

HOUSE BILL NO. 742

INTRODUCED BY RASER, PARKER, SINRUD, WELLS, CALLAHAN, FUREY, BRANAE, GRINDE, BIXBY,
HENDRICK, KOTTEL, MCCHESENEY, ERICKSON, AUGARE, L. JONES, VILLA, HAMILTON, HENRY,
WARD, FRENCH, HANDS, COHENOUR, SMALL-EASTMAN

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE ADMISSIBILITY OF HEARSAY STATEMENTS TO PROVE THE OCCURRENCE OF, OR THE IDENTIFY OF THE ABUSER, IN CASES OF PHYSICAL OR SEXUAL ABUSE OF AN INDIVIDUAL WITH A DEVELOPMENTAL DISABILITY; AND PROVIDING AN APPLICABILITY DATE."

WHEREAS, physical or sexual abuse of an individual with a developmental disability is an abhorrent phenomenon that should not be tolerated in any society; and

WHEREAS, physical or sexual abuse of an individual with a developmental disability is sometimes hard to prove because no one except the abuser and the individual are present and the individual is sometimes incapable of expressing in language the circumstances of the abuse sufficiently to allow for criminal prosecution of the abuser and because testimony of another individual on behalf of the developmentally delayed individual could be excluded by various provisions of the Montana Rules of Evidence, especially the rule governing exceptions to the rule against the admissibility of hearsay evidence, contained in Rule 804 of the Montana Rules of Evidence, adopted by the Montana Supreme Court in 1976; and

WHEREAS, Rule 802 of the Montana Rules of Evidence adopted by the Montana Supreme Court allows the Legislature to provide exceptions to the rule against admission of hearsay statements into evidence because Rule 802 provides that hearsay is inadmissible except as provided by statute; and

WHEREAS, the Legislature therefore believes that it is appropriate for the Legislature to adopt, using as a guide the guidelines on child hearsay adopted by the Montana Supreme Court in *State v. J.C.E.*, 235 Mont. 264, 767 P.2d 309 (1988), and applied in such opinions as *State v. Osborne*, 1999 MT 149, 295 Mont. 54, 982 P.2d 1045 (1999), a statute allowing the admission into evidence of testimony of third persons under circumstances in which there are sufficient guarantees of trustworthiness to render the testimony of the third person probative and valuable to the trial court or jury.

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

NEW SECTION. Section 1. Testimony of third person in cases of abuse of individual with developmental disability. (1) Otherwise inadmissible hearsay may be admitted into evidence in a criminal proceeding, as provided in subsections (2) and (3), if:

- (a) the declarant of the out-of-court statement is an individual with a developmental disability 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 that the time, content, and circumstances of the statement provide circumstantial guarantees of trustworthiness;
- (c) the individual with a developmental disability is unavailable as a witness;
- (d) the 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 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, and the circumstances surrounding the statement that the offering party believes support the statement's reliability.

(2) The court shall issue findings of fact and conclusions of law setting forth the court's reasoning on the admissibility of the testimony.

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

- (a) the attributes of the hearsay declarant, including:
 - (i) the individual's age;
 - (ii) the individual's ability to communicate verbally;
 - (iii) the individual's ability to comprehend the statements or questions of others;
 - (iv) the individual's ability to tell the difference between truth and falsehood;
 - (v) the individual's motivation to tell the truth, including whether the individual understands the general obligation to speak truthfully and not fabricate stories;
 - (vi) whether the individual possessed sufficient mental capacity at the time of the alleged incident to create an accurate memory of the incident; and
 - (vii) whether the individual possesses sufficient memory to retain an independent recollection of the

events at issue;

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

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

(ii) whether the relationship between the witness and the individual has an impact on the trustworthiness of the individual's hearsay statement;

(iii) whether the witness has a motive to fabricate or distort the individual's statement; and

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

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

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

(ii) whether the statement was spontaneous;

(iii) the suggestiveness of statements by other persons to the individual at the time that the individual made the statement;

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

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

(VI) WHETHER THE STATEMENT IS TESTIMONIAL OR NONTESTIMONIAL IN CHARACTER; AND

~~— (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 individual's statement identifies a perpetrator, whether that identity can be corroborated; and~~

~~(e)~~(D) other considerations that in the judge's opinion may bear on the admissibility of the individual's hearsay testimony.

(4) As used in this section, "developmental disability" has the meaning provided in 53-20-102.

NEW SECTION. Section 2. Codification instruction. [Section 1] is 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].

NEW SECTION. Section 3. 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 4. Applicability.** [This act] applies to criminal proceedings begun on or after October 1, 2007.

- END -