COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-07-2222.

GEORGE ULYSSES ARNEY,
PLAINTIFF-APPELLEE

v.

TARA MAYFAIR ARNEY,
DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF THE PROBATE & FAMILY COURT.

BRIEF OF THE PLAINTIFF-APPELLEE, GEORGE ULYSSES ARNEY

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STATEMENT OF THE ISSUES

I. Whether it was error for the Probate & Family Court to find that the children were not unavailable, and thus deny Defendant's Motion to admit the children's out-of-court statements.

II. Whether it was error for the Probate & Family Court to find that the children's statements were not reliable, and thus deny Defendant's Motion to admit the children's out-of-court statements.

STATEMENT OF THE CASE

Plaintiff George Ulysses Arney ("plaintiff") is seeking to divorce from his wife, Tara Mayfair Arney ("defendant"). There is a dispute to the custody rights of Plaintiff and Defendant for the two children from the marriage. The Defendant is seeking for the Probate & Family Court ("Probate Court") to admit alleged statements the children made to their mother about acts of physical and mental abuse that they have witnessed by their father upon their mother. (Record page 1). After an evidentiary hearing in regards to the out-of-court statements of the children, the Probate Court denied Defendant's Motion to admit the statements as evidence at trial. On April 3, 2007, the Defendant filed her Notice of Appeal.

STATEMENT OF THE FACTS

The parties were married on June 7, 1999 and settled in Tewksbury, Massachusetts. (R.A. 2). On December 9, 2006, the husband, George Ulysses Arney, filed a complaint for divorce against Tara Mayfair Arney, seeking sole custody of the minor children. (R.A. 2). On December 15, 2006, Tara obtained temporary physical custody of the children, subject to George's right to (unsupervised) visitation every weekend. (R.A. 2). On the day of the temporary custody hearing, Probate Court appointed counsel for the children and also appointed the Guardian *ad litem*. (R.A. 2). The children's lawyer has taken the position that the children should not testify, that their out-of-court statements are reliable and testifying would cause them trauma. (R.A. 2). The Guardian *ad litem* is currently still investigating the case, as her interim report only focused on the statements. (R.A. 2). Probate Court will receive another report from her with her recommendation as to custody and visitation. (R.A. 2).

At trial, Tara Arney will present evidence that George Arney has not only battered her, but has caused

the children much trauma as they observed the many incidents of domestic violence between their parents. (R.A. 3). According to Tara, while George physically and mentally abused Tara, he was careful not to do anything in front of others, except, of course, his own children. (R.A. 3). When Tara had observable injuries, George made sure she stayed in the house. (R.A. 3). Tara has never sought a restraining order for any of George's actions. (R.A. 3, emphasis added).

George allegedly has destroyed property of Tara's, for example once he cut up her skirts because they were too short. (R.A. 3). Another time he threw out all of her makeup because she came home one day from the mall looking too pretty; he accused her of being out with another man. (R.A. 3). Her sister had sent her a Buddhist statue, which he broke, because "we are Christian." (R.A. 3). Many times he threw his dinner at her or the wall because she was "the worst cook in the world." (R.A. 3). Although she had graduated college with a degree cum laude in English before they were married, she never worked outside the home because they wanted to start a family first. (R.A. 3). George did not go to college; when he

graduated high school, he took over the family restaurant business. (R.A. 3).

The restaurant became quite lucrative, and he opened two more, along with an entertainment lounge, and employed a work force of close to a hundred, paying them well. (R.A. 3). His employees as well as his business associates have only good things to say about George. (R.A. 3). He built a new home for his family, and also acquired a vacation home in Cape Code – by stipulation of the parties on December 15, Tara and the children are currently residing there. (R.A. 3). George frequently takes his employees out, and has many friends and acquaintances. (R.A. 3).

George is very well liked by friends, business relations, and employees. (R.A. 3). In contrast, Tara's life is only her family, her husband, and her children. (R.A. 3). Her only other family is her sister, who she sees two or three time a year. (R.A. 4). She has no friends of her own, only the wives and girlfriends of George's friends. (R.A. 4). She never goes out, except for shopping and events planned by George. (R.A. 4). Tara will also testify that while they were together, George ruled her life. (R.A. 4). He not only kept her from having outside friends, he

also prevented her from developing professionally or intellectually by forbidding her to work or to go back to school. (R.A. 4). In addition, he forbade her from ever confiding in anyone about their home life. (R.A. 4).

