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EVIDENCE Competency of Witnesses: Amend Provision for Qualification of Victims and Witnesses of Child Molestation and Other Crimes

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EVIDENCE

Competency of Witnesses: Amend Provisions for Qualification of Victims and Witnesses of Child Molestation and Other Crimes

CODE SECTION:	O.C.G.A. § 24-9-5 (amended)
BILL NUMBER:	SB 216
ACT NUMBER:	674
SUMMARY:	The Act amends a section of the Code pertaining to the competency of child witnesses to testify. Before this change, a child's competency as a witness could be challenged by either party in court. Upon such challenge, the court was obligated to examine the child to determine her ability to understand the nature and ramifications of her testimony. The Act declares that children ages fourteen and under who were or may have been the victims or witnesses of child molestation or other crimes are automatically competent to testify.
EFFECTIVE DATE:	April 19, 1989

History

The prior witness competency statute in Georgia, O.C.G.A. § 24-9-5, had remained virtually unchanged since 1867. "[I]diots, lunatics during lunacy, and children who do not understand the nature of an oath," were incompetent as witnesses.[1] If any witness were alleged to fit within this category, the court was required to examine her to determine whether she were competent to testify.[2] Other aspects of the competency statute, regarding which classes of persons are presumed competent to give testimony in a Georgia tribunal,[3] have changed dramatically. Yet, the provision regarding children and others without the "use of reason" has remained.[4]

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1. Code of Ga. § 3800 (1867), added by 1866 Ga. Laws 138; O.C.G.A. § 24-9-5 (1982).
2. Code of Ga. § 3803 (1867).
3. *See, e.g.*, 1933 Ga. Code 38-1603, repealed by 1979 Ga. Laws 1261.
4. O.C.G.A. § 24-9-5 (1982).

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Prior to the passage of the Act, children were subject to examination and cross-examination by the court and by defense counsel regarding their competency to testify. The decision of whether to allow a child to testify was within the discretion of the trial court.[5] The Georgia courts considered a child competent to testify if she understood that if she did not tell the truth she risked punishment by the court. Courts did not require the child to understand the term "oath" or the process of taking the oath.[6] Counsel, as well as the court, could question a child to determine her competency.[7] The courts expressed a liberal attitude toward the questioning procedure, holding that even if the trial court failed to hold a competency hearing, the omission would not be reversible error.[8]

There are three concerns about allowing children to testify in court: (1) children may not possess the requisite character to tell the truth, even if they understand the distinction between the truth and a lie; (2) children may be subject to suggestibility in their testimony; and (3) children are more likely than adults to report incidences of sexual fantasy as realistic occurrences.[9]

The original legislative intent behind SB 216 was to eliminate the competency test altogether.[10] Those fond of the traditional language and labels quickly resurrected the essence of O.C.G.A. § 24-9-5 and reinserted the competency test into the Act.[11]

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5. *See, e.g.*, Pope v. State, 167 Ga. App. 328, 329, 306 S.E.2d 326, 328 (1983).

6. *Id.* A child over the age of 14 is presumed competent to testify, although the presumption is rebuttable. T. GREEN, GEORGIA LAW OF EVIDENCE 294 (3d ed. 1988).

7. Sprayberry v. State, 174 Ga. App. 574, 575, 330 S.E.2d 731, 733 (1985).

8. *Id.* at 576, 330 S.E.2d at 733.

9. Deaver, *The Competency of Children*, 4 COOLEY L. REV. 522, 524–27 (1987). The author argues that children are no more subject to these biases than are adults. Further, when an issue of bias is raised, Deaver believes that it should affect the witness's credibility, rather than her competency to testify. On the issue of sexual fantasy and its encroachment into a child's testimony, the author suggests that a child is ill-equipped to imagine and report that which she has not truly experienced. *Id. See also* Moss, *Are the Children Lying?*, 73 A.B.A. J. 59 (May 1987) (emphasizing that the suggestibility dangers in prosecuting a criminal case in which a child may be a witness may arise from the attorney's readying the child for her testimony. These techniques, when employed by prosecutors, have led to the dismissal of major criminal cases. It appears that the caution should lie not with putting the child on the stand, but with the degree of coaching the attorney may believe is necessary.).

