

VIRGINIA ACTS OF ASSEMBLY -- 2019 SESSION

CHAPTER 413

An Act to amend and reenact §§ 63.2-1522 and 63.2-1523 of the Code of Virginia, relating to out-of-court and recorded statements made by a child; abuse or neglect of a child.

[H 1622]

Approved March 18, 2019

Be it enacted by the General Assembly of Virginia:

- 1. That §§ 63.2-1522 and 63.2-1523 of the Code of Virginia are amended and reenacted as follows:**
§ 63.2-1522. Admission of evidence of sexual acts with children.

A. In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to §§ 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-283, or § 20-107.2, an out-of-court statement made by a child ~~the age of twelve~~ *14 years of age* or ~~under younger~~ at the time the statement is offered into evidence, describing any act of a sexual nature performed with or on the child by another, not otherwise admissible by statute or rule, may be admissible in evidence if the requirements of subsection B are met.

B. An out-of-court statement may be admitted into evidence as provided in subsection A if:

1. The child testifies at the proceeding, or testifies by means of a videotaped deposition or closed-circuit television, and at the time of such testimony is subject to ~~cross examination~~ *cross-examination* concerning the out-of-court statement or the child is found by the court to be unavailable to testify on any of these grounds:

- a. The child's death;
- b. The child's absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;
- c. The child's total failure of memory;
- d. The child's physical or mental disability;
- e. The existence of a privilege involving the child;
- f. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; and
- g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.

2. The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness and reliability.

C. A statement may not be admitted under this section unless the proponent of the statement notifies the adverse party of his intention to offer the statement and the substance of the statement sufficiently in advance of the proceedings to provide the adverse party with a reasonable opportunity to prepare to meet the statement, including the opportunity to subpoena witnesses.

D. In determining whether a statement possesses particularized guarantees of trustworthiness and reliability under subdivision B 2, the court shall consider, but is not limited to, the following factors:

1. The child's personal knowledge of the event;
2. The age and maturity of the child;
3. Certainty that the statement was made, including the credibility of the person testifying about the statement and any apparent motive such person may have to falsify or distort the event including bias, corruption, or coercion;
4. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
5. The timing of the child's statement;
6. Whether more than one person heard the statement;
7. Whether the child was suffering pain or distress when making the statement;
8. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
9. Whether the statement has internal consistency or coherence, and uses terminology appropriate to the child's age;
10. Whether the statement is spontaneous or directly responsive to questions;
11. Whether the statement is responsive to suggestive or leading questions; and
12. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

E. The court shall support with findings on the record, or with written findings in a court not of record, any rulings pertaining to the child's unavailability and the trustworthiness and reliability of the

out-of-court statement.

§ 63.2-1523. Use of videotaped statements of complaining witnesses as evidence.

A. In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to §§ § 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-283, or § 20-107.2, a recording of a statement of the alleged victim of the offense, made prior to the proceeding, may be admissible as evidence if the requirements of subsection B are met and the court determines that:

1. The alleged victim is ~~the age of twelve~~ *14 years of age* or ~~under~~ *younger* at the time the statement is offered into evidence;
2. The recording is both visual and oral, and every person appearing in, and every voice recorded on, the tape is identified;
3. The recording is on videotape or was recorded by other electronic means capable of making an accurate recording;
4. The recording has not been altered;
5. No attorney for any party to the proceeding was present when the statement was made;
6. The person conducting the interview of the alleged victim was authorized to do so by the child-protective services coordinator of the local department;
7. All persons present at the time the statement was taken, including the alleged victim, are present and available to testify or be cross examined at the proceeding when the recording is offered; and
8. The parties or their attorneys were provided with a list of all persons present at the recording and were afforded an opportunity to view the recording at least ~~ten~~ *10* days prior to the scheduled proceedings.

B. A recorded statement may be admitted into evidence as provided in subsection A if:

1. The child testifies at the proceeding, or testifies by means of closed-circuit television, and at the time of such testimony is subject to ~~cross examination~~ *cross-examination* concerning the recorded statement or the child is found by the court to be unavailable to testify on any of these grounds:
 - a. The child's death;
 - b. The child's absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;
 - c. The child's total failure of memory;
 - d. The child's physical or mental disability;
 - e. The existence of a privilege involving the child;
 - f. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason;
 - g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of closed-circuit television; and
2. The child's recorded statement is shown to possess particularized guarantees of trustworthiness and reliability.

C. A recorded statement may not be admitted under this section unless the proponent of the statement notifies the adverse party of his intention to offer the statement and the substance of the statement sufficiently in advance of the proceedings to provide the adverse party with a reasonable opportunity to prepare to meet the statement, including the opportunity to subpoena witnesses.

D. In determining whether a recorded statement possesses particularized guarantees of trustworthiness and reliability under subdivision B 2, the court shall consider, but is not limited to, the following factors:

1. The child's personal knowledge of the event;
2. The age and maturity of the child;
3. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
4. The timing of the child's statement;
5. Whether the child was suffering pain or distress when making the statement;
6. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
7. Whether the statement has a "ring of verity," has internal consistency or coherence, and uses terminology appropriate to the child's age;
8. Whether the statement is spontaneous or directly responsive to questions;
9. Whether the statement is responsive to suggestive or leading questions; and
10. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

E. The court shall support with findings on the record, or with written findings in a court not of record, any rulings pertaining to the child's unavailability and the trustworthiness and reliability of the recorded statement.