Tara wants to testify about the out-of-court statements of her children, who allegedly witnessed the abuse from infancy until the day the couple separated. (R.A. 4). She states the children have made many statements about the abuse, both before and after she left George. (R.A. 4). The children's therapist, Dr. Helen Hollis, obtained by Tara, has testified that forcing the children to testify would cause them severe psychological trauma. (R.A. 4). At trial Dr. Hollis will testify generally about the damaging effects on children of witnessing domestic violence between their parents, but will not be allowed to testify that these children specifically have suffered from witnessing abuse. (R.A. 4). Tara will testify that George always behaved in a physically and emotionally harmful way toward her, and that the children witnessed many attacks. (R.A. 4). Lionel's first words, she (Tara) will say, were "No Daddy no!" (R.A. 4, emphasis added). These words allegedly came

out of Lionel's mouth as he observed his father striking his pregnant mother, and dragging her by her hair. (R.A. 4). Georgia also at a young age expressed herself after witnessing acts of abuse, according to Tara. (R.A. 4, emphasis added). When Georgia was three, eating her breakfast one morning, said to Tara "why daddy push you?" (R.A. 4).

Tara's testimony will be that George was a controlling figure in her life and in the children's lives. (R.A. 4). Tara lived in a constant state of fear, always preparing for the next beating, always vigilant, always ensuring that her children were safe in their rooms and protected from George's rages and physical assaults. (R.A. 4). What she didn't realize, she says, until recently, was the extent to which the children remembered these horrific years, and how traumatized they have been by their father's treatment of their mother. (R.A. 4). She states that both children, and Lionel, in particular, have made statements about witnessing many violent episodes, and also have told her they remembered the night she left George. (R.A. 4).

According to Tara, on that night, she had packed a suitcase and intended to leave with Lionel and

Georgia. (R.A. 5). She thought that George was going to be out for the evening, but he arrived home earlier than she expected. (R.A. 5). When a drunken George burst in unexpectedly, he became enraged when he saw that there was no dinner prepared and ready for him. (R.A. 5). The children, trained from earlier violent episodes, ran to Lionel's bedroom. (R.A. 5). They would later tell Tara they could hear everything until they fell asleep shortly after eleven. (R.A. 5).

It is this episode that Tara seeks to present extensive statements about, and the Probate Court has questioned the children *in camera* about this specific incident. (R.A. 5). Lionel stated he remembered because he heard the grandfather clock chime at eleven, but not at twelve. (R.A. 5). According to Tara, George has a gun and threatened that he was not going to let her live until morning. (R.A. 5). (At the temporary custody hearing, however, Tara's counsel conceded that she never filed for a restraining order or for a criminal complaint, and, there was some discussion about George not even having a gun license). (R.A. 5). At midnight, George took Tara to their bedroom and forced her to have sex. (R.A. 5). This was the only way they had been having any

intimate relations since Georgia was born, Tara says. (R.A. 5). After this attack, George fell asleep and Tara managed to get the car keys. (R.A. 5). She then went to Lionel's room where the children had fallen asleep and put them in the car along with the packed suitcase. (R.A. 5). Tara says that Georgia said to her as she was putting her in the car "hurry, mom, he might kill you this time." (R.A. 5, emphasis added). As she was driving with the children to a motel for the night, Lionel said "I wish you kept the gun – I could a killed him." (R.A. 5). In the meantime, George woke up and called his lawyer, exclaiming that this wife had left him and took the children. (R.A. 5). The next day, his lawyer filed for divorce, asking for custody of the children. (R.A. 5).

According to the Guardian *ad litem*, Attorney Marissa Burns, George presents as a well-kept, well-dressed and well-spoken professional man, while Tara is a bit disheveled and sometimes stutters. (R.A. 5). George will have witnesses testifying that they have known George personally and professionally and that he never raised his voice to or struck Tara. (R.A. 5). These witnesses are friends, employees, relatives, and business associates. (R.A. 5).

Attorney Burns stated that victims of battered woman's syndrome are anxious, depressed, humiliated, and fearful, and focus on mollifying the abuser. (R.A. 6). Because abused women are depressed, and have feelings of "learned helplessness", they stay in the relationship despite the fact they are being abused. (R.A. 6). Furthermore, abused women lose their self-esteem, and most women who suffer from the syndrome are too ashamed to seek help. (R.A. 6). Tara's response to the abuse "was also typical of that of a women suffering from this syndrome. She became depressed, fearful, suffering from learned helplessness, felt there was no way out, contemplated suicide, but couldn't see that as a way out because she feared what would happen if she left her kids—the situation that it would leave her children in. She felt trapped in the relationship." (R.A. 6).

