

1 AN ACT relating to the Kentucky Rules of Evidence.

2 *Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

3 ➔SECTION 1. A NEW SECTION OF THE KENTUCKY RULES OF
4 EVIDENCE 801 TO 806 IS CREATED TO READ AS FOLLOWS:

5 *(a) An out-of-court statement made by a child with a physical, mental, emotional, or*
6 *developmental age of twelve (12) years or less at the time of trial or hearing*
7 *describing any sexual act performed by, with, or on the child or describing any*
8 *act of physical violence directed against the child is not excluded as hearsay*
9 *under KRE 802 if all of the following apply:*

10 *(1) The court finds that the totality of the circumstances surrounding the*
11 *making of the statement provides particularized guarantees of*
12 *trustworthiness. In making its determination of the reliability of the*
13 *statement, the court shall consider all of the circumstances surrounding the*
14 *making of the statement, including but not limited to spontaneity, the*
15 *internal consistency of the statement, the mental state of the child, the*
16 *child's motive or lack of motive to fabricate, the child's use of terminology*
17 *unexpected of a child of similar age, the means by which the statement was*
18 *elicited, and the lapse of time between the act and the statement;*

19 *(2) Either:*

20 *(A) The child testifies but his or her testimony does not include*
21 *information contained in the out-of-court statement; or*

22 *(B) The child's testimony is not reasonably obtainable by the proponent of*
23 *the statement and there is corroborative evidence of the act that is the*
24 *subject of the statement;*

25 *(3) The primary purpose of the child's statement was not to create an out-of-*
26 *court substitute for trial testimony; and*

27 *(4) At least ten (10) days before the trial or hearing, a proponent of the*

1 statement has notified all other parties in writing of the content of the
2 statement, the time and place at which the statement was made, the identity
3 of the witness who is to testify about the statement, and the circumstances
4 surrounding the statement that are claimed to indicate its trustworthiness.

5 (b) (1) The child's testimony is "not reasonably obtainable by the proponent of the
6 statement" under subsection (a)(2)(B) of this rule if one (1) or more of the
7 following apply:

8 (A) The child claims a lack of memory of the subject matter of the
9 statement;

10 (B) The court finds:

11 (i) The child is absent from the trial or hearing;

12 (ii) The proponent of the statement has been unable to procure the
13 child's attendance or testimony by process or other reasonable
14 means despite a good-faith effort to do so; and

15 (iii) It is probable that the proponent would be unable to procure the
16 child's testimony or attendance if the trial or hearing were
17 delayed for a reasonable time; or

18 (C) The court finds:

19 (i) The child is unable to testify at the trial or hearing because of:

20 a. Death;

21 b. Physical or mental illness; or

22 c. Infirmary, including the child's inability to communicate
23 about the offense because of fear or a similar reason; and

24 (ii) The illness or infirmity would not improve sufficiently to permit
25 the child to testify if the trial or hearing were delayed for a
26 reasonable time.

27 (2) The proponent of the statement has not established that the child's

1 testimony or attendance is not reasonably obtainable if the child's claim of
2 lack of memory, absence, or inability is due to the procurement or
3 wrongdoing of the proponent of the statement for the purpose of preventing
4 the child from attending or testifying.

5 (c) The court shall make the findings required by this rule on the basis of a hearing
6 conducted outside the presence of the jury and shall make findings of fact, on the
7 record, as to the bases for its ruling.

8 (d) If any provision of this rule should conflict with Article VIII of these rules, this
9 rule shall prevail.