**General Information about C.R.**S**. § 13-25-129 - Child Hearsay Exception**

Colorado Revised Statute § 13-25-129 provides parties with an additional exception to the hearsay rule. Under C.R.S. § 13-25-129, a party may move to introduce out of court statements made by a child that are the subject of the action relevant to the proceeding. This statute provides an additional exception and only applies to statements that are not admissible under any other hearsay exceptions.[[1]](#footnote-1) The statute allows for statements describing acts or attempted acts of sexual assault where the child is the victim,  statements describing any act of child abuse where the child was the victim or the witness and is subject to a dependency and neglect proceeding, and statements made by children under the age of thirteen describing an act of domestic violence.[[2]](#footnote-2) The statements are admissible in criminal, delinquency or civil proceedings if all of the requirements listed under the statute are met.

Under the statute, if a party moves to admit out of court statements, they must give the adverse party reasonable notice of the intention to admit the statements and the particulars of the statement.[[3]](#footnote-3) The court must hold a hearing regarding the statements outside the presence of the jury and find that the “time, content and circumstances” of the statements provide “sufficient safeguards of reliability.”[[4]](#footnote-4) The child must also either be available to testify at the proceeding where the statements will be introduced or be found unavailable to testify by the court. If the child is found unavailable to testify by the court, there must be corroborating evidence of act described in statement.[[5]](#footnote-5) The jury instructions must state that the jury was presented with an out of court statement made by a child, that it is up to the jury to determine the weight and credit of the statement and that they may consider the age and maturity of the child, the nature of the statements, the circumstances under which the statement was made and other relevant factors.[[6]](#footnote-6)

It is important to note that the statute itself seems to be geared towards jury trials and criminal cases. It is also important to note that a lot of the issues litigated when it comes to child hearsay center around the confrontation clause which does not extend to dependency and neglect proceedings.

**Introducing Child Hearsay**

If you are seeking to introduce child hearsay into a hearing, the first step is to file a motion with the court requesting a hearing and notifying the parties of your intention to introduce child hearsay statements. The motion serves as the notice to the opposing party so it should outline the particulars of the statements you are seeking to introduce. The hearing will serve as the place for the parties to litigate any issues or concerns with the statements so the motion should include the standard case law, evidentiary rules, and particulars of the statements.

At the motions hearing, the court will determine if the statements are admissible under the analysis outlined in the statute. The first step is for the court to find that “the time, content, and circumstances of the statement provide sufficient safeguards of reliability.”[[7]](#footnote-7) The Colorado Supreme Court has provided the court a number of factors to considered when analyzing the reliability of the statements. The factors are considered guidelines and are not an immutable set of standards. Here are the typical factors used in an analysis:

“(1) whether the statement was made spontaneously

(2) whether the statement was made while the child was still upset or in pain from the alleged abuse;

(3) whether the language of the statement was likely to have been used by a child the age of the declarant;

(4) whether the allegation was made in response to a leading question

(5) whether either the child or the hearsay witness had any bias against the defendant or any motive for lying;

(6) whether any other event occurred between the time of the abuse and the time of the statement which could account for the contents of the statement”

(7) whether more than one person heard the statement; and

(8) the general character of the child.”[[8]](#footnote-8)

While not all factors need to be established for the statements to be admitted, the more factors that can be met the more evidence of reliability the party can show.

The second step is determine whether the victim is available to testify at trial. If the party plans to have the child testify at the trial, then the second requirement of the statute is conditionally met.[[9]](#footnote-9) If the child is considered unavailable to testify, then the party must also provide corroborative evidence of the act prior to the trial. Children are often found unavailable to testify because they are incompetent, either due to the age or their mental health. The corroborating evidence is evidence that is “direct or circumstantial, that is independent of and supplementary to the child’s hearsay statement and that tends to confirm that the act described in the child’s statement actually occurred.”[[10]](#footnote-10)

**Objecting to the Introduction of Child Hearsay**

If you are objecting to the introduction of child hearsay, you will likely attack the reliability of the statements, and if applicable, the corroborating evidence being offered by the party.

While there are no specific elements that must be met to prove reliability, the court has outlined a number of factors that serve as guidance for the parties. A party who is objecting to the introduction of child hearsay can use those some factors in their argument. When objecting to the hearsay statements, the party should look at when the statements were made, to who, if the stories changed or any of the other characteristics outlined in the factors above as a starting point. Since the factors are not an immutable set of standards, they are a good starting point but the party can look to other things that make the statements unreliable.