Attorney Burns also testified about the effects of domestic violence on children, that children are also likely to have low self-esteem, have constant terror for their lives as well as their parents, and often assume violence to be the norm. (R.A. 6). Children from these homes are psychologically abused, have depression, stress disorders and psychosomatic

complaints, and feel powerless regarding decisions like custody issues. (R.A. 6). Attorney Burns testified that both Lionel and Georgia did not express opinions either way regarding seeing their father. (R.A. 6, emphasis added). Not present at the Probate Court hearing was Tara's expert, Dr. Lenore Walker, who will testify at trial that Tara suffers from post-traumatic stress disorder, which is consistent with battered woman's syndrome. (R.A. 6). Battered woman's syndrome will be described as "a constellation" of behaviors and emotions found in relationships characterized by physical and psychological abuse. (R.A. 6). According to Dr. Walker, the syndrome runs in cycles consisting of three stages. (R.A. 6).

SUMMARY OF ARGUMENT

The Trial Court did not abuse its discretion or make an error of law in determining unavailability or lack of reliability of the children's out-of-court statements.

The Trial judge heard the testimony in a separate hearing from the Guardian *ad litem*, Dr. Lenore Walker, and the children in an *in camera* interview. Based upon the testimony the trial judge correctly concluded that the children "are not unavailable, the proffered statements are not reliable, and there is lack of independently admitted evidence that corroborates these statements." (R.A. 7). "[A] judge has broad discretion in determining the admissibility of testimony concerning an evaluation which occurred at some time in the past." Adoption of Carla, 416 Mass. 510 (1993). The subsidiary findings will not be disturbed unless clearly erroneous. Custody of Eleanor, 414 Mass. 795 (1993).

The Trial Court relies on Colin for the standard of unavailability, and even though this is a criminal case, with a higher standard, the Supreme Judicial Court has noted that "The requirements outlined in §82

are analogous to §81." Adoption of Quentin, 424 Mass. 882 (1997).

In Bea, Bea's parents sexually molested her and handcuffed Bea to her brother when they were home. Adoption of Bea, 64 Mass.App.Ct. 1108 (2005). In Xavier, similar circumstances were present where there was evidence that the mother left the children with others while she went to crack houses, evidence of physical beatings and strong evidence of sexual abuse. Adoption of Xavier, 54 Mass.App.Ct. 1103 (2002). In both cases, the court found that the children were unavailable due to the trauma the children could suffer. In our case, there is no evidence that the children were abused either physically or mentally.

The Trial Court also relies on Colin for the standard of reliability. Commonwealth v. Colin, 419 Mass. 54 (1994). Due to the constitutional implications of allowing hearsay statements, "[i]f a child witness's out-of-court statements are to be admitted substantively, there must be other evidence, independently admitted, that corroborates those hearsay statements." Colin, 419 Mass. at 62. In order to demonstrate reliability, there also needs to be

"specific examples of independent corroborative evidence." Adoption of Quentin, 424 Mass. 882 (1997). The judge weighed the evidence and within his discretion concluded that there was not sufficient evidence to demonstrate reliability.

The finding is not clearly erroneous because there is established Supreme Judicial Court precedent that determined the standard by which the trial court applied to the facts in this particular case under the rule of law. The trial court did not abuse its discretion or make an error of law in determining that the children's statements were not reliable or that the children were unavailable.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR MAKE AN ERROR OF LAW IN DETERMINING UNAVAILABILITY

Under Mass. Gen. Laws, ch. 233, §82(b), the statement specifies that "[t]he proponent of such statement shall demonstrate a diligent and good faith effort to produce the child and shall bear the burden of showing unavailability." Mass. Gen. Laws, ch. 233, §82(b). In particular, §82(b)(5) states that a child may be found unavailable "based upon the expert testimony from treating psychiatrist, psychologist, or clinician, that testifying would be likely to cause severe psychological or emotional trauma to the child." Mass. Gen. Laws, ch. 233, §82(b)(5). A "trial judge has broad discretion with respect to the admission of expert testimony." Commonwealth v. Colin, 419 Mass. 54 (1994). "[A] judge has broad discretion in determining the admissibility of testimony concerning an evaluation which occurred at some time in the past." Adoption of Carla, 416 Mass. 510 (1993). The subsidiary findings will not be disturbed unless clearly erroneous. Custody of Eleanor, 414 Mass. 795 (1993). "A finding is clearly erroneous when there is

