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Admission, Recantation, and Georgia's Child Hearsay Statute

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Research Guides

Admission, Recantation, and Georgia's Child Hearsay Statute

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Overview

The present child hearsay exception in Georgia allows for a statement by a child under fourteen years of age regarding an act of sexual contact or physical violence on or with the child to be admitted so long as the child declarant is available for cross-examination and the court finds that there is some indicia of truthfulness. (The statute also extends this exception to statements by a child declarant regarding acts of sexual contact or physical violence performed on another in the child's presence; however, this provision was found unconstitutional in Woodard v. State, 496 S.E.2d 896, 903 (Ga. 1998).

Prongs

The "available for cross-examination" and "indicia of truth" requirements are not nearly demanding as they might appear. Courts have found that even where the child declarant is called to testify but is unresponsive, he is still "available for cross examination" for purposes of the exception. Further, appellate courts have been willing to find, even where the record is blank on the issue, that trial courts made the necessary findings of reliability prior to admitting a child's hearsay statement.

The result is an exception that allows the introduction of the hearsay statement without providing many of the protections, including a full ability to confront the declarant, as well as the assurances of reliability that would be mandatory had the statement been made by an adult. This has given rise to equal protection and confrontation clause claims against the exception. Even so, where the declarant is the alleged victim, Georgia courts have consistently found that these reduced protections do not infringe upon a Defendant's constitutional rights, and that in those cases where they might, the harm is not so great as to cause reversible error.

The re-occurring explanations for allowing these decreased protections is the state's interest in protecting children and the recognition that child witnesses are generally not as cooperative as adult witnesses. Balancing these interests against the Defendant's interest in being able to cross-examine the alleged victim, the Georgia Supreme Court has interpreted the Georgia Hearsay Statute to provide a bare minimum of protections for a Defendant. Not only is the Defendant forced with the strategic dilemma of losing face with the jury by cross-examining a child or being deemed as having waived his right to do so, but even should the child refuse to respond at all during cross-examination, the Defendant has no right to have the hearsay statement excluded.

Conversely, the hearsay statement of the alleged victim is even more admissible than similar statements by adult witnesses. The child's statement may be used to bolster the credibility of the child or of other witnesses when the declarant's credibility has not been called into question – something that Georgia otherwise forbids. This benefit applies only to those statements describing the act of sexual contact or physical violence, and so more often than not, only applies to accusations or direct recantations of an accusation. Statements that generally deny abuse may not be protected from a hearsay objection under this exception, and the Defendant may not be allowed to admit them without first confronting the child declarant and giving him or her a chance to explain or deny the statement.

Examining a child witness is a precarious business. Noticeably, the current rules of evidence allow for the prosecution to introduce a child's accusation without ever having to call the child to the stand; however, the defense has no such power. This, however, changes in the new evidentiary rules effective January 1, 2013, as the opposing attorney will now be able to impeach a hearsay declarant's credibility by showing inconsistent statements or conduct, and need not give the declarant a chance to explain or deny the conduct.

Because the prospect of cross-examining a child witness comes with so many risks, for any criminal defense attorney, it is key to know not only which inconsistent statements by the child declarant can be brought to the jury's attention without having to take the risk of putting the child on the stand. It is also important to know, when such a risk must be taken, how to elicit that information from the witness effectively and without losing face before the jury.

About the Author

David Price is a student at the Georgia State University School of Law, and will be graduating in May, 2012. Mr. Price has interned with various criminal defense firms and organizations the Georgia Innocence Project . Mr. Price has an undergraduate degree in political science obtained from Berry College in 2008.

Scope

This guide provides a brief overview of the law surrounding hearsay statements by witnesses under the age of fourteen years in criminal cases in Georgia. While the majority of the guide will focus on the current rules of evidence in Georgia, parts of the guide will discuss the upcoming changes in the rules, effective January 1, 2013.

The resources provided in this guide include helpful laws, secondary materials, and internet resources on the topic of the child hearsay exception. However, to provide context to this specific issue, some of the materials relate to the broad subject of hearsay in general. This research guide is intended to assist attorneys with little or no familiarity with this subject matter in gaining a better understanding of the relevant law. At the end of the guide you will find internet resources that may be used to locate many of the sources contained in the guide.