If the child is unavailable to testify at trial, there must be corroborating evidence of the act. The objecting party can also attack the corroborating evidence being provided. Corroborating evidence is generally seen as independent evidence that confirms the statement. There have been some instances where the prosecution in criminal cases has attempted to corroborate the hearsay statements with other hearsay statements and the court found that was not corroborating evidence.

If the party seeking to introduce the evidence is planning to have the child testify at trial, the objecting party could also object to the competency of the child. The court is not required to address competency at the motions hearing but the issue can still be raised if the objecting party finds it appropriate.

**Relevant Case law**

Note: The majority of the case law is criminal cases dealing with sexual assault offenses. These are the main cases referenced throughout child hearsay motions but this list is not exhaustive.

***People v. District Court of El Paso, 776 P.2d 1083 (Colo. 1989)***

The prosecution filed a motion requesting statements be admitted under the child hearsay exception in a criminal trial. The trial court held a child hearsay hearing where it found that the child was not competent to testify but was still considered available to testify, it further held that that the statements made by the child were not reliable and did not fall under the child hearsay exception. The Supreme Court disagreed with the trial court findings. In regards to the availability of the child to testify, the court held that “a child who is not competent to testify is unavailable within the meaning of section 13-25-129(1)(b)(II)” and that “unavailability in the constitutional sense is established if the proponent of the hearsay testimony can show good faith, albeit unsuccessful, efforts have been made to produce the declarant for trial.” The court held that a child’s hearsay statement is not automatically inadmissible when the child is found not competent to testify, instead the court must determine if the statement is “sufficiently reliable to be admitted in spite of the child’s unavailability and whether there is corroborative evidence of the act which is the subject of the statement.” The court further held that a competency hearing “only determines whether a child can accurately recollect and narrate at trial the events of abuse, not whether the child was competent at the time the hearsay statement was reliable.”

The statute requires the trial court to determine if the “time, content, and circumstances of the hearsay statement provide sufficient safeguards of reliability.” The court listed a number of factors that can be considered when determining how the time, content, and circumstances impact the reliability of the statement including:

“(1) whether the statement was made spontaneously

(2) whether the statement was made while the child was still upset or in pain from the alleged abuse;

(3) whether the language of the statement was likely to have been used by a child the age of the declarant;

(4) whether the allegation was made in response to a leading question

(5) whether either the child or the hearsay witness had any bias against the defendant or any motive for lying;

(6) whether any other event occurred between the time of the abuse and the time of the statement which could account for the contents of the statement”

(7) whether more than one person heard the statement; and

(8) the general character of the child.”

The court held that the factors “provide guidance and direction but are not an immutable set of standards for the trial court in determining that the rather amorphous standard of ‘sufficient indicia of reliability’ has been met.” When making a determination, the court held that the “proper balance is struck between protecting the defendant’s right to confront an adverse witness and the prosecution’s right to present reliable, otherwise unobtainable evidence to the jury.”

**See: *People v. Rojas, 181 P.3d 1216 (Colo. App. 2008)***

The court references the factors from *People v. District Court of El Paso* as guiding factors when determining the time, content, and circumstances of the statements provide sufficient safeguards of reliability.

***People v. Bowers, 801 P.2d 511 (Colo. 1990).***

In this matter, the prosecutor moved to admit out of court statements made by the child in a criminal sexual assault case.  The prosecution argued the statements were admissible under the child hearsay exception as well as under CRE 803(24) and CRE 804(b)(5). The trial court found the statements admissible under both CRE 803(24) and CRE 804(b)(5) and C.R.S. § 13-25-129, finding the statements were reliable and corroborated.  The court of appeals reversed and remanded for a new trial finding the trial court erred in finding the statements satisfied CRE 803(24) and CRE 804(b)(5), not specifying the reasons for finding the witness not competent to testify, not specifying the factors that rendered the statements reliable, and by finding corroborating evidence for the statement.

The Supreme Court answered a number of questions when reviewing this case. It began by answering two preliminary questions regarding child hearsay. The court held that the child hearsay exception applies when the statements are not admissible under another statute or hearsay exception as CRS 13-25-129 “provides ‘the sole basis upon which hearsay evidence, which otherwise comes within the terms of that statute, may be admitted. It also reviewed what evidence the court can consider when making its determination. It held that the ruling of the court should “be based solely on those matters presented to the court at the *in limine* hearing.” It also held that the standard to be used by the courts is a preponderance of the evidence standard. The court also stated that to enhance effective appellate review, the trial court should make a record of:

“ first, the specific factors, if any, relating to the ‘time, content, and circumstances’ of each statement that ‘provide sufficient safeguards of

Reliability’ pursuant to subsection (1)(a) of the statute; second, if the court determines that the child-victim is unavailable as a witness, the specific

factors rendering the child unavailable; and third, if the child's statement is

ruled admissible, the nature of the ‘corroborative evidence of the act which

is the subject of the statement’ in keeping with subsection (1)(b)(II)”

The appellate courts are also to conduct their reviews based on the records made at the *in-limine* hearings and can only go beyond that record if harmless error or plain error is raised.

