

## Child Protection Committee

### Hearsay

**Summary:** Under current law, hearsay is admissible at most stages of a CHINS proceeding except at a merits hearing. In addition, there is a rule of evidence that allows hearsay to be admitted in a CHINS proceeding (including a merits hearing) if the statement concerns child sexual abuse. If the Committee wishes to expand the admissibility of hearsay, it could either modify the statute pertaining to merits hearings and/or amend the evidentiary rule.

**Current Law:** Hearsay is a statement other than that by a witness testifying at a hearing that is offered to prove the truth of the matter stated. Hearsay is usually not admissible. The rationale for this rule is that the fact finder (judge or jury) must weigh the credibility of a witness in determining whether to believe the statement, and without the benefit of cross-examination or the ability to observe a witness's demeanor, the fact finder cannot properly weigh credibility. As a result, under the hearsay rule, out-of-court statements are generally not admissible because the fact finder does not have the ability to see and hear the witness, and weigh that person's credibility.

Existing Vermont law establishes exceptions to the hearsay rule. Hearsay is admissible at the following stages of a CHINS proceeding:

- Emergency care hearings: "All parties shall have the right to present evidence on their own behalf and examine witnesses. Hearsay, to the extent it is deemed relevant and reliable by the Court, shall be admissible." 33 V.S.A. § 5307(f).
- Disposition hearings: "If disposition is contested, all parties shall have the right to present evidence and examine witnesses. Hearsay may be admitted and may be relied on to the extent of its probative value." 33 V.S.A. § 5317(b).
- Permanency hearings: "All evidence helpful in determining the questions presented, including hearsay, may be admitted and relied upon to the extent of its probative value even though not competent at an adjudication hearing." 33 V.S.A. § 5321(f).

However, hearsay is not admissible at a merits hearing. A merits hearing is held after an emergency care hearing, but before the disposition or permanency hearings. At a merits hearing, the State has the burden of proving that a child is in need of care and supervision. If, at the end of the hearing, the court finds that the State has failed to prove that the child is in need of care and supervision, the CHINS petition will be dismissed. Therefore, the merits hearing and adjudication is a key step in the CHINS process. See 33 V.S.A. § 5315.

Under the Vermont Rules of Evidence hearsay that would normally not be admissible is admissible under certain circumstances. For example, pursuant to Rule 804a, a hearsay statement made by a child under the age of 12 is admissible if the child was a victim of an alleged sexual assault, or is the subject of a CHINS proceeding and the statement concerns sexual abuse. However, the child must be available to testify, or the court must

engage in analysis of whether the child is available under Rule 807. Therefore, this exception: 1) only applies to statements concerning sexual abuse (not physical abuse); and 2) requires the court to determine if the child is available.

In sum, hearsay is admissible at other CHINS hearings, but is not allowed at a merits hearing. However, pursuant to the existing Rule 804a, a hearsay statement by a child concerning sexual abuse might be admissible at a merits hearing.

**Issues and Committee Options:** If this Committee wishes to allow hearsay to be admitted during a merits hearing, it could:

1. Amend statute to allow hearsay at a merits hearing. The result would be that hearsay would be allowed at all CHINS hearings.
2. Expand Rule 804a to cover not only sexual abuse but also physical abuse. This approach would be narrower than #1. Instead of allowing all hearsay, it would only allow child hearsay statements concerning physical or sexual abuse to be admitted at CHINS hearings (including merits hearings).
3. Expand Rule 804a beyond CHINS proceedings. H.436 from last session proposed to amend Rule 804a to allow hearsay statements in a broader range of proceedings. This approach would therefore be broader than #2.