

Rule 804A Hearsay exceptions: testimony by child victim declarant not reasonably obtainable

- (a) An out-of-court statement made by a child with a physical, mental, emotional, or developmental age of twelve (12) years or less at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under KRE 802 if all of the following apply:
- (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement;
 - (2) Either:
 - (A) The child testifies but his or her testimony does not include information contained in the out-of-court statement; or
 - (B) The child's testimony is not reasonably obtainable by the proponent of the statement and there is corroborative evidence of the act that is the subject of the statement;
 - (3) The primary purpose of the child's statement was not to create an out-of-court substitute for trial testimony; and
 - (4) At least ten (10) days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.
- (b) (1) The child's testimony is "not reasonably obtainable by the proponent of the statement" under subsection (a)(2)(B) of this rule if one (1) or more of the following apply:
- (A) The child claims a lack of memory of the subject matter of the statement;
 - (B) The court finds:
 - (i) The child is absent from the trial or hearing;
 - (ii) The proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good-faith effort to do so; and
 - (iii) It is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time; or

- (C) The court finds:
 - (i) The child is unable to testify at the trial or hearing because of:
 - a. Death;
 - b. Physical or mental illness; or
 - c. Infirmary, including the child's inability to communicate about the offense because of fear or a similar reason; and
 - (ii) The illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.
- (2) The proponent of the statement has not established that the child's testimony or attendance is not reasonably obtainable if the child's claim of lack of memory, absence, or inability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.
- (c) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.
- (d) If any provision of this rule should conflict with Article VIII of these rules, this rule shall prevail.

Effective: July 14, 2018

History: Created 2018 Ky. Acts ch. 116, sec. 1, effective July 14, 2018.