no evidence to support it, or when, although there is no evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. The Trial Court relies on Colin for the standard of unavailability, even though Colin specifically addresses Mass. Gen. Laws, ch. 233, §81, which is the standard for criminal cases. (Record page 7). Even though this is a higher standard, the Supreme Judicial Court has noted that "The requirements outlined in §82 are analogous to §81." Adoption of Quentin, 424 Mass. 882 (1997). The court noted that §82 balances the parents' due process rights to rebut evidence with the State's need to have the best interest of the children in mind. Id. With this balance in mind, "§82 should survive the same type of constitutional scrutiny [as §81]." Id. Even though there may be a civil case that does not require the full set of procedures discussed in Colin, "the better part of caution would be for judges to incorporate these procedures into §82 proceedings as well." Id. The statutory requirements of §82 coupled with the procedures outlined in Colin shows that "a sufficient guarantee of trustworthiness would exist that would justify admitting statements

under G.L. c. 233, §82, as substantive evidence." Id. The Supreme Judicial Court has noted that even the proceeding to dispense with consent to adoption is "appropriately governed by the more stringent standards of G.L. c. 233, §82." Care and Protection of Rebecca, 419 Mass. 67 (1994).

In Bea, Bea's parents sexually molested her and handcuffed Bea to her brother when they were home. Adoption of Bea, 64 Mass.App.Ct. 1108 (2005). These traumatic events caused Bea to make suicidal statements, destroy property and act violently with other children at the foster home. Id. A qualified expert stated under oath that allowing the child to testify would "likely provoke considerable anxiety." Adoption of Bea, 64 Mass.App.Ct. 1108 (2005). The judge could rely on the testimony because there "were no arrangements that could be created for Bea's testimony that could eliminate the psychological harm." Id. The abuse and psychological trauma suffered by Bea was demonstrable from professional observation of the child's actions, while the facts in the case at bar do not rise to the same level observed in Bea. Id. In Xavier, similar circumstances were present where there was evidence that the mother left the children

with others while she went to crack houses, evidence of physical beatings and strong evidence of sexual abuse. Adoption of Xavier, 54 Mass.App.Ct. 1103 (2002). The courts found the child was unable to testify, "because doing so would be likely to cause severe psychological or emotional trauma to him." Id. In Kerry, the child had a sexual abuse evaluation after she started to exhibit night terrors, sexualized behaviors and nightmares and was found that the stepfather sexually abused Kerry. Adoption of Kerry, 66 Mass.App.Ct. 1109 (2006). The court found that "testifying would be likely to cause [Kerry] severe psychological or emotional trauma." Id. These cases can be distinguished from the case at bar because the children have not exhibited any such psychological trauma associated with the alleged abuse at home. In Kimberly, the judge found Kimberly available to testify even though she might suffer severe emotional trauma from the sexual abuse if she testified. Adoption of Kimberly, 414 Mass. 526 (1993). Both parties allowed the children to be questioned in chambers by the judge as a compromise. Id. The Trial Court had an *in camera* interview with the children with the Guardian *ad litem*, Attorney Marissa Burns.

(Report page 2) When Attorney Burns testified about the children, she admitted that both children did not express opinions either way regarding seeing their father. (Report page 6) The facts are silent to whether the children exhibited any trauma associated with the alleged abuse at home. In looking at the unavailability requirement, the circumstances surrounding the children are weighed with the right of the defendant to cross examine those statements made against him. Quentin, 424 Mass. at 882. "[D]ue process and fundamental fairness dictate that a parent should have the opportunity to rebut the evidence against the parent." Adoption of Carla, 416 Mass. 510 (1993). The child witness's "refusal to testify does not reach that measure of necessity which justifies other hearsay exceptions." Commonwealth v. Colin, 419 Mass. 54 (1994).

