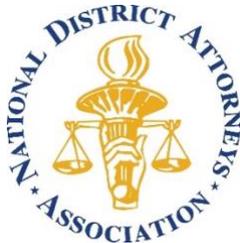




Child Statement and Forensic Interview Admissibility

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**National
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How to Use this Guide

As the next few hundred pages of U.S. state and territory admissibility statutes, hearsay exceptions, and related case law demonstrate, there are many paths to admitting forensic interviews and other statements by child victims into evidence.

Seeking to introduce a forensic interview is not an ancillary matter in child abuse prosecution. In many cases, it is the most critical, persuasive piece of evidence for the jury's consideration. If a child recants their disclosure of abuse due to pressures exerted by perpetrators, the dynamics of victimization, or other stressors, the forensic interview and statements made by the child to caregivers, teachers, or others are crucial to the State's case. Even in the absence of recantation, the original statement retains a power and authenticity that will benefit juries, particularly since in many cases, there is a significant delay between the child's original statement and trial. Additionally, introduction of the child's statement reduces incentives for the child to be mistreated or attacked while on the stand, since disclosures will be placed into evidence even if the victim becomes confused during cross-examination as a result of developmentally or linguistically problematic questions from defense counsel.

This guide was developed to equip entry-level prosecutors with an understanding of relevant admissibility law in their jurisdiction, and encourage seasoned prosecutors to take a fresh look at the several viable options for forensic interview admissibility. In most states, potential routes will include the medical treatment, excited utterance, prompt outcry, state of mind, present sense impression, and residual hearsay exceptions, as well as the possibility of prior consistent or inconsistent statements, forfeiture by wrongdoing, and other strategies. Whether preparing for suppression hearings or drafting proactive admissibility motions, prosecutors may benefit from the wealth of persuasive law articulated by other jurisdictions in this guide. Investigators and other members of the multidisciplinary team will also benefit from an enhanced understanding of law relevant to their daily work.

These statutes and cases also provide a glimpse at the status of child courtroom protections throughout the United States, and we encourage child advocates and others to note both those states that are catalyzing a trauma-informed approach to children in criminal proceedings and those states in need of more robust evidentiary or courtroom accommodation provisions.

Most importantly, this guide demonstrates the resilience and tenacity of American prosecutors and the children they serve. We are grateful to the thousands of professionals who continue to forge a path to justice and healing for our children and communities.

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Alabama

Alabama Admissibility

Ala. Code § 15-25-2. Videotaped deposition.

(a) In any criminal prosecution referred to in Section 15-25-1, the court, upon motion of the district attorney or Attorney General, for good cause shown and after notice to the defendant, may order the taking of a videotaped deposition of an alleged victim of or witness to the crime who is under the age of 16 at the time of the order.

(b) On any motion for a videotaped deposition of the victim or a witness, the court shall consider the age and maturity of the child, the nature of the offense, the nature of testimony that may be expected, and the possible effect that the testimony in person at trial may have on the victim or witness, along with any other relevant matters that may be required by Supreme Court rule.

(c) During the taping of a videotaped deposition authorized pursuant to this section, the following persons shall be in the room with the child: the prosecuting attorney, the attorney for the defendant, and a person whose presence, in the judgment of the court, contributes to the well-being of the child and who has dealt with the child in a therapeutic setting regarding the abuse. Additional persons, such as the parent or parents or legal guardian, other than the defendant, may be admitted into the room in the discretion of the court.

(d) Examination and cross-examination of the alleged victim or witness shall proceed at the taking of the videotaped deposition as though the alleged victim or witness were testifying personally in the trial of the case. The state shall provide the attorney for the defendant with reasonable access and means to view and hear the videotaped deposition at a suitable and reasonable time prior to the trial of the case. Objections to the introduction into the record of such deposition shall be heard by the judge in whose presence the deposition was taken, and unless the court determines that its introduction in lieu of the victim's or witness's actual appearance as a witness at the trial will unfairly prejudice the defendant, such videotaped deposition shall be entered into the record by the state in lieu of the direct testimony of the alleged victim or witness and shall be viewed and heard at the trial of the case.

(e) For the purposes of this section, "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound of a witness testifying under oath to be entered in the record in a judicial proceeding.

(f) The Supreme Court may adopt rules of procedure regarding the taking and use of videotaped depositions in criminal proceedings and juvenile cases, as well as for the transcribing of such in the event the case is thereafter appealed.

(g) All costs associated with the videotaping of a deposition ordered pursuant to this article shall be paid by the state. The district attorney shall submit all such cost bills to the State Comptroller for approval and payment from the fund entitled "Court Costs Not Otherwise Provided For."

(h) All videotapes ordered pursuant to this article shall be subject to any protective order of the court for the purpose of protecting the privacy of the victim of the offense.

(i) When necessary, the operator of the videotaping equipment may also be in the room and the operator shall make every effort to be unobtrusive.

(j) Only the court, the prosecuting attorney, and the attorney for the defendant may question the child victim or witness. During the testimony of the child, the defendant shall be provided access to view the testimony out of the presence of the child and shall be allowed to communicate with his or her attorney by any appropriate election method.

(k) This section shall not apply when the defendant is an attorney pro se.

Ala. Code § 15-25-31. Out-of-court statements; admissibility.

An out-of-court statement made by a child under 12 years of age at the time the statement is made concerning an act that is a material element of any crime involving child physical offense, sexual offense, and exploitation, as defined in Section 15-25-39, which statement is not otherwise admissible in evidence, is admissible in evidence in criminal proceedings, if the requirements of Section 15-25-32 are met.

Ala. Code § 15-25-32. Out-of-court statements; requirements for admissibility.

An out-of-court statement may be admitted as provided in Section 15-25-31, if:

(1) The child testifies at the proceeding, or testifies by means of video tape deposition as provided by Section 15-25-2, or testifies by means of closed-circuit television as is provided in Section 15-25-3, and at the time of such testimony is subject to cross-examination about the out-of-court statements; or

(2)

a. The child is found by the court to be unavailable to testify on any of these grounds:

1. The child's death;

2. The court finds that there are reasonable grounds to believe that the defendant or someone acting on behalf of the defendant has intentionally removed the child from the jurisdiction of the court;

3. The child's total failure of memory;

4. The child's physical or mental disability;
 5. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or
 6. Substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of closed-circuit television; and
- b. The child's out-of-court statement is shown to the reasonable satisfaction of the court to possess particularized guarantees of trustworthiness.

Ala. Code § 15-25-35. Notice of use of statement.

The proponent of the statement must inform the adverse party of the opponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

Ala. Code § 15-25-37. Determination of particularized guarantees of trustworthiness.

In determining whether a statement possesses particularized guarantees of trustworthiness under Section 15-25-32(2)b, the court shall consider any one, but is not limited to, the following factors:

- (1) The child's personal knowledge of the event;
- (2) The age and maturity of the child;
- (3) Certainty that the statement was made, including the credibility of the person testifying about the statement;
- (4) Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
- (5) The timing of the child's statement;
- (6) Whether more than one person heard the statement;
- (7) Whether the child was suffering from pain or distress when making the statement;
- (8) The nature and duration of any alleged abuse;
- (9) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(10) Whether the statement has a “ring of verity,” has an internal consistency or coherence, and uses terminology appropriate to the child’s age;

(11) Whether the statement is spontaneous or directly responsive to questions;

(12) Whether the statement is suggestive due to improperly leading questions;

(13) Whether extrinsic evidence exists to show the defendant’s opportunity to commit the act complained of in the child’s statement.

Cases

Key Points:

- A video deposition does not violate the defendant’s right to confrontation, so long as the defendant has access to both a live video feed and to counsel during the child victim’s testimony.
- A child victim’s out-of-court statements can be admitted at trial and do not violate the Confrontation Clause when the court deems the victim to be an unavailable witness.
- Witnesses can provide hearsay testimony to a child victim’s out-of-court statements when they contemplate material elements of the offense(s) and when the victim also testifies.

In *E.L.Y. v. State*, the defendant attempted to appeal his conviction while arguing that his absence in the physical courtroom while the seven-year-old victim gave her video deposition violated both the Confrontation Clause of the Sixth Amendment to the United States Constitution as well as Art. 1 § 6 of the Alabama Constitution. *E.L.Y. v. State*, 266 So. 3d 1125, 2018 Ala. Crim. App. LEXIS 16 (Ala. Crim. App. 2018). The Alabama Criminal Appeals Court disagreed with the defendant’s argument and found that the trial court had not erred by not allowing the defendant in the physical courtroom. *Id.* The trial court had wholly complied with the updated code. *Id.* Pursuant to the code, the defendant had been granted access to watch a live video feed from another room in the courthouse while being able to communicate with his counsel during the victim’s testimony. *Id.* Defense counsel had been allowed full access to the victim to cross-examine her. *Id.*

In *D.L.R. v. State*, the Alabama Criminal Appeals Court rejected the defendant’s claim that the trial court violated the Confrontation Clause or Ala. Code § 15-25-32(1) by allowing the child victim’s out-of-court statements into evidence. The court noted that, “[victim] testified at trial. Therefore, neither the Confrontation Clause of the Sixth Amendment nor § 15-25-32(1) barred the admission of her out-of-court statements.” *D.L.R. v. State*, 188 So. 3d 720, 2015 Ala. Crim. App. LEXIS 64 (Ala. Crim. App. 2015). The appellate court also affirmed that the “[victim] personally appeared in court and was subjected to direct questions from defense counsel. No limits or restrictions were placed on defense counsel’s ability to question [victim] as to her out-of-court statements.” *Id.* Despite the victim’s answers not being satisfactory according to defense counsel, the victim did not refuse to answer the questions. *Id.* Thus, the appellate court concluded that “the trial court did not violate the Confrontation Clause of the Sixth Amendment or § 15-25-32(1), Ala.Code 1975.” *Id.*

In *Crow v. State*, because the defendant had allegedly had her sister remove the victim from the trial court's jurisdiction prior to the trial, the court allowed the victim to be deemed an unavailable witness and admitted the victim's out-of-court statements at trial. The defendant attempted to argue on appeal that the trial court had erred in its decision. *Crow v. State*, 195 So. 3d 346, 2015 Ala. Crim. App. LEXIS 89 (Ala. Crim. App. 2015). The Alabama Criminal Appeals Court found that during a pre-trial hearing at which the State had the burden to prove that the defendant had indeed had her sister relocate the victim, the State had presented a generous amount of evidence. This evidence included testimony from a police investigator who testified that the defendant, while left alone in an interview room during a videotaped statement, had made a phone call to her sister while the video recording remained on, in that call, the defendant stated that the sister needed to "get [victim] out of here." *Id.* Based on the evidence presented and the trial court's ability to hear the video recording, the Alabama Criminal Appeals Court affirmed the trial court's holding. *Id.*

In *Campos v. State*, the Alabama Criminal Appeals court rejected the defendant's appeal where he contended "that the trial court erred by allowing three witnesses to testify to [victim's] out-of-court statements" regarding the defendant's acts of abuse. *Campos v. State*, 217 So. 3d 1, 2015 Ala. Crim. App. LEXIS 98 (Ala. Crim. App. 2015). The Court noted that the statements the victim made to the three witnesses contemplated material elements of first-degree sodomy and sexual abuse. *Id.* Additionally, the victim testified at trial and was subject to cross-examination. *Id.* Thus, the trial court did not err in admitting the hearsay testimony and video pursuant to § 15-25-32. *Id.*

Alabama Hearsay Exceptions

Ala. R. Evid. Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then existing mental, emotional, or physical condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms,

pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, when offered against the defendant in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state or governmental authority in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, of vital statistics such as those relating to 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** 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.** 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.** Statements of fact concerning 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** 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 that was prepared before January 1, 1998, the authenticity of which 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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

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

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state or other governmental authority in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

Ala. R. Evid. Rule 804. Hearsay exceptions; declarant unavailable.

(a) Grounds of unavailability. "Unavailability as a witness" includes situations in which the declarant -

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) now possesses a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-

examination, and (D) in litigation in which the issues and parties were substantially the same as in the present cause.

(2) *Statement under belief of impending death.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) *Statement against interest.* A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) ***Forfeiture by wrongdoing.*** A statement offered against a party that has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Ala. R. Evid. Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Ala. R. Evid. Rule 106. Remainder of writings or recorded statements.

When a party introduces part of either a writing or recorded statement, an adverse party may require the introduction at that time of any other part of the writing or statement that ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- Out-of-court excited utterances and statements made by a child victim during medical examinations are exceptions to hearsay and can corroborate other out-of-court statements.
- A child's excited utterances do not qualify as "quintessential retrospective narration" and can be admitted.

In *Ex parte C.L.Y.*, the Supreme Court of Alabama held that the trial court properly allowed the child victim's out-of-court statements to be admitted to corroborate the victim's other out-of-court statements -- which would otherwise be hearsay -- relating to the alleged abuse. *Ex parte C.L.Y.*, 928 So.2d 1069 (Ala. 2005). The Court first found that the child's statements, both immediately after the abuse and during a medical examination, were properly admitted under, respectively, the excited utterance and medical exceptions to hearsay. *Id.* In regard to the child's excited utterance, the Court held that she had provided these statements "while she was still under the influence of emotions arising from the sexual abuse, which had occurred earlier that evening... her statement, though not made contemporaneously with the abuse, was made contemporaneously with the stress and excitement resulting from the [abuse]." *Id.* The child also made statements of abuse and indicating fault during her medical examination; the Court noted that although "statements indicating fault normally do not qualify for this hearsay exception, in cases of sexual abuse where the identity of the perpetrator is related to the treatment of the emotional and psychological injuries suffered by the victim, such statements regarding identity can fall within this exception to the hearsay rule." *Id.* The Court then turned to legislative intent, finding that the intent was to broaden testimony allowed in child abuse cases; thus, an out-of-court statement by a child victim of sexual abuse that falls within a recognized hearsay exception may corroborate other out-of-court statements by the child victim relating to the alleged abuse, which may otherwise be hearsay. *Id.*

In *Jackson v. State*, the Court of Criminal Appeals of Alabama held that the trial court properly admitted the child victim's out-of-court statements under the excited utterance exception to hearsay. *Jackson v. State*, 305 So.3d 440 (Ala. Crim. App. 2019). The Court denied the defendant's claim that the child's statements were merely "quintessential retrospective narration." *Id.* The Court opted to take a "broad and liberal" approach to defining excited utterance in regard to children, noting that although the child made her statements three hours after the event, she was still in a state of shock. *Id.* Furthermore, the Court suggested that the child's young age of four may require more leniency when allowing exceptions to hearsay. *Id.*

Alaska

Alaska Admissibility

Alaska Stat. § 12.45.046. Testimony of children in criminal proceedings.

(a) In a criminal proceeding under AS 11.41 involving the prosecution of an offense committed against a child under the age of 16, or witnessed by a child under the age of 16, the court

(1) may appoint a guardian ad litem for the child;

(2) on its own motion or on the motion of the party presenting the witness or the guardian ad litem of the child, may order that the testimony of the child be taken by closed circuit television or through one-way mirrors if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate.

(b) In making a determination under (a)(2) of this section, the court shall consider factors it considers relevant, including

(1) the child's chronological age;

(2) the child's level of development;

(3) the child's general physical health;

(4) any physical, emotional, or psychological injury experienced by the child; and

(5) the mental or emotional strain that will be caused by requiring the child to testify under normal courtroom procedures.

(c) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the defendant, the court, and the finder of fact in the proceeding. If the court authorizes use of closed-circuit televised testimony under this subsection,

(1) each of the following may be in the room with the child when the child testifies:

(A) the prosecuting attorney;

(B) the attorney for the defendant; and

(C) operators of the closed-circuit television equipment;

(2) the court may, in addition to persons specified in (1) of this subsection, admit a person whose presence, in the opinion of the court, contributes to the well-being of the child.

(d) When a child is to testify under (c) of this section, only the court and counsel may question the child. The persons operating the equipment shall do so in as unobtrusive a manner as possible. If the defendant requests, the court shall excuse the defendant from the courtroom, shall permit the defendant to attend in another location, and shall afford the defendant a means of viewing the child's testimony and of communicating with the defendant's attorney throughout the proceedings. Upon request of the defendant or the defendant's attorney, the court shall permit a recess to allow them to confer. The court shall provide a means of communicating with the attorneys during the questioning of the child. Objections made by the attorneys to questions of a child witness may be resolved in the courtroom if the court finds it necessary.

