

Protecting the Child's Voice: Use and Application of the Child Victim Hearsay Exception

Presented by:

Kelly A. Swartz, Director of Legal Advocacy, and Sara E. Goldfarb and Laura J. Lee,
Senior Program Attorneys, Guardian ad Litem Program

September 5, 2018

Learning Objectives

- Ensure child hearsay statement hearings are conducted pursuant to law and rules of procedure.
- Obtain appellate-proof child hearsay orders, including specific findings of fact.
- Follow appropriate procedural steps to allow court appearances of children.
- Understand mental and emotional impact on children appearing in court proceedings.
- Identify options to avoid children appearing in court.

What is Hearsay?

- **Hearsay** is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.
- The necessary reliability of the statement is lacking because the jury/court cannot observe the demeanor of the witness when the statement was originally made and there was no opportunity for cross-examination at that time. Reliability (or lack thereof) is at issue with hearsay statements. Thus, if the statement is hearsay, it is generally inadmissible.

Hearsay Exceptions

- However, the Florida Evidence Code provides 24 specific exceptions to the hearsay rule – one of them being the Statement of the Child Victim.
- Section 90.803(23), Florida Statutes, became effective October of 1986 and has most recently been amended in 2013, effective January 1, 2014.

Section 90.803(23) – Child Hearsay Exception

(23) Hearsay exception; statement of child victim.--

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; **and**

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Purpose of Exception

Section 90.803(23) – Child Hearsay Exception

- Allows admission of child hearsay statements
- Balances victim's rights with those of the parent/accused
- Primary means of introducing child hearsay
 - Other exceptions may be available (spontaneous statement, excited utterance, statements for purposes of medical diagnosis and treatment, etc.)
 - Exception for medical diagnosis and treatment per Section 90.803(4) does not apply to statements identifying the perpetrator. *State v. Jones*, 625 So.2d 821 (Fla. 1993).

What is Child Hearsay?

The child hearsay exception applies to statements:

- Made out of court
- By a child 16 or younger (used to be 11 years of age or younger prior to January 2014)
- Describing an act of child abuse, neglect, or sexual abuse
- Occurring in the presence of, with, by, or on the declarant child

What is a Statement?

- **Out-of-Court Statement:** a statement made without benefit of cross-examination.
- Child statements made during a taped forensic interview can be admitted as hearsay. *Springer v. State*, 874 So.2d 719 (Fla. 5th DCA 2004).

- When an expert testifies as to how child behaved with anatomically correct dolls, the expert is repeating communications of child and the court must evaluate the testimony under the requirements of child victim exception to hearsay rule.
 - *State v Townsend*, 635 So.2d 949 (Fla. 1994).

What qualifies as a statement?

Describing an act of child abuse, neglect or sexual abuse

- Hearsay exception for statements of child victims of sexual abuse applied to children who witnessed abuse, not merely to the actual physical victim of the abuse. *Russell v. State*, 572 So.2d 940 (Fla. 5th DCA 1990), review denied, 583 So.2d 1036.
- However, the Florida Supreme Court ruled in *State v. Dupree*, 656 So.2d 430 (Fla. 1995), that hearsay exception did not apply to statements made by a child who witnessed the murder of her sister.
- What about domestic violence in front of a child? This is considered child abuse by the Third DCA (affirmed without an opinion).

Performed in the presence of, with, by, or on the declarant child.

Age Requirement

- **Physical, mental, emotional or developmental age of 16 or less**
- Calculate the age as of the time that the statement is made, not at the time of trial. *Blanton v. State*, 880 So.2d 798 (Fla. 5th DCA 2004).

When the child tells someone about abuse, how is that statement admitted into evidence?

Child hearsay is admitted:

- If it is reliable and trustworthy + child testifies (subject to cross-examination) **OR**
- If it is reliable and trustworthy + child does not testify/is unavailable + there is other corroborating evidence of the abuse

Notice Requirements

- §90.803(23) does not require advance notice for use of child hearsay in civil cases. In criminal cases, there is a 10 day notice requirement of statements and details.
- A hearing with specific findings by the court are all that is required for admission.
- **FAILURE TO HOLD A HEARING OR MAKE FINDINGS WILL RESULT IN REVERSIBLE ERROR!**
- Best practice tips:
 - **Look for a written motion outlining the statements to be admitted and the basis for reliability in advance of hearing/trial. If no written motion, ask moving party to be specific as to the statements sought to be admitted and the basis.**
 - **Require notice even in a civil case in order to avoid trial by ambush.**

Statutory Factors for Reliability

- Mental and physical age and maturity
- Nature and duration of abuse
- Relationship to offender
- Reliability of statement
- Reliability of child
- “Any other appropriate factor”

Case Law Reliability Factors

- *State v. Townsend*, 635 So.2d 949 (Fla. 1994) factors:
 - Spontaneity
 - Child-appropriate language (cultural issues may also be relevant, such as language or terms that the child uses for body parts)
 - Specificity of statements
 - Consistency of statements
 - Whether it was made at first opportunity
 - Came from questions v. spontaneous statements
 - Motive to fabricate
 - Ability to distinguish between reality and fantasy
 - Improper influence
 - Vagueness of accusations

Two-Step Approach

Trial court must follow two-step approach to determine admissibility of out-of-court statements when **child victim is unavailable to testify** at trial.

