

SENATE BILL NO. 263
INTRODUCED BY GRIMES

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING A CHILD HEARSAY EXCEPTION IN CRIMINAL PROCEEDINGS; ALLOWING THE USE OF CHILD HEARSAY TESTIMONY REGARDING OUT-OF-COURT STATEMENTS MADE BY A CHILD WITNESS OR VICTIM IN CRIMINAL PROCEEDINGS INVOLVING SEXUAL OFFENSES AND OTHER CRIMES OF VIOLENCE; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, the state has an interest in protecting the welfare of children generally; and

WHEREAS, the state has an interest in protecting the well-being of children who are victims of or witnesses to sexual offenses and other violent crimes; and

WHEREAS, the state has an interest in giving child witnesses a voice in criminal proceedings; and

WHEREAS, it is the Legislature's prerogative to enact laws for the protection of children; and

WHEREAS, the Legislature finds that the admission of child hearsay testimony under a residual exception to the general hearsay rules does not always serve the general purposes of the rules and the interests of justice; and

WHEREAS, Rule 802 of the Montana Rules of Evidence provides that the Legislature may by statute provide for exceptions to the general rule that hearsay is not admissible; and

WHEREAS, the Legislature acknowledges the necessity that child hearsay testimony must be examined closely for reliability.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. SECTION 1. PURPOSE. (1) THE PURPOSE OF [SECTION 2] IS TO CODIFY AN EXCEPTION TO THE HEARSAY RULE FOR A STATEMENT FROM A CHILD WHO WAS A VICTIM OF A SEXUAL OR VIOLENT CRIME OR A WITNESS TO A SEXUAL OR VIOLENT CRIME. THE CHILD MAY BE AVAILABLE OR UNAVAILABLE FOR THE CRIMINAL HEARING. THE LEGISLATURE HAS THE AUTHORITY TO ENACT EXCEPTIONS TO THE HEARSAY RULE UNDER RULE 802 OF THE MONTANA RULES OF EVIDENCE. THE LEGISLATURE ALSO HAS THE AUTHORITY TO ENACT LAWS TO PROTECT MONTANA'S CHILDREN.

(2) [SECTION 2] REQUIRES NOTICE, A HEARING, AND A RULING FROM THE COURT BEFORE A CHILD'S STATEMENT IS ADMITTED INTO EVIDENCE. THESE MANDATORY PROCEDURES PROTECT THE DEFENDANT'S CONFRONTATION RIGHTS

IN A CRIMINAL PROCEEDING.

(3) THE STATE OF MONTANA HAS AN INTEREST IN PROTECTING THE WELFARE OF CHILDREN GENERALLY AND IN PROTECTING THE WELL-BEING OF CHILDREN WHO ARE VICTIMIZED BY AND WHO WITNESS VIOLENT AND SEXUAL CRIMES. THE STATE OF MONTANA ALSO HAS AN INTEREST IN GIVING CHILD VICTIMS AND WITNESSES A VOICE IN CRIMINAL PROCEEDINGS. [SECTION 2] PROTECTS CHILDREN FROM HAVING TO APPEAR IN CRIMINAL PROCEEDINGS WHEN THEIR TESTIMONY IS UNNECESSARY UNDER [SECTION 2].

NEW SECTION. Section 2. Child hearsay exception -- criminal proceedings. (1) Otherwise inadmissible hearsay may be admissible in evidence in a criminal proceeding, as provided in subsection (2), if:

- (a) the declarant of the out-of-court statement is a child who is:
 - (i) an alleged victim of a sexual offense or other crime of violence, including partner or family member assault, that is the subject of the criminal proceeding; or
 - (ii) a witness to an alleged sexual offense or other crime of violence, including partner or family member assault, that is the subject of the criminal proceeding;
- (b) the court finds, after a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide circumstantial guarantees of trustworthiness;
- (c) (i) the child testifies and the court finds that the child has not fully and accurately described the offense and the facts and circumstances surrounding the offense; or
 - (ii) the child is unavailable as a witness, whether through death, absence from the jurisdiction, incompetency, illness, infirmity, or other similar reason, including but not limited to trauma induced by the courtroom setting;
- (d) the child hearsay testimony is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence available through reasonable efforts; and
- (e) the party intending to offer the child hearsay testimony gives sufficient notice to provide the adverse party with a fair opportunity to prepare. The notice must include the content of the statement, the approximate time, date, and location of the statement, the person to whom the statement was made, WHETHER ANY VIDEOTAPES AND RECORDINGS OF ANY INTERVIEWS OF THE CHILD ARE IN THE POSSESSION OR SUBJECT TO THE CONTROL OF THE PARTY INTENDING TO OFFER THE CHILD HEARSAY TESTIMONY, and the circumstances surrounding the statement that indicate the statement's reliability.

(2) The admissibility of evidence under subsection (1) is in the discretion of the judge and that decision may not be overturned unless an abuse of discretion is clearly shown. The judge shall issue findings of fact and

conclusions of law setting forth the judge's ruling on the admissibility of child hearsay testimony.

(3) When deciding the admissibility of offered child hearsay testimony under subsections (1) and (2), a judge may consider the following:

(a) the attributes of the child hearsay declarant, including:

(i) the child's age;

(ii) the child's ability to communicate verbally;

(iii) the child's ability to comprehend the statements or questions of others;

(iv) the child's ability to tell the difference between truth and falsehood;

(v) the child's motivation to tell the truth, including whether the child understands the general obligation to speak truthfully and not fabricate stories;

(vi) whether the child possessed sufficient mental capacity at the time of the alleged incident to create an accurate memory of the incident; and

(vii) whether the child possesses sufficient memory to retain an independent recollection of the events at issue;

(b) information regarding the witness who is relating the child's hearsay statement, including:

(i) the witness's relationship to the child;

(ii) whether the relationship between the witness and the child might have an impact on the trustworthiness of the child's hearsay statement;

(iii) whether the witness might have a motive to fabricate or distort the child's statement; and

(iv) the circumstances under which the witness heard the child's statement, including the timing of the statement in relation to the incident at issue and the availability of another person in whom the child could confide;

(c) information regarding the child's statement, including:

(i) whether the statement contains knowledge not normally attributed to a child of the declarant's age;

(ii) whether the statement was volunteered spontaneously;

(iii) the suggestiveness of prior statements by the witness relating the statement or by third parties present when the statement was made;

(iv) if statements were made by the child to more than one person, whether those statements were consistent; and

(v) the nearness in time of the statement to the incident at issue;

(d) the availability of corroborative evidence through physical evidence or circumstantial evidence of motive or opportunity, including:

- (i) whether the alleged act can be corroborated; and
- (ii) if the child's statement identifies a perpetrator, whether that identity can be corroborated; and
- (e) other considerations that in the judge's opinion may bear on the admissibility of the child hearsay testimony.

NEW SECTION. Section 3. Codification instruction. ~~Section 1~~ is SECTIONS 1 AND 2 ARE intended to be codified as an integral part of Title 46, chapter 16, part 2, and the provisions of Title 46, chapter 16, part 2, apply to ~~section 1~~ SECTIONS 1 AND 2.

NEW SECTION. Section 4. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. Section 5. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 6. Effective date. [This act] is effective July 1, 2003.

NEW SECTION. Section 7. Applicability. [This act] applies to criminal proceedings begun after June 30, 2003.

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