

XXIV. CHILD HEARSAY

A. Code Sections: O.C.G.A. §24-3-16, 24-9-5

B. Procedure:

1. Elements of Exception. (O.C.G.A. §24-3-16). An out of court statement by a child under the age of 14 years is admissible by the testimony of the person or persons to whom made if:

the statement describes an act of sexual contact or physical abuse performed with or on the child¹ and

the child is available to testify and

the court finds that the circumstances of the statement provide sufficient indicia of reliability.

2. Available to Testify. The phrase "available to testify" means "competent to testify" under O.C.G.A. §24-9-5².

O.C.G.A. §24-9-5(a) provides that a child who does not understand the nature of an oath is not a competent witness, except as provided in (b).

O.C.G.A. §24-9-5(b) provides that in all deprivation cases and in criminal cases involving child molestation, and in all other criminal cases in which a child was a victim of or a witness to any crime, any such child shall be competent to testify and his credibility shall be determined as provided in O.C.G.A. §24-9-80, et al. O.C.G.A. §24-9-80 states: "The credibility of a witness is a matter to be determined by the jury under proper instructions from the court." The Article also addresses impeachment, bad character and false swearing.

3. Indicia of Reliability.

No hearing is required to be held to determine the indicia of reliability prior to the statement being admitted.³

The judge is not required to make a specific finding of sufficient indicia of reliability on the record; the Court of Appeals has held that implicit in the admission of statements pursuant to O.C.G.A. §24-3-16 is that the trial court made the necessary finding of admissibility.⁴

¹ **NOTE:** The statute also permits hearsay when the abuse occurs to another in the presence of the child, but that portion of the statute has been declared an unconstitutional violation of equal protection principles. Woodard v. State, 269 Ga. 317 (1998).

² In re K.G.L., 198 Ga. App. 891, 403 S.E.2d 464 (1991).

³ Reynolds v. State, 257 Ga. 725, 363 S.E.2d 249 (1988).

⁴ Calloway v. State, 202 Ga. App. 816, 415 S.E.2d 533 (1992).

There are certain factors, however, that have been delineated for the court to consider in making a determination as to whether there exist sufficient indicia of reliability surrounding the statement. These factors include but are not limited to the following: (1) the atmosphere and circumstances under which the statement was made (including the time, the place and the people present); (2) the spontaneity of the child's statement to the persons present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition, both physical and emotional; (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of coaching by parents or other third parties, the type of coaching and circumstances surrounding it, and the nature of the child's statement and the type of language used; and, (10) the consistency between repeated out-of-court statements by the child.⁵

4. Procedure When Section Is Invoked.

The party calling the witness should offer enough testimony regarding the circumstances of the statement so that the Court may make a finding of indicia of reliability. If not, the Court should inquire into the circumstances.

Although not required, the Court may specifically find that sufficient indicia of reliability have been demonstrated.

The Court should determine whether or not the child is "available to testify." If the matter is a deprivation case, a child molestation case, or a criminal case in which the child was a victim of or a witness to any crime, then the child is made "available to testify" by O.C.G.A. §24-9-5(b). Otherwise, inquiry must be made as to whether the child understands the nature of an oath.

When child hearsay evidence is introduced under the statute, the Court shall, at the request of either party and before the state rests, call the child to the stand.⁶

5. Challenges and holdings as to this Code Section.

Does not violate the Sixth Amendment's right of confrontation
See Frazier v. State, 195 Ga. App. 109 (1990)

Is not void for vagueness and uncertainty
See Weathersby v. State, 262 Ga. 126 (1992)

Withstands equal protection challenge with regard to statements by the victim
See Dobbins v. State, 262 Ga. 161 (1992)

Violates equal protection clause with regard to statements by a child witness
See Woodard v. State, 269 Ga. 317 (1998)

⁵ Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200 (1992), Gentry v. State, 213 Ga. App. 24, 443 S.E.2d 667 (1994); Gregg v. State, 201 Ga. App. 238, 411 S.E.2d 65 (1991).

⁶ Sosebee v. State, 257 Ga. 298, 357 S.E.2d 562 (1987).