

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 16-01

**In the Matter to Amend Wisconsin Statutes
 §§ 885.16, 885.17, 885.205, and 906.01**

FILED**FEB 21, 2017**

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On April 19, 2016, Attorney April M. Southwick filed a petition on behalf of the Wisconsin Judicial Council requesting that the court repeal the so-called "Deadman's statutes," Wis. Stats. §§ 885.16 (Transactions with deceased or insane persons) and 885.17 (Transactions with deceased agent), and amend Wis. Stat. § 906.01 (General Rule of Competency) to remove references to the Deadman's statutes. The petition also proposes repeal of Wis. Stat. § 885.205 (Privileged communications) which appears to create a privilege for communications between a student and dean of students or a school psychologist.

The court discussed this petition at open rules conference on May 12, 2016, and voted to schedule a public hearing. On September 6, 2016, a letter was sent to interested persons seeking input. Attorneys Jonathan R. Ingrisano and Jonathan T. Smies, both attorneys at Godfrey and Kahn, S.C., submitted a letter in support of the

petition. The State Bar of Wisconsin submitted a response stating it would take no position on the petition.

The court conducted a public hearing on October 24, 2016. Attorney April M. Southwick appeared and presented the petition on behalf of the Wisconsin Judicial Council, joined by Attorney Thomas L. Shriner. Attorney Jonathon R. Ingrisano and Attorney Jonathan T. Smies testified in support of the aspect of the petition relating to repeal of the Deadman's statutes. Attorney Jeff A. Goldman, State Bar of Wisconsin Board of Governors, also testified, providing additional context for proposed repeal of the Deadman's statutes, but took no position on the petition.

At the ensuing open rules conference, the court discussed the petition. The court discussed whether aspects of the proposal, particularly the proposal to repeal Wis. Stat. § 885.205 of the statutes, transcend the court's authority under Wis. Stat. § 751.12 and determined that it would not further consider the proposed repeal of Wis. Stat. § 885.205. Upon further discussion the court indicated it was satisfied that the Deadman's statutes, which this court retained as part of its adoption of the Wisconsin Rules of Evidence in 1973, 59 Wis. 2d R1 (1973), are procedural and fall within the court's rule-making authority. The court voted unanimously to repeal the Deadman's statutes.¹ After some additional discussion as to how

¹ On January 11, 2017, Attorney S.A. Schapiro filed a motion asking the court to reconsider its decision to repeal the Deadman's statutes. Attorney Schapiro contends they were legislatively enacted, substantive, and are not within the purview of s. 751.12. The court considered these issues, as reflected in its discussion in open rules conference on October 24, 2016, and the motion is denied.

it should amend Wis. Stat. § 906.01 (General Rule of Competency) to remove references to the Deadman's statutes, the court voted to make the change, as requested by the petitioner. Therefore,

IT IS ORDERED that:

SECTION 1. 885.16 of the statutes is repealed.

SECTION 2. 885.17 of the statutes is repealed.

SECTION 3. 906.01 of the statutes is amended to read:

906.01 General rule of competency. Every person is competent to be a witness except as ~~provided by ss. 885.16 and 885.17 or as~~ otherwise provided in these rules.

IT IS FURTHER ORDERED that the effective date of this order is July 1, 2017.

IT IS FURTHER ORDERED that the rule adopted pursuant to this order shall apply to court proceedings commenced after the effective date of this rule and to any proceedings within a court proceeding then pending, except insofar as, in the opinion of the circuit court, application of the rule change would not be feasible or would work injustice, in which event the former rule applies.

IT IS FURTHER ORDERED that notice of this amendment of Wis. Stats. §§ 885.16, 885.17, and 906.01 be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 21st day of February, 2017.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*concurring*). I join most of the order repealing the "deadman's statutes." I write to discuss two provisions of the order: the effective date of the rule and the applicability of the rule after the effective date of the rule.

¶2 These two provisions have given the court pause in a number of orders, and the court is not consistent in its language relating to the applicability provision.

¶3 I write to clarify and memorialize the issues for the future. The Legislative Reference Bureau has had a great deal of experience with drafting effective date and applicability provisions in statutes, and I rely on chapter 6 of the Wisconsin Bill Drafting Manual 2017-2018, along with other materials, for my comments.

¶4 The effective date of a rule (like the effective date of a statute) is the date when the change becomes operative. The effective date of Rule 16-01, issued in January 2017, is July 1, 2017. This rule adopted by the court will appear in the Wisconsin Statutes as § 906.01. Sections 885.16 and 885.17 of the Statutes will be shown in the statutory history as repealed by the court.

¶5 Two reasons justify the delayed effective date of this rule. First and foremost, this rule (although it fails to so state) was issued pursuant to Wis. Stat. § 757.12, which provides that the effective dates for all rules adopted by the court shall be January 1 or July 1. See Wis. Stat. § 751.12(1).

Second, the delayed effective date gives the bench and bar time to learn of and adapt to the change.

¶6 The applicability provision of the rule (like the applicability provision of a statute) specifies the event or series of events in a temporal sequence that the change will govern after the effective date of the order. Although the rule becomes effective on July 1, 2017, its application after that date may be limited to certain events.

¶7 The order adopting the rule declares that the rule applies "to court proceedings commenced after the effective date of this rule and to any proceeding within a court proceeding then pending, except insofar as, in the opinion of the circuit court, application of the rule change would not be feasible or would work injustice, in which event the former rule applies."

¶8 The phrases "court proceedings" (used once) and "court proceeding" (used once) and the word "proceeding" (used once) are not defined in the rule. These phrases and words are apparently used in the Wisconsin Statutes more than one hundred times, and they do not always have the same meaning. The rule does not adopt any particular usage of the phrases or words.

¶9 Because the text of the applicability provision is not clear, I write separately.

¶10 Privy to the discussions of the applicability provision at open rules conferences and in e-mails by the justices and staff, I think I understand the court's intent in

adopting the applicability provision. I conclude that the court can express its intent better and more clearly.

¶11 Accordingly, I offer the following language to be adopted as the applicability provision and a comment. I think this language is clearer than that adopted and expresses the intent of the court:

The rule applies fully and without limitation to any action commenced after July 1, 2017. For any action commenced before July 1, 2017, but continuing thereafter, the rule applies to all events in the action except to the extent that the circuit court determines that application of the rule change would not be feasible or would work injustice.

COMMENT: The deadman's statute governs testimony in "any civil action or proceeding." See Wis. Stat. § 885.16. The words "civil action or proceeding" are not defined in § 885.16. The phrase "action commenced" is used herein to describe the commencement of a civil action as set forth in Wis. Stat. §§ 801.01 and 801.02 (2015-16). The phrase "events in the action" is used herein to refer to any matter in which a party or person may be examined pursuant to Wis. Stat. §§ 885.16 and 885.17 (2013-14). For a discussion of the word "action," including "special proceedings," used in Wis. Stat. § 801.01, the history of this terminology, and the commencement of civil actions, see Charles D. Clausen and David P. Lowe, The New Wisconsin Rules of Civil Procedure: Chapters 801-803, 59 Marq. L. Rev. 1. 2-9 (1976).

¶12 For the reasons set forth, I write separately.

¶13 I am authorized to state that Justice ANN WALSH BRADLEY joins this opinion.

