

A defendant was prosecuted for bankruptcy fraud. The defendant's wife, now deceased, had testified adversely to the defendant during earlier bankruptcy proceedings that involved similar issues. Although the wife had been cross-examined, no serious effort was made to challenge her credibility despite the availability of significant impeachment information. At the fraud trial, the prosecutor offers into evidence the testimony given by the defendant's wife at the bankruptcy proceeding.

Is this evidence admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the defendant has the right to prevent use of his spouse's testimony against him in a criminal case.
- C. Yes, because it is a statement by a person identified with a party.
- D. Yes, under the hearsay exception for former testimony.

Explanation:

Former testimony

(FRE 804(b)(1))

Hearsay exception for unavailable declarant's testimony that:

was given at trial, hearing, or deposition in current case or different proceeding that involved similar parties & issues *and*

is offered against party who had opportunity & similar motive to develop testimony by direct or cross-examination

FRE = Federal Rule of Evidence.

The **rule against hearsay** prohibits the admission of a statement made outside the present proceeding that is offered for the truth of the matter asserted therein. However, one **exception** to this rule permits admission of an **unavailable** (eg, deceased) **declarant's former testimony** if:

the testimony was given at a **trial, hearing, or deposition** in the current case or a different proceeding that involved **similar parties and issues** *and*

the party against whom the testimony is offered had an opportunity and similar motive to develop that testimony through **direct or cross-examination** of the declarant.

Here, the prosecution sought to introduce the deceased wife's prior testimony against the defendant at his fraud trial. Her testimony was given at earlier bankruptcy proceedings that involved similar issues. And though the defendant made no significant effort to discredit the wife at those proceedings, he had an opportunity and similar motive to do so on cross-examination.* Therefore, the wife's testimony is admissible under the hearsay exception for former testimony **(Choice A)**.

*The admission of the wife's former testimony does not raise Sixth Amendment **confrontation** issues because the criminal defendant had a prior opportunity to cross-examine her.

(Choice B) A criminal defendant has no right to prevent the use of his spouse's testimony against him in a criminal case. Instead, under the **spousal-immunity privilege**, a criminal defendant's current spouse may refuse to testify against the defendant about events that occurred before or during the marriage.

(Choice C) A statement made by a person identified with a party—ie, an agent, employee, or person authorized to speak on that party's behalf—may fall within the hearsay exclusion for an **opposing party's statement**. Since there is no evidence that the wife filled any of these roles, this is not a basis to admit her prior testimony.

Educational objective:

The hearsay exception for former testimony allows admission of testimony (1) given at a trial, hearing, or deposition in the same case or a different proceeding that involved similar parties and issues and (2) offered against a party who had an opportunity and similar motive to develop that testimony through direct or cross-examination.

References

Fed. R. Evid. 804(b)(1) (hearsay exception for former testimony).

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