(e) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may authorize the use of one-way mirrors in conjunction with the taking of the child's testimony. The attorneys may pose questions to the child and have visual contact with the child during questioning, but the mirrors shall be placed to provide a physical shield so that the child does not have visual contact with the defendant and jurors.

(f) If the court does not find under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures will result in the child's inability to effectively communicate, the court may, after taking into consideration the factors specified in (b) of this section, supervise the spatial arrangements of the courtroom and the location, movement, and deportment of all persons in attendance so as to safeguard the child from emotional harm or stress. In addition to other procedures it finds appropriate, the court may

- (1) allow the child to testify while sitting on the floor or on an appropriately sized chair;
- (2) schedule the procedure in a room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to the child's developmental age; and
- (3) order a recess when the energy, comfort, or attention span of the child warrants.

Alaska Stat. § 47.17.033. Investigations and interviews.

(a) In investigating child abuse and neglect reports under this chapter, the department may make necessary inquiries about the criminal records of the parents or of the alleged abusive or neglectful person, including inquiries about the existence of a criminal history record involving a serious offense as defined in AS 12.62.900.

(b) For purposes of obtaining access to information needed to conduct the inquiries required by (a) of this section, the department is a criminal justice agency conducting a criminal justice activity.

(c) An investigation by the department or another investigating agency of child abuse or neglect reported under this chapter shall be conducted by a person trained to conduct a child abuse and

neglect investigation and without subjecting a child to duplicative interviews about the abuse or neglect except when new information is obtained that requires further information from the child.

(d) An interview of a child conducted as a result of a report of harm may be audiotaped or videotaped. If an interview of a child concerns a report of sexual abuse of the child by a parent or caretaker of the child, the interview shall be videotaped, unless videotaping the interview is not feasible or will, in the opinion of the investigating agency, result in trauma to the child.

(e) An interview of a child that is audiotaped or videotaped under (d) of this section shall be conducted

(1) by a person trained and competent to conduct the interview;

(2) if available, at a child advocacy center; and

(3) by a person who is a party to a memorandum of understanding with the department to conduct the interview or who is employed by an agency that is authorized to conduct investigations.

(f) An interview of a child may not be videotaped more than one time unless the interviewer or the investigating agency determines that one or more additional interviews are necessary to complete an investigation. If additional interviews are necessary, the additional interviews shall be conducted, to the extent possible, by the same interviewer who conducted the initial interview of the child.

(g) A recorded interview of a child shall be preserved in the manner and for a period provided by law for maintaining evidence and records of a public agency.

(h) A recorded interview of a child is subject to disclosure under the applicable court rules for discovery in a civil or criminal case.

(i) The training required under (c) of this section must address the constitutional and statutory rights of children and families that apply throughout the investigation and department intervention. The training must inform department representatives of the applicable legal duties to protect the rights and safety of a child and the child's family.

(j) During a joint investigation by the department and a law enforcement agency, the department shall coordinate an investigation of child abuse or neglect with the law enforcement agency to ensure that the possibility of a criminal charge is not compromised.

(k) Unless a law enforcement official prohibits or restricts notification under (j) of this section, at the time of initial contact with a person alleged to have committed child abuse or neglect, the department shall notify the person of the specific complaint or allegation made against the person, except that the identity of the complainant may not be revealed.

(l) In this section, "child advocacy center" means a facility operated with a child-focused, community partnership committed to a multidisciplinary team approach that includes representatives from law enforcement, child protection, criminal prosecution, victim advocacy, and the medical and mental health fields who collaborate and assist in investigating allegations of sexual or other abuse and neglect of children.

AK R Rev Rule 801. Definitions.

The following definitions apply under this article:

(a) **Statement.** A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A declarant is a person who makes a statement.

(c) **Hearsay.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and the statement is

(A) inconsistent with the declarant's testimony. Unless the interests of justice otherwise require, the prior statement shall be excluded unless

(i) the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement or

(ii) the witness has not been excused from giving further testimony in the action; or

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

(C) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is

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

(B) a statement of which the party has manifested an adoption or belief in its truth, or

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

(D) 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

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy; or

(3) *Recorded Statement by Child Victims of Crime.* The statement is a recorded statement by the victim of a crime who is less than 16 years of age and

- (A) the recording was made before the proceeding;
- (B) the victim is available for cross-examination;
- (C) the prosecutor and any attorney representing the defendant were not present when the statement was taken;
- (D) the recording is on videotape or other format that records both the visual and aural components of the statement;
- (E) each person who participated in the taking of the statement is identified on the recording;
- (F) the taking of the statement as a whole was conducted in a manner that would avoid undue influence of the victim;
- (G) the defense has been provided a reasonable opportunity to view the recording before the proceeding; and
- (H) the court has had an opportunity to view the recording and determine that it is sufficiently reliable and trustworthy and that the interests of justice are best served by admitting the recording into evidence.

Cases

Key Points:

- State law permitting the admission of video recorded statements of child victims who are less than 16 years of age is interpreted to refer to the victim's age at the time of statement, not at the time of trial.
- Forensic interviews conducted by multidisciplinary team members other than forensic interviewers are admissible.
- A trial court's independent assessment of a child victim's video statement satisfies a foundational requirement.
- Viewers of forensic interviews, who may consult the interviewer off the record without influencing the child victim, do not need to be identified as participants.

In *Hayes v. State*, the Alaska Court of Appeals denied the defendant's first claim that Rule 801(d)(3) (allowing video-recorded statements of a child into evidence so long as the child is less than 16 years of age) should be interpreted as the age of the child at the time of trial rather than at the time of statement. *Hayes v. State*, 474 P.3d 1179 (Alaska Ct. App. 2020). Although the Court agreed that the statute could reasonably be interpreted both ways, the Court argued that "at the time of statement" was the proper interpretation because of the natural assumption a reasonable reader would make, in addition to how other jurisdictions had interpreted similar rules. *Id.* Additionally, the Court agreed with

the legislative history of the rule, noting that the legislative intent was to protect victims and requiring a child to restate their narrative could result in harm to the victim, in addition to a reduction of charges for the defendant if the child was unable to restate the events completely. *Id.* The Court additionally denied the defendant's second claim that the video interviews were deficient because they were conducted by police detectives. *Id.* The Court found that child video interviews conducted by police investigators are not *per se* inadmissible, noting again that the legislative history specifically contemplated the notion that police officers would be a part of the multidisciplinary teams within the child advocacy center (CAC). *Id.* The Court noted that interviews generally would only be inadmissible if the interviewer acted in a leading or suggestive manner in an attempt to elicit certain answers. *Id.*

In *Cole v. State*, the Alaska Court of Appeals denied the defendant's claim that the trial court had erred in finding that the video interviews of the child victim met all foundational requisites for admission into evidence. *Cole v. State*, 452 P.3d 704 (Alaska Ct. App. 2019). Specifically, the defendant alleged that the Court failed to determine the statement's reliability and trustworthiness and the interview itself had failed to identify each person participating in the forensic interview. *Id.* The Court noted that the trial court had independently assessed the reliability and trustworthiness of the child's statements, thus fulfilling this foundational requisite. *Id.* Additionally, the Court found that interviews must only identify participants who may be heard on the video recording; viewers who may consult the interviewer off-record are unable to influence the child, and therefore are not required to be identified. *Id.*

Alaska Hearsay Exceptions

Alaska Stat. § 12.40.110. Hearsay evidence in prosecutions for sexual offenses.

(a) In a criminal proceeding under AS 11.41 involving the prosecution of an **offense committed against a child under the age of 16, or witnessed by a child under the age of 16**, the court

(1) may appoint a guardian ad litem for the child;

(2) on its own motion or on the motion of the party presenting the witness or the guardian ad litem of the child, may order that the testimony of the child be taken by closed circuit television or through one-way mirrors if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate.

(b) In making a determination under (a)(2) of this section, the court shall consider factors it considers relevant, including

(1) the child's chronological age;

(2) the child's level of development;

- (3)** the child's general physical health;
- (4)** any physical, emotional, or psychological injury experienced by the child; and
- (5)** the mental or emotional strain that will be caused by requiring the child to testify under normal courtroom procedures.

(c) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the defendant, the court, and the finder of fact in the proceeding. If the court authorizes use of closed-circuit televised testimony under this subsection,

(1) each of the following may be in the room with the child when the child testifies:

- (A)** the prosecuting attorney;
- (B)** the attorney for the defendant; and
- (C)** operators of the closed-circuit television equipment;

(2) the court may, in addition to persons specified in (1) of this subsection, admit a person whose presence, in the opinion of the court, contributes to the well-being of the child.

(d) When a child is to testify under (c) of this section, only the court and counsel may question the child. The persons operating the equipment shall do so in as unobtrusive a manner as possible. If the defendant requests, the court shall excuse the defendant from the courtroom, shall permit the defendant to attend in another location, and shall afford the defendant a means of viewing the child's testimony and of communicating with the defendant's attorney throughout the proceedings. Upon request of the defendant or the defendant's attorney, the court shall permit a recess to allow them to confer. The court shall provide a means of communicating with the attorneys during the questioning of the child. Objections made by the attorneys to questions of a child witness may be resolved in the courtroom if the court finds it necessary.

(e) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may authorize the use of one-way mirrors in conjunction with the taking of the child's testimony. The attorneys may pose questions to the child and have visual contact with the child during questioning, but the mirrors shall be placed to provide a physical shield so that the child does not have visual contact with the defendant and jurors.

(f) If the court does not find under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures will result in the child's inability to effectively communicate, the court may, after taking into consideration the factors specified in (b) of this section, supervise the spatial arrangements of the courtroom and the location, movement, and department of all persons in attendance so as to safeguard the child from emotional harm or stress. In addition to other procedures it finds appropriate, the court may

- (1) allow the child to testify while sitting on the floor or on an appropriately sized chair;
- (2) schedule the procedure in a room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to the child's developmental age; and
- (3) order a recess when the energy, comfort, or attention span of the child warrants.

Alaska R. Evid. 803. Hearsay exceptions -- availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present Sense Impression.*** — A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then Existing Mental, Emotional, or Physical Condition.*** — A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) offered to prove the declarant's present condition or future action, 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) ***Recorded Recollection.*** — A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- (6) ***Business Records.*** — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of Record.** — Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** —

(a) To the extent not otherwise provided in (b) of this subdivision, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

(b) The following are not within this exception to the hearsay rule:

(i) investigative reports by police and other law enforcement personnel;

(ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party;

(iii) factual findings offered by the state in criminal cases;

(iv) factual findings resulting from special investigation of a particular complaint, case, or incident;

(v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

Any writing admissible under this subdivision shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before the trial, unless the court finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

(9) **Records of Vital Statistics.** — Records or data compilations, in any form, of birth, 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.** — To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** — 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.** — Statements of facts 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.** — Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings and urns, crypts, or tombstones, or the like.

(14) **Records of Documents Affecting an Interest in Property.** — 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** — 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 twenty years or more the authenticity of which is established.

(17) **Market Reports, Commercial Publications.** — Market quotations, tabulations, lists, directories, codes, standards, 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** — Reputation among members of a person's family by blood, adoption, or marriage, or among the person's associates, or in the community, concerning the person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** — Reputation in a community, arising before controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** — Reputation of a person's character among associates or in the community.

(22) **Judgment as to Personal, Family, or General History, or Boundaries.** — A judgment as proof of a matter of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(23) **Other Exceptions.** — A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(a) the statement is offered as evidence of a material fact;

(b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(c) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Alaska R. Evid. 804. Hearsay exceptions -- declarant unavailable.

(a) **Definition of Unavailability.** — Unavailability as a witness includes situations in which the declarant

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) establishes a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), (4), or (5), of this rule, the declarant's attendance or testimony) by reasonable means including process.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony*. — Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death*. — A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement Against Interest*. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History*. — (A) A statement concerning the declarant's own birth, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) ***Other Exceptions***. — **A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.**

Alaska R. Evid. 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.

Alaska R Evid. 106. Remainder of, or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- A child's refusal to testify in the face of adults' persuasion makes them "unavailable" to testify and their hearsay statements are then admissible.
- A child's statement's trustworthiness should be evaluated by (including but not limited to) its spontaneity, consistency, and terminology, as well as by the child's age, mental state, and lack of motive to fabricate.
- The medical exception to hearsay is only valid when an examination is for diagnostic and not investigative purposes.

In *Matter of T.P.*, the Supreme Court of Alaska held that the trial court properly admitted the child victim's hearsay statements, rejecting the defendant's claims that the child was not "unavailable" and that her statements were not trustworthy. *Matter of T.P.*, 838 P.2d 1236 (Alaska 1992). The court noted that to be unavailable, the witness must continuously refuse to answer despite a court order to do so. Even then, the extent of the "order" is under the trial judge's discretion and may vary in intensity depending on the child's age. *Id.* The child's refusal to testify despite the judge's, counsel's, and mother's attempts to persuade her rendered her unavailable. *Id.* Additionally, the Court explained that the "trustworthiness" of a statement should be evaluated by "(1) the spontaneity of the child's statements; (2) the age of the child; (3) the use of "childish" terminology; (4) the consistency of the statements; (5) the mental state of the declarant; and (6) the lack of motive to fabricate." *Id.* The Court denied the defendant's contention that the child's statement did not use sexual language beyond what was normal for her age. *Id.* The Court elaborated, noting that the aforementioned list was not all-inclusive, nor should it be applied mechanically. *Id.* The Court found the child to be unavailable and her out-of-court statements to be trustworthy, thus holding that the trial court properly admitted her statements under the hearsay exception. *Id.*

In *Davison v. State*, the Supreme Court of Alaska held that the trial court erred in admitting the child victim's out-of-court statements under the medical exception to hearsay. *Davison v. State*, 282 P.3d 1262 (Alaska 2012). The child victim received an additional medical examination a day after the reported assault; during the examination, the child was told that any information given would be used for evidentiary purposes. *Id.* The examination was attended by both a state trooper and medical professionals. *Id.* When the child had difficulty describing the assault to the doctor, the state trooper offered to retell what the child had told him during the initial report. *Id.* With this testimony, coupled with the physical exam, the doctor decided that the child had been assaulted. *Id.* The Court cited six reasons why the medical examination was more investigative than for medical diagnosis: "(1) the child

had already received some prior medical treatment; (2) the state trooper arranged the interview, and drove the child and her mother from the airport; (3) the trooper and a women's advocate were present during the exam; (4) the trooper took an active role in questioning, and prompted the responses that the child eventually gave; (5) the doctor emphasized the forensic purpose of the exam to the child; and (6) the doctor did not actually view and follow-up on the results of the lab tests she had ordered." *Id.* Thus, the Court found that the statements given could not be admissible under the medical exception to hearsay. *Id.*

Arizona

Arizona Admissibility

Ariz. Rev. Stat. Ann. § 13-1416. Admissibility of minor's statement; notice.

A. Except as otherwise provided in title 8,1 a statement made by a minor who is under the age of ten years describing any sexual offense or physical abuse performed with, on or witnessed by the minor, which is not otherwise admissible by statute or court rule, is admissible in evidence in any criminal or civil proceeding if both of the following are true:

- 1.** The court finds, in an in-camera hearing, that the time, content and circumstances of the statement provide sufficient indicia of reliability.
- 2.** Either of the following is true:
 - (a)** The minor testifies at the proceedings.
 - (b)** The minor is unavailable as a witness, provided that if the minor is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the statement.

B. A statement shall not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

Ariz. Rev. Stat. Ann. § 13-4251. Applicability; definition

A. This article applies to the testimony or statements of a minor in criminal proceedings involving acts committed against the minor or involving acts witnessed by the minor whether or not those acts are charged and in civil proceedings including proceedings involving a dependency or a termination of parental rights.

B. In this article, "minor" means a person under fifteen years of age or a person who has a developmental disability as defined in section 41-2451 and who has a tested intelligence quotient score below seventy-five.

Ariz. Rev. Stat. Ann. § 13-4252. Recording of testimony

A. The recording of an oral statement of a minor made before a proceeding begins is admissible into evidence if all of the following are true:

1. No attorney for either party was present when the statement was made.
2. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.
3. Every voice on the recording is identified.
4. The person conducting the interview of the minor in the recording is present at the proceeding and available to testify or be cross-examined by either party.
5. The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence.
6. The minor is available to testify.
7. The recording equipment was capable of making an accurate recording, the operator of the equipment was competent and the recording is accurate and has not been altered.
8. The statement was not made in response to questioning calculated to lead the minor to make a particular statement.

B. If the electronic recording of the oral statement of a minor is admitted into evidence under this section, either party may call the minor to testify and the opposing party may cross-examine the minor.