In conclusion, the Supreme Judicial Court has given broad discretion to a trial court in determining the unavailability requirement. Commonwealth v. Colin, 419 Mass. 54 (1994). The trial Judge had an *in camera* interview with the children, the Guardian *ad litem* and Dr. Helen Hollis testified to their unavailability. (Report page 2). The judge weighed the evidence and

within his discretion concluded that there was not sufficient evidence to demonstrate unavailability. The finding is not clearly erroneous because there is established Supreme Judicial Court precedent that determined the standard by which the trial court applied to the facts in this particular case under the rule of law. Custody of Eleanor, 414 Mass. 795 (1993). The trial court did not abuse its discretion or make an error of law in determining that the children were not unavailable because the facts do not rise to the level of psychological trauma suffered by children in other cases where they were found to be unavailable. Adoption of Bea, 64 Mass.App.Ct. 1108 (2005), Adoption of Xavier, 54 Mass.App.Ct. 1103 (2002), Adoption of Kerry, 66 Mass.App.Ct. 1109 (2006), Adoption of Kimberly, 414 Mass. 526 (1993).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR MAKE AN ERROR OF LAW IN DETERMINING RELIABILITY

Under Mass. Gen. Laws, ch. 233, §82(c), the statement specifies that if the finding of unavailability is made, then the hearsay statements can be admitted if the judge further finds: "(1) that such statement was accurately recorded and preserved;

or (2) that such statement was made under circumstances inherently demonstrating a special guarantee of reliability." Mass. Gen. Laws, ch. 233, §82(c). Out-of-court statements made by a child under the age of ten relating to sexual abuse are admissible if "(a) a child is unavailable; and (b) the judge makes the additional finding that the statement was reliable, based on a list of enumerated factors." Adoption of Quentin, 424 Mass. 882 (1997). In Quentin, the statements of the eight year old Quentin were found to be admissible after a determination of reliability, including "specific examples of independent corroborative evidence." Id. at 893. Some of the enumerated factors, not all, are required to demonstrate that out-of-court statements were reliable. Id. at 892. The statement may be admissible if "imbued with such particularized guarantees of trustworthiness" that there is no material departure from the reasoning behind the confrontation right." Commonwealth v. Colin, 419 Mass. 54 (1994). Due to the constitutional implications of allowing hearsay statements, "[i]f a child witness's out-of-court statements are to be admitted substantively, there must be other evidence, independently admitted, that

corroborates those hearsay statements." Colin, 419 Mass. at 62. "[W]hen the child does not testify and the trial judge has no other means by which to assess the credibility and accuracy of the child's statements." Adoption of Carla, 416 Mass. 510 (1993). In measuring the reliability of the out-of-court statements, the court needs to evaluate the circumstances in which they were made. Colin, 419 Mass. at 65, Edward E. v. Department of Social Services, 42 Mass. App. Ct. 478 (1997). For the reliability prong of allowing out-of-court statements, the criteria can include what the child can "observe, remember, and give expression to that which [he] has seen , heard, or experienced." Adoption of Xavier, 54 Mass. App. Ct. 1103 (2002), Mass. Gen. Laws, ch. 233, §82(c)(i). Corroborative evidence of the substance of the statement, and a child's statements supported by testimony of the treating clinician are some of these "enumerated" factors. Mass. Gen. Laws ch. 233 §82(c)(2)(i)-(iii). Many observable factors are of the child "to observe, remember and give expression to that which he has seen, heard or experienced" are considered when evaluating reliability. Mass. Gen. Laws ch. 233 §82(c)(i). "[C]onsistent repetition" is a

substantial element when considering the reliability of the child's hearsay statements. Adoption of Gillian, 63 Mass.App.Ct. 398 (2005).

The court found the child's out-of-court statements to be reliable when the interviewers determined the child could understand "the distinction between truth telling and lying, and that he made the statements in a controlled and comfortable setting." Adoption of Arnold, 50 Mass.App.Ct. 743 (2001). The court in Arnold also found that the consistency of the statements made multiple times in the absence of questioning added to the reliability, similar to our case where the children repeated the statements before and after the separation. Id. The statements the children allegedly made were "why daddy push you", "hurry, mom, he might kill you" and "I wish you kept the gun – I could have killed him" with only the mother to corroborate the statements. (Report page 5). Given the gravity of the statements, the children still did not express opinions either way regarding seeing their father. (Report page 6) The court found the child's out-of-court statements to be reliable when the interviewers determined the child could understand "the distinction between truth telling and

lying, and that he made the statements in a controlled and comfortable setting." Adoption of Arnold, 50 Mass.App.Ct. 743 (2001). This can be distinguished from the case at bar because the facts are silent to the circumstances of how the statements were made if at all. The court in Arnold also found that the consistency of the statements made multiple times in the absence of questioning added to the reliability, similar to our case where the children repeated the statements before and after the separation. Id. This can be distinguished from the case at bar because the children made the statements at most six times over their lifetime. (Report page 9) In Bea, the child "consistently recounted" the details. Adoption of Bea, 64 Mass.App.Ct. 1104 (2005). "Her demeanor and reluctance to discuss the incident reflected her understanding of the gravity of her statements and their consequences." Id.

