

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(R)

\* THIS SECTION IS CURRENT THROUGH ACT 36 OF THE 2004 LEGISLATIVE SESSION \*  
\*\*\* SEPTEMBER 2004 ANNOTATION SERVICE \*\*\*

PENNSYLVANIA CONSOLIDATED STATUTES  
TITLE 42. JUDICIARY AND JUDICIAL PROCEDURE  
PART VI. ACTIONS, PROCEEDINGS AND OTHER MATTERS GENERALLY  
CHAPTER 59. DEPOSITIONS AND WITNESSES  
SUBCHAPTER D. CHILD VICTIMS AND WITNESSES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

42 Pa.C.S. @ 5985.1 (2004)

STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT  
LEXSEE 2003 Pa. SB 979 -- See section 4.

@ 5985.1. Admissibility of certain statements

(a) GENERAL RULE.-- An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing physical abuse, indecent contact or any of the offenses enumerated in 18 Pa.C.S. Ch. 31 (relating to sexual offenses) performed with or on the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

(1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

(i) testifies at the proceeding; or

(ii) is unavailable as a witness.

(A.1) EMOTIONAL DISTRESS.-- Before the court makes a finding under subsection (a)(2)(ii), the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress such that the child cannot reasonably communicate. In making this determination, the court may do all of the following:

(1) Observe and question the child victim or child material witness, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such

as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(A.2) COUNSEL AND CONFRONTATION.-- If the court hears testimony in connection with making a finding under subsection (a)(2)(ii), all of the following apply:

(1) Except as provided in paragraph (2), the defendant, the attorney for the defendant and the attorney for the Commonwealth or, in the case of a civil proceeding, the attorney for the plaintiff has the right to be present.

(2) If the court observes or questions the child, the court shall not permit the defendant to be present.

(b) NOTICE REQUIRED.-- A statement otherwise admissible under subsection (a) shall not be received into evidence unless the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

LexisNexis (R) Notes:

#### CASE NOTES

Criminal Law & Procedure: Criminal Offenses: Sex Crimes: Sexual Assault  
Criminal Law & Procedure: Trials: Defendant's Rights: Right to Confrontation  
Criminal Law & Procedure: Trials: Examination of Witnesses: Child Witnesses  
Criminal Law & Procedure: Evidence: Admission, Exclusion & Preservation  
Criminal Law & Procedure: Evidence: Hearsay Rule & Exceptions  
Criminal Law & Procedure: Postconviction Proceedings: Motions for New Trial  
Evidence: Hearsay Rule & Exceptions: Child's Statement of Sexual Abuse  
Evidence: Hearsay Rule & Exceptions: Prior Statement by Witness  
Family Law: Family Protection & Welfare: Cohabitants & Spouses  
Governments: Legislation: Effect & Operation: Prospective & Retrospective

Operation

Criminal Law & Procedure: Criminal Offenses: Sex Crimes: Sexual Assault

1. Declarant's testimony regarding a four-year-old girl's description of sexual assault was not inadmissible hearsay but was properly admitted under the tender years exception to the hearsay rule, 42 Pa. Cons. Stat. Ann. @ 5985.1, or alternatively under Pa. R. Evid. 613(c), the prompt complaint exception; the testimony in essence repeated earlier testimony by the girl, who was competent to testify, and the girl's statements to her mother and the declarant, offered by the declarant at trial, provided indicia of reliability. Commonwealth v. O'Drain, 2003 PA Super 255, 829 A.2d 316, 2003 Pa. Super. LEXIS 2064 (Pa. Super. Ct. 2003).

Criminal Law & Procedure: Trials: Defendant's Rights: Right to Confrontation

2. Pennsylvania Tender Years Statute, 42 Pa. Cons. Stat. Ann. @ 5985.1, which permitted a child victim not to be required to testify at defendant's trial, did

not violate the Sixth Amendment or Pa. Const. art. I, @ 9 insofar as it related to defendant's right of confrontation. Commonwealth v. Lyons, 2003 PA Super 360, 833 A.2d 245, 2003 Pa. Super. LEXIS 3185 (Pa. Super. Ct. 2003).

3. Tender years exception to the hearsay rule, 42 Pa. Cons. Stat. @ 5985.1, did not violate defendant's right to meet the witnesses against him face-to-face pursuant to the Confrontation Clause, Pa. Const. art. I, @ 9. Commonwealth v. Hanawalt, 419 Pa. Super. 411, 615 A.2d 432, 1992 Pa. Super. LEXIS 3728 (1992).

#### Criminal Law & Procedure: Trials: Examination of Witnesses: Child Witnesses

4. Order evicting a father from his home, following a civil hearing on a petition of the mother for protection under the Pennsylvania Protection from Abuse Act, was reversed because the trial court erred in permitting a caseworker to testify on hearsay statements of the child victim pursuant to 42 Pa. Cons. Stat. Ann. @ 5985.1(a), where @ 5985.1 only applied to criminal proceedings. K.D., by K.H.D. v. J.D., 696 A.2d 232, 1997 Pa. Super. LEXIS 1629 (Pa. Super. Ct. 1997).