Ariz. Rev. Stat. Ann. § 13-4253. Out of court testimony; televised; recorded.

A. The court, on motion of the prosecution, may order that the testimony of the minor be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment and any person whose presence would contribute to the welfare and well-being of the minor may be present in the room with the minor during his testimony. Only the attorneys may question the minor. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the minor during his testimony but does not permit the minor to see or hear them. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant.

B. The court, on motion of the prosecution, may order that the testimony of the minor be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection A may be present during the taking of the minor's testimony, and the persons operating the equipment shall be confined from the minor's sight and hearing as provided by subsection A. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant. The court shall also ensure that:

1. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.
2. The recording equipment was capable of making an accurate recording, the operator was competent and the recording is accurate and is not altered.
3. Each voice on the recording is identified.
4. Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

C. If the court orders the testimony of a minor to be taken pursuant to this section, the minor shall not be required to testify in court at the proceeding for which the testimony was taken.

Cases

Key Points:

- To avoid violating a defendant's rights under the Confrontation Clause, prosecutors have the burden to produce evidence showing that a child would (not "could") suffer particular trauma from testifying in court, particularly from cross-examination.
- This evidence must be particularized, or individualized to a prospective child witness's own circumstances and probable trauma.

In *State ex rel. Montgomery v. Padilla*, the Court of Appeals of Arizona held that the trial court had not erred by not restricting the defendant's ability to cross-examine the child victims and witness. *State ex rel. Montgomery v. Padilla*, 349 P.3d 1100 (Ariz. Ct. App. 2015). Pursuant to A.R.S. § 13-4251, § 13-4252, and § 13-4253, the Court may afford child victims and witnesses protection under an "individualized showing of necessity." *Id.* To do so, the plaintiff's counsel must bring forth evidence to show that the burden of testimony for the specific child would cause the child to suffer particular trauma. *Id.* Here, the Court stated that the State had failed to produce any evidence, and therefore if the trial court had prevented the defendant from cross-examining the children, the defendant's rights under the Confrontation Clause would have been violated. *Id.* Thus, without specific evidence of particular trauma a child may face by testifying in court or being personally cross-examined by the defendant, the Court has no constitutional basis to restrict the defendant. *Id.*

In *State v. Vincent*, the Supreme Court of Arizona reversed the trial court's holding, finding that the trial court had erred by allowing the child witnesses to provide testimony via videotape. In doing so, the court had violated the defendant's right to confront. *State v. Vincent*, 768 P.2d 150 (Ariz. 1989). The Court held that for a child to qualify for protection, the court must evaluate the particular circumstances and probable trauma of the specific child. *Id.* The Court agreed with the defendant's assertion that merely finding that the children "could" be traumatized and basing the decision on the presumed best interests of the children did not meet the threshold required to overcome the defendant's right to confrontation. *Id.* Additionally, the Court noted that any evidence supporting a

decision to admit a videotape at trial must discuss the "particularized need" of the child -- a general concern and assumption of trauma does not suffice. *Id.*

Arizona Hearsay Exceptions

A.R.S. § 8-237. Statement or conduct of child; hearsay exception.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.

Ariz. R. Evid. R. 803. Exceptions to the rule against hearsay--regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then existing mental, emotional, or physical condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.
- (4) ***Statement made for medical diagnosis or treatment.*** A statement that:
 - (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and
 - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
- (5) **Recorded recollection.** A record that:
 - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a regularly conducted activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a record of a regularly conducted activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public records.** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) **Public records of vital statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a public record.** Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 20 days before trial, and the defendant does not object in writing within 10 days of receiving the notice—unless the court sets a different time for the notice or the objection.

(11) **Records of religious organizations concerning personal or family history.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of marriage, baptism, and similar ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of documents that affect an interest in property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in documents that affect an interest in property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) **Market reports and similar commercial publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in learned treatises, periodicals, or pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation concerning personal or family history.** A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation concerning boundaries or general history.** A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation concerning character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a previous conviction.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments involving personal, family, or general history or a boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) **[Other exceptions.]** [Transferred to Rule 807.]

(25) **Former testimony (non-criminal action or proceeding).** Except in a criminal action or proceeding, testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Ariz. R. Evid. R. 804. Exceptions to the rule against hearsay -- when the declarant is unavailable as a witness.

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subsection (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony in a Criminal Case.* Testimony that:

- (A) was made under oath by a party or witness during a previous judicial proceeding or a deposition under Arizona Rule of Criminal Procedure 15.3 shall be admissible in evidence if:
 - (i) The party against whom the former testimony is offered was a party to the action or proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive

similar to that which the party now has (no person who was unrepresented by counsel at the proceeding during which a statement was made shall be deemed to have had the right and opportunity to cross-examine the declarant, unless such representation was waived) and

(ii) The declarant is unavailable as a witness, or is present and subject to cross-examination.

(B) The admissibility of former testimony under this subsection is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that the former testimony offered under this subsection is not subject to:

(i) Objections to the form of the question which were not made at the time the prior testimony was given.

(ii) Objections based on competency or privilege which did not exist at the time the former testimony was given.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Formerly (7) Other exceptions.] [Transferred to Rule 807.]

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

Ariz. R. Evid. R. 805. Hearsay within hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Ariz. R. Evid. R. 807. Residual exception.

(a) *In General.* Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness -- after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) *Notice.* The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement -- including its substance and the declarant's name -- so that the party has a fair opportunity to meet it. The notice must be provided in a writing filed with the court before the trial or hearing -- or in a filing during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Ariz. R. Evid. R. 106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

Cases

Key Points:

- A medical exception to hearsay can include a child's statements of identification or fault because an abuser's identity can be key to diagnosis and treatment of mental as well as physical health.

- To qualify as an excited utterance, a statement must consist of words related to a startling event, which must be spoken within a timeframe too narrow for the utterer to have fabricated the words.
- To qualify as a medical exception, a video recorded interview must be salient to a treating physician's diagnosis and/or treatment.

In *State v. Thompson*, the Court of Appeals of Arizona held that the trial court erred in admitting the child victim's out-of-court statements under the residual exception, and furthermore found that the statements would not have been admissible under either the excited utterance or medical exception. *State v. Thompson*, 820 P.2d 335 (Ariz. Ct. App. 1991). For a statement to qualify as an excited utterance, there must "1. be a startling event, 2. the words spoken must be spoken soon after the event so as not to give the person speaking the words time to fabricate, and 3. the words spoken must relate to the startling event." *Id.* The Court noted that although child victims may be given more leniency in timing, the four-hour interval between the assault and statements fell outside of the excited utterance time frame. *Id.* Furthermore, the Court noted that the subsequent video recorded interview with the child and a social worker was not admissible under the medical exception because the treating doctor neither attended the interview nor viewed the video, and did not state reliance on it for diagnosis or treatment. *Id.*

In *State v. Taylor*, the Court of Appeals of Arizona denied the defendant's claim that the trial court erred in admitting the victim's statement to her stepmother forty-five minutes after the incident under the excited utterance hearsay exception. *State v. Taylor*, 2 P.3d 674, 680 (Ariz. Ct. App. 1999). The eight-year-old victim was "still upset, crying, and shaking" when she told her stepmother that the defendant had touched her "private part." *Id.* The Court noted that, "although the opportunity for reflection increases as the length of time between the event and the statement increases, the " 'physical and emotional condition of the declarant is the important thing,' " and length of time is only one factor to consider in determining whether, under the totality of the circumstances, the statement was made while in a state of nervous excitement or shock. *Id.* (quoting *State v. Rivera*, 678 P.2d 1373, 1375 (1984)).

Arkansas

Arkansas Admissibility

Ark. Code Ann. § 16-44-203. Videotaped deposition of alleged victim under 17 years of age in sexual offense prosecution.

(a) As used in this section, the term "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

(b) In any prosecution for a sexual offense or criminal attempt to commit a sexual offense against a minor, upon motion of the prosecuting attorney and after notice to the opposing counsel, the court may, for good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of seventeen (17) years. The videotaped deposition shall be taken before the judge in chambers in the presence of the prosecuting attorney, the defendant, and the defendant's attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of the Arkansas Uniform Rules of Evidence.

(c) Any videotaped deposition taken under the provisions of this section shall be admissible at trial and received into evidence in lieu of the direct testimony of the alleged victim. However, neither the presentation nor the preparation of such videotaped deposition shall preclude the prosecutor's calling the alleged victim to testify at trial if that is necessary to serve the interests of justice.

(d) Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the alleged victim.

Cases

Key Points:

- Defendants must be afforded the opportunity to cross examine child victims when video recorded statements are admitted into evidence. (However, see Arkansas Hearsay Exceptions below.)
- For a trial court to have abused its discretion in finding a child witness competent to testify, a defendant must be able to show clear evidence.

In *Kester v. State*, the Supreme Court of Arkansas reversed the trial court's holding, finding that the trial court had erred in admitting video recorded testimony of the child victim. *Kester v. State*, 797 S.W.2d 704 (Ark. 1990). The trial court had allowed two videotapes of the child to be admitted: one

videotape was taken while the child was in the hospital for examination, and the other was taken via forensic interview. *Id.* In allowing the admission of the hospital tape, the trial court had erred by finding that there was no requirement for notice or confrontation of the witness by the defendant. *Id.* Rather, the Supreme Court of Arkansas held that the defendant's right of confrontation was violated and the child was effectively allowed to testify twice. *Id.*

In *Clem v. State*, the Supreme Court of Arkansas denied the defendant's argument that the trial court had erred in finding the seven-year-old victim competent to testify. *Clem v. State*, 90 S.W.3d 428 (Ark. 2002). The defendant argued that the child was not competent because the child was "unable to receive and retain accurate impressions, and because she lacked the capacity to transmit a reasonable statement of what transpired." *Id.* The Court noted that the trial court had sole discretion when determining competency, and was not an issue for appeal without evidence of clear abuse of its discretion. *Id.* The trial court had conducted two in camera hearings for the child, where the child was asked a multitude of questions and gave a sufficient answer to what constitutes a truth and a lie. *Id.* Thus, the Court found no instance of the trial court's abuse of discretion. *Id.*

Arkansas Hearsay Exceptions

AR R REV Rule 803. Hearsay exceptions -- availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present Sense Impression.*** -- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then Existing Mental, Emotional, or Physical Condition.*** -- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) ***Recorded Recollection.*** -- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his

memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Business Activity. -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6). -- Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. -- To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

(i) investigative reports by police and other law enforcement personnel;

(ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party;

(iii) factual findings offered by the government in criminal cases;

(iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and

(v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. -- Records or data compilations, in any form, of birth, 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. -- To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public

office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** -- Statements of births, marriages, divorces, death, 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.** -- 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.** -- Statements of fact concerning 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.** -- 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 applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** -- 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 twenty (20) years or more the authenticity of which 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 him 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 admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** -- Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) **Reputation Concerning Boundaries or General History.** -- Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and

reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** -- Reputation of a person's character among his associates or in the community.

(22) **Judgment of Previous Conviction.** -- Evidence of a final judgment, (entered after a trial or upon a plea of guilty,) adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

(24) **Other Exceptions.** -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(25) **Child Hearsay When Declarant Is Available at Trial and Subject to Cross-Examination.** A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against that child, which is inconsistent with the child's testimony and offered in a criminal proceeding, provided:

(A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness considering the competency of the child both at the time of the out of court statement and at the time of the testimony.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

AR R REV Rule 804. Hearsay exceptions -- declarant unavailable.

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;
- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;
- (3) Testifies to a lack of memory of the subject matter of his statement;
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) *Statement Under Belief of Impending Death.* A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.
- (3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offering to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.
- (4) *Statement of Personal or Family History.*
 - (i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(ii) a statement concerning the foregoing matters and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(i) the statement is offered as evidence of a material fact;

(ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(iii) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(6) Child Hearsay in Civil Cases in Which the Confrontation Clause of the Sixth Amendment of the Constitution of the United States Is Not Applicable. A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against the child, provided:

(A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.
2. The lack of time to fabricate.
3. The consistency and repetition of the statement and whether the child has recanted the statement.
4. The mental state of the child.
5. The competency of the child to testify.
6. The child's use of terminology unexpected of a child of similar age.
7. The lack of a motive by the child to fabricate the statement.
8. The lack of bias by the child.

9. Whether it is an embarrassing event the child would not normally relate.
10. The credibility of the person testifying to the statement.
11. Suggestiveness created by leading questions.
12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.
13. Corroboration of the statement by other evidence.
14. Corroboration of the alleged offense by other evidence.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

(7) Child Hearsay in Criminal Cases. A statement made by a child under the age of ten (10) years concerning any type of sexual offense against that child, where the Confrontation Clause of the Sixth Amendment of the United States is applicable, provided:

(A) The trial court conducts a hearing outside the presence of the jury, and, with the evidentiary presumption that the statement is unreliable and inadmissible, finds that the statement offered possesses sufficient guarantees of trustworthiness that the truthfulness of the child's statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.
2. The lack of time to fabricate.
3. The consistency and repetition of the statement and whether the child has recanted the statement.
4. The mental state of the child.
5. The competency of the child to testify.
6. The child's use of terminology unexpected of a child of similar age.
7. The lack of a motive by the child to fabricate the statement.
8. The lack of bias by the child.

9. Whether it is an embarrassing event the child would not normally relate.
10. The credibility of the person testifying to the statement.
11. Suggestiveness created by leading questions.
12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

AR R REV Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

AR R REV Rule 106. Remainder of or related writings or recorded statements.

Whenever a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

Cases

Key Points:

- Arkansas Rules of Evidence and hearsay exceptions relating to child statement admissibility are among the most advantageous in the United States.
- A trial court's decision to admit a child hearsay statement necessarily relies on a multitude of factors.
- A medical exception to hearsay can include a child's statements of identification or fault because an abuser's identity can be key to diagnosis and treatment of mental as well as physical health.

In *Rye v. State*, the Court of Appeals of Arkansas held that the child victim's out-of-court statements were properly admitted under the child-hearsay exception to the hearsay rule. *Rye v. State*, 373

S.W.3d 354 (Ark. Ct. App. 2009). Prior to admitting a child hearsay statement, the trial court may employ any factor it deems appropriate including, but not limited to, the following: "(1) the spontaneity of the statement; (2) the lack of time to fabricate; (3) the consistency and repetition of the statement and whether the child has recanted the statement; (4) the mental state of the child; (5) the competency of the child to testify; (6) the child's use of terminology unexpected of a child of similar age; (7) the lack of a motive by the child to fabricate the statement; (8) the lack of bias by the child; (9) whether it is an embarrassing event the child would not normally relate; (10) the credibility of the person testifying to the statement; (11) suggestiveness created by leading questions; (12) whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges." *Id.* The Court affirmed the trial court's finding that the statement had guarantees of truthfulness based on the spontaneous nature, the fact that the statements had not been recanted or recited since the original statement, the striking terminology used by the minor, the lack of a motive to fabricate, and the lack of evidence of any ill-will. *Id.* Thus, the statement was properly admitted under the exception. *Id.*

In *Hawkins v. State*, the Supreme Court of Arkansas held that the trial court properly admitted the examining physician's testimony that the child victim had identified the defendant as the person who raped her under the hearsay exception for statements made for purposes of medical diagnosis or treatment. *Hawkins v. State*, 72 S.W.3d 493 (Ark. 2002). The Court noted that the child's identification of the defendant as her abuser aided the examining physician to take steps to prevent further abuse, as the defendant was a member of the victim's household. *Id.* Additionally, the victim's identification of the defendant allowed the physician to take specific steps to treat her psychological injuries related to familial abuse. *Id.* Thus, the identification of the defendant was for medical diagnosis and treatment, and properly admitted. *Id.*

California

California Admissibility

Cal. Penal Code § 1346. Video reporting of victim's preliminary hearing testimony; Admission of video recording at trial

(a) When a defendant has been charged with a violation of Section 220, 243.4261, 261.5 264.1, 269, 273a, 273d, 285, 286, 287, 288, 288.5, 288.7, 289, 647.6, or former Section 288a, and the victim either is a person 15 years of age or younger or is developmentally disabled as a result of an intellectual disability, as specified in subdivision (a) of Section 4512 of the Welfare and Institutions Code, the people may apply for an order that the victim's testimony at the preliminary hearing, in addition to being stenographically recorded, be video recorded and the video recording preserved.

(b) The application for the order shall be in writing and made three days prior to the preliminary hearing.