Court must first determine:

1) whether **hearsay statement is reliable and from a trustworthy source** without regard to corroborating evidence,

and if so then must determine:

2) whether **other corroborating evidence is present**, and if answer to either question is no, then the hearsay statements are inadmissible.

Jones v. State, 728 So.2d 788 (Fla. 1st DCA 1999).

- Child does not have to be competent to have his/her hearsay statement admitted. *P.D. v. State*, 666 So.2d 968 (Fla. 3d DCA 1996).
- Reliability is to be determined independent of the corroborative evidence. *Mathis v. State*, 682 So.2d 175 (Fla. 1st DCA 1996), disapproved of on other grounds by, *Dudley v. State*, 139 So. 3d 273 (Fla. 2014).
- Need to determine reliability and trustworthiness even if child testifies. Trustworthiness is really the same thing as reliability.

- It is reversible error to allow a witness (expert or non-expert) to testify that, in their opinion, the child is telling the truth. *Luszczuk v. Dep't of Health & Rehab. Servs.*, 576 So.2d 431 (Fla. 5th DCA 1991).
- Court can consider whether witness has a personal stake in the case. *M.H. v. Dep't of Health & Rehab. Servs.*, 703 So.2d 1195 (Fla. 1st DCA 1997).

Reversible Error

Reversible error if findings are not specific.

State v. Townsend, 635 So.2d 949 (Fla.1994).

- Trial court, which merely listed hearsay statements of child victim and summarily concluded that time, content, and circumstances of the statements were sufficient to reflect that they were reliable, did not make adequate findings before admitting statements, and such failure was reversible error.

- This means NON-conclusory findings, utilizing specific facts of the statements and factors. *D.W.G. v. Dep't of Children & Fams.*, 833 So.2d 238 (Fla. 4th DCA 2002).
- Also see *Platt v. State*, 201 So.3d 775 (Fla. 4th DCA 2016), a criminal case that indicates the court should look at the totality of the circumstances in ruling on admissibility.
- Best practice tip: Make sure findings are consistent with allegations in motion if the motion is specific enough, well-written and the evidence supports such findings.

Specific Findings

M.H. v. Dep't of Health & Rehab. Servs., 703 So.2d 1195 (Fla. 1st DCA 1997).

- Trial judge's oral statement in child dependency proceeding at time of admission of child's out-of-court statements indicating that child witnessed his father killing his mother, coupled with written findings contained in order of adjudication of dependency were sufficient to support admission of out-of-court statements of child under statement of child victim exception to hearsay rule.
- Best practice tip: Request a separate written order with specific findings, which may be based on proposed order prepared by moving party after oral findings are made on the record. *J.B. and M.W. v. Dep't of Children & Fams.*, 229 So.3d 412 (Fla. 3d DCA 2017).

Admissibility

Hearsay is admissible regardless of in-court testimony:

1. Even if child CONTRADICTS hearsay statement OR
2. Even if child doesn't remember making the statements

- *D.W.G. v. Dep't of Children & Fams.*, 833 So.2d 238 (Fla. 4th DCA 2002) (Says child doesn't have to remember).
- *T.O. v. Dep't of Children & Fams.*, 21 So.3d 173 (Fla. 4th DCA 2009) (If cannot remember, then unavailable).
- *In Interest of C.W.*, 681 So.2d 1181 (Fla. 2nd DCA 1996) (Child's inability to remember event renders the child unavailable).

What if the in-court statements are different than the hearsay statements?

- *Dep't. of Health and Rehab. Servs., v. M.B.*, 701 So.2d 1155 (Fla. 1997).
 - “We hold that section 90.803(23), Florida Statutes (1995), permits the admission into evidence of certain out-of-court statements of a child crime victim without the necessity that those statements be consistent with the child's trial testimony.”
- It comes in as substantive evidence!
- But see: *In re RK*, 38 So.3d 859 (Fla. 2d DCA 2010).
 - Criteria for admission were not met under 90.803(23) for prior inconsistent statements to be admitted as substantive evidence in a dependency case.

Unavailability

- If the child does not testify, hearsay statements are not admissible unless the child is unavailable and there is corroborative evidence of the abuse.
- But what constitutes “unavailability”?