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Primary Sources

Georgia Rules of Evidence (current)

Ga. Code. Ann. § 24-3-1 (1933): Hearsay – Definition and when admitted

Ga. Code. Ann. § 24-3-16 (1995): (Child Hearsay Statute) Testimony as to child's description of sexual contact or physical abuse. This provides a narrow exception to Georgia's hearsay rule. In order to qualify, the statement must be by a declarant under the age of 14, it must describe an act of sexual contact or physical abuse performed with or on the child or with or on another person in the presence of the child, the child must be present to testify at the hearing at which the statement is introduced, and the court must find that the circumstances of the statement provide a sufficient indicia of reliability.

Georgia Rules of Evidence (effective January 1, 2013)

Ga. Code. Ann.§ 24–8–820: (Revised Child Hearsay Statute) This section replaces § 24-3-16 of the current code. It is substantially similar, but does not allow for a child's statement to be introduced if that statement describes an act of sexual contact or physical abuse performed in the presence of the child (as opposed to on or with the child).

Ga. Code. Ann.§ 24–6-613:
This section provides that generally, a witness (other than a party opponent) shall not be impeached by a prior inconsistent statement without first being given the opportunity to deny or explain the inconsistent statement. As seen below, there is another notable exception.

Ga. Code. Ann.§ 24–8–806:
This secion provides that where a hearsay statement is admitted into evidence, the declarant may be impeached by showing a statement or conduct inconsistent with the hearsay statement and that the declarant need not be given an opportunity to deny or explain the inconsistent statement or actions. In a case where the defense is effectively unable to (or simply chooses not to) cross-examine a child declarant, this statute poses a more readily-available means to introduce an inconsistent statement or action by the child witness which would suggest the defendant's innocence.

Legislation

2011 Georgia Laws Act 52 H.B. No. 24 (2011)
This Act revises Georgia's Rules of Evidence so as to better conform with the Federal Rules of Evidence. Where federal circuit courts differed in their interpretations, the General Assembly considered the decisions from the 11th Circuit Court of Appeals. The Act retains several provisions, in whole or in part, which exist in the current code, but are not found in the Federal Rules (for example, as described in the box above, a substantial portion of the child hearsay exception is retained).

Cases

Overview

While the new version of Georgia's child hearsay exception has yet to become effective and so has not been challenged, it remains almost identical to the current exception provided for under Georgia's Child Hearsay Statute (O.C.G.A. 24-3-16). The sole difference is that the current version requires that the statement be regarding an act of physical abuse or sexual contact performed with or on the child or on another in the presence of the child, while the revised version does not

extend the exception to statements regarding those acts which were performed in the presence of the child. Because of the substantial similarity between the current and revised versions, standing case law regarding the validity and scope of the child hearsay exception should be expected to remain controlling.

These cases are available on LexisNexis and Westlaw.

Allen v. State, 428 S.E.2d 73 (Ga. 1993)
Child Hearsay Statute is not unconstitutional on its face. Further, it was not found unconstitutional as applied where the testimony of the victim exhibited guarantees of trustworthiness, the victim's interview was videotaped and preserved in its entirety for consideration for the jury, the victim testified, and victim's testimony in the videotape and on the stand were consistent

Gibby v. State, 213 Ga.App.20, 443 S.E.2d 852 (1994)certiorari denied, grant of habeas corpus reversed 267 Ga. 96, 475 S.E.2d 603
The Child hearsay statute does not violate Sixth Amendment of the United States Constitution.

Cimildoro v. State, 259 Ga. 788, 387 S.E.2d 335 (1990)
Georgia Supreme Court declined to address the constitutionality of Child Hearsay Statute where evidence, excluding the hearsay statements, amply supported verdict finding defendant guilty of enticing a child for indecent purposes.

Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200 (1992)
Child hearsay statute, by requiring court "to find that the circumstances of the statement provides sufficient indicia of reliability," was not void for vagueness. Further, the child hearsay statute did not violate equal protection clause of the Georgia Constitution by allowing State to bolster testimony of victim but denying same opportunity to defendant, in view of State's strong governmental interest in protecting children.