(c) Upon timely receipt of the application, the magistrate shall order that the testimony of the victim given at the preliminary hearing be taken and preserved as a video recording, in addition to being stenographically recorded. The video recording shall be transmitted to the clerk of the court in which the action is pending.

(d) If at the time of trial, the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or unavailable within the meaning of Section 240 of the Evidence Code, the court may admit the video recording of the victim's testimony at the preliminary hearing as former testimony under Section 1291 of the Evidence Code.

(e) A video recording that is taken pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the victim. This subdivision does not affect the provisions of subdivision (b) of Section 868.7.

(f) A video recording made pursuant to this section shall be made available to the prosecuting attorney, the defendant, and his or her attorney for viewing during ordinary business hours. A video recording that is made available pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the victim.

(g) The video recording shall be destroyed after five years have elapsed from the date of entry of judgment, except that if an appeal is filed, the video recording shall not be destroyed until a final judgment on appeal has been rendered.

CAL. WEL. & INST. § 16519.62. Admissibility of out-of-court statements of child under 12 years of age.

(a) The out-of-court statements of a child under 12 years of age who is the subject or victim of an allegation at issue constitutes admissible evidence at an administrative hearing conducted pursuant to this article. The out-of-court statement may provide the sole basis for a finding of fact if the proponent of the statement provided the statement to all parties prior to the hearing and the adjudicator finds that the time, content, and circumstances of the statement provide sufficient indicia of reliability. However, the out-of-court statement shall not be admissible if an objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence.

(b) This section shall not be construed to limit the right of any party to the administrative hearing to subpoena a witness whose statement is admitted as evidence or to introduce admissible evidence relevant to the weight of the hearsay evidence or the credibility of the hearsay declarant.

Cases

In *People v. Mitchell*, the California Court of Appeals upheld the trial court's decision to admit the child victims' out-of-court statements in a case of child torture, mayhem, and misdemeanor child abuse. *People v. Mitchell*, 260 Cal.Rptr.3d 285 (Cal. Ct. App. 2020). The defendant argued that the trial court erroneously applied §1360 of the California Evidence Code to the case, noting that the offenses with which the defendant was charged were not enumerated under the statute. *Id.* The Court held that the statute was not intended to be interpreted narrowly -- doing so would allow child statements to only be admissible for cases where the defendant was "only charged with a misdemeanor pursuant to Penal Code section 273a, but inadmissible where the defendant's conduct is more severe, warranting more serious charges." *Id.*

California Hearsay Exceptions

CA. EVID. §1226. Statement of minor child in parent's action for child's injury.

Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 of the Code of Civil Procedure for injury to such minor child.

CA. EVID. §1228. Admissibility of certain out-of-court statements of minors under the age of 12; establishing elements of certain sexually oriented crimes; notice to defendant.

Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of violating Section 261, 264.1, 285, 286, 287, 288, 289, or 647a of, or former Section 288a of, the Penal Code, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following:

- (a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department.
- (b) The statement describes the minor child as a victim of sexual abuse.
- (c) The statement was made prior to the defendant's confession. The court shall view with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice.
- (d) There are no circumstances, such as significant inconsistencies between the confession and the statement concerning material facts establishing any element of the crime or the identification of the defendant, that would render the statement unreliable.
- (e) The minor child is found to be unavailable pursuant to paragraph (2) or (3) of subdivision (a) of Section 240 or refuses to testify.
- (f) The confession was memorialized in a trustworthy fashion by a law enforcement official.

If the prosecution intends to offer a statement of the complaining witness pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement.

If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the statement is found to be admissible pursuant to this section, it shall be admitted out of the presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.

CAL. EVID. §1240. Spontaneous statement.

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

- (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
- (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

CAL. EVID. §1253. Statements for purposes of medical diagnosis or treatment; contents of statement; child abuse or neglect; age limitations.

Subject to Section 1252, evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. This section applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect. "Child abuse" and "child neglect," for purposes of this section, have the meanings provided in subdivision (c) of Section 1360. In addition, "child abuse" means any act proscribed by Chapter 5 (commencing with Section 281) of Title 9 of Part 1 of the Penal Code committed against a minor.

CAL. EVID. §1293. Former testimony by minor child complaining witness at preliminary examination.

(a) Evidence of former testimony made at a preliminary examination by a minor child who was the complaining witness is not made inadmissible by the hearsay rule if:

(1) The former testimony is offered in a proceeding to declare the minor a dependent child of the court pursuant to Section 300 of the Welfare and Institutions Code.

(2) The issues are such that a defendant in the preliminary examination in which the former testimony was given had the right and opportunity to cross-examine the minor child with an interest and motive similar to that which the parent or guardian against whom the testimony is offered has at the proceeding to declare the minor a dependent child of the court.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the minor child were testifying at the proceeding to declare him or her a dependent child of the court.

(c) The attorney for the parent or guardian against whom the former testimony is offered or, if none, the parent or guardian may make a motion to challenge the admissibility of the former testimony upon a showing that new substantially different issues are present in the proceeding to declare the minor a dependent child than were present in the preliminary examination.

(d) As used in this section, "complaining witness" means the alleged victim of the crime for which a preliminary examination was held.

(e) This section shall apply only to testimony made at a preliminary examination on and after January 1, 1990.

CAL. EVID. §1350. Unavailable declarant; hearsay rule.

(a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:

(1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.

(2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.

(3) The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.

(4) The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.

(5) The statement is relevant to the issues to be tried.

(6) The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

(b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial.

(c) If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

(d) As used in this section, "serious felony" means any of the felonies listed in subdivision (c) of Section 1192.7 of the Penal Code or any violation of Section 11351, 11352, 11378, or 11379 of the Health and Safety Code.

(e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.

CAL. EVID. §1360. Statements describing an act or attempted act of child abuse or neglect; criminal prosecutions; requirements.

(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

(1) The statement is not otherwise admissible by statute or court rule.

(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

(3) The child either:

(A) Testifies at the proceedings.

(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

(c) For purposes of this section, "child abuse" means an act proscribed by Section 273a, 273d, or 288.5 of the Penal Code, or any of the acts described in Section 11165.1 of the Penal Code, and "child neglect" means any of the acts described in Section 11165.2 of the Penal Code.

CA. HLTH & S §1596.8872. Witnesses under age 12; hearsay testimony.

(a)

(1) An out-of-court statement made by a minor under 12 years of age who is the subject or victim of an allegation at issue is admissible evidence at an administrative hearing conducted pursuant to this article. The out-of-court statement may be used to support a finding of fact unless an objection is timely made and the objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence. However, the out-of-court statement may not be the sole basis for the finding

of fact, unless the adjudicator finds that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

(2) The proponent of the statement shall give reasonable notice to all parties of the intended introduction of the statement at the hearing.

(3) For purposes of this subdivision, an objection is timely if it identifies with reasonable specificity the disputed out-of-court statement and it gives the proponent of the evidence a reasonable period of time to prepare a response to the objection prior to the hearing.

(b) This section shall not be construed to limit the right of any party to the administrative hearing to subpoena a witness whose statement is admitted as evidence or to introduce admissible evidence relevant to the weight of the hearsay evidence or the credibility of the hearsay declarant.

CAL. EVID. § 356. Entire act, declaration conversation, or writing to elucidate part offered.

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

Cases

Key Points:

- The consistency of a child's out-of-court statements, especially given their age and competency among other factors, is inconsistently perceived by courts.
- A trial court's decision to admit a child's out-of-court statement necessarily relies on a multitude of factors.

In *In re I.C.*, the Supreme Court of California held that the trial court erred in finding the child victim's hearsay statements sufficient to support conviction of the defendant, her father. *In re I.C.*, 415 P.3d 773 (Cal. 2018). The child disclosed following another incident of abuse she endured from a peer -- both courts noted that her accusation against her father mirrored the accusations against her peer. *Id.* Although the child appeared to be unclear and confused in her statements, the trial court found that her initial statement of her father's abuse was spontaneous and that her subsequent statements were consistent. *Id.* Given the child's young age of three, the court found that these statements outweighed the unreliable statements. *Id.* However, the Supreme Court of California disagreed, noting that the "striking similarities" of the two allegations, coupled with the "inconsistencies and

inaccuracies that were woven through her core allegations" rendered her hearsay statements unreliable and thus overturned the defendant's conviction. *Id.*

In *In re Cindy L.*, the Supreme Court of California held that the juvenile court did not abuse its discretion by finding the child victim's out-of-court statement to a teacher's aide about sexual abuse from their father to be admissible and competent evidence under the child dependency hearsay exception. *In re Cindy L.*, 947 P.2d 1340 (Cal. 1997). First, the Court noted that the child's statements were spontaneous, unprompted, and consistent. *Id.* Second, the Court found the child's statements to be sufficiently corroborated by a medical examination, which found symptoms in line with sexual abuse; the Court noted that the corroborating evidence was necessary due to the child's incompetency and inability to be cross-examined. *Id.* Finally, the Court noted that the defendant knew of the child's statements and was not surprised by them. *Id.* Thus, the child's hearsay statements were properly admitted by the trial court. *Id.*

Colorado

Colorado Admissibility

Colo. Rev. Stat. Ann. § 18-3-411. Sex offenses against children -- definition -- limitation for commencing proceedings -- evidence -- statutory privilege.

(1) As used in this section, "unlawful sexual offense" means enticement of a child, as described in section 18-3-305; sexual assault, as described in section 18-3-402, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the first degree, as described in section 18-3-402, as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the second degree, as described in section 18-3-403(1)(a), (1)(b), (1)(c), (1)(d), (1)(g), or (1)(h), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age, or as described in section 18-3-403(1)(e), as it existed prior to July 1, 2000, when the victim is less than fifteen years of age and the actor is at least four years older than the victim; unlawful sexual contact, as described in section 18-3-404(1)(a), (1)(b), (1)(c), (1)(d), (1)(f), or (1)(g), when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the third degree, as described in section 18-3-404(1)(a), (1)(b), (1)(c), (1)(d), (1)(f), or (1)(g), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault on a child, as described in section 18-3-405; sexual assault on a child by one in a position of trust, as described in section 18-3-405.3; aggravated incest, as described in section 18-6-302; human trafficking of a minor for sexual servitude, as described in section 18-3-504(2); sexual exploitation of a child, as described in section 18-6-403; procurement of a child for sexual exploitation, as described in section 18-6-404; indecent exposure, as described in section 18-7-302; soliciting for child prostitution, as described in section 18-7-402; pandering of a child, as described in section 18-7-403; procurement of a child, as described in section 18-7-403.5; keeping a place of child prostitution, as described in section 18-7-404; pimping of a child, as described in section 18-7-405; inducement of child prostitution, as described in section 18-7-405.5; patronizing a prostituted child, as described in section 18-7-406; class 4 felony internet luring of a child, as described in section 18-3-306(3); internet sexual exploitation of a child, as described in section 18-3-405.4; unlawful electronic sexual communication, as described in section 18-3-418; or criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

(2) No person shall be prosecuted, tried, or punished for a misdemeanor offense specified in section 18-3-402 or 18-3-404, unless the indictment, information, complaint, or action for the same is found or instituted within five years after the commission of the offense. The limitation for commencing criminal proceedings and juvenile delinquency proceedings concerning unlawful sexual offenses that are felonies shall be governed by section 16-5-401(1)(a), C.R.S

(3) An out-of-court statement made by a child, as "child" is defined under the statutes that are the subject of the action, or a person under fifteen years of age if "child" is undefined under the statutes that are the subject of the action, describing all or part of an offense of unlawful sexual behavior, as

defined in section 16-22-102(9), performed or attempted to be performed with, by, on, or in the presence of the child declarant, and that is not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, may be admissible pursuant to section 13-25-129(2).

(4) All cases involving the commission of an unlawful sexual offense shall take precedence before the court; the court shall hear these cases as soon as possible after they are filed.

(5) The statutory privilege between the husband and the wife shall not be available for excluding or refusing testimony in any prosecution of an unlawful sexual offense.

(6) Prosecution for any incident of sexual contact constituting the offense or any incident of sexual contact constituting a pattern offense of sexual abuse pursuant to section 18-3-405(2)(d) or 18-3-405.3(2)(b) may be commenced and the offenses charged in an information or indictment in a county where at least one of the incidents occurred or in a county where an act in furtherance of the offense was committed.

Colo. Rev. Stat. Ann § 18-3-413. Video tape depositions – children - victims of sexual offenses

(1) When a defendant has been charged with an unlawful sexual offense, as defined in section 18-3-411 (1), or incest, as defined in section 18-6-301, and when the victim at the time of the commission of the act is a child less than fifteen years of age, the prosecution may apply to the court for an order that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on video tape.

(2) The prosecution shall apply for the order in writing at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition.

(3) Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, the victim is likely to be medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence. Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on video tape. The prosecution shall transmit the video tape to the clerk of the court in which the action is pending.

(4) If at the time of trial, the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the video tape of the victim's deposition as former testimony under rule 804 (b)(1) of the Colorado rules of evidence.

(5) Nothing in this section shall prevent the admission into evidence of any videotaped statements of children which would qualify for admission pursuant to section 13-25-129, C.R.S., or any other statute or rule of evidence.

Colo. Rev. Stat. Ann § 18-6-401.3. Video tape depositions - children - victims of child abuse

- (1)** When a defendant has been charged with an act of child abuse, as defined in section 18-6-401 (1), and when the victim at the time of the commission of the act is a child less than fifteen years of age, the prosecution may apply to the court for an order that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on video tape.
- (2)** The prosecution shall apply for the order in writing at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition.
- (3)** Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, the victim is likely to be medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence. Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on video tape. The prosecution shall transmit the video tape to the clerk of the court in which the action is pending.
- (4)** If at the time of trial, the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the video tape of the victim's deposition as former testimony under rule 804 (b)(1) of the Colorado rules of evidence.
- (5)** Nothing in this section shall prevent the admission into evidence of any videotaped statements of children that would qualify for admission pursuant to section 13-25-129, C.R.S., or any other statute or rule of evidence.

Colo. Rev. Stat. Ann § 19-3-308.5. Recorded interviews of child

- (1)** Any interview of a child conducted pursuant to section 19-3-308, concerning a report of child abuse, may be audiotaped or videotaped. However, interviews concerning reports of sexual child abuse are strongly encouraged to be videotaped. Any audiotaped or videotaped interview shall be conducted by a competent interviewer at a child advocacy center, as that term is defined in section 19-1-103 (19.5), that has a memorandum of understanding with the agency responsible for the investigation or by a competent interviewer for the agency responsible for the investigation in accordance with such section; except that an interview shall not be videotaped when doing so is impracticable under the circumstances or will result in trauma to the child, as determined by the investigating agency. No more than one videotaped interview shall be required unless the interviewer or the investigating agency determines that additional interviews are necessary to complete an investigation. Additional interviews shall be conducted, to the extent possible, by the same interviewer. Such recordings shall be preserved as evidence in the manner and for a period provided by law for maintaining such evidence. In addition, access to such recordings shall be subject to the rules of discovery under the Colorado rules of criminal and civil procedure.

(2) The provisions of this section shall not apply to a videotaped deposition taken in accordance with and governed by section 18-3-413, C.R.S., or section 13-25-132, C.R.S., and rule 15 (d) of the Colorado rules of criminal procedure. In addition, this section shall not apply to interviews of the child conducted after a dependency and neglect action or a criminal action has been filed with the court.

(3) Any agency subject to the provisions of this section shall provide equipment necessary to videotape or audiotape the interviews or shall enter into a memorandum of understanding with a child advocacy center authorizing the use of such equipment. The investigating agency shall train persons responsible for conducting videotaped interviews in accordance with this section; except that the agency shall not be responsible for training interviewers employed by a child advocacy center. The agency shall adopt standards for persons conducting such interviews.

(4) An agency that enters into a memorandum of understanding with a child advocacy center that employs interviewers shall assure that such interviewers meet the training standards for persons conducting interviews adopted by the agency pursuant to subsection (3) of this section. In addition, an agency that enters into a memorandum of understanding with a child advocacy center that provides technical assistance for forensic interviews, forensic medical examinations, or evidence collection or preservation may require that the child advocacy center meets the national performance standards for children's advocacy centers as established by the national accrediting body. These standards include, but are not limited to, standards for forensic interviews to be conducted in a manner which is of a neutral, fact-finding nature and coordinated to avoid duplicative interviewing.

Cases

Key Points:

- Nonverbal assertions from one set of hearsay statements are not considered to be corroborative evidence that can support a child victim's other out-of-court statements. (*Editor's Note:* From an investigative and prosecutorial perspective, nonverbal gestures can and do constitute corroborative evidence.)
- A child between the ages of 15 and 18 still counts as a child under the law, so their out-of-court statements remain admissible.

