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EVIDENCE Hearsay: Sexually Abused Children

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EVIDENCE

Hearsay: Sexually Abused Children

CODE SECTION:	O.C.G.A. § 24-3-16 (new)
BILL NUMBER:	HB 289
ACT NUMBER:	1448
SUMMARY:	The Act adds an exception to the hearsay rule to allow testimony of a third party concerning statements made by a sexually or physically abused child under age fourteen. The child must be available to testify and the court must find sufficient indications of the statement's reliability.

History

In 1985, one assistant district attorney for DeKalb County prosecuted more than 130 cases of sexual abuse of children.[1] Prosecuting these cases is difficult for several reasons. The likelihood of conviction generally depends on the credibility of the child's testimony. The child must sit a few feet from his or her assailant, who may be a member of his or her own household. In almost all cases, the assailant is physically and mentally superior to the child. The child, surrounded by strangers in an unfamiliar setting, may forget key points of his or her testimony, such as the date, the time, the place, or the sequence of the events of the assault.[2] The testimony may take place months, sometimes years, after the assault.

Furthermore, it is much more difficult to rehabilitate a child-witness than an adult. In Georgia, rehabilitation of a witness impeached by using prior inconsistent statements is limited to evidence of the good character of the witness.[3] Adequate evidence of the child's good character is usually less credible because his or her peers are generally also youngsters. The defense, on the other hand, may introduce a multitude of "good character" witnesses, frequently including the assailant's employer, fellow employees, minister, and neighbors, each of whom attests to the alleged assailant's fine reputation and character.

The diligent prosecutor attempts to prepare and shield his or her child

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1. Interview with J. Thomas Morgan, DeKalb County Assistant District Attorney, in Decatur, Georgia (June 5, 1986) [hereinafter cited as Morgan Interview].
2. Thompson, *Making Law Fit Child Abuse Victims' Needs*, Atlanta Const., Jan. 26, 1986, at 1B, col. 1.
3. O.C.G.A. § 24-9-83 (1982).

witness before trial. Because of this extensive preparation, the child witness may sound rehearsed and thus less believable. This creates an opportunity for the defense to attack the child's credibility. Sometimes the child even admits that "Mama" or the district attorney or a psychologist told him or her what to say.[4]

Prosecutors and defense attorneys have debated the means by which the defendant's right to confront his or her accuser should be balanced against the child's right to freedom from fear caused by testifying in open court. As a result, at least fourteen states have developed evidentiary exceptions to the hearsay rule. These exceptions include allowing the jury to view videotapes of interviews with the child concerning the assault and allowing the admission of the child's out-of-court statements made to a third party.[5]

The Georgia Supreme Court recently recognized the latter of these two exceptions in *Cuzzort v. State*.[6] In *Cuzzort*, a father was convicted of sodomizing his daughter. The evidence presented at trial included testimony of the victim's mother describing a conversation with her daughter.[7] This conversation prompted the mother to take the victim to the sheriff and the doctor.[8]

Georgia statutory law defines hearsay as "that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons."[9] In ruling on the admissibility of testimony, the Georgia Supreme Court has relied on McCormick's definition of hearsay as "testimony in court, or written evidence of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[10]

The Georgia Supreme Court ruled in *Cuzzort* that the "out-of-court statement of the daughter was admissible into evidence despite a hearsay objection."[11] The court stated that "[t]he concerns of the rule against hearsay are satisfied"[12] because the witness testifying as to the child's statement and the child making the statement were available for cross-examination.

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4. *See* Morgan, *The Need for a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases*, 21 GA. ST. B.J. 50, 51 (1985).

5. *Id.*; *see* Thompson, *supra* note 2.

6. 173 Ga. App. 157, 325 S.E.2d 826 (1984), *aff'd*, 254 Ga. 745, 334 S.E.2d 661 (1985).

7. *Cuzzort*, 173 Ga. App. at 158-59, 325 S.E.2d at 828.

8. The mother testified that, "She told me that Clines was taking her to the bedroom of a night when I was at work." *Id.*

9. O.C.G.A. § 24-3-1 (1982).

10. Reed v. State, 249 Ga. 52, 56 n.3, 287 S.E.2d 205, 210 n.3 (1982) (quoting MCCORMICK ON EVIDENCE § 246 (2d ed. 1972)).

11. 254 Ga. at 745, 334 S.E.2d at 662.