Woodard v. State, 496 S.E.2d 896 (Ga. 1998)
Georgia Supreme Court declared that the 1998 amendment to the Child Hearsay Statute -- allowing for the hearsay statement of a child witness testifying regarding an act of sexual or physical abuse inflicted on another to be admitted as substantive evidence if the child was available to be cross-examined -- was unconstitutional because it violated the equal protection clauses of both the state and federal constitutions. The Court explained that the equal protection violation occurred because the statue allowed a prior consistent statement by a child witness to be introduced as substantive evidence even when the credibility of the child had not been impeached by an affirmative charge of recent fabrication, improper influence, or improper motive during cross examination; however, had the witness been an adult, a prior consistent statement would not have been admissible until such a charge arose. As the portion of the Child Hearsay Statute dealing with acts of sexual contact or physical violence upon or with a child was not before the Court in this case, the lower courts have declined to extend its holding to that portion of the statute.

Estep v. State, 518 S.E.2d 176 (Ga. App. 1999)
The Court of Appeals declined to apply a *Woodard* equal protection analysis where the where the prior consistent statement of the victim-witness was admitted under the Child Hearsay Statute, finding that reversal was not required because the witness's prior consistent statement was cumulative of statements made by the Defendant.

Bunn v. State, 307 Ga.App. 381, 705 S.E.2d 180 (2010) reconsideration denied, certiorari granted.
Statute allowing the admission of hearsay statements made by a child under the age of 14 who witnessed an act of abuse inflicted upon another was not unconstitutional as applied in child molestation prosecution where therapist testified that first child victim witnessed defendant's acts of molestation against second victim, and vice versa, where both children were victims.

Robinson v. State, 308 Ga.App. 45, 706 S.E.2d 577 (2011)

A defendant's confrontation rights are not violated by his own counsel's failure to call a child molestation victim to the stand if that victim is available to testify at trial.

In re S.S., 281 Ga.App. 781, 637 S.E.2d 151 (2006)

Child's statements to her sister and her mother regarding alleged molestation by juvenile were not "testimonial," and thus admission of those statements in delinquency proceeding did not violate juvenile's right to confront a witness under *Crawford v. Washington*.

Fuller v. State, 211 Ga.App. 104, 438 S.E.2d 183 (1993)

Statute permitting out-of-court statement made by a child describing any act of sexual contact or physical abuse of child to be put in evidence through testimony of person to whom statement was made was not unconstitutional as conflicting with confrontation clause where statute required both presence of declarant at trial and sufficient indicia of reliability.

Bright v. State, 197 Ga.App. 784, 400 S.E.2d 18 (1990)

Unresponsiveness of a child witness during cross-examanation does not render the witness "unavailable" for cross-examination for purposes of the Confrontation Clause. "So long as the witness is made available for confrontation and cross-examination, the defendant's rights are protected, even if the witness is uncommunicative or unresponsive. The thrust of the child witness statute is to allow the jury, which must be convinced of guilt beyond a reasonable doubt, to judge the credibility of a child's accusations. If a child, who has reported child molestation to an adult permitted to testify to the out-of-court statement at trial, is incapable of reiterating the accusation at trial or is unresponsive or evasive during cross-examination, the jury must decide the child's credibility ... The manner in which the witness responds to cross-examination is, itself, evidence as to credibility."

Davis v. State, 694 S.E.2d 381 (2010)
Consistent hearsay statement of thirteen-year old child to mother under Child Hearsay Act is admissible, even if it is "bolstering." The objecting attorney's remedy is to address the bolstering on cross-examination.

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Secondary Sources

Law Review Articles and Other Periodical Sources

These periodical sources may be accessed on Westlaw or JSTOR.

• Jean Montoya, Child Hearsay Statutes: At Once Over-Inclusive and Under-Inclusive, 5 Psychol. Pub. Pol'y & L. 304 (1999)
This article explores the psychological effect of testimony, including cross-examination, on a child witness, and the burden placed on the child witness by the various child hearsay requirements set out by different states.

