

ASSEMBLY BILL NO. 237—COMMITTEE ON JUDICIARY

MARCH 2, 2007

Referred to Committee on Judiciary

SUMMARY—Makes various changes to provisions governing the admissibility into evidence of certain statements made by certain young children. (BDR 4-1180)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in **bolded italics** is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to hearsay; revising provisions governing the admissibility into evidence of certain hearsay statements made by certain young children; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides that a hearsay statement made by a child under the age of 10 years describing any sexual or physical abuse of the child is admissible in a criminal proceeding regarding that act if the court finds that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness and the child either testifies during the proceeding or is unavailable to testify. (NRS 51.385) In 2006, the Nevada Supreme Court, applying the holding of the United States Supreme Court in *Crawford v. Washington*, 124 S.Ct. 1354 (2004), held that statute unconstitutional in part. The Nevada Supreme Court held that the Sixth Amendment to the United States Constitution, which guarantees individuals an opportunity to be confronted with witnesses against them and to cross-examine such witnesses, applies to statements which are testimonial in nature. Therefore, the Court held that testimonial statements of a child may not be admitted during a criminal proceeding unless the child is called to testify and is available for cross-examination. (*Pantano v. State*, 122 Nev. Adv. Op. 68 (2006))

This bill revises existing law for consistency with the holding in *Pantano*. It also defines "testimonial statements" as statements made in preparation for and with the intent or knowledge that the statement may be used at trial. Such statements are only admissible during a criminal proceeding if the child has previously been cross-examined by the defense during another proceeding or the child testifies during the proceeding and is available for cross-examination.



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THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 51.385 is hereby amended to read as follows:

51.385 1. In addition to any other provision for admissibility made by statute or rule of court, *except as otherwise provided in subsection 2*, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child or any act of physical abuse of the child is admissible in a criminal proceeding regarding that act of sexual conduct or physical abuse if:

(a) The court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) The child testifies at the proceeding or is unavailable or unable to testify.

2. *A testimonial statement is not admissible pursuant to subsection 1 unless the defendant has had an opportunity to cross-examine the child concerning the statement during another proceeding or the child testifies during the proceeding.*

3. In determining the trustworthiness of a statement, the court shall consider, without limitation, whether:

(a) The statement was spontaneous;

(b) The child was subjected to repetitive questioning;

(c) The child had a motive to fabricate;

(d) The child used terminology unexpected of a child of similar age; and

(e) The child was in a stable mental state.

~~13.1~~ 4. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the prosecution's intention to offer the statement in evidence.

5. *As used in this section, "testimonial statement" means a statement made in preparation for and with the intent or knowledge that the statement may be used at trial and includes, without limitation:*

(a) *Any statement made during a proceeding conducted in preparation for trial;*

(b) *Any statement included in a document prepared for or in anticipation of a trial, including, without limitation, an affidavit, deposition, declaration or confession;*

(c) *Any statement that was made under circumstances which would lead an objective person reasonably to believe that the statement would be available for use at trial; or*

(d) *Any statement made to a law enforcement officer or other person during a custodial examination.*



1 **Sec. 2.** This act becomes effective upon passage and approval.

