

In a suit based on a will, the distribution of \$1 million depends upon whether the wife survived her husband when both died in the crash of a small airplane. An applicable statute provides that, for purposes of distributing an estate after a common disaster, there is a rebuttable presumption that neither spouse survived the other.

A witness has been called to testify that as she approached the plane she heard what she thought was a woman's voice saying, "I'm dying," although by the time the husband and wife were removed from the wreckage they were both dead.

Is the witness's testimony admissible?

- A. No, because the matter is governed by the presumption that neither spouse survived the other.
- B. No, because the witness's testimony is too speculative to support a finding.
- C. Yes, because it is relevant and not otherwise prohibited.
- D. Yes, because the hearsay rule does not apply to statements by decedents in actions to determine rights under a will.

Explanation:

To be admissible, **evidence must be relevant**. This means that the evidence must have some tendency to make a **material fact more or less probable**. Here, the outcome of the suit depends on whether the wife survived the husband. And the witness's testimony that she heard a woman's voice say, "I'm dying," as she approached the wreckage increases the likelihood that the wife outlived the husband and rebuts the statutory **presumption** that neither spouse survived the other. Therefore, the witness's testimony is relevant.

However, relevant evidence **may be excluded** by a specific **rule, law, or constitutional provision**. One ground for exclusion raised here pertains to the **hearsay rule**, which prohibits out-of-court statements offered to prove the truth of the matter asserted therein. But the out-of-court statement, "I'm dying," is *not* hearsay since it is being used to prove that the woman could speak and so was alive when the statement was made—not to prove that she was actually dying (**Choice D**). Therefore, the witness's testimony is admissible.

(Choice A) Under the "**bursting bubble**" **approach*** followed by the Federal Rules of Evidence in civil cases, a party can overcome a presumption (eg, that neither spouse survived the other) by producing sufficient contrary evidence. Once this occurs, the presumption "bursts" and no longer governs the matter.

(Choice B) The witness's **testimony** is *not* too speculative since there is no requirement that a witness be absolutely certain of matters about which he/she testifies.

*This bursting-bubble approach does not apply to conclusive presumptions or in federal diversity cases, where state law governs the effect of a presumption.

Educational objective:

Evidence is only admissible if it is relevant—ie, tends to make a material fact more or less probable. But relevant evidence may be excluded by a specific rule, law, or constitutional provision (eg, the hearsay rule).

References

Fed. R. Evid. 401 (test for relevant evidence).

Fed. R. Evid. 402 (general admissibility of relevant evidence).

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Legal bases for excluding relevant evidence (FRE 402)

U.S. Constitution
(eg, obtained illegally)



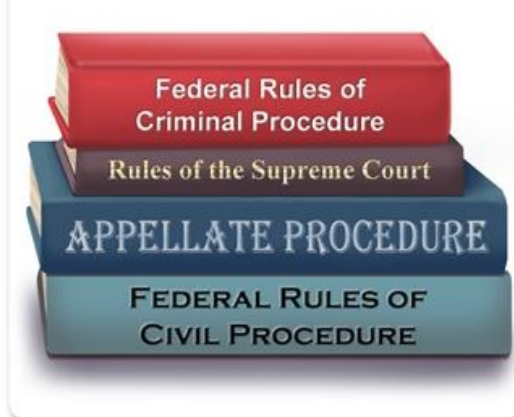
Federal statute
(eg, prohibited disclosure)



Federal Rules of Evidence
(eg, hearsay)



Other rules promulgated by
U.S. Supreme Court



FRE = Federal Rules of Evidence