10. The original bill proclaimed that all witnesses are competent to testify. SB 216, as introduced, 1989 Ga. Gen. Assem. O.C.G.A. §§ 24-9-5 to -7 (1982), required the court to disqualify children, lunatics, idiots, and drunkards unless determined to be competent and specified that the court must determine competency. The original bill would have left any issues regarding the "use of reason," to the issue of the witness's credibility. SB 216, as introduced, 1989 Ga. Gen. Assem.

11. SB 216 (SCS), 1989 Ga. Gen. Assem. Representative Denmark Groover, Jr., House District No. 99 remarked, "It's been here for 200 years, why change it?" Lundy, *Passage Likely For Child Witness Bill*, Fulton Co. Daily Rep., Mar. 3, 1989, at 4, col. 1.

A sponsor in the House of Representatives introduced a similar bill which contained provisions for idiots and lunatics but expressly permitted victims or witnesses of child molestation or other crimes to testify in child abuse prosecution cases.[12] This bill, had it not been amended and subsequently defeated, would have changed the Code as much as the Act does.[13] Attempts to attach a similar amendment to SB 216 were defeated in the House.[14]

The original bill would have stricken the competency test requirements for all witnesses.[15] The primary concern in the General Assembly, however, was not the testimony of lunatics or idiots, but rather the testimony of children who may be intimidated by the competency examination administered by the trial court and defense attorneys.[16] The Georgia law appears to go much further, however, since no child who has been the victim or witness of a criminal act can be disqualified as a witness on the basis of her lack of competence. The change in the Code was largely the result of concern that if child victims and witnesses were not permitted to testify, or were rendered unable to do so as a result of a competency hearing, the state would be without necessary evidence to convict the perpetrators.[17]

Several states have dealt with this problem by adopting the federal evidence rule, which allows any witness to be deemed competent.[18] The

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12. HB 218, as introduced, 1989 Ga. Gen. Assem.

13. HB 218 (CSFA), 1989 Ga. Gen. Assem. The Amendment provided that those child abuse victims younger than ten years of age were competent to testify, but those above ten must still be tested for competency by the trial court. The amendment was offered by Representative Denmark Groover, Jr., House District No. 99, who expressed concern that older children were more likely to fabricate testimony. Lundy, *supra* note 11, at col. 1. Experts have expressed the opinion that children are no more likely to tell untruths than are adults. Note, *Child Witnesses in Sex Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform,* 13 PEPPERDINE L. REV. 157, 158–59 (1985) (describing an experiment which resulted in the conclusion that children over the age of five were as competent as adults to testify).

Senator Harrill L. Dawkins, Senate District No. 45, sponsor of SB 216, commented, "That's the stupidest amendment I've ever seen .... If ... under 10, you are competent to testify. If over 10, you are in there with the idiots and lunatics." Lundy, *supra* note 11, at col. 2.

14. Lundy, *supra* note 11, at col. 2.

15. "We're inflicting punishment on the child when we do this to them," said Representative Barbara Couch, House District No. 36. *House Passes Exempting Kids From Witness Tests,* Atlanta Const., Feb. 22, 1989, at A13, col. 3.

16. *Id.*

17. *See generally* Lundy, *supra* note 11.

18. FED. R. EVID. 601. *See* Deaver, *supra* note 9, at 529 for a list of the states that have employed this type of legislation. This scheme is attractive to state legislatures, almost too much so, as they often then adopt FED. R. EVID. 603, which disqualifies a witness who does not understand the nature of the oath to tell the truth. Deaver, *supra* note 9, at 529. The net effect of these conflicting rules is to leave these state courts in the same position as before the legislation, employing their common law and continuing to examine child witnesses as to their competence. *Id.*

Act is limited in its scope, however, since it applies only to children under fifteen years of age and only in criminal trials.[19]

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19. O.C.G.A. § 24-9-5(b) (Supp. 1989). *Bill on Competency Tests For Trials Gets House OK*, Atlanta Const., Mar. 9, 1989, at C5, col. 3.