

D R A F T

SUMMARY

Provides that requirement that certain hearsay statements of unavailable witnesses concerning acts of abuse must be supported by corroborative evidence applies in juvenile delinquency proceedings.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1 Relating to hearsay; amending ORS 40.460; and declaring an emergency.

2 **Be It Enacted by the People of the State of Oregon:**

3 **SECTION 1.** ORS 40.460 is amended to read:

4 40.460. The following are not excluded by ORS 40.455, even though the
5 declarant is available as a witness:

6 (1) (Reserved.)

7 (2) A statement relating to a startling event or condition made while the
8 declarant was under the stress of excitement caused by the event or condi-
9 tion.

10 (3) A statement of the declarant's then existing state of mind, emotion,
11 sensation or physical condition, such as intent, plan, motive, design, mental
12 feeling, pain or bodily health, but not including a statement of memory or
13 belief to prove the fact remembered or believed unless it relates to the exe-
14 cution, revocation, identification, or terms of the declarant's will.

15 (4) Statements made for purposes of medical diagnosis or treatment and
16 describing medical history, or past or present symptoms, pain or sensations,
17 or the inception or general character of the cause or external source thereof
18 insofar as reasonably pertinent to diagnosis or treatment.

19 (5) A memorandum or record concerning a matter about which a witness
20

1 once had knowledge but now has insufficient recollection to enable the wit-
2 ness to testify fully and accurately, shown to have been made or adopted by
3 the witness when the matter was fresh in the memory of the witness and to
4 reflect that knowledge correctly. If admitted, the memorandum or record may
5 be read into evidence but may not itself be received as an exhibit unless of-
6 fered by an adverse party.

7 (6) A memorandum, report, record, or data compilation, in any form, of
8 acts, events, conditions, opinions, or diagnoses, made at or near the time by,
9 or from information transmitted by, a person with knowledge, if kept in the
10 course of a regularly conducted business activity, and if it was the regular
11 practice of that business activity to make the memorandum, report, record,
12 or data compilation, all as shown by the testimony of the custodian or other
13 qualified witness, unless the source of information or the method of circum-
14 stances of preparation indicate lack of trustworthiness. The term "business"
15 as used in this subsection includes business, institution, association, profes-
16 sion, occupation, and calling of every kind, whether or not conducted for
17 profit.

18 (7) Evidence that a matter is not included in the memoranda, reports,
19 records, or data compilations, and in any form, kept in accordance with the
20 provisions of subsection (6) of this section, to prove the nonoccurrence or
21 nonexistence of the matter, if the matter was of a kind of which a memo-
22 randum, report, record, or data compilation was regularly made and pre-
23 served, unless the sources of information or other circumstances indicate
24 lack of trustworthiness.

25 (8) Records, reports, statements or data compilations, in any form, of
26 public offices or agencies, including federally recognized American Indian
27 tribal governments, setting forth:

28 (a) The activities of the office or agency;

29 (b) Matters observed pursuant to duty imposed by law as to which matters
30 there was a duty to report, excluding, in criminal cases, matters observed
31 by police officers and other law enforcement personnel;

1 (c) In civil actions and proceedings and against the government in crimi-
2 nal cases, factual findings, resulting from an investigation made pursuant to
3 authority granted by law, unless the sources of information or other cir-
4 cumstances indicate lack of trustworthiness; or

5 (d) In civil actions and criminal proceedings, a sheriff's return of service.

6 (9) Records or data compilations, in any form, of births, fetal deaths,
7 deaths or marriages, if the report thereof was made to a public office, in-
8 cluding a federally recognized American Indian tribal government, pursuant
9 to requirements of law.

10 (10) To prove the absence of a record, report, statement or data compila-
11 tion, in any form, or the nonoccurrence or nonexistence of a matter of which
12 a record, report, statement or data compilation, in any form, was regularly
13 made and preserved by a public office or agency, including a federally re-
14 cognized American Indian tribal government, evidence in the form of a cer-
15 tification in accordance with ORS 40.510, or testimony, that diligent search
16 failed to disclose the record, report, statement or data compilation, or entry.

17 (11) Statements of births, marriages, divorces, deaths, legitimacy, ances-
18 try, relationship by blood or marriage, or other similar facts of personal or
19 family history, contained in a regularly kept record of a religious organiza-
20 tion.