In *People v. Bowers*, the Supreme Court of Colorado upheld the court of appeals in finding the child victim's out-of-court statements to be inadmissible. *People v. Bowers*, 801 P.2d 511 (Colo. 1990). In accordance with §13-25-129(1)(b)(II), a child's out-of-court statements must be corroborated with evidence to be admissible. *Id.* The Court stated that the trial court had originally erred by allowing the child's statements to police and counselor to be admitted. *Id.* The trial court had erroneously found the child's non-verbal gestures to an anatomically correct doll during said interviews to be corroborative evidence. *Id.* The Supreme Court held that these non-verbal assertions were hearsay, and thus not admissible as corroborative evidence. *Id.* (*Editor's Note:* From an investigative and prosecutorial perspective, nonverbal gestures can and do constitute corroborative evidence.)

In *People v. Chirinos-Raudales*, the Colorado Court of Appeals denied the defendant's argument that a child must be under the age of 15 at the time of giving their out-of-court statement for it to be admissible. *People v. Chirinos-Raudales*, 2021 WL 1133843 at *2-4 (Colo. App. 2021). The Court noted that the defendant's analysis would lead to absurd results and that "a child victim in this instance does not cease to be a child for purposes of the child hearsay statute merely because a defendant committed a more aggravated version of the offense." *Id.* The Court held that because two of four counts against the defendant defined "child" as under 18, the child's age of 15 sufficed and the evidence could be admitted. *Id.*

Colorado Hearsay Exceptions

C.R.S.A. § 13-25-129. Statements of child -- hearsay exception.

(1) An out-of-court statement made by a person under thirteen years of age, not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, is admissible in any criminal, delinquency, or civil proceeding in which the person is alleged to have been a victim if the conditions of subsection (5) of this section are satisfied.

(2) An out-of-court statement made by a child, as child is defined under the statutes that are the subject of the action, or a person under fifteen years of age if child is undefined under the statutes that are the subject of the action, describing all or part of an offense of unlawful sexual behavior, as defined in section 16-22-102(9), performed or attempted to be performed with, by, on, or in the presence of the child declarant, and that is not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, is admissible in evidence in any criminal, delinquency, or civil proceeding if the conditions of subsection (5) of this section are satisfied.

(3) An out-of-court statement by a child, as child is defined under the statutes that are the subject of the action, describing any act of child abuse, as defined in section 18-6-401, to which the child declarant was subjected or that the child declarant witnessed, and that is not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection, is admissible in evidence in any criminal, delinquency, or civil proceeding in which a child is a victim of child abuse or the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104(1)(b), if the conditions of subsection (5) of this section are satisfied.

(4) An out-of-court statement made by a person under thirteen years of age describing all or part of an offense contained in part 1 of article 3 of title 18, or describing an act of domestic violence as defined in section 18-6-800.3(1), and that is not otherwise admissible by statute or court rule that provides an exception to the hearsay objection, is admissible in evidence in any criminal, delinquency, or civil proceeding if the conditions of subsection (5) of this section are satisfied.

(5)

(a) The exceptions to the hearsay objection described in subsections (1) to (4) of this section apply only if the court finds in a pretrial hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(b) The child either:

(I) Testifies at the proceedings; or

(II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(6) If a statement is admitted pursuant to this section, the court shall instruct the jury in the final written instructions that during the preceding the jury heard evidence repeating a child's out-of-court statement and that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, the jury shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(7) The proponent of the statement shall give the adverse party reasonable notice of the proponent's intention to offer the statement and the particulars of the statement.

CO. ST. REV. Rule 804. Hearsay exceptions: declarant unavailable.

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant --

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

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

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(3) or (4) his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) [There is no paragraph (b)(2).]

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Transferred to Rule 807]

CO. ST. REV. Rule 807. Residual exception.

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

CO. ST. REV. Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- A trial court's decision to admit a child hearsay statement necessarily relies on a multitude of factors in assessing the statement's reliability.

In *People v. Rojas*, the Colorado Court of Appeals held that the trial court properly admitted child victim's hearsay statements. *People v. Rojas*, 181 P.3d 1216 (Colo. App. 2008). The Court denied the defendant's argument that the child's statements lacked sufficient safeguards of reliability, noting that reliability may be evaluated by the following factors: "(1) Whether the statement was made spontaneously; (2) whether the statement was made while the child was still upset or in pain from the alleged abuse; (3) whether the language of the statement was likely to have been used by a child the age of the declarant; (4) whether the allegation was made in response to a leading question; (5) whether either the child or the hearsay witness had any bias against the defendant or any motive for lying; (6) whether any other event occurred between the time of the abuse and the time of the statement which could account for the contents of the statement; (7) whether more than one person heard the statement; and (8) the general character of the child." *Id.* Despite the lack of findings generally, the Court noted that the child gave her statements in response to non-leading, open-ended questions. *Id.* Additionally, the child gave her statements shortly after the incident and her demeanor was abnormal, she used age-appropriate language to describe the events, and she consistently retold the same series of events. *Id.* Thus, the Court found the child's statements to be sufficiently reliable. *Id.*

In *People v. Cernazanu*, the Colorado Court of Appeals held that the child victim's out-of-court statements to her mother describing the defendant's abuse were sufficiently reliable to be admitted under the hearsay exception. *People v. Cernazanu*, 410 P.3d 603 (Colo. App. 2015). The Court noted that the trial court properly held a pre-trial hearing to assess the reliability of the child's statements,

and found the spontaneity, consistency, and use of age appropriate language to sufficiently show reliability. *Id.*

Connecticut

Connecticut Admissibility

Conn. Gen. Stat. § 46b-137. Admissibility of admission, confession or statement in juvenile proceedings

(a) Any admission, confession or statement, written or oral, made by a child under the age of sixteen to a police officer or Juvenile Court official shall be inadmissible in any proceeding concerning the alleged delinquency of the child making such admission, confession or statement unless made by such child in the presence of the child's parent or parents or guardian and after the parent or parents or guardian and child have been advised

(1) of the child's right to retain counsel, or if unable to afford counsel, to have counsel appointed on the child's behalf,

(2) of the child's right to refuse to make any statements, and

(3) that any statements the child makes may be introduced into evidence against the child.

(b) Any admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age to a police officer or Juvenile Court official, except an admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age to a police officer in connection with a case transferred to the Juvenile Court from the youthful offender docket, regular criminal docket of the Superior Court or any docket for the presentment of defendants in motor vehicle matters, shall be inadmissible in any proceeding concerning the alleged delinquency of the child making such admission, confession or statement, unless

(1) the police or Juvenile Court official has made reasonable efforts to contact a parent or guardian of the child, and

(2) such child has been advised that

(A) the child has the right to contact a parent or guardian and to have a parent or guardian present during any interview,

(B) the child has the right to retain counsel or, if unable to afford counsel, to have counsel appointed on behalf of the child,

(C) the child has the right to refuse to make any statement, and

(D) any statement the child makes may be introduced into evidence against the child.

(c) The admissibility of any admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age to a police officer or Juvenile Court official, except an admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age to a

police officer in connection with a case transferred to the Juvenile Court from the youthful offender docket, regular criminal docket of the Superior Court or any docket for the presentment of defendants in motor vehicle matters, shall be determined by considering the totality of the circumstances at the time of the making of such admission, confession or statement. When determining the admissibility of such admission, confession or statement, the court shall consider

- (1) the age, experience, education, background and intelligence of the child,
- (2) the capacity of the child to understand the advice concerning rights and warnings required under subdivision (2) of subsection (b) of this section, the nature of the privilege against self-incrimination under the United States and Connecticut Constitutions, and the consequences of waiving such rights and privilege,
- (3) the opportunity the child had to speak with a parent, guardian or some other suitable individual prior to or while making such admission, confession or statement, and
- (4) the circumstances surrounding the making of the admission, confession or statement, including, but not limited to,
 - (A) when and where the admission, confession or statement was made,
 - (B) the reasonableness of proceeding, or the need to proceed, without a parent or guardian present, and
 - (C) the reasonableness of efforts by the police or Juvenile Court official to attempt to contact a parent or guardian.

(d) Any confession, admission or statement, written or oral, made by the parent or parents or guardian of the child or youth after the filing of a petition alleging such child or youth to be neglected, uncared for or abused shall be inadmissible in any proceeding held upon such petition against the person making such admission or statement unless such person shall have been advised of the person's right to retain counsel, and that if the person is unable to afford counsel, counsel will be appointed to represent the person, that the person has a right to refuse to make any statement and that any statements the person makes may be introduced in evidence against the person, except that any statement made by the mother of any child or youth, upon inquiry by the court and under oath if necessary, as to the identity of any person who might be the father of the child or youth shall not be inadmissible if the mother was not so advised.

Conn. Gen. Stat. § 54-861. Admissibility in criminal or juvenile proceeding of statement by child twelve years of age or younger at time of statement relating to sexual offense of offense involving physical abuse against the child

(a) Notwithstanding any other rule of evidence or provision of law, a statement by a child twelve years of age or younger at the time of the statement relating to a sexual offense committed against that child, or an offense involving physical abuse committed against that child by the child's parent or

guardian or any other person exercising comparable authority over the child at the time of the offense, shall be admissible in a criminal or juvenile proceeding if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, if any, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness,
- (2) the statement was not made in preparation for a legal proceeding,
- (3) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement including the content of the statement, the approximate time, date and location of the statement, the person to whom the statement was made and the circumstances surrounding the statement that indicate its trustworthiness, at such time as to provide the adverse party with a fair opportunity to prepare to meet it, and
- (4) either
 - (A) the child testifies and is subject to cross-examination at the proceeding, or
 - (B) the child is unavailable as a witness and
 - (i) there is independent nontestimonial corroborative evidence of the alleged act, and
 - (ii) the statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

(b) Nothing in this section shall be construed to

- (1) prevent the admission of any statement under another hearsay exception,
- (2) allow broader definitions in other hearsay exceptions for statements made by children twelve years of age or younger at the time of the statement concerning any alleged act described in subsection (a) of this section than is done for other declarants, or
- (3) allow the admission pursuant to the residual hearsay exception of a statement described in subsection (a) of this section.

Conn. Gen. Stat. § 17a-106a. Multidisciplinary teams. Purpose. Composition. Confidentiality. Records of meetings.

(a) For purposes of this section, "children's advocacy center" means an entity accredited or granted associate or developing status by the National Children's Alliance that provides a child-focused, trauma-informed, facility-based program that fosters collaboration among members of a multidisciplinary team established pursuant to subsection (b) of this section for the purpose of interviewing or meeting with children and children's parents, guardians or other caregivers, in order to obtain information and provide such information to personnel charged with making decisions

regarding the investigation and prosecution of allegations of child abuse or neglect or trafficking, as defined in section 46a-170, of children and the safety, treatment and provision of services to alleged victims of child abuse or neglect or trafficking of children.

(b) The Commissioner of Children and Families, as department head of the lead agency, and the appropriate state's attorney may establish multidisciplinary teams for the purposes of

- (1)** reviewing particular cases or particular types of cases,
- (2)** coordinating the intervention in and prevention of child abuse or neglect or trafficking of children and the treatment of abused, neglected or trafficked children in each judicial district,
- (3)** reviewing selected cases of child abuse or neglect or trafficking of children,
- (4)** advancing and coordinating the prompt investigation of suspected cases of child abuse or neglect or trafficking of children,
- (5)** reducing the trauma experienced by alleged victims of such abuse or neglect or trafficking and,
- (6)** ensuring the treatment of abused, neglected or trafficked children and the protection of such children and their families. The head of the local law enforcement agency or such head's designee may request the assistance of the Division of State Police within the Department of Emergency Services and Public Protection in order to accomplish such purposes.

(c) Each multidisciplinary team shall consist of at least one representative of each of the following:

- (1)** The state's attorney of the judicial district of the multidisciplinary team, or such state's attorney's designee;
- (2)** the Commissioner of Children and Families, or the commissioner's designee;
- (3)** the heads of the local or state law enforcement agencies, or such heads' designees;
- (4)** a health care professional with substantial experience in the diagnosis and treatment of abused or neglected children, who shall be designated by the multidisciplinary team members;
- (5)** a member, where appropriate, of a youth service bureau;
- (6)** a mental health professional with substantial experience in the treatment of abused or neglected children, who shall be designated by the multidisciplinary team members;
- (7)** a forensic interviewer, who shall be designated by the multidisciplinary team members;
- (8)** a victim advocate, who shall be designated by the multidisciplinary team members; and
- (9)** any other appropriate individual with expertise in the welfare of children that the members of the multidisciplinary team deem necessary. Each multidisciplinary team shall select a

chairperson. Each multidisciplinary team may invite experts to participate in the review of any case and may invite any other individual with particular information germane to the case to participate in such review, provided the expert or individual shall have the same protections and obligations under subsections (h) to (j), inclusive, of this section as members of the multidisciplinary team.

(d) The Governor's task force for justice for abused children, through the subcommittee comprised of individuals with expertise in the investigation of child abuse and neglect, shall:

- (1)** Establish and modify standards to be observed by multidisciplinary teams;
- (2)** review protocols of the multidisciplinary teams; and
- (3)** monitor and evaluate multidisciplinary teams and make recommendations for modifications to the system of multidisciplinary teams.

(e) Children's advocacy centers may assist multidisciplinary teams by

- (1)** providing safe, child and family-friendly settings that maintain the privacy of children and their families;
- (2)** establishing policies and procedures that are culturally competent;
- (3)** aiding in the development of written protocols for an interdisciplinary and coordinated approach to such investigations;
- (4)** providing forensic interviews of children that
 - (A)** are conducted by a trained forensic interviewer,
 - (B)** are recorded,
 - (C)** solicit information in an unbiased, fact-finding manner that is culturally sensitive and appropriate for each child's developmental stage, and
 - (D)** may be observed by members of the multidisciplinary teams involved in such investigations whenever possible;
- (5)** providing specialized medical evaluation and treatment, mental health services and support and advocacy services to children at such centers or through coordination with and referral to other appropriate providers of such services;
- (6)** providing regular case review for the purpose of aiding in decision-making, problem solving, systems coordination and information sharing concerning the status of cases and the services required by children and their families; and
- (7)** providing a tracking system for monitoring the progress and outcomes of cases.

(f) The state chapter of the National Children's Alliance and multidisciplinary teams may

- (1)** coordinate and facilitate the exchange of information among children's advocacy centers;
- (2)** provide technical assistance to municipalities in order to support the establishment, growth and accreditation of children's advocacy centers;
- (3)** educate the public and the General Assembly on the needs of victims of child abuse or neglect or trafficking of children;
- (4)** provide or coordinate multidisciplinary training opportunities that support a comprehensive response to allegations of child abuse or neglect or trafficking of children; and
- (5)** submit a report annually to the Governor's task force on justice for abused children and the General Assembly concerning outcomes from each children's advocacy center.

(g) All criminal investigative work of multidisciplinary teams shall be undertaken by members of such multidisciplinary teams who are law enforcement officers and all child protection investigative work of such multidisciplinary teams shall be undertaken by members of such multidisciplinary teams who represent the Department of Children and Families, provided such representatives may coordinate investigative work with such multidisciplinary teams and rely upon information generated by such multidisciplinary teams in the course of such department's investigations. The protocols, procedures and standards of such multidisciplinary teams shall not supersede the protocols, procedures and standards of the agencies who are represented by members of such multidisciplinary teams.

(h) Each multidisciplinary team shall have access to and may copy any record, transcript, document, photograph or other data pertaining to an alleged child victim within the possession of the Department of Children and Families, any public or private medical facility or any public or private health professional provided, in the case of confidential information, the coordinator of the multidisciplinary team, or such coordinator's designee, shall identify the record in writing and certify, under oath, that the record sought is necessary to investigate child abuse or neglect and that the multidisciplinary team will maintain the record as confidential. No person who provides access to or copies of a record upon delivery of certification under this section shall be liable to any third party for such action. No multidisciplinary team shall be deemed a public agency as defined in section 1-200, for the purposes of the Freedom of Information Act.

(i) No person shall disclose information obtained from a meeting of a multidisciplinary team without the consent of the participant of the meeting who provided such information unless disclosure is ordered by a court of competent jurisdiction or is necessary to comply with the provisions of the Constitution of the state of Connecticut.