#### Criminal Law & Procedure: Evidence: Admission, Exclusion & Preservation

5. After evidence of potential taint was allowed, the court noted that if taint of hearsay statements by child victims of alleged sexual abuse were found, then defendant would be permitted to cross-examine the children as to the accuracy of the statements made to the third parties. Commonwealth v. Delbridge, 771 A.2d 1, 2003 Pa. Super. LEXIS 3223 (Sept. 25, 2003).

6. Under the Tender Years Act, 42 Pa. Cons. Stat. @ 5985.1, the admission of a child's out-of-court statement due to the fragile nature of young victims of sexual abuse was allowed. Commonwealth v. Bishop, 1999 PA Super 292, 742 A.2d 178, 1999 Pa. Super. LEXIS 4046 (Pa. Super. Ct. 1999).

#### Criminal Law & Procedure: Evidence: Hearsay Rule & Exceptions

7. Counsel was ineffective in failing to specifically challenge retroactive application, in contravention of plain statutory language, of expansion of exception to hearsay rule relating to allegations by young children to matters other than sexual abuse; the defendant's physical child abuse and child death convictions were vacated because of the admission of hearsay evidence that was inadmissible at the time of the alleged crime. Commonwealth v. Mackert, 2001 PA Super 219, 781 A.2d 178, 2001 Pa. Super. LEXIS 2011 (Pa. Super. Ct. 2001).

#### Criminal Law & Procedure: Postconviction Proceedings: Motions for New Trial

8. Because the Commonwealth failed to notify defendant in accordance with 42 Pa. Cons. Stat. @ 5985.1(b), the child's hearsay statements should not have been admitted into evidence through other witnesses, and defendant was entitled to a new trial. Commonwealth v. Crossley, 711 A.2d 1025, 1998 Pa. Super. LEXIS 688

(Pa. Super. Ct. 1998).

#### Evidence: Hearsay Rule & Exceptions: Child's Statement of Sexual Abuse

9. After evidence of potential taint was allowed, the court noted that if taint of hearsay statements by child victims of alleged sexual abuse were found, then

defendant would be permitted to cross-examine the children as to the accuracy of the statements made to the third parties. Commonwealth v. Delbridge, 771 A.2d 1, 2003 Pa. Super. LEXIS 3223 (Sept. 25, 2003).

10. Pennsylvania Tender Years Statute, 42 Pa. Cons. Stat. Ann. @ 5985.1, which permitted a child victim not to be required to testify at defendant's trial, did not violate the Sixth Amendment or Pa. Const. art. I, @ 9 insofar as it related to defendant's right of confrontation. Commonwealth v. Lyons, 2003 PA Super 360, 833 A.2d 245, 2003 Pa. Super. LEXIS 3185 (Pa. Super. Ct. 2003).

11. Trial court did not abuse its discretion in applying the Pennsylvania Tender Years Statute, 42 Pa. Cons. Stat. Ann. @ 5985.1, to permit the admission of hearsay statements of the child; the trial court properly held an in camera hearing under @ 5985.1(A.1) to determine whether the child victim was available to testify at defendant's trial, during which the child's doctor was cross-examined regarding her assessment of the child's mental state and ability to appear at trial, but the trial court did not question the child directly. Commonwealth v. Lyons, 2003 PA Super 360, 833 A.2d 245, 2003 Pa. Super. LEXIS 3185 (Pa. Super. Ct. 2003).

12. Trial court did not err in admitting a child victim's statements to various persons under the Tender Years exception, 42 Pa. Cons. Stat. Ann. @ 5985.1, to the hearsay rule where the statements were made in response to open-ended questions in the days following the incident, the child had no reason to lie about what had happened to her or who the perpetrator was, the statements pertained to the attack, the statements were consistent with the injuries the child sustained, the statements were made while the child was in immediate distress at seeing defendant on television, and the statements helped to identify defendant. Commonwealth v. Lyons, 2003 PA Super 360, 833 A.2d 245, 2003 Pa. Super. LEXIS 3185 (Pa. Super. Ct. 2003).

13. Declarant's testimony regarding a four-year-old girl's description of sexual assault was not inadmissible hearsay but was properly admitted under the tender years exception to the hearsay rule, 42 Pa. Cons. Stat. Ann. @ 5985.1, or alternatively under Pa. R. Evid. 613(c), the prompt complaint exception; the testimony in essence repeated earlier testimony by the girl, who was competent to testify, and the girl's statements to her mother and the declarant, offered by the declarant at trial, provided indicia of reliability. Commonwealth v. O'Drain, 2003 PA Super 255, 829 A.2d 316, 2003 Pa. Super. LEXIS 2064 (Pa. Super. Ct. 2003).

