

D R A F T

SUMMARY

Provides that witness is unavailable for purposes of hearsay rules if witness is absent from hearing and proponent of statement has established that party against whom statement is offered engaged in certain conduct that caused witness to be unavailable.

A BILL FOR AN ACT

Relating to forfeiture by wrongdoing; amending ORS 40.465.

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

SECTION 1. ORS 40.465 is amended to read:

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

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

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

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

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

(e) Is absent from the hearing and the proponent of the declarant’s statement has been unable to procure the declarant’s attendance (or in the case of an exception under subsection (3)(b), (c) or (d) of this section, the declarant’s attendance or testimony) by process or other reasonable means[.] ; **or**

(f) Is absent from the hearing and the proponent of the declarant’s statement has established the criteria of subsection (3)(f) or (g) of this

1 **section by a preponderance of the evidence.**

2 (2) A declarant is not unavailable as a witness if the declarant's ex-
3 emption, refusal, claim of lack of memory, inability, or absence is due to the
4 procurement or wrongdoing of the proponent of the declarant's statement for
5 the purpose of preventing the witness from attending or testifying.

6 (3) The following are not excluded by ORS 40.455 if the declarant is un-
7 available as a witness:

8 (a) Testimony given as a witness at another hearing of the same or a
9 different proceeding, or in a deposition taken in compliance with law in the
10 course of the same or another proceeding, if the party against whom the
11 testimony is now offered, or, in a civil action or proceeding a predecessor in
12 interest, had an opportunity and similar motive to develop the testimony by
13 direct, cross, or redirect examination.

14 (b) A statement made by a declarant while believing that death was im-
15 minent, concerning the cause or circumstances of what the declarant be-
16 lieved to be impending death.

17 (c) A statement which was at the time of its making so far contrary to
18 the declarant's pecuniary or proprietary interest, or so far tended to subject
19 the declarant to civil or criminal liability, or to render invalid a claim by
20 the declarant against another, that a reasonable person in the declarant's
21 position would not have made the statement unless the person believed it to
22 be true. A statement tending to expose the declarant to criminal liability and
23 offered to exculpate the accused is not admissible unless corroborating cir-
24 cumstances clearly indicate the trustworthiness of the statement.

25 (d)(A) A statement concerning the declarant's own birth, adoption, mar-
26 riage, divorce, legitimacy, relationship by blood or adoption or marriage,
27 ancestry, or other similar fact of personal or family history, even though the
28 declarant had no means of acquiring personal knowledge of the matter
29 stated; or

30 (B) A statement concerning the foregoing matters, and death also, of an-
31 other person, if the declarant was related to the other by blood, adoption,

1 or marriage or was so intimately associated with the other's family as to be
2 likely to have accurate information concerning the matter declared.

3 (e) A statement made at or near the time of the transaction by a person
4 in a position to know the facts stated therein, acting in the person's profes-
5 sional capacity and in the ordinary course of professional conduct.

6 (f) A statement offered against a party who intentionally or knowingly
7 engaged in criminal conduct that directly caused the death of the declarant,
8 or directly caused the declarant to become unavailable as a witness because
9 of incapacity or incompetence.

10 (g) A statement offered against a party who engaged in, directed or oth-
11 erwise participated in wrongful conduct that was intended to cause the
12 declarant to be unavailable as a witness, and did cause the declarant to be
13 unavailable.

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

28 *[(4) For purposes of subsection (3)(f) and (g) of this section, the proponent*
29 *of a statement is not required to issue a material witness order, as defined in*
30 *ORS 136.608, or seek sanctions for contempt in order to show the unavailability*
31 *of the declarant under subsection (1)(e) of this section.]*