21 (12) A statement of fact contained in a certificate that the maker per-
22 formed a marriage or other ceremony or administered a sacrament, made by
23 a member of the clergy, a public official, an official of a federally recognized
24 American Indian tribal government or any other person authorized by the
25 rules or practices of a religious organization or by law to perform the act
26 certified, and purporting to have been issued at the time of the act or within
27 a reasonable time thereafter.

28 (13) Statements of facts concerning personal or family history contained
29 in family bibles, genealogies, charts, engravings on rings, inscriptions on
30 family portraits, engravings on urns, crypts, or tombstones, or the like.

31 (14) The record of a document purporting to establish or affect an interest

1 in property, as proof of content of the original recorded document and its
2 execution and delivery by each person by whom it purports to have been
3 executed, if the record is a record of a public office, including a federally
4 recognized American Indian tribal government, and an applicable statute
5 authorizes the recording of documents of that kind in that office.

6 (15) A statement contained in a document purporting to establish or affect
7 an interest in property if the matter stated was relevant to the purpose of
8 the document, unless dealings with the property since the document was
9 made have been inconsistent with the truth of the statement or the purport
10 of the document.

11 (16) Statements in a document in existence 20 years or more the authen-
12 ticity of which is established.

13 (17) Market quotations, tabulations, lists, directories, or other published
14 compilations, generally used and relied upon by the public or by persons in
15 particular occupations.

16 (18) (Reserved.)

17 (18a)(a) A complaint of sexual misconduct, complaint of abuse as defined
18 in ORS 107.705 or 419B.005, complaint of abuse of an elderly person, as those
19 terms are defined in ORS 124.050, or a complaint relating to a violation of
20 ORS 163.205 or 164.015 in which a person 65 years of age or older is the
21 victim, made by the witness after the commission of the alleged misconduct
22 or abuse at issue. Except as provided in paragraph (b) of this subsection,
23 such evidence must be confined to the fact that the complaint was made.

24 (b) A statement made by a person concerning an act of abuse as defined
25 in ORS 107.705 or 419B.005, a statement made by a person concerning an act
26 of abuse of an elderly person, as those terms are defined in ORS 124.050, or
27 a statement made by a person concerning a violation of ORS 163.205 or
28 164.015 in which a person 65 years of age or older is the victim, is not ex-
29 cluded by ORS 40.455 if the declarant either testifies at the proceeding and
30 is subject to cross-examination, or is unavailable as a witness but was
31 chronologically or mentally under 12 years of age when the statement was

1 made or was 65 years of age or older when the statement was made. However,
2 if a declarant is unavailable, the statement may be admitted in evidence only
3 if the proponent establishes that the time, content and circumstances of the
4 statement provide indicia of reliability, and in a criminal trial **or juvenile**
5 **delinquency proceeding** that there is corroborative evidence of the act of
6 abuse and of the alleged perpetrator's opportunity to participate in the con-
7 duct and that the statement possesses indicia of reliability as is constitu-
8 tionally required to be admitted. No statement may be admitted under this
9 paragraph unless the proponent of the statement makes known to the adverse
10 party the proponent's intention to offer the statement and the particulars of
11 the statement no later than 15 days before trial, except for good cause shown.
12 For purposes of this paragraph, in addition to those situations described in
13 ORS 40.465 (1), the declarant shall be considered "unavailable" if the
14 declarant has a substantial lack of memory of the subject matter of the
15 statement, is presently incompetent to testify, is unable to communicate
16 about the abuse or sexual conduct because of fear or other similar reason
17 or is substantially likely, as established by expert testimony, to suffer lasting
18 severe emotional trauma from testifying. Unless otherwise agreed by the
19 parties, the court shall examine the declarant in chambers and on the record
20 or outside the presence of the jury and on the record. The examination shall
21 be conducted immediately prior to the commencement of the trial in the
22 presence of the attorney and the legal guardian or other suitable person as
23 designated by the court. If the declarant is found to be unavailable, the court
24 shall then determine the admissibility of the evidence. The determinations
25 shall be appealable under ORS 138.045 (1)(d). The purpose of the examination
26 shall be to aid the court in making its findings regarding the availability
27 of the declarant as a witness and the reliability of the statement of the
28 declarant. In determining whether a statement possesses indicia of reliability
29 under this paragraph, the court may consider, but is not limited to, the fol-
30 lowing factors:

31 (A) The personal knowledge of the declarant of the event;

1 (B) The age and maturity of the declarant or extent of disability if the
2 declarant is a person with a developmental disability;

3 (C) Certainty that the statement was made, including the credibility of
4 the person testifying about the statement and any motive the person may
5 have to falsify or distort the statement;

6 (D) Any apparent motive the declarant may have to falsify or distort the
7 event, including bias, corruption or coercion;

8 (E) The timing of the statement of the declarant;

9 (F) Whether more than one person heard the statement;

10 (G) Whether the declarant was suffering pain or distress when making the
11 statement;

12 (H) Whether the declarant's young age or disability makes it unlikely
13 that the declarant fabricated a statement that represents a graphic, detailed
14 account beyond the knowledge and experience of the declarant;

15 (I) Whether the statement has internal consistency or coherence and uses
16 terminology appropriate to the declarant's age or to the extent of the
17 declarant's disability if the declarant is a person with a developmental dis-
18 ability;

19 (J) Whether the statement is spontaneous or directly responsive to
20 questions; and

21 (K) Whether the statement was elicited by leading questions.

22 (c) This subsection applies to all civil, criminal and juvenile proceedings.

23 (d) This subsection applies to a child declarant, a declarant who is an
24 elderly person as defined in ORS 124.050 or an adult declarant with a de-
25 velopmental disability. For the purposes of this subsection, "developmental
26 disability" means any disability attributable to mental retardation, autism,
27 cerebral palsy, epilepsy or other disabling neurological condition that re-
28 quires training or support similar to that required by persons with mental
29 retardation, if either of the following apply:

30 (A) The disability originates before the person attains 22 years of age, or
31 if the disability is attributable to mental retardation the condition is mani-

1 fested before the person attains 18 years of age, the disability can be ex-
2 pected to continue indefinitely, and the disability constitutes a substantial
3 handicap to the ability of the person to function in society.

4 (B) The disability results in a significant subaverage general intellectual
5 functioning with concurrent deficits in adaptive behavior that are manifested
6 during the developmental period.

7 (19) Reputation among members of a person's family by blood, adoption
8 or marriage, or among a person's associates, or in the community, concerning
9 a person's birth, adoption, marriage, divorce, death, legitimacy, relationship
10 by blood or adoption or marriage, ancestry, or other similar fact of a person's
11 personal or family history.

12 (20) Reputation in a community, arising before the controversy, as to
13 boundaries of or customs affecting lands in the community, and reputation
14 as to events of general history important to the community or state or nation
15 in which located.

16 (21) Reputation of a person's character among associates of the person
17 or in the community.

18 (22) Evidence of a final judgment, entered after a trial or upon a plea of
19 guilty, but not upon a plea of no contest, adjudging a person guilty of a
20 crime other than a traffic offense, to prove any fact essential to sustain the
21 judgment, but not including, when offered by the government in a criminal
22 prosecution for purposes other than impeachment, judgments against persons
23 other than the accused. The pendency of an appeal may be shown but does
24 not affect admissibility.

25 (23) Judgments as proof of matters of personal, family or general history,
26 or boundaries, essential to the judgment, if the same would be provable by
27 evidence of reputation.

28 (24) Notwithstanding the limits contained in subsection (18a) of this sec-
29 tion, in any proceeding in which a child under 12 years of age at the time
30 of trial, or a person with a developmental disability as described in sub-
31 section (18a)(d) of this section, may be called as a witness to testify con-

1 cerning an act of abuse, as defined in ORS 419B.005, or sexual conduct
2 performed with or on the child or person with a developmental disability by
3 another, the testimony of the child or person with a developmental disability
4 taken by contemporaneous examination and cross-examination in another
5 place under the supervision of the trial judge and communicated to the
6 courtroom by closed-circuit television or other audiovisual means. Testimony
7 will be allowed as provided in this subsection only if the court finds that
8 there is a substantial likelihood, established by expert testimony, that the
9 child or person with a developmental disability will suffer severe emotional
10 or psychological harm if required to testify in open court. If the court makes
11 such a finding, the court, on motion of a party, the child, the person with
12 a developmental disability or the court in a civil proceeding, or on motion
13 of the district attorney, the child or the person with a developmental disa-
14 bility in a criminal or juvenile proceeding, may order that the testimony of
15 the child or the person with a developmental disability be taken as described
16 in this subsection. Only the judge, the attorneys for the parties, the parties,
17 individuals necessary to operate the equipment and any individual the court
18 finds would contribute to the welfare and well-being of the child or person
19 with a developmental disability may be present during the testimony of the
20 child or person with a developmental disability.