12. *Id.*

After *Cuzzort*, it appeared that if a child made an out-of-court statement to a third person concerning a sexual assault and that third person testified as to the contents of the statement, that testimony would be admissible as long as the child was available for cross-examination. Although it appeared that *Cuzzort* created a judicial exception to the hearsay rule, prosecutors were hesitant to risk a conviction by relying upon this exception because the parameters of the rule were ill-defined.[13] Another concern was that *Cuzzort* was a criminal case. There was no judicially-created exception for domestic relations cases which would allow the child's statements made to a third party concerning sexual abuse to be admitted into evidence over a hearsay objection.[14]

HB 289

In 1984, the DeKalb County Child Advisory Task Force on child sexual abuse and the Atlanta Council on Family Violence drafted a bill allowing an exception to the hearsay rule for statements made by a sexually or physically abused child to a third person. The House Special Judiciary Committee received but did not act upon the bill.[15] This bill was reintroduced by Representatives Cathy Steinberg and Barbara Couch in the 1986 legislature and passed both houses of the session with a slight change in the language.[16] Under the new O.C.G.A. § 24-3-16 there are four criteria that must be met before the testimony is admissible: 1) the child must be under fourteen years; 2) the statement must describe an act of physical abuse or sexual contact "performed with or on the child by another"; 3) the child must be available to testify; and 4) the court must find that the circumstances of the statement provide "sufficient indicia of reliability."[17]

The most subjective of these tests is the finding of "sufficient indicia of reliability." This provision of the law will undoubtedly be clarified by the appellate courts. Initially, the trial courts may hold hearings out of the presence of the jury to determine whether there are "sufficient indicia of reliability." In determining whether the circumstances of the child's

13. Morgan Interview, *supra* note 1.

14. *Id.* It should be noted, however, that in domestic relations cases, the courts exercise broad discretion in admitting a wide range of evidence to determine what is in the best interests of the child. O.C.G.A. § 19-9-1 (Supp. 1986). Two safeguards might make a judicial exception less appropriate in domestic relations than in criminal cases. First, in practice, children are frequently questioned by the judge alone, without the presence of either counsel. Second, the court may direct the Department of Human Resources to investigate a child's home life and environment, thus affording the child an opportunity to discuss informally the sexual abuse charge. *See* O.C.G.A. § 19-9-4 (Supp. 1986).

15. Morgan Interview, *supra* note 1.

16. HB 289 (CA) 1986 Ga. Gen. Assem. The House Judiciary Committee amended the bill by adding, "by the testimony of the person or persons to whom made . . . ."

17. O.C.G.A. § 24-3-16 (Supp. 1986).

statement satisfy the statute, the court may consider the words used by the witness in describing the child's conversation. For instance, the court may find an adult's statement unreliable if it uses anatomically correct words in relating the statement, believing that a small child is more likely to use a child's terminology. The relationship of the witness to the child is important. For instance, a statement made to a person that the child trusted, such as a parent, another relative, or a school teacher, would be more reliable than a statement made by the child to a casual acquaintance or relative stranger. Another consideration would be the circumstances surrounding the conversation. However, the court may recognize that children are not likely to relate incidents of sexual abuse until long after the event.[18]

The Act differs from bills passed in other states, notably the statute enacted in the State of Washington. In the Washington statute,[19] the hearsay testimony of a third person is admissible even if the child is not available as a witness if there is corroborating testimony. However, the sponsors of the Georgia Act and prosecutors in Georgia anticipated that this language would give rise to sixth amendment constitutional challenges since the defendant would be denied the opportunity to confront his or her accuser.[20] Thus, the Act stipulated that the child must be available to testify.[21]

Based on *Cuzzort* it seems likely that the Georgia Supreme Court will uphold the constitutional validity of the law. Therefore, prosecutors will not hesitate to rely on O.C.G.A. § 24-3-16. The statutory exception is not limited to criminal proceedings; the Act will also have far-reaching effects in civil trials. Attorneys in custody proceedings, juvenile court proceedings, and termination of parental rights proceedings may also rely on this exception to the hearsay rule.

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18. Morgan Interview, *supra* note 1. This was one reason prosecutors could not rely on the *res gestae* exception to the hearsay rule. The rule requires that a statement must be made at or near the time of the event in order to be admissible. *Id.*

19. Wash. Rev. Code Ann. § 9A.44.120 (1986).

20. The Supreme Court of Washington upheld Washington's statute despite a sixth amendment constitutional challenge. State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984).

21. Morgan Interview, *supra* note 1.