(j) Each multidisciplinary team shall maintain records of meetings that include, but are not limited to, the name of the alleged victim and perpetrator, the names of the members of the multidisciplinary team and such members' positions, the decision or recommendation of the multidisciplinary team and information regarding support services provided. In any proceeding to gain access to such records or testimony concerning matters discussed at such meetings, the privileges from disclosure applicable to the information provided by each of the participants at such meeting shall apply to all participants.

Cases

Key Points:

- A video recorded interview does not violate the U.S. Constitution's 6th Amendment Confrontation Clause so long as the defendant has access to counsel during the child victim's testimony, and the defendant's counsel can cross-examine the witness.
- Forensic interviews conducted for the purpose of medical assistance rather than to build a case against the defendant are nontestimonial and therefore admissible.

In *State v. Arroyo*, the Supreme Court of Connecticut denied the defendant's claim that the trial court had erred in allowing the admission of the victim's video interview. *State v. Arroyo*, 935 A.2d 975 (Conn. 2007). The Court held that the State had provided clear and convincing evidence that the victim would be unable to testify in front of the defendant. *Id.* Furthermore, the Court held that the trial court had adequately balanced the defendant's right to confrontation by first, allowing his counsel to cross-examine the victim; and second, giving the defendant both the opportunity to view the victim's cross-examination and testimony via one-way mirror, and full and free access to communicate with his counsel during the victim's testimony. *Id.* The Court also discussed the defendant's claim that the trial court erred in allowing the victim's forensic interviewer to testify regarding the victim's statements made during the aforementioned interview. *Id.* The Court held that the statements were nontestimonial and thus admissible because the interviewer worked hand-in-hand with a medical provider. *Id.* The Court noted that because the medical provider used the forensic interview to create a treatment plan for the victim, the interview's purpose was for medical assessment rather than an investigation. *Id.*

In *State v. Maguire*, the Supreme Court of Connecticut further clarified the standard set forth in *Arroyo*, noting that a victim's statement during a forensic interview may only be admissible if it is found to be nontestimonial. *State v. Maguire*, 78 A.3d 828 (Conn. 2013); *State v. Arroyo*, 935 A.2d 975 (Conn. 2007). For a forensic interview to be nontestimonial, its purpose must be to provide medical assistance to the victim, rather than to build a case against the defendant. *Id.* The trial court had erred in failing to provide a hearing for the admission of the forensic interview because the State had not been afforded an opportunity to present evidence that would deny that the interviewer was investigating on behalf of law enforcement and investigating, as well as evidence that would deny the interview was not used for the purposes of providing treatment. *Id.*

Connecticut Hearsay Exceptions

CT. R. SUPER. CT. JUV. § 35a-23. Child's hearsay statement; residual exception.

(a) A party who seeks the admission of a hearsay statement of a child pursuant to the residual exception to the hearsay rule, based upon psychological unavailability, shall provide a written notice within a reasonable time before the trial.

(b) A notice pursuant to subsection (a) shall be filed with the court and shall be served on all counsel of record and self-represented parties when appropriate, in accordance with Section 10-13. The notice shall identify the proffered statement, the basis for the psychological unavailability claim and shall be filed within a reasonable time before the trial.

(c) A party who objects to the introduction of the child's hearsay statement and challenges the representations contained in the notice filed pursuant to subsection (b) of this section, shall file a written objection with the court within a reasonable time before the trial, stating the reasons therefor.

(d) The judicial authority shall hold an evidentiary hearing to determine the admissibility of the child's hearsay statement in a manner that does not unduly delay resolution of the proceedings. The party seeking to introduce the statement shall have the burden of proving the child's psychological unavailability; specifically, that the child will suffer serious emotional or mental harm if required to testify.

CT. R. REV. § 8-3. Hearsay exceptions: availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Statement by a Party Opponent.** A statement that is being offered against a party and is
 - (A)** the party's own statement, in either an individual or a representative capacity,
 - (B)** a statement that the party has adopted or approved,
 - (C)** a statement by a person authorized by the party to make a statement concerning the subject,
 - (D)** a statement by the party's agent, servant or employee, concerning a matter within the scope of the agency or employment, and made during the existence of the relationship,
 - (E)** a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy,
 - (F)** in an action for a debt for which the party was surety, a statement by the party's principal relating to the principal's obligations, or
 - (G)** a statement made by a predecessor in title of the party, provided the declarant and the party are sufficiently in privity that the statement of the declarant would affect the party's interest in the property in question.

The hearsay statement itself may not be considered to establish the declarant's authority under (C), the existence or scope of the relationship under (D), or the existence of the conspiracy or participation in it under (E).

- (2) **Spontaneous 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.
- (3) **Statement of then Existing Physical Condition.** A statement of the declarant's then existing physical condition, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.
- (4) **Statement of then Existing Mental or Emotional Condition.** A statement of the declarant's then existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.
- (5) **Statement for Purposes of Obtaining Medical Diagnosis or Treatment.** A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment.
- (6) **Recorded Recollection.** A memorandum or record concerning an event about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness at or about the time of the event recorded and to reflect that knowledge correctly.
- (7) **Public Records and Reports.** Records, reports, statements or data compilations, in any form, of public offices or agencies, provided (A) the record, report, statement or data compilation was made by a public official under a duty to make it, (B) the record, report, statement or data compilation was made in the course of his or her official duties, and (C) the official or someone with a duty to transmit information to the official had personal knowledge of the matters contained in the record, report, statement or data compilation.
- (8) **Statement in Learned Treatises.** To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art, recognized as a standard authority in the field by the witness, other expert witness or judicial notice.
- (9) **Statement in Ancient Documents.** A statement in a document in existence for more than thirty years if it is produced from proper custody and otherwise free from suspicion.
- (10) **Published Compilations.** Market quotations, tabulations, lists, directories or other published compilations, that are recognized authority on the subject, or are otherwise trustworthy.
- (11) **Statement in Family Bible.** A statement of fact concerning personal or family history contained in a family bible.
- (12) **Personal Identification.** Testimony by a witness of his or her own name or age.

CT. R. REV. § 8-5. Hearsay exceptions: declarant must be available.

The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial:

- (1) **Prior Inconsistent Statement.** A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.
- (2) **Identification of a Person.** The identification of a person made by a declarant prior to trial where the identification is reliable.

CT. R. REV. § 8-6. Hearsay exceptions: declarant must be unavailable.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) **Former Testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, provided (A) the issues in the former hearing are the same or substantially similar to those in the hearing in which the testimony is being offered, and (B) the party against whom the testimony is now offered had an opportunity to develop the testimony in the former hearing.
- (2) **Dying Declaration.** In a prosecution in which the death of the declarant is the subject of the charge, a statement made by the declarant, while the declarant was conscious of his or her impending death, concerning the cause of or the circumstances surrounding the death.
- (3) **Statement against Civil Interest.** A trustworthy statement that, at the time of its making, was against the declarant's pecuniary or proprietary interest, or that so far tended to subject the declarant to civil liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of such a statement, the court shall consider whether safeguards reasonably equivalent to the oath taken by a witness and the test of cross-examination exist.
- (4) **Statement against Penal Interest.** A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest.
- (5) **Statement Concerning Ancient Private Boundaries.** A statement, made before the controversy arose, as to the location of ancient private boundaries if the declarant had peculiar means of knowing the boundary and had no interest to misrepresent the truth in making the statement.

(6) **Reputation of a Past Generation.** Reputation of a past generation concerning facts of public or general interest or affecting public or private rights as to ancient rights of which the declarant is presumed or shown to have had competent knowledge and which matters are incapable of proof in the ordinary way by available witnesses.

(7) **Statement of Pedigree and Family Relationships.** A statement concerning pedigree and family relationships, provided (A) the statement was made before the controversy arose, (B) the declarant had no interest to misrepresent in making the statement, and (C) the declarant, because of a close relationship with the family to which the statement relates, had special knowledge of the subject matter of the statement.

(8) **Forfeiture by Wrongdoing.** A statement offered against a party who has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

CT. R. REV. § 8-9. Residual exception.

A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule.

CT. R. REV. § 8-10. Hearsay exceptions: tender years.

“(a) Notwithstanding any other rule of evidence or provision of law, a statement by a child twelve years of age or younger at the time of the statement relating to a sexual offense committed against that child, or an offense involving physical abuse committed against that child by the child's parent or guardian or any other person exercising comparable authority over the child at the time of the offense, shall be admissible in a criminal or juvenile proceeding if: (1) The court finds, in a hearing conducted outside the presence of the jury, if any, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness, (2) the statement was not made in preparation for a legal proceeding, (3) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement including the content of the statement, the approximate time, date and location of the statement, the person to whom the statement was made and the circumstances surrounding the statement that indicate its trustworthiness, at such time as to provide the adverse party with a fair opportunity to prepare to meet it, and (4) either (A) the child testifies and is subject to cross-examination at the proceeding, or (B) the child is unavailable as a witness and (i) there is independent nontestimonial corroborative evidence of the alleged act, and (ii) the statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

“(b) Nothing in this section shall be construed to (1) prevent the admission of any statement under another hearsay exception, (2) allow broader definitions in other hearsay exceptions for statements

made by children twelve years of age or younger at the time of the statement concerning any alleged act described in subsection (a) of this section than is done for other declarants, or (3) allow the admission pursuant to the residual hearsay exception of a statement described in subsection (a) of this section." General Statutes § 54-86l.

CT. R. REV. § 1-5. Remainder of statements.

(a) Contemporaneous Introduction by Proponent. When a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it.

(b) Introduction by Another Party. When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it.

Cases

Key Points:

- In determining whether a child is unavailable to testify, a therapist's testimony must be specific to a child victim and their circumstances when it reflects the harm that testifying could inflict on a child.
- Generally, testifying is not in a child's best interest.
- A medical exception to hearsay can include a child's statements of identification or fault because an abuser's identity can be key to diagnosis and treatment of mental as well as physical health.
- However, the tender years exception considers the purpose of the interview as a whole, while the medical treatment exception considers the declarant's purpose in making individual statements.
- Therefore, a child declarant must clearly understand that their statement is part of medical treatment and not investigation.

In *In re Tayler F.*, the Supreme Court of Connecticut held that the trial court properly admitted the child victim's hearsay statements under the residual exception after finding the child to be unavailable to testify. *In re Tayler F.*, 995 A.2d 611 (Conn. 2010). In showing the child's unavailability, the State offered testimony from the child's therapist, who discussed the specific consequences of having the child testify. *Id.* The Court noted that "the [trial] court's determination must be based...on

evidence specific to the child and the circumstances, not a generalized presumption that testifying is per se harmful." *Id.* Furthermore, the Court emphasized that "a finding that it is not in the best interest of the child to testify is not equivalent to psychological harm...rarely will it be in a child's best interest to testify." *Id.* The Court held that the therapist's testimony was specific and discussed psychological harm, thus satisfying the elements required to admit the child's statements under the residual exception. *Id.*

In *State v. Dollinger*, the Appellate Court of Connecticut held that the child victim's statements that identified her abuser, which were made to a medical professional, were admissible under the medical exception to hearsay. *State v. Dollinger*, 568 A.2d 1058 (Conn. App. Ct. 1990). The Court noted that although identification of abusers was typically not relevant to medical examination and thus not admissible, an exception existed in cases of sexual abuse within the victim's home in order to prevent reoccurrences and to facilitate the proper treatment for psychological harm. *Id.* For statements made during a medical examination to be admissible, the statements must be 1.) pertinent to treatment, and 2.) motivated by the desire for treatment rather than investigation. *Id.* The Court noted that the child's complaints of pain, and physical manifestations of pain, "could have led the doctor, an expert in child sexual abuse, to conclude that the child was aware of her discomfort and her need for medical attention." *Id.* Thus, the child's statements were properly made in search for medical treatment, and her identification of her abuser was necessary for treatment. *Id.* (*Editor's Note:* In most jurisdictions, perpetrator identification is often considered relevant to treatment or diagnosis.)

In *State v. Freddy T.*, the Connecticut Appellate Court held that statements made by the five-year-old child victim about sexual abuse to a forensic interviewer were not admissible under the medical treatment exception to hearsay. *State v. Freddy T.*, 241 A.3d 173 (Conn. App. Ct. 2020). In defining what was required to meet the medical treatment exception, the court noted that the declarant must have a clear understanding that the interview is for a medical purpose. *Id.* at 184. In this instance, "the basic purpose of the interview was 'to obtain more information for the investigation' as [the forensic interviewer] testified," and the child would not have understood the interview to be for a medical purpose, despite the forensic interviewer's referral to psychiatric therapy and a physical examination at the conclusion of the interview. *Id.* at 184-85.

In *State v. Manuel T.*, the Supreme Court of Connecticut heard the defendant's appeal that the child's entire forensic interview be excluded from evidence because the "primary purpose" was not to provide medical diagnosis or treatment. *State v. Manuel T.*, --- A.3d ----, 2020 WL 8255326 at *6 (Conn. 2020). Forensic interviews may be admissible under the tender years exception which includes any statement relating to a sexual offense committed against the child or physical abuse by certain persons, so long as the primary purpose of the interview was nontestimonial. *Id.* The court, however, declined to accept the state's assertion that forensic interviews were per se nontestimonial in nature and therefore admissible. Instead, forensic interviews need to be assessed on a case by case basis because "a victim's statements during a forensic interview may be deemed nontestimonial only if the essential purpose of the interview is to provide medical assistance to the victim." *Id.* at *7 (quoting *State v. Maguire*, 78 A.3d 828, 850 (Conn. 2013)). The tender years exception considers the purpose of the interview as a whole, while the medical treatment exception considers the declarant's purpose in making individual statements. *Id.* at *9. The court refused to extend the "primary purpose" test to the medical treatment exception, and did not invalidate the inclusion of the forensic interview per se. However, because the defendant was entitled to a new trial for other reasons, the court did not

address whether specific statements made by the child during the forensic interview were objectionable and should be excluded. *Id.*

Delaware

Delaware Admissibility

11 Del. C. § 3507. Use of prior statements as affirmative evidence.

(a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.

(b) The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.

(c) This section shall not be construed to affect the rules concerning the admission of statements of defendants or of those who are codefendants in the same trial. This section shall also not apply to the statements of those whom to cross-examine would be to subject to possible self-incrimination.

11 Del. C. § 3511. Videotaped deposition and procedures for child witnesses.

(a) In any criminal case or hearing on delinquency, upon motion of the Deputy Attorney General prior to trial and with notice to the defense, the court may order all questioning of any witnesses under the age of 12 years to be videotaped in a location designated by the court. Persons present during the videotaping shall include the witness, the Deputy Attorney General, the defendant's attorney and any person whose presence would contribute to the welfare and well-being of the witness, and if the court permits, the person necessary for operating the equipment. Only the attorneys or a defendant acting pro se may question the child. The court shall permit the defendant to observe and hear the videotaping of the witness in person or, upon motion by the State, the court may exclude the defendant providing the defendant is able to observe and hear the witness and communicate with the defense attorney. The court shall ensure that:

- (1) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;
- (2) The recording equipment was capable of making an accurate recording, the operator was competent to operate such equipment and the recording is accurate and is not altered;
- (3) Each voice on the recording is identified;
- (4) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(b) If the court orders testimony of a witness taken under this section, the witness may not be compelled to testify in court at the trial or upon any hearing for which the testimony was taken. At the trial or upon any hearing, a part or all of the videotaped deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence. If only a part of a deposition is offered in evidence by a party, an adverse party may require the party to offer all of it which is relevant to the part offered and any party may offer other parts. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(c) The witness need not be physically present in the courtroom when the videotape is admitted into evidence.

(d) The cost of such videotaping shall be paid by the court.

(e) Videotapes which are part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the witness.

Cases

Key Points:

- A trial court's decision to admit a child's out-of-court hearsay statement necessarily relies on a multitude of factors.

In *Woodlin v. State*, the Supreme Court of Delaware denied the defendant's claim that the trial court erred in admitting the child victim's forensic interview into evidence. Under §3507, for a statement to be admissible, it must be voluntary, the witness must testify about the events and their truthfulness, and the opposing counsel must have the opportunity to cross-examine the witness on their out-of-court statements. *Id*; *Keys v. State*, 337 A.2d 18 (Del.1975); *Hatcher v. State*, 337 A.2d 30, 32 (Del.1975); *Johnson v. State*, 338 A.2d 124 (Del.1975). The defendant had claimed that the victim's testimony did not discuss the events described in the aforementioned interview, nor did the victim affirm the truthfulness of the interview. *Woodlin v. State*, 3 A.3d 1084 (Del. 2010). The Court noted, however, that the victim had implicitly affirmed the truthfulness of her out-of-court statements by having consistent answers, and had implicitly touched on the events described in the interview by using the same language to describe the event. *Woodlin*, 3 A.3d 1084. Furthermore, the Court noted that the victim could not be penalized for the opposing counsel's refusal to cross-examine the victim on the truthfulness and events discussed in her out-of-court statements. *Id*.