• Margaret Ann Shannon, Cross-Examining Children in A Productive Manner Under Georgia's Child Hearsay Law, 14 Ga. St. U. L. Rev. 663 (1998)
This article is concerned primarily with methods necessary to ensure an effective cross-examination of a child witness, and as she points out, an effective cross is key, as having a child witness refuse become unresponsive still does not render the witness "unavailable" for cross-examination for purposes of the Confrontation Clause.

• Matthew M. Staab, student work, Child's Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution, 108 W. Va. L. Rev. 501 (2005).
This article explains the changes taken by the courts of various states, including Georgia, in regards to their child hearsay statutes following the decision in *Crawford v. Washington*.

• Paul Vignos, The New Necessity Exception to the Hearsay Rule in Georgia, 16 Ga. St. U. L. Rev. 573 (2000)
While this primarily covers the necessity exception, the author compares the necessity exception to the to the heavily-deferential approach taken by appellate courts in regards to trial court rulings on the admissibility of hearsay evidence, specifically in the context of the Child Hearsay Statute. In the process, the author shows just how deferential appellate courts have been as to the trial courts' rulings on the issue of reliability of the hearsay statement.

• Judy Yun, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum. L. Rev. 1745 (Nov. 1983).
This article, while somewhat dated, makes an articulate case for the need child hearsay exceptions such as Georgia's, and shows the insufficiency of the common law exceptions such as excited utterance or res gestae, which rely on spontaneity or proximity in time between the moment the statement is made and the moment of the alleged act. In light of the various constituitonal challenges being brought against such statutes, this article makes a powerful policy argument in their defense.

American Law Reports

The American Law Reports (A.L.R.) and Corpus Juris Secuncum (C.J.S.) provide an objective, in-depth, analysis of many specific legal issues, together with a complete list of every case—in every jurisdiction—that discusses it. Both series can be found on Westlaw or LexisNexis.

Georgia Jurisprudence is a legal encyclopedia detailing issues under Georgia law. It is available on Westlaw.

American Law Reports

• Carol Schultz Vento, Validity, Construction, and Application of Child Hearsay Statutes, 71 A.L.R.5th 637 (1999).

This A.L.R. was originally published in 1999, but has been consistently updated to include new relevant case law. This article discusses admissibility limitations on child hearsay statements, as well as constitutional challenges to the statutes which authorize the admission of such statements.

Corpus Juris Secundum

43 C.J.S. Infants § 130 (2011)

Georgia Jurisprudence

Ga. Jur. Criminal Law § 12:32, Requirement that child be available to testify (2011)

Ga. Jur. Criminal Law § 12:33, Requirement that there be sufficient indicia of reliability (2011)

Ga. Jur. Criminal Law § 12:34, Requirement that there be sufficient indicia of reliability-Court's determination of reliability (2011)

Ga. Jur. Criminal Law § 12:2, Elements of child molestation (2011)

Ga. Jur. Criminal Law § 12:9, Corroboration of victim's testimony (2011)

Ga. Jur. Criminal Law § 11:17, Victim's out-of-court statements (2011)

Ga. Jur. Criminal Law § 12:24, Generally; competency to testify (2011)

Ga. Jur. Family Law § 13:42, Conduct of hearing; hearsay (2011)

