SENATE JOINT RESOLUTION
No. 29

STATE OF NEW JERSEY
219th LEGISLATURE

INTRODUCED JANUARY 30, 2020

Sponsored by:
Senator JOSEPH P. CRYAN
District 20 (Union)

SYNOPSIS

Clarifies exception to hearsay rule concerning medical diagnosis or treatment for purposes of providing, continuing, or ending mental health services.

CURRENT VERSION OF TEXT

As introduced.

A JOINT RESOLUTION pursuant to P.L.1960, c.52 proposing an amendment to the Rules of Evidence.

WHEREAS, Decisions associated with the provision, continuation, or cessation of mental health services can profoundly impact the lives of those persons in need of or currently undergoing treatment, as well as their family, friends, and caretakers; and

WHEREAS, The use of hearsay testimony about a person's medical history or present condition may be a vital source in making decisions about the provision, continuation, or cessation of mental health services; and

WHEREAS, Clarifying the availability of such hearsay testimony as an exception to the general prohibition against using hearsay testimony in legal proceedings will eliminate efforts to prevent its admissibility; and

WHEREAS, Section 38 of P.L.1960, c.52 (C.2A:84A-38) provides a procedure for the adoption of rules of evidence without necessity for presentation at the Judicial Conference so that their adoption by the Supreme Court may be accelerated; now, therefore,

BE IT RESOLVED *by the Senate and General Assembly of the State of New Jersey:*

1. Pursuant to section 38 of P.L.1960, c.52 (C.2A:84A-38), the Supreme Court of New Jersey may adopt the amendatory rule specified in this section in the form set out, at any time after this joint resolution has been delivered to and signed by the Governor of the State of New Jersey, by entering an order that the amendment is adopted and by causing true copies of its order of adoption to be delivered to the President of the Senate, the Speaker of the General Assembly and the Governor, without presenting the subject matter and a tentative draft of rules at a Judicial Conference.

Rule 803 is amended to read as follows:

Rule 803. Hearsay Exceptions Not Dependent on Declarant's Unavailability

The following statements are not excluded by the hearsay rule:

(a) Prior statements of witnesses. A statement previously made by a person who is a witness at a trial or hearing, provided it would have been admissible if made by the declarant while testifying and the statement:

(1) is inconsistent with the witness' testimony at the trial or hearing and is offered in compliance with Rule 613. However, when the statement is offered by the party calling the witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the witness in

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined <u>thus</u> is new matter.

circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; or

(2) is consistent with the witness' testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive; or

(3) is a prior identification of a person made after perceiving that person if made in circumstances precluding unfairness or unreliability.

(b) Statement by party-opponent. A statement offered against a party which is:

(1) the party's own statement, made either in an individual or in a representative capacity, or

(2) a statement whose content the party has adopted by word or conduct or in whose truth the party has manifested belief, or

(3) a statement by a person authorized by the party to make a statement concerning the subject, or

(4) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(5) a statement made at the time the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan. In a criminal proceeding, the admissibility of a defendant's statement which is offered against the defendant is subject to Rule 104(c).

(c) Statements not dependent on declarant's availability. Whether or not the declarant is available as a witness:

(1) Present sense impression. A statement of observation, description or explanation of an event or condition made while or immediately after the declarant was perceiving the event or condition and without opportunity to deliberate or fabricate.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.

(3) Then existing mental, emotional, or physical condition. A statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made in good faith for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment<u>, including a course</u>

of treatment concerning the provision, continuation, or cessation of mental health services.

(5) Recorded recollection. A statement concerning a matter about which the witness is unable to testify fully and accurately because of insufficient present recollection if the statement is contained in a writing or other record which (A) was made at a time when the fact recorded actually occurred or was fresh in the memory of the witness, and (B) was made by the witness or under the witness' direction or by some other person for the purpose of recording the statement at the time it was made, and (C) the statement concerns a matter of which the witness had knowledge when it was made, unless the circumstances indicate that the statement is not trustworthy; provided that when the witness does not remember part or all of the contents of a writing, the portion the witness does not remember may be read into evidence but shall not be introduced as an exhibit over objection.