In conclusion, the Supreme Judicial Court has given broad discretion to a trial court in determining the reliability requirement. Commonwealth v. Colin, 419 Mass. 54 (1994). The trial Judge had an *in camera* interview with the children, and the Guardian *ad litem*. (Report page 2). The judge weighed the evidence

and within his discretion concluded that there was not sufficient evidence to demonstrate reliability. The finding is not clearly erroneous because there is established Supreme Judicial Court precedent that determined the standard by which the trial court applied to the facts in this particular case under the rule of law. Custody of Eleanor, 414 Mass. 795 (1993). The trial court did not abuse its discretion or make an error of law in determining that the children's statements were not reliable because there is no corroborative evidence to support the children hearsay statements, and no indicia of reliability to the statements themselves. Adoption of Quentin, 424 Mass. 882 (1997), Adoption of Carla, 416 Mass. 510 (1993), Edward E. v. Department of Social Services, 42 Mass. App. Ct. 478 (1997), Adoption of Xavier, 54 Mass. App. Ct. 1103 (2002), Adoption of Gillian, 63 Mass.App.Ct. 398 (2005).

CONCLUSION

The trial court did not abuse its discretion or make an error of law in determining that the children's statements were not reliable or that the children were unavailable when it denied a Motion by Defendant to admit the children's out-of-court statements.

The Plaintiff George Ulysses Arney respectfully requests that the Court affirm the trial court's judgment.

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ADDENDUM

MASSACHUSETTS GENERAL LAWS

CHAPTER 233. WITNESSES AND EVIDENCE TESTIMONY OF CHILD ABUSE VICTIMS

Chapter 233: Section 82 Civil proceedings; out-of-court statements describing sexual contact; admissibility

Section 82. (a) The out-of-court statements of a child under the age of ten describing any act of sexual contact performed on or with the child, the circumstances under which it occurred, or which identifies the perpetrator shall be admissible as substantive evidence in any civil proceeding, except proceedings brought under subparagraph C of section twenty-three or section twenty-four of chapter one hundred and nineteen; provided, however, that such statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; the person to whom such statement was made or who heard the child make such statement testifies; the judge finds pursuant to subsection (b) that the child is unavailable as a witness; and the judge finds pursuant to subsection (c) that such statement is reliable.

(b) The proponent of such statement shall demonstrate a diligent and good faith effort to produce the child and shall bear the burden of showing unavailability. A finding of unavailability shall be supported by specific findings on the record, describing facts with particularity, demonstrating that:

(1) the child is unable to be present or to testify because of death or existing physical or mental illness or infirmity; or

(2) by a ruling of the court, the child is exempt on the ground of privilege from testifying concerning the subject matter of such statement; or

(3) the child testifies to a lack of memory of the subject matter of such statement; or

(4) the child is absent from the hearing and the proponent of such statement has been unable to procure the attendance of the child by process or by other reasonable means; or

(5) the court finds, based upon expert testimony from a treating psychiatrist, psychologist, or clinician, that testifying would be likely to cause severe psychological or emotional trauma to the child; or

(6) the child is not competent to testify.

(c) If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further statement was made under oath, that it was accurately recorded and preserved, and there was sufficient opportunity to cross-examine; or (2) after holding a separate hearing and, where practicable and where not inconsistent with the best interests of the child, meeting with the child, that such statement was made under circumstances inherently demonstrating a special guarantee of reliability.

For the purposes of finding circumstances demonstrating reliability pursuant to clause (2) of subsection (c) a judge may consider whether the relator documented the child witness's statement, and shall consider the following factors:

(i) the clarity of the statement, meaning, the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a treating psychiatrist, psychologist, or clinician;

(ii) the time, content and circumstances of the statement;

(iii) the existence of corroborative evidence of the substance of the statement regarding the abuse including either the act, the circumstances, or the identity of the perpetrator;

(iv) the child's sincerity and ability to appreciate the consequences of the statement.

(d) An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.