Books and Treatises

- Handling Child Custody, Abuse, and Adoption Cases by Ann M. Haralambie
  Call Number: KF547 .H37 1993
  Publication Date: 2010
  http://gilfind.gsu.edu/vufind/Record/45929Provides a thorough analysis of custody, adoption, and abuse issues generally and comparatively by jurisdiction. An up to date version of this treatise are also available on Westlaw.
- Handbook on Georgia Practice with Forms by M. Windle Davis
  Call Number: KFG530 .D3 1992
  Publication Date: 1992
  http://gilfind.gsu.edu/vufind/Record/44486Provides a brief guide to basics of civil practice in Georgia, including child hearsay issues arising in tort and family cases. An up to date version of this treatise are also available on Westlaw.
- Courtroom Handbook on Georgia Evidence by Paul S. Milich
  Call Number: KFG540 .M542 c.1
  Publication Date: 1996
  http://gilfind.gsu.edu/vufind/Record/50353Milich's Handbook on Georgia Evidence provides an in-depth look at Georgia's evidence provisions as they've developed throughout caselaw and compares them with the Federal Rules of Evidence.
- Georgia Divorce, Alimony, and Child Custody by Dan E. McConaughey
  Publication Date: 1975
  http://KFG100 .M25This treatise provides an in-depth look at family law issues in Georgia, including the admissibility of hearsay statements by minor children. An up to date version of this treatise are also available on Westlaw.
- Green's Georgia Law of Evidence by Alexander Scherr
  Call Number: KFG540 .G7 2008
  Publication Date: 2008
  http://gilfind.gsu.edu/vufind/Record/1946940This treatise provides an in-dept look at Georgia's evidence rules and issues, including the admissibility of hearsay statements by minor children. An up to date version of this treatise is also available on Westlaw.

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Interest Groups and Associations

Interest groups

Below is a brief list of relevant interest groups as well as descriptions of the group and, where applicable, information and resources offered on their sites.

The Advocacy Center

The Advocacy Center
he Advocacy Center for Crime Victims and Children began in 1976 as the Waco Rape Crisis Center. It has grown into an umbrella agency with four programs: the Children's Advocacy Center (CAC), Court Appointed Special Advocates (CASA) The Victims Center, and Prevention and Education. The Advocacy Center for Crime Victims and Children is an umbrella 501(c)(3) non-profit organization of programs that serve to bring about healing to children and adults who are victims of crime and to facilitate change to end violence through advocacy, collaboration and community awareness.

Child Trends, Inc.

Child Trends provides a great deal of statistical data regarding child welfare, and works to reform policy so as to improve child welfare across the nation.

The Committee for Children

The Committe for Children develops and publishes curricula for preventing violence, bullying, and sexual abuse among children.

The National Coalition for Child Protection Reform (NCCPR)

The NCCPR works to bring reform to streamline America's child welfare system with an emphasis on child abuse prevention and regulation of the foster care system.

The National Council on Child Abuse & Family Violence (NCCAFV)

The NCCAFV's site provides resources on intergenerational family violence prevention in America. The organization is in its third decade of service, and provides public awareness and education materials, program and resource development consultation, and technical assistantance in the United States and internationally.

The Rape, Abuse, and Incest National Network (RAINN)

RAINN is one of the nation's largest anti-sexual assault organizations. It works to educate the public about sexual assault; and leads national efforts to prevent sexual assault, and improve services to victims.

Public/Private Associations

Below is a sampling of related associations in Georgia and the United States. A brief description of each organization is included, along with a link to the organization's website (each of which includes a wealth of information and additional resources).

American Bar Association's Center on Children and the Law
The website for the Center on Children and the Law offers several resources on the issue of practice standards, effective representation, and evidentiary issues encountered in child abuse cases.

American Bar Association Criminal Justice Section
The Criminal Justice Section of the American Bar Aasociation provides resources dealing with this and other practice issues, including a list of relevant books and periodicals.

American Bar Association Family Law Section
The Georgia Child Hearsay Statute does not limit the exception to only criminal cases. Thus, the same allegations may appear in the context of a custody or other proceeding. The Family Law Section of the ABA provides several resources, including publications, that offer guidance on dealing with these and other issues.

U.S. Department of Justice, Child Exploitation and Obscenity Section (CEOS)
The CEOS website offers several resources (though primarily intended for non-lawyers) regarding the legal issues surrounding child abuse cases, including the "Citizen's Guide to Laws on Sexual Abuse."

U.S. Department of Health and Human Sciences, Children's Bureau
The Children's Bureau site offers a great deal of statistical information regarding child abuse and neglect throughout the nation.

United Nations Committee on the Rights of the Child
The UN Committee on the Rights of the Child is responsible for producing the UN Convention on the Rights of the child. The convention (which was signed, but not ratified by the United States) provides for a child's right to be heard in all legal matters affecting him or her. The text of the convention may be found here.

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