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EVIDENCE Securing Attendance of Witnesses and Production and Preservation of Evidence: Allow Depositions of Physicians to Preserve Testimony in Criminal Child Abuse and Molestation Proceedings

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EVIDENCE

Securing Attendance of Witnesses and Production and Preservation of Evidence: Allow Depositions of Physicians to Preserve Testimony in Criminal Child Abuse and Molestation Proceedings

CODE SECTION:	O.C.G.A. § 24-10-130 (amended)
BILL NUMBER:	HB 290
ACT NUMBER:	503
GEORGIA LAWS:	1995 Ga. Laws 1360
SUMMARY:	The Act expands the scope of the parties' right to take depositions of witnesses in criminal matters when a defendant has been charged with an offense of child molestation, aggravated child molestation, or physical or sexual abuse of a child. The Act permits counsel for the defendant or the prosecuting attorney to preserve by deposition the testimony of any physician whose testimony is relevant to the crime charged. Upon motion by either party, the court having jurisdiction to try the charged offense may order the taking of a deposition.
EFFECTIVE DATE:	July 1, 1995

History

In 1980, title 38 of the Code was amended to provide for the taking and use of depositions in certain criminal matters after the filing of an indictment, special presentment, or accusation.[1] The original statute permitting depositions to be taken allowed "the testimony of a prospective witness of a party [to] be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place."[2] However, depositions could be taken only if the court found that "the witness [was] in imminent

1. 1980 Ga. Laws 426 (formerly found at O.C.G.A. § 24-10-130 (1982)).
2. *Id.* § 1, at 427 (formerly found at O.C.G.A. § 24-10-130 (1982)).

danger of death or that the witness has been threatened with death or great bodily harm because of the witness's status as a potential witness in any criminal trial or proceeding."[3]

In 1994, the statute was amended to allow the taking of a deposition after "a defendant has been charged with an offense against the laws of th[e] state or an ordinance of any political subdivision or authority thereof."[4] This revision allowed the taking of depositions only if the witness was "material" to the case.[5] In addition to amending procedural requirements, the 1994 amendment expanded the circumstances under which a deposition could be taken to include: (1) when a witness was "about to leave the state and there [were] reasonable grounds to believe that such witness [would] be unable to attend the trial,"[6] (2) when a witness was "so sick or infirm as to afford reasonable grounds to believe that such witness [would] be unable to attend the trial,"[7] or (3) when a witness was "being detained as a material witness and there [were] reasonable grounds to believe that the witness [would] flee if released from detention."[8]

HB 290 was introduced during the 1995 legislative session to ease the procedural difficulties of trial when the charges involve child molestation, aggravated child molestation, or physical or sexual abuse of a child.[9] Most importantly, the purpose of the bill was to reduce the number of instances in which child victims are required to testify in a court of law.[10] Additionally, the Act sought to facilitate early settlement of cases through plea bargaining by improving the truth-finding ability of the justice

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3. *Id.*

4. 1994 Ga. Laws 1895, § 5, at 1908 (formerly found at O.C.G.A. § 24-10-130(a) (Supp. 1994)). Previously, depositions could be taken only after the filing of an indictment, special presentment, or accusation. *See supra* note 1 and accompanying text.

5. 1994 Ga. Laws 1895 (codified at O.C.G.A. § 24-10-130(b) (1995)).

6. *Id.* § 5, at 1909 (codified at O.C.G.A. § 24-10-130(b)(3) (1995)).

7. *Id.* (codified at O.C.G.A. § 24-10-130(b)(4) (1995)).

8. *Id.* (codified at O.C.G.A. § 24-10-130(b)(5) (1995)).

9. Telephone Interview with Rep. McCracken Poston, Jr., House District No. 3 (Apr. 25, 1995) [hereinafter Poston Interview I]. Rep. Poston is a former prosecutor in the Lookout Mountain Circuit and maintains a close affiliation with the current District Attorney of that circuit, Ralph Van Pelt. *Id.*

10. *Id.* It is Rep. Poston's experience that the event of testifying in court is often as traumatic to the child as the abuse or molestation that the child has suffered. *Id.*

system.[11] Secondarily, the purpose of HB 290 was to ease the testimonial burden placed on physicians, providing an alternative to trial testimony.[12]

Because crimes against children usually occur in private where the only witnesses are the victim and the perpetrator, the ensuing criminal litigation often boils down to a swearing match.[13] In such cases, the most crucial evidence becomes the physical evidence of the crime, and treating physicians are in the best position to provide relevant and objective testimony about such evidence.[14]

Because defendants usually claim nothing happened, they often choose to take their chances at trial, thus significantly reducing the number of cases settled through plea bargaining.[15] By allowing the treating physician to be deposed prior to trial, the Act lowers barriers to settlement by permitting each side to view the gravity of the evidence.[16] Thus, depending on the outcome of such a deposition, either party may see compromise as a viable alternative to trial.[17]