21 (25)(a) Any document containing data prepared or recorded by the Oregon
22 State Police pursuant to ORS 813.160 (1)(b)(C) or (E), or pursuant to ORS
23 475.235 (4), if the document is produced by data retrieval from the Law
24 Enforcement Data System or other computer system maintained and operated
25 by the Oregon State Police, and the person retrieving the data attests that
26 the information was retrieved directly from the system and that the docu-
27 ment accurately reflects the data retrieved.

28 (b) Any document containing data prepared or recorded by the Oregon
29 State Police that is produced by data retrieval from the Law Enforcement
30 Data System or other computer system maintained and operated by the
31 Oregon State Police and that is electronically transmitted through public or

1 private computer networks under an electronic signature adopted by the
2 Oregon State Police if the person receiving the data attests that the docu-
3 ment accurately reflects the data received.

4 (c) Notwithstanding any statute or rule to the contrary, in any criminal
5 case in which documents are introduced under the provisions of this sub-
6 section, the defendant may subpoena the analyst, as defined in ORS 475.235
7 (6), or other person that generated or keeps the original document for the
8 purpose of testifying at the preliminary hearing and trial of the issue. Ex-
9 cept as provided in ORS 44.550 to 44.566, no charge shall be made to the
10 defendant for the appearance of the analyst or other person.

11 (26)(a) A statement that purports to narrate, describe, report or explain
12 an incident of domestic violence, as defined in ORS 135.230, made by a victim
13 of the domestic violence within 24 hours after the incident occurred, if the
14 statement:

15 (A) Was recorded, either electronically or in writing, or was made to a
16 peace officer as defined in ORS 161.015, corrections officer, youth correction
17 officer, parole and probation officer, emergency medical services provider or
18 firefighter; and

19 (B) Has sufficient indicia of reliability.

20 (b) In determining whether a statement has sufficient indicia of reliability
21 under paragraph (a) of this subsection, the court shall consider all circum-
22 stances surrounding the statement. The court may consider, but is not lim-
23 ited to, the following factors in determining whether a statement has
24 sufficient indicia of reliability:

25 (A) The personal knowledge of the declarant.

26 (B) Whether the statement is corroborated by evidence other than state-
27 ments that are subject to admission only pursuant to this subsection.

28 (C) The timing of the statement.

29 (D) Whether the statement was elicited by leading questions.

30 (E) Subsequent statements made by the declarant. Recantation by a
31 declarant is not sufficient reason for denying admission of a statement under

1 this subsection in the absence of other factors indicating unreliability.

2 (27) A report prepared by a forensic scientist that contains the results of
3 a presumptive test conducted by the forensic scientist as described in ORS
4 475.235, if the forensic scientist attests that the report accurately reflects the
5 results of the presumptive test.

6 (28)(a) A statement not specifically covered by any of the foregoing ex-
7 ceptions but having equivalent circumstantial guarantees of trustworthiness,
8 if the court determines that:

9 (A) The statement is relevant;

10 (B) The statement is more probative on the point for which it is offered
11 than any other evidence that the proponent can procure through reasonable
12 efforts; and

13 (C) The general purposes of the Oregon Evidence Code and the interests
14 of justice will best be served by admission of the statement into evidence.

15 (b) A statement may not be admitted under this subsection unless the
16 proponent of it makes known to the adverse party the intention to offer the
17 statement and the particulars of it, including the name and address of the
18 declarant, sufficiently in advance of the trial or hearing, or as soon as
19 practicable after it becomes apparent that such statement is probative of the
20 issues at hand, to provide the adverse party with a fair opportunity to pre-
21 pare to meet it.

22 **SECTION 2. This 2023 Act being necessary for the immediate pres-**
23 **ervation of the public peace, health and safety, an emergency is de-**
24 **clared to exist, and this 2023 Act takes effect on its passage.**

25