In *State v. Krick*, the Superior Court of Delaware found that the three-year-old victim's out-of-court statements were properly admitted. *State v. Krick*, 643 A.2d 331 (Del. Super. Ct. 1993). The Court held that the child's statements were 1) made spontaneously without prompting or leading by a third person, 2) were repeated with sufficient consistency, 3) included descriptions of activities not normally discussed by a three-year-old, and 4) were graphic and continued detailed accounts of the events which were consistent with a child her age. *Id*. Thus, under the totality of circumstances, the Court found the statements to be reliable and admissible. *Id*.

Delaware Hearsay Exceptions

11 Del. C. § 3513. Hearsay exception for child victim's or witness's out-of-court statement of abuse.

(a) An out-of-court statement made by a child victim or witness who is under 11 years of age at the time of the proceeding concerning an act that is a material element of the offense relating to sexual abuse, physical injury, serious physical injury, death, abuse or neglect as described in any felony delineated in subpart A, B or D of subchapter II of Chapter 5 of this title, or in any of the felonies delineated in § 782, § 783, § 783A, § 787, § 1100A, § 1102, § 1108, § 1109, § 1111, § 1112A, § 1112B, § 1335(a)(6), § 1335(a)(7), § 1353(2), or § 1361(b) of this title or in any attempt to commit any felony delineated in this paragraph that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of subsections (b) through (f) of this section are met.

(b) An out-of-court statement may be admitted as provided in subsection (a) of this section if:

(1) The child is present and the child's testimony touches upon the event and is subject to cross-examination rendering such prior statement admissible under § 3507 of this title; or

(2)

a. The child is found by the court to be unavailable to testify on any of these grounds:

1. The child's death;
2. The child's absence from the jurisdiction;
3. The child's total failure of memory;
4. The child's persistent refusal to testify despite judicial requests to do so;
5. The child's physical or mental disability;
6. The existence of a privilege involving the child;
7. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or
8. Substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television; and

b. The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(c) A finding of unavailability under paragraph (b)(2) a.8. of this section must be supported by expert testimony.

(d) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

(e) In determining whether a statement possesses particularized guarantees of trustworthiness under paragraph (b)(2) of this section, the court may consider, but is not limited to, the following factors:

- (1) The child's personal knowledge of the event;
- (2) The age and maturity of the child;
- (3) Certainty that the statement was made, including the credibility of the person testifying about the statement;
- (4) Any apparent motive the child may have to falsify or distort the event, including bias, corruption or coercion;
- (5) The timing of the child's statement;
- (6) Whether more than 1 person heard the statement;
- (7) Whether the child was suffering pain or distress when making the statement;
- (8) The nature and duration of any alleged abuse;
- (9) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
- (10) Whether the statement has a "ring of verity," has internal consistency or coherence and uses terminology appropriate to the child's age;
- (11) Whether the statement is spontaneous or directly responsive to questions;
- (12) Whether the statement is suggestive due to improperly leading questions;
- (13) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

(f) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

DE. R. REV. Rule 803. Exceptions to the rule against hearsay regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) **Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) **Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.

(4) **Statement Made for Medical Diagnosis or Treatment.** A statement that:

(A) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and

(B) describes medical history, past or present symptoms or sensations; their inception; or their general cause.

(5) **Recorded Recollection.** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the memorandum or record may be read into evidence or may be received as an exhibit in the court's discretion.

(6) **Records of a Regularly Conducted Activity.** A memorandum, report, record or data compilation, in any form of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the memorandum, report, record or data compilation was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

- (A) the evidence is admitted to prove that the matter did not occur or exist;
- (B) a record was regularly kept for a matter of that kind unless the sources of information or other circumstances indicate lack of trustworthiness; and
- (C) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(8) **Public Records.** Records, reports, statements or data compilations, in any form, of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

But the following are not within this exception to the hearsay rule:

- (A) Investigative reports by police and other law-enforcement personnel;
- (B) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party;
- (C) factual findings offered by the government in criminal cases;
- (D) factual findings resulting from special investigation of a particular complaint, case or incident;
- (E) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of Public Record or Entry; Use of Public Record or Entry for Testimonial Purposes.**

(A) Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that: (i) the record or statement does not exist; or (ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(B) In a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days -- unless the court sets a different time for notice or the objection.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning

the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the conviction was for a felony under the law pursuant to which the person was convicted;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments Involving Personal, Family, or General History or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) was essential to the judgment; and
- (B) could be proved by evidence of reputation.

(24) [Other exceptions.] [Transferred to Rule 807.]

(25) **Business Records in Justice of the Peace Court Civil Cases.** In a civil case before a Justice of the Peace, a bill, estimate, receipt or statement of account which appears to have been made in the regular course of business may be admitted into evidence by the Court, if the Justice of the Peace is satisfied that the document is reliable.

DE. R. REV. Rule 804. Exceptions to the rule against hearsay -- when the declarant is unavailable as a witness.

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) Is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) Refuses to testify about the subject matter despite a court order to do so;

- (3) Testifies to not remembering the subject matter;
- (4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.
- (2) *Statement under belief of impending death.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.
- (3) *Statement against interest.* A statement which was, at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- (4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
- (5) *Other exceptions.* [Omitted].
- (6) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

DE. R. REV. Rule 807. Residual exception.

(a) *In General.* Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;**
- (2) it is offered as evidence of a material fact;**
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and**
- (4) admitting it will best serve the purposes of these Rules and the interests of justice.**

(b) *Notice.* The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it

DE. R. REV. Rule 106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

Cases

Key Points:

- Even a very young, confused, and/or non-English-speaking child can demonstrate consistency and truthfulness when testifying about their out-of-court statement(s).
- Although nonverbal demonstrations using anatomical dolls is a generally accepted method of obtaining a child victim's statement, it's improper for a prosecutor to rely on §3507 and not on a hearsay exception to admit such a statement.

In *Feleke v. State*, the Supreme Court of Delaware held that child victim's out-of-court statements were properly admitted under the hearsay exception. *Feleke v. State*, 620 A.2d 222 (Del. 1993). Pursuant to §3507, a statement may be admissible if the declarant testifies regarding the truthfulness of the statement, and must testify as to the events perceived or heard. *Id.* Although the child victim was very young and had difficulty speaking and understanding English, the Court found that she met both elements by affirming that she had not been coached, and by somewhat consistently recounting the events as they happened to her. *Id.* Further, while the child was often confused and slightly inconsistent, the Court noted that the trial court judge could have found that the child at least touched on the events perceived or heard, and thus properly admitted her statements. *Id.*

In *Baker v. State*, the Supreme Court of Delaware held that the investigator's testimony regarding the child victim's manipulation of anatomical dolls was inadmissible hearsay. *Baker v. State*, 213 A.3d 1187 (Del. 2019). The investigator testified that the child made nonverbal statements of abuse through the manipulation of anatomical dolls to depict the abuse the child endured. *Id.* The Court noted that "it is generally accepted that a child's use of anatomical dolls to show someone what happened to the child—especially when used to respond to questions about what happened—is nonverbal conduct intended as an assertion and, therefore, a 'statement' for purposes of the hearsay rule." *Id.* However, the Court further noted that the State had improperly attempted to admit these statements under §3507, and had not offered another exception for admission. *Id.* Therefore, the statements were inadmissible. *Id.*

District of Columbia

District of Columbia Admissibility

D.C. Code § 16-2316. Conduct of hearings; evidence.

(a) The Division shall, without a jury, hear and adjudicate cases involving delinquency, need of supervision, or neglect. The Corporation Counsel shall present evidence in support of all petitions arising under this subchapter and otherwise represent the District of Columbia in all proceedings.

(b) Evidence which is competent, material, and relevant shall be admissible at fact finding hearings. Evidence which is material and relevant shall be admissible at detention hearings, transfer hearings under section 16-2307, and dispositional hearings.

(c) Where the petition alleges a child is a neglected child by reason of abuse, evidence of illness or injury to a child who was in the custody of his or her parent, guardian, or custodian for which the parent, guardian or custodian can give no satisfactory explanation shall be sufficient to justify an inference of neglect.

(d)

(1) Where the petition alleges a child is abandoned as referred to in section 16-2301(9)(A), as amended by this act, the following evidence shall be sufficient to justify an inference of neglect:

(A) the child is a foundling whose parents have made no effort to maintain a parental relationship with the child and reasonable efforts have been made to identify the child and to locate the parents for a period of at least four (4) weeks since the child was found;

(B) the child's parent gave a false identity at the time of the child's birth, since then has made no effort to maintain a parental relationship with the child and reasonable efforts have been made to locate the parent for a period of at least four (4) weeks since his or her disappearance;

(C) the child's parent, guardian or custodian is known but has abandoned the child in that he or she has made no reasonable effort to maintain a parental relationship with the child for a period of at least four (4) months; or

(D) the child has resided in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian, or custodian of the child did not undertake any action or make any effort to maintain a parental, guardianship, or custodial relationship or contact with the child.

(2) It shall not be necessary to prove that the parent, guardian or custodian intended to abandon the child or that he or she is now dead. However, if the judge is satisfied that there was a satisfactory explanation for the abandonment he or she need not enter a finding of neglect.

(e)

(1) All hearings and proceedings under this subchapter shall be recorded by appropriate means.

(2) Except in hearings to declare an adult in contempt of court, the general public shall be excluded from hearings arising under this subchapter.

(3) Except as provided in paragraph (4) of this subsection, only persons necessary to the proceedings shall be admitted, but the Division may, pursuant to rule of the Superior Court of the District of Columbia, admit such other persons (including members of the press) as have a proper interest in the case or the work of the court on condition that they refrain from divulging information identifying the child or members of the child's family involved in the proceedings.

(4) In cases involving delinquency proceedings, the victims and eyewitnesses and the immediate family members and custodians of the victims and eyewitnesses shall have a right to attend transfer, fact finding, disposition, and post-disposition hearings, subject to the rule on witnesses. Immediate family members and custodians of the victims and eyewitnesses shall have a right to be present during the victims' or eyewitnesses' testimony.

(5) Any person who by virtue of this subsection attends a transfer, fact finding, disposition, or post-disposition hearing shall be bound by the confidentiality requirements of sections 16-2331, 16-2332, and 16-2333, and shall be informed by the Division of these confidentiality requirements and the penalties for their violation as set out in section 16-2336.

(f) If the Division finds that it is in the best interest of the child, it may temporarily exclude him from any proceeding except a fact-finding hearing. If the petition alleges neglect, the child may also be temporarily excluded from a fact-finding hearing. In any case, counsel for the child may not be excluded.

D.C. Code § 23-114. Corroboration of a child witness' testimony not required.

For purposes of prosecutions brought under Title 22 of the D.C. Official Code, independent corroboration of the testimony of a child victim is not required to warrant a conviction.

Cases

Key Points:

- A forensic interview cannot be admitted as an out-of-court statement if all three criteria in §14-102(b)(1) are met.
- A child victim's refusal to answer questions during testimony about their out-of-court statement doesn't qualify as "inconsistency" with prior testimony if they haven't refused to answer *all* questions.

In *McRoy v. U.S.*, the District of Columbia Court of Appeals held that the trial court had erred in allowing the admission of the child victim's forensic interview. *McRoy v. U.S.*, 106 A.3d 1051 (D.C. 2015). Under §14-102(b)(1), an out-of-court statement is only admissible if 1) the declarant testifies at trial and is subject to cross-examination concerning the statement, 2) the statement is inconsistent with the declarant's testimony, and 3) the statement was made under oath. *Id.* The Court refused to decide on the question of whether refusal to answer is "inconsistent" with prior testimony. *Id.* Rather, the Court noted that this question was unnecessary to address because the victim had not refused to answer all questions presented to her. *Id.*

District of Columbia Hearsay Exceptions

D.C. Code § 14-102. Impeachment of witnesses.

- (a) The credibility of a witness may be attacked by any party, including the party calling the witness.
- (b) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (1) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (2) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, or (3) an identification of a person made after perceiving the person. Such prior statements are substantive evidence.

Cases

Key Points:

- The District's "report a rape rule" applies to statements made by a child victim who is too young to have reasonably consented to sexual conduct.

- Identifying a sex abuser without describing details of the abuse is admissible under the prior identification exception to the hearsay rule.
- A medical exception to hearsay can include a child's statements of identification or fault because an abuser's identity can be key to diagnosis and treatment of mental as well as physical health.

In *Williams v. U.S.*, the District of Columbia Court of Appeals held that the child victim's statements to her friend that she was being sexually abused by the defendant were admissible under the "report a rape rule." *Williams v. U.S.*, 756 A.2d 380 (D.C. 2000). Under the "report a rape rule," "a witness may testify that the complainant stated that a sexual crime occurred and may relate the detail necessary to identify the crime." *Id.*; *Galindo v. United States*, 630 A.2d 202, 209 (D.C.1993). The Court denied the defendant's argument that the rule did not apply because the child consented; the Court noted that due to the age gap between the child and defendant, the child could not reasonably consent. *Id.* Additionally, the Court noted that the child's statements, if not admissible under the "report a rape rule," would have been admissible under the prior identification exception to the hearsay rule because "the child's admissions identified defendant as the person she was having sex with but included no details of the sexual incidents." *Williams*, 756 A.2d at 386.

In *Brown v. U.S.*, the District of Columbia Court of Appeals held that the child victim's statements to a medical professional, which identified the defendant, were admissible under the medical treatment exception to hearsay. *Brown v. U.S.*, 840 A.2d 82 (D.C. 2004). The Court noted that "if the statement involves a child who has been sexually assaulted by a member of her household, it may be admissible because the injury being treated is no longer just physical but psychological and emotional as well." *Id.* The child lived in the immediate household of the defendant, thus making her identification of him during treatment necessary and admissible. *Id.*

Florida

Florida Admissibility

Fla. Stat. § 92.53. Videotaping the testimony of a victim or witness under age 18 or who has an intellectual disability.

(1) On motion and hearing in camera and a finding that there is a substantial likelihood that a victim or witness who is under the age of 18 or who has an intellectual disability as defined in s. 393.063 would suffer at least moderate emotional or mental harm due to the presence of the defendant if such victim or witness is required to testify in open court, or is unavailable as defined in s. 90.804(1), the trial court may order the videotaping of the testimony of the victim or witness in a case, whether civil or criminal in nature, in which videotaped testimony is to be used at trial in lieu of trial testimony in open court.

(2) The motion may be filed by:

- (a)** The victim or witness, or the victim's or witness's attorney, parent, legal guardian, or guardian ad litem;
- (b)** A trial judge on his or her own motion;
- (c)** Any party in a civil proceeding; or
- (d)** The prosecuting attorney or the defendant, or the defendant's counsel.

(3) The judge shall preside, or shall appoint a special master to preside, at the videotaping unless:

- (a)** The child or the person who has the intellectual disability is represented by a guardian ad litem or counsel;
- (b)** The representative of the victim or witness and the counsel for each party stipulate that the requirement for the presence of the judge or special master may be waived; and
- (c)** The court finds at a hearing on the motion that the presence of a judge or special master is not necessary to protect the victim or witness.

(4) The defendant and the defendant's counsel must be present at the videotaping unless the defendant has waived this right. The court may require the defendant to view the testimony from outside the presence of the child or the person who has an intellectual disability by means of a two-way mirror or another similar method that ensures that the defendant can observe and hear the testimony of the victim or witness in person, but the victim or witness cannot hear or see the defendant. The defendant and the attorney for the defendant may communicate by any appropriate private method.

(5) Any party, or the court on its own motion, may request the aid of an interpreter, as provided in s. 90.606, to aid the parties in formulating methods of questioning the child or person who has the intellectual disability and in interpreting the answers of the child or person during proceedings conducted under this section.

(6) The motion referred to in subsection (1) may be made at any time with reasonable notice to each party to the cause, and videotaping of testimony may be made any time after the court grants the motion. The videotaped testimony is admissible as evidence in the trial of the cause; however, such testimony is not admissible in any trial or proceeding in which such witness testifies by use of closed-circuit television pursuant to s. 92.54.

(7) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

Fla. Stat. § 92.54. Use of closed-circuit television in proceedings involving a victim or witness under the age of 18 or who has an intellectual disability.