HB 290

As initially proposed, HB 290 would have created Code section 17-2-210.[18] This version of the bill established that "[i]n all cases involving allegations of child molestation, aggravated child molestation, or physical or sexual abuse of a child and upon reasonable written notice, a prosecuting attorney shall be allowed to take the deposition upon oral examination of any physician whose testimony is relevant to the case."[19] This provision,

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11. *Id.*
12. *Id.* Rep. Poston noted that physicians serve a public health function, and it is detrimental to public health to keep physicians tied up in courts, especially in rural areas of the state. *Id.* Furthermore, given the nature of the crimes involved, the physicians who are often witnesses to these crimes are emergency room physicians. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* Rep. Poston does not see the legislation as benefiting either side. Rather, the deposition functions as a truth-seeking tool that allows each side to see and evaluate the evidence. *Id.*
18. HB 290, as introduced, 1995 Ga. Gen. Assem.
19. *Id.*

permitting the taking of a physician's deposition on the mere allegation of the specified crimes, was intended to lower, as much as possible, the threshold requirements for taking such a deposition.[20]

The remainder of the bill dealt with notice requirements; alternative means of transcription; examination, cross-examination, and objections; signing and modification of the deposition transcription by the deponent; duties of the transcribing officer, including handling of documents used as exhibits during the deposition; admissibility of a deposition as evidence at trial; and availability of the deponent as a witness at trial.[21]

In a subsequent revision of the bill by the House Special Judiciary Committee, the idea of creating Code section 17-2-210 was discarded in favor of amending Code section 24-10-130.[22] Code section 24-10-130, along with Code sections 24-10-131 to -137, contained notice and procedural requirements similar to those proposed in the initial bill.[23]

The House Special Judiciary Committee proposed a substitute bill to amend Code section 24-10-130. The substitute proposed adding a subsection that permitted taking a physician's deposition in cases in which law enforcement had begun investigations into allegations of child molestation, aggravated child molestation, or physical or sexual abuse of a child.[24] This

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20. Telephone Interview with Rep. McCracken Poston, Jr., House District No. 3 (Apr. 27, 1995) [hereinafter Poston Interview II]. The result of this provision is that children are less likely to have to testify at trial. *Id.*

21. HB 290, as introduced, 1995 Ga. Gen. Assem.

22. *Compare* HB 290, as introduced, 1995 Ga. Gen. Assem. *with* HB 290 (HCS), 1995 Ga. Gen. Assem. In drafting the bill, Rep. Poston worked closely with Bob Keller, Clayton County District Attorney. Poston Interview II, *supra* note 20. Mr. Keller identified O.C.G.A. § 24-10-130 as an appropriate alternative location for the amendment. The procedural aspects of the initial bill were found to be duplicative of the 1994 Code revisions permitting depositions in criminal cases. Thus, the procedural elements of the initial bill were removed. Poston Interview II, *supra* note 20.

23. *Compare* 1994 Ga. Laws 1895 (formerly found at O.C.G.A. §§ 24-10-130 to -137 (Supp. 1994)) *with* HB 290, as introduced, 1995 Ga. Gen. Assem.

24. HB 290 (HCS), 1995 Ga. Gen. Assem. The added subsection read:

> At any time after a law enforcement agency has begun an investigation of allegations of child molestation, aggravated child molestation, or the physical or sexual abuse of a child, the district attorney or counsel for a

provision would have slightly raised the threshold requirements for taking a physician's deposition from the requirements established by the initial bill. For example, under the substitute bill, a physician's deposition could be taken only after law enforcement had begun an investigation; mere allegations of the specified criminal conduct would not suffice as a triggering event.[25]

Following the House Special Judiciary Committee's proposal, the Senate Judiciary Committee proposed a different substitute bill which significantly limited the circumstances under which a physician's deposition could be taken.[26] This substitute required that the defendant be charged with an offense of child molestation, aggravated child molestation, or physical or sexual abuse of a child before the deposition of a physician could be taken.[27] Moreover, the Senate version permitted the taking of a deposition only upon the motion of the deposing party and approval by the court.[28] These provisions were incorporated into the Act to make it internally consistent with the Code's requirements for taking depositions in other criminal matters.[29]

Nevertheless, the Act as passed significantly lowers the threshold requirements for taking a physician's deposition when charges of child molestation, aggravated child molestation, or physical or sexual abuse of a child are brought against a defendant. Specifically, in order to take the deposition of a physician under these circumstances, the physician's testimony need only be relevant to the charges brought against the defendant.[30]

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person who has been accused of such offense shall be allowed to take the deposition of any physician whose testimony is relevant to the investigation as provided in this article.

Id.

25. HB 290 (HCS), 1995 Ga. Gen. Assem.
26. HB 290 (SCS), 1995 Ga. Gen. Assem.
27. *Id.*
28. *Id.*
29. Poston Interview II, *supra* note 20.
30. O.C.G.A. § 24-10-130(a)(2) (1995); Poston Interview II, *supra* note 20.

Both the House and Senate adopted the Senate Judiciary Committee's version of the Act.[31]

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31. *Compare* HB 290 (SCS), 1995 Ga. Gen. Assem. *with* O.C.G.A. § 24-10-130 (1995).