14. Trial court properly determined that hearsay statements were admissible under and possessed the requisite indicia of reliability under 42 Pa. Cons. Stat. Ann. @ 5985.1 because the children's statements were repeated spontaneously and consistently on several occasions, described conduct about which children of their age would not likely be knowledgeable, and there was no evidence that the children had a reason to lie. Commonwealth v. Delbridge, 2001 PA Super 75, 771 A.2d 1, 2001 Pa. Super. LEXIS 276 (Pa. Super. Ct. 2001).

15. Commonwealth's motion for admission of hearsay statements pursuant to 42 Pa. Cons. Stat. @ 5985.1, which governed the admissibility of statements describing abuse made by children age 12 or younger, was denied where, inter alia, the alleged victim's statements were cloaked with a shroud of unreliability. Commonwealth v. Allen, 44 Pa. D. & C.4th 62, 1998 Pa. D. & C. LEXIS 2 (1998).

16. Under 42 Pa. Cons. Stat. @ 5985.1(b), explicit notice requirement has meaning beyond mere compliance with discovery requests, and requires notice of an intention to offer the hearsay statement at trial; supplying an opponent with a number of discovery documents is not the same as informing that opponent of an

intention to use a specific document in a particular manner. Commonwealth v. Crossley, 711 A.2d 1025, 1998 Pa. Super. LEXIS 688 (Pa. Super. Ct. 1998).

17. Because the Commonwealth failed to notify defendant in accordance with 42 Pa. Cons. Stat. @ 5985.1(b), the child's hearsay statements should not have been admitted into evidence through other witnesses, and defendant was entitled to a new trial. Commonwealth v. Crossley, 711 A.2d 1025, 1998 Pa. Super. LEXIS 688 (Pa. Super. Ct. 1998).

18. Defendant's sentence on a conviction of involuntary deviate sexual intercourse, corruption of minors, and indecent assault and incest of his eleven-year-old mildly retarded son was reversed because the trial court improperly admitted witness testimony under the tender years' exception to the hearsay rule, regarding a child's allegations of sexual abuse without adequately inquiring into the reliability of the statements. Commonwealth v. Bean, 450 Pa. Super. 574, 677 A.2d 842, 1996 Pa. Super. LEXIS 1218 (1996).

19. Police officer's written report based on notes taken with a minor over an allegation of child abuse could not be admitted at trial against the defendant for deviate sexual behavior under the Tender Years Hearsay Act, 42 Pa. Cons. Stat. @ 5985.1, because the state did not give notice to the defendant that it intended to introduce the statement. Commonwealth v. Halsted, 542 Pa. 318, 666 A.2d 655, 1995 Pa. LEXIS 995 (1995).

20. Tender years exception to the hearsay rule, 42 Pa. Cons. Stat. @ 5985.1, did not violate defendant's right to meet the witnesses against him face-to-face pursuant to the Confrontation Clause, Pa. Const. art. I, @ 9. Commonwealth v. Hanawalt, 419 Pa. Super. 411, 615 A.2d 432, 1992 Pa. Super. LEXIS 3728 (1992).

#### Evidence: Hearsay Rule & Exceptions: Prior Statement by Witness

21. Declarant's testimony regarding a four-year-old girl's description of sexual assault was not inadmissible hearsay but was properly admitted under the tender years exception to the hearsay rule, 42 Pa. Cons. Stat. Ann. @ 5985.1, or alternatively under Pa. R. Evid. 613(c), the prompt complaint exception; the testimony in essence repeated earlier testimony by the girl, who was competent to testify, and the girl's statements to her mother and the declarant, offered by the declarant at trial, provided indicia of reliability. Commonwealth v. O'Drain, 2003 PA Super 255, 829 A.2d 316, 2003 Pa. Super. LEXIS 2064 (Pa. Super. Ct. 2003).

#### Family Law: Family Protection & Welfare: Cohabitants & Spouses

22. Order evicting a father from his home, following a civil hearing on a petition of the mother for protection under the Pennsylvania Protection from Abuse Act, was reversed because the trial court erred in permitting a caseworker to testify on hearsay statements of the child victim pursuant to 42 Pa. Cons. Stat. Ann. @ 5985.1(a), where @ 5985.1 only applied to criminal proceedings. K.D., by K.H.D. v. J.D., 696 A.2d 232, 1997 Pa. Super. LEXIS 1629 (Pa. Super. Ct. 1997).

#### Governments: Legislation: Effect & Operation: Prospective & Retrospective Operation

23. Counsel was ineffective in failing to specifically challenge retroactive application, in contravention of plain statutory language, of expansion of

exception to hearsay rule relating to allegations by young children to matters other than sexual abuse; the defendant's physical child abuse and child death convictions were vacated because of the admission of hearsay evidence that was inadmissible at the time of the alleged crime. Commonwealth v. Mackert, 2001 PA Super 219, 781 A.2d 178, 2001 Pa. Super. LEXIS 2011 (Pa. Super. Ct. 2001).

#### TREATISES AND ANALYTICAL MATERIALS

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