(6) Records of regularly conducted activity. A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

(7) Absence of an entry in records of regularly conducted activity. Evidence that a matter is not included in a writing or other record kept in accordance with the provisions of Rule 803(c)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a writing or other record was regularly made and preserved, unless the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.

(8) Public records, reports, and findings. Subject to Rule 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

(9) Records of vital statistics. Subject to Rule 807, a statement contained in any form such as records of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. Subject to Rule 807, a certification in accordance with Rule 902 stating that diligent search failed to disclose a public record, report, writing, or entry when offered to prove (A) the absence of a public record, report, writing, or entry, or (B) the nonoccurrence or nonexistence of a matter of which a record, report, writing, or entry is regularly made and preserved by a public office or agency, unless the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.

(11) Records of religious organizations. Subject to Rule 807, statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Subject to Rule 807, statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Subject to Rule 807, statements of fact concerning a personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. Subject to Rule 807, the record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. Subject to Rule 807, a statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence 30 years or more whose authenticity is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other

science or art, established as a reliable authority by testimony or by judicial notice. If admitted, the statements may not be received as exhibits but may be read into evidence or, if graphics, shown to the jury.

(19) Reputation concerning personal or family history. Evidence of a person's reputation, among members of the person's family by blood, adoption, or marriage, or among that person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, ancestry, relationship by blood, adoption, or marriage, or other similar fact of the person's personal or family history.

(20) Reputation concerning boundaries or general history. Evidence of reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and as to events of general history important to the community or state or nation in which the community is located.

(21) Reputation as to character. Evidence of reputation of a person's character at a relevant time among the person's associates or in the community.

(22) Judgments of previous conviction of crime. In a civil proceeding, except as otherwise provided by court order on acceptance of a plea, evidence of a final judgment against a party adjudging the party guilty of an indictable offense in New Jersey or of an offense which would constitute an indictable offense if committed in this state, as against that party, to prove any fact essential to sustain the judgment.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if those matters would be provable by evidence of reputation.

(24) Other exceptions. [Not Adopted]

(25) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary, proprietary, or social interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid declarant's claim against another, that a reasonable person in declarant's position would not have made the statement unless the person believed it to be true. Such a statement is admissible against an accused in a criminal action only if the accused was the declarant.

(26) Judgments against persons entitled to indemnity. Subject to Rule 807 and except in a proceeding brought under the "Joint Tortfeasors Contribution Law," **[**N.J.S.A.**]** P.L.1952, c.335 (C.2A:53A-1 et seq.), the record of a final judgment is admissible if offered by the judgment debtor in an action in which the debtor seeks to recover partial or total indemnity or exoneration for money paid or a liability incurred because of the judgment, as evidence of the liability of the judgment debtor, of the facts on which the judgment is based, and of the reasonableness of the damages recovered. If the defendant

in the second action had notice of and opportunity to defend the first action, the judgment is conclusive evidence.

(27) Statements by a child relating to a sexual offense. A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if ⟦(a)⟧ (A) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; ⟦(b)⟧ (B) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and ⟦(c)⟧ (C) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

2. The rule set forth in section 1 of this Joint Resolution, if ordered adopted by the Supreme Court, shall take effect on the date set forth in the order of adoption.

3. This joint resolution shall take effect immediately upon signature thereof by the Governor; and the Secretary of State is directed to transmit an authenticated copy forthwith to the Chief Justice of the Supreme Court of New Jersey.

STATEMENT

This joint resolution would clarify an exception to the hearsay rule, Rule 803 of the Rules of Evidence, concerning a person's medical diagnosis or treatment for purposes of providing, continuing, or ending mental health services. The use of hearsay testimony about a person's medical history or present condition may be a vital source in making such treatment decisions.

In accordance with the procedure set forth in "The Evidence Act, 1960," P.L.1960, c.52 (C.2A:84A-1 et al.), the Legislature may initiate a rule change by passage of a joint resolution, which if signed by the Governor will be presented to the Supreme Court for consideration of adoption. As per the statutory procedure and as further specified in this joint resolution, if the rule change is adopted by the Supreme Court it would take effect on a date set forth in the order of adoption.