 29 **unavailable as a witness because the proponent of the statement engaged or acquiesced in**
 30 **wrongdoing that caused the declarant to be unavailable.**

31 **SECTION 2. (1) Except as provided in subsection (2) of this section, the amendments to**
 32 **ORS 40.465 by section 1 of this 2005 Act apply to all statements, whether made before, on or**
 33 **after the effective date of this 2005 Act.**

34 **(2) The amendments to ORS 40.465 by section 1 of this 2005 Act do not apply to an action**
 35 **or proceeding commenced before the effective date of this 2005 Act.**

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