The court also addressed corroborative evidence. The people were seeking to present non-verbal statements made by the child as corroborating evidence of the hearsay statements. The court disagreed with the people on what corroborating evidence meant. While the statute does not define Corroborative evidence, the court held that it is intended to mean “evidence, direct or circumstantial, that is independent of and supplementary to the child’s hearsay statement and that tends to confirm that the act described in the child’s statement actually occurred.” The court also provided some examples to give guidance to the court, including: testimony from an eyewitness other than the child that the offense occurred, statements from other children that were present when the act occurred, medical or scientific evidence, expert opinion evidence that the child experienced post-traumatic stress that is consistent with the perpetration of the act, party’s confession to the act, or any other independent evidence.

***People v. Juvenile Court, City and County of Denver*, 937 P.2d 758 (Colo. 1997)**

The people sought to introduce child hearsay statements in a juvenile delinquency proceeding. The people offered summaries of the statements they were seeking to introduce and informed the parties the victim would be testifying at trial. The victim did not testify at the motions hearing. The trial court denied the people’s motion to admit child hearsay statements finding that since the victim had not testified at the motions hearing, the people had failed to establish the victim was competent to testify and therefore the court could not consider the reliability of the statements since the second part of the statute was not met.

The Supreme Court disagreed with the trial court’s interpretation of the statute. The court held that the court is not required to find the victim is competent at the hearsay hearing. At the hearing the court must determine whether “sufficient safeguards of reliability” exists based on the “time, content, and circumstances” of the statements and whether the victim is available to testify. If the victim is not available to testify at trial, then there needs to be additional corroboration for the statements. If the victim is available to testify at trial, then the second requirement is conditionally met, pending actual testimony at trial.

***People In Interest of G.E.S.*, 409 P.3d 645 (Colo. App. 2016)**

Following an adjudication in a dependency and neglect proceeding, respondent father appealed a number of issues including that the trial court erred in allowing the child hearsay statements into evidence without the child testifying. During the evidentiary hearing, the child’s therapist testified that testifying could gravely endanger the mental and emotional health of the child. The trial court considered the testimony of the child’s therapist and found that if the mental health of the child was the same on the date of the trial as in the evidentiary hearing, then she would be unavailable to testify. At the time of trial, the parties agreed that the therapist’s opinion regarding the child’s mental health had not changed and the court found her unavailable to testify. The trial court further found there was corroborating evidence of the act and that the right to confrontation does not extend to dependency and neglect cases.

The court of appeals affirmed the findings of the trial court. The court held that the “due process does not necessitate extension of the Sixth amendment’s right to confront witnesses to litigants in dependency and neglect cases. It further held that “the potential traumatic impact of a child victim’s giving testimony of sexual abuse may form the basis of a finding of unavailability if the child’s emotional or psychological health would be substantially impaired. See *People v. Diefenderfer,* 784 P.2d 741, 750 (Colo. 1989). After reviewing the trial court’s admission of the statements for an abuse of discretion, the court found no error in the trial courts findings that the child was unavailable to testify and agreed that the confrontation clause does not extend to dependency and neglect cases.

1. People v. Bowers, 801 P.2d 511 (Colo. 1990). [↑](#footnote-ref-1)
2. Colo. Rev. Stat. § 13-25-129 [↑](#footnote-ref-2)
3. Colo. Rev. Stat. § 13-25-129(3) [↑](#footnote-ref-3)
4. Colo. Rev. Stat. § 13-25-129(1)(a) [↑](#footnote-ref-4)
5. Colo. Rev. Stat. § 13-25-129(1)(b)(II) [↑](#footnote-ref-5)
6. Colo. Rev. Stat. § 13-25-129(2) [↑](#footnote-ref-6)
7. Colo. Rev. Stat. § 13-25-129(1)(a) [↑](#footnote-ref-7)
8. *People v. District Court of El Paso*, 776 P.2d 1083 (Colo. 1989). [↑](#footnote-ref-8)
9. *People v. Juvenile Court, City and County of Denver*, 937 P.2d 758 (Colo. 1997). [↑](#footnote-ref-9)
10. People v. Bowers, , 801 P.2d 511 (Colo. 1990). [↑](#footnote-ref-10)