Unavailability can be proven in several ways:

- Court finds that “there is a substantial likelihood that the child will suffer severe emotional abuse” if the child testifies.
- Therapist testimony is sufficient to support this finding. *Perez v. State*, 536 So.2d 206 (Fla. 1989); *Seaman v. Florida*, 608 So.2d 71 (Fla. 3d DCA 1992).
 - However, an expert is not required to prove this; could be any lay witness.

Findings per Section 90.804

“Unavailability as a witness” means that the declarant:

- (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement;
- (b) Persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so;
- (c) Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant’s effectiveness as a witness during the trial;

Section 90.804

(d) Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or

(e) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

- ▶ Unavailability also includes if the child is incompetent (inability to recall and relate). Remember, competency to testify does not affect reliability. *State v. Townsend*, 635 So.2d 949 (Fla. 1994).

Protections for Child Testimony

- The court may consider Chapter 92 (Sections 92.53 and 92.54) protections such as videotaping of testimony and/or closed circuit television testimony and/or “any order necessary to protect a child...from severe emotional or mental harm” if required to testify in open court.
- The court may also utilize therapy animals or facility dogs pursuant to Section 92.55 in order to reduce trauma to the child.

- *AG v. DCF*, 193 So.3d 1097 (Fla. 4th DCA 2016) (a dependency case) – reversed because the trial court granted a motion for in camera testimony without an evidentiary hearing and failed to conduct a competency inquiry of the child; the court also admitted child hearsay statements without an evidentiary hearing.
- *In re AB*, 186 So.3d 544 (Fla. 2d DCA 2015) (an injunction case) – reversed because the trial court ordered that the child could testify by video but did not conduct the video interview or appoint a special master to conduct it. The trial court sent the child to an advocacy center for the interview and later attempted to retroactively make the interviewer a special master. The child did not testify and there was no corroborative evidence so the injunction was dismissed.

Corroborative Evidence

Corroborative Evidence IS:

- Physical evidence of abuse.
- Behavioral evidence of abuse.
 - *T.O. v. Dep't of Children & Fams.*, 21 So.3d 173 (Fla. 4th DCA 2009) (Domestic violence case and the corroborative evidence was the child becoming frightened at seeing the father at visitation).
- Evidence of similar acts. *Jones v. State*, 728 So.2d 788 (Fla. 1st DCA 1999).
- Defendant's confession. *Jenkins v. State*, 242 So.3d 499 (Fla. 1st DCA 2018).

Corroborative Evidence IS:

- Testimony (especially expert) that the child is acting in a manner consistent with a child who has been abused.
Zmijewski v. B’Nair Torah Congregation of Boca Raton, Inc., 639 So.2d 1022 (Fla. 4th DCA 1994).
- This opinion is to be distinguished from testimony that the child is telling the truth.

Corroborative Evidence IS NOT:

- Other hearsay statements. *Delacruz v. State*, 734 So.2d 1116 (Fla. 1st DCA 1999).
- Testimony that the child is telling the truth. *R.U. v. Dep't. of Children & Fams.*, 777 So.2d 1153 (Fla. 4th DCA 2001).
- However, be cautious about specific findings.
- As noted in *Roberts v. State*, 43 Fla. L. Weekly D1094a (Fla. 3d DCA, May 16, 2018), court's findings that child's hearsay statements "do corroborate each other" do not appear to rely on the type of corroborating evidence prohibited by case law.

Hypothetical

6 year old Johnny comes to school with a black eye. His teacher asked what happened, and he said, “my dad and mom were fighting all night, and my dad hit my mom and she was crying. When I yelled at him for hitting her, he hit me in my face and I fell down.”

Johnny is later removed from his parents. On your second day of dependency trial, the child’s teacher is on the witness stand. After describing the child’s injuries she observed and his demeanor at school the day of the report, the DCF attorney asks the teacher if the child said anything to her about how the injuries happened. The parents object on hearsay grounds. No pretrial motions were filed for the admission of child hearsay.

Hypothetical (Continued)

- Is some or all of this statement admissible? How?
- What has to be proven if Johnny does not testify?
- What if Johnny testifies at trial that his dad did not hit him but that he just fell down and that is how he got a black eye?
- What if Johnny testifies that his mom told him to say he just fell down?

In Summary

- Out of court statements of a child 16 or younger can be admitted if they are trustworthy and reliable and IF the child testifies or is unavailable and if unavailable, there is corroborating evidence of the abuse.
- Child hearsay alone may be sufficient to meet the preponderance of the evidence burden at dependency stage. *In re A.B.*, 952 So.2d 571 (Fla. 2d DCA 2007).

Thanks for your participation.
Questions?

For any follow up questions, contact us:

- Kelly A. Swartz
 - (850) 688-8529
- Laura J. Lee
 - Laura.lee@gal.fl.gov
- Sara E. Goldfarb
 - Sara.Goldfarb@gal.fl.gov