(1) Upon motion and hearing in camera and upon a finding that there is a substantial likelihood that a victim or witness under the age of 18 or who has an intellectual disability will suffer at least moderate emotional or mental harm due to the presence of the defendant if such victim or witness is required to testify in open court, or is unavailable as defined in s. 90.804(1), the trial court may order that the testimony of the victim or witness be taken outside of the courtroom and shown by means of closed-circuit television.

(2) The motion may be filed by the victim or witness; the attorney, parent, legal guardian, or guardian ad litem of the victim or witness; the prosecutor; the defendant or the defendant's counsel; or the trial judge on his or her own motion.

(3) Only the judge, the prosecutor, the defendant, the attorney for the defendant, the operators of the videotape equipment, an interpreter, and some other person who, in the opinion of the court, contributes to the well-being of the child or the person who has an intellectual disability and who will not be a witness in the case may be in the room during the recording of the testimony.

(4) During the victim's or witness's testimony by closed-circuit television, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the victim or witness, but must ensure that the victim or witness cannot hear or see the defendant. The defendant's right to assistance of counsel, which includes the right to immediate and direct communication with counsel conducting cross-examination, must be protected and, upon the defendant's request, such communication must be provided by any appropriate electronic method.

(5) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

Fla. Stat. § 92.55. Judicial or other proceedings involving victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness; special protections; use of therapy animals or facility dogs.

(1) For purposes of this section, the term:

(a) "Sexual offense victim or witness" means a person who was under the age of 18 when he or she was the victim of or a witness to a sexual offense.

(b) "Sexual offense" means any offense specified in s. 775.21(4)(a)1. or s. 943.0435(1)(h)1.a.(l).

(2) Upon motion of any party, upon motion of a parent, guardian, attorney, guardian ad litem, or other advocate appointed by the court under s. 914.17 for a victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness, or upon its own motion, the court may enter any order necessary to protect the victim or witness in any judicial proceeding or other official proceeding from severe emotional or mental harm due to the presence of the defendant if the victim or witness is required to testify in open court. Such orders must relate to the taking of testimony and include, but are not limited to:

(a) Interviewing or the taking of depositions as part of a civil or criminal proceeding.

(b) Examination and cross-examination for the purpose of qualifying as a witness or testifying in any proceeding.

(c) The use of testimony taken outside of the courtroom, including proceedings under ss. 92.53 and 92.54.

(3) In ruling upon the motion, the court shall consider:

(a) The age of the child, the nature of the offense or act, the relationship of the child to the parties in the case or to the defendant in a criminal action, the degree of emotional trauma that will result to the child as a consequence of the defendant's presence, and any other fact that the court deems relevant;

(b) The age of the person who has an intellectual disability, the functional capacity of such person, the nature of the offenses or act, the relationship of the person to the parties in the case or to the defendant in a criminal action, the degree of emotional trauma that will result to the person as a consequence of the defendant's presence, and any other fact that the court deems relevant; or

(c) The age of the sexual offense victim or witness when the sexual offense occurred, the relationship of the sexual offense victim or witness to the parties in the case or to the defendant in a criminal action, the degree of emotional trauma that will result to the sexual offense victim or witness as a consequence of the defendant's presence, and any other fact that the court deems relevant.

(4) In addition to such other relief provided by law, the court may enter orders limiting the number of times that a child, a person who has an intellectual disability, or a sexual offense victim or witness

may be interviewed, prohibiting depositions of the victim or witness, requiring the submission of questions before the examination of the victim or witness, setting the place and conditions for interviewing the victim or witness or for conducting any other proceeding, or permitting or prohibiting the attendance of any person at any proceeding. The court shall enter any order necessary to protect the rights of all parties, including the defendant in any criminal action.

(5) The court may set any other conditions it finds just and appropriate when taking the testimony of a victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness, including the use of a therapy animal or facility dog, in any proceeding involving a sexual offense or child abuse, abandonment, or neglect.

(a) When deciding whether to permit a victim or witness under the age of 18, a person who has an intellectual disability, or a sexual offense victim or witness to testify with the assistance of a therapy animal or facility dog, the court shall consider the age of the child victim or witness, the age of the sexual offense victim or witness at the time the sexual offense occurred, the interests of the child victim or witness or sexual offense victim or witness, the rights of the parties to the litigation, and any other relevant factor that would facilitate the testimony by the victim or witness under the age of 18, person who has an intellectual disability, or sexual offense victim or witness.

(b) For purposes of this subsection the term:

1. "Facility dog" means a dog that has been trained, evaluated, and certified as a facility dog pursuant to industry standards and provides unobtrusive emotional support to children and adults in facility settings.
2. "Therapy animal" means an animal that has been trained, evaluated, and certified as a therapy animal pursuant to industry standards by an organization that certifies animals as appropriate to provide animal therapy.

Cases

Key Points:

- To determine whether a child victim is unavailable to testify, a trial court can rely on testimony from the victim's parent, treating medical staff, and out-of-court statements corroborating their testimony.
- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors.
- The totality of a forensic interview and not a balance of reliable vs. unreliable responses determines its admissibility.

In *Perez v. State*, the Supreme Court of Florida denied defendant's argument that the judge must personally examine a child victim prior to finding the victim unavailable to testify before the court.

Perez v. State, 536 So.2d 206 (Fla. 1988). The Court noted that the trial court's decision, which was based on findings of fact on the record, was sufficient to decide the child's availability. *Id.* The trial court's finding was properly based on testimony from the child's mother and medical personnel, and was corroborated by the defendant's admission of abuse to an officer. *Id.*

In *Cabrera v. State*, the District Court of Appeal of Florida held that the trial court had properly admitted the child victim's videotaped CAC interview in accordance with §90-803(23). *Cabrera v. State*, 206 So.3d 768 (Fla. Dist. Ct. App. 2016). The Court noted that, although the five-year-old child had initially struggled to differentiate between a truth and a lie and provided certain nonsensical, nonresponsive answers, the trial court sufficiently looked at the other statements made and found the interview as a whole to be reliable. *Id.* Additionally, the Court noted that the trial court was not required to explain the nonsensical, nonresponsive answers because there is no statutory requirement that findings necessarily reflect a balance of indicia of unreliability with indicia of reliability. *Id.*

In *Ferreiro v. State*, the District Court of Appeal of Florida found that the trial court had not abused its discretion in allowing the child victim's three hearsay statements to be admissible. *Ferreiro v. State*, 936 So.2d 1140 (Fl. Dist. Ct. App. 2006). The child had made spontaneous statements regarding her abuse to her father, investigating police detective, and child abuse investigator. *Id.* The trial court properly reviewed these statements in terms of the 1) trustworthiness of the source, and 2) the reliability of the statement based on the time, content, and circumstances. *Id.* The trial court held hearings prior to the admission of evidence, and heard witness testimony regarding the circumstances in which each statement was made, and provided a detailed written order explaining its findings in accordance with *State v. Townsend*. *Id.*; *State v. Townsend*, 635 So.2d 949 (Fla. 1994). Under the standards set forth in *Townsend*, a court may find statements to be reliable under certain factors: "the statement's spontaneity; whether the statement was made at the first available opportunity following the alleged incident; whether the statement was elicited in response to questions from adults; the mental state of the child when the abuse was reported; whether the statement consisted of a child-like description of the act; whether the child used terminology unexpected of a child of similar age; the motive or lack thereof to fabricate the statement; the ability of the child to distinguish between reality and fantasy; the vagueness of the accusations; the possibility of any improper influence on the child by participants involved in a domestic dispute; and contradictions in the accusation." *Townsend*, 635 So.2d at 957-58.

Florida Hearsay Exceptions

Fla. Stat. §90.803. Hearsay exception; availability of declarant immaterial.

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(1) **Spontaneous statement.** -- A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

(2) **Excited utterance.** -- A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then-existing mental, emotional, or physical condition.** --

(a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
2. Prove or explain acts of subsequent conduct of the declarant.

(b) However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.
2. A statement made under circumstances that indicate its lack of trustworthiness.

(4) **Statements for purposes of medical diagnosis or treatment.** -- Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** -- A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted business activity.** --

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s.

90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

(7) Absence of entry in records of regularly conducted activity. -- Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness.

(8) Public records and reports. -- Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

(9) Records of vital statistics. -- Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if a report was made to a public office pursuant to requirements of law. However, nothing in this section shall be construed to make admissible any other marriage of any party to any cause of action except for the purpose of impeachment as set forth in s. 90.610.

(10) Absence of public record or entry. -- Evidence, in the form of a certification in accord with s. 90.902, or in the form of testimony, that diligent search failed to disclose a record, report, statement, or data compilation or entry, when offered to prove the absence of the record, report, statement, or data compilation or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation would regularly have been made and preserved by a public office and agency.

(11) **Records of religious organizations.** -- Statements of births, marriages, divorces, deaths, parentage, 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.** -- Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, when such statement was certified by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and when such certificate purports to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** -- Statements of fact concerning personal or family history in family Bibles, charts, engravings in rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** -- The record of a document purporting to establish or affect an interest in property, as proof of the contents of the original recorded or filed 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 or filing of the document in the office.

(15) **Statements in documents affecting an interest in property.** -- 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 20 years or more, the authenticity of which 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 if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission.

(18) **Admissions.** -- A statement that is offered against a party and is:

(a) The party's own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(c) A statement by a person specifically authorized by the party to make a statement concerning the subject;

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

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by

independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

(19) **Reputation concerning personal or family history.** -- Evidence of reputation:

(a) Among members of a person's family by blood, adoption, or marriage;

(b) Among a person's associates; or

(c) In the community,

concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation concerning boundaries or general history.** -- Evidence of reputation:

(a) In a community, arising before the controversy about the boundaries of, or customs affecting lands in, the community.

(b) About events of general history which are important to the community, state, or nation where located.

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

(22) **Former testimony.** -- Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

(23) **Hearsay exception; statement of child victim.** --

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or

offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

(24) Hearsay exception; statement of elderly person or disabled adult. --

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and

2. The elderly person or disabled adult is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be

offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled adult's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Fla. Stat. § 90.804. Hearsay exceptions; declarant unavailable.

(1) **Definition of unavailability.** -- "Unavailability as a witness" means that the declarant:

(a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(c) Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;

(d) Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or

(e) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his or her statement in preventing the witness from attending or testifying.

(2) **Hearsay exceptions.** -- The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:

(a) *Former testimony.* -- Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(b) *Statement under belief of impending death.* -- In a civil or criminal trial, a statement made by a declarant while reasonably believing that his or her death was imminent, concerning the physical cause or instrumentalities of what the declarant believed to be impending death or the circumstances surrounding impending death.

(c) *Statement against interest.* -- A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the

declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

(d) *Statement of personal or family history.* -- A statement concerning the declarant's own birth, adoption, marriage, divorce, parentage, ancestry, or other similar fact of personal or family history, including relationship by blood, adoption, or marriage, even though the declarant had no means of acquiring personal knowledge of the matter stated.

(e) *Statement by deceased or ill declarant similar to one previously admitted.* -- In an action or proceeding brought against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person, or against a trustee of a trust created by a deceased person, or against the assignee, committee, or guardian of a mentally incompetent person, when a declarant is unavailable as provided in paragraph (1)(d), a written or oral statement made regarding the same subject matter as another statement made by the declarant that has previously been offered by an adverse party and admitted in evidence.

(f) *Statement offered against a party that wrongfully caused the declarant's unavailability.* -- A statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

FL. ST. § 90.108. Introduction of related writings or recorded statements.

(1) When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

(2) The report of a court reporter, when certified to by the court reporter as being a correct transcript of the testimony and proceedings in the case, is prima facie a correct statement of such testimony and proceedings.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors.

In *Mikler v. State*, the District Court of Appeal of Florida held that the child victim's out-of-court statement was admissible under a hearsay exception and was sufficiently corroborated through other evidence. *Mikler v. State*, 829 So.2d 932 (Fla. Dist. Ct. App. 2002). The child's statement was

deemed reliable because the child was able to clearly recount the incident, provided answers that were “responsive and expansive,” and made her statement the same day of the assault. *Id.* Furthermore, the child’s story was corroborated by a medical examination, as well as the defendant’s statements during arrest that he had “messed up big time” amongst other incriminating statements. *Id.* Thus, the child’s statements were properly admitted. *Id.*

In *Fitzsimmons v. State*, District Court of Appeal of Florida held that the child victim’s out-of-court statements were sufficiently reliable to be admitted under the child hearsay exception. *Fitzsimmons v. State*, 309 So.3d 261 (Fla. Dist. Ct. App. 2020). To be admissible, a child’s statement must meet two elements: “(1) the source of the information through which the statement was reported must show trustworthiness; and (2) the time, content, and circumstances of the statement must reflect that the statement provides sufficient safeguards of reliability.” *Id.* The Court noted that the trial court found that the child consistently recounted the abuse to multiple witnesses, made statements either spontaneously or in response to non-leading questions, and used language appropriate to her age. *Id.* Thus, the child’s statements were properly admitted. *Id.*

Georgia

Georgia Admissibility

O.C.G.A. § 17-8-54. Persons in courtroom when person under age of 16 testifies concerning sexual offense.

In the trial of any criminal case, when any person under the age of 16 is testifying concerning any sexual offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, victim assistance coordinators, victims' advocates, and such other victim assistance personnel as provided for by Code Section 15-18-14.2, jurors, newspaper reporters or broadcasters, and court reporters.

O.C.G.A. § 17-8-55. Testimony of child less than 17 years old outside physical presence of accused.

(a) As used in this Code section, the term "child" means an individual who is under 17 years of age.

(b) This Code section shall apply to all proceedings when a child is a witness to or an alleged victim of a violation of Code Section 16-5-1, 16-5-20, 16-5-23, 16-5-23.1, 16-5-40, 16-5-70, 16-5-90, 16-5-95, 16-6-1, 16-6-2, 16-6-3, 16-6-4, 16-6-5, 16-6-5.1, 16-6-11, 16-6-22, 16-6-22.1, 16-6-22.2, 16-8-41, or 16-15-4.

(c) The court, upon the motion of the prosecuting attorney or the parent, legal guardian, or custodian of a child, or on its own motion, shall hold an evidentiary hearing to determine whether a child shall testify outside the physical presence of the accused. Such motion shall be filed, or requested by the court, at least ten days prior to trial unless the court shortens such time period for good cause, as it deems just under the circumstances.

(d) The court may order a child to testify outside the physical presence of the accused, provided that the court finds by a preponderance of the evidence that such child is likely to suffer serious psychological or emotional distress or trauma which impairs such child's ability to communicate as a result of testifying in the presence of the accused. In determining whether a preponderance of the evidence has been shown, the court may consider any one or more of the following circumstances:

- (1)** The manner of the commission of the offense being particularly heinous or characterized by aggravating circumstances;
- (2)** The child's age or susceptibility to psychological or emotional distress or trauma on account of a physical or mental condition which existed before the alleged commission of the offense;
- (3)** At the time of the alleged offense, the accused was:

- (A)** The parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time; or
- (B)** A person who maintains or maintained an ongoing personal relationship with such child's parent, guardian, legal custodian, or other person responsible for the custody or care of the child at the relevant time and the relationship involved the person living in or frequent and repeated presence in the same household or premises as the child;
- (4)** The alleged offense was part of an ongoing course of conduct committed by the accused against the child over an extended period of time;
- (5)** A deadly weapon or dangerous instrument was used during the commission of the alleged offense;
- (6)** The accused has inflicted serious physical injury upon the child;
- (7)** A threat, express or implied, of physical violence to the child or a third person if the child were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer, or law enforcement office concerning the incident has been made by or on behalf of the accused;
- (8)** A threat, express or implied, of the incarceration of a parent, relative, or guardian of the child, the removal of the child from the family, or the dissolution of the family of the child if the child were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer, or law enforcement office concerning the incident has been made by or on behalf of the accused;
- (9)** A witness other than the child has received a threat of physical violence directed at such witness or to a third person by or on behalf of the accused, and the child is aware of such threat;
- (10)** The accused, at the time of the inquiry:
- (A) Is living in the same household with the child;
 - (B) Has ready access to the child; or
 - (C) Is providing substantial financial support for the child; or
- (11)** According to expert testimony, the child would be particularly susceptible to psychological or emotional distress or trauma if required to testify in open court in the physical presence of the accused.
- (e)** A court order allowing or not allowing a child to testify outside the physical presence of the accused shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of such testimony shall:
- (1)** State the method by which such child shall testify;

(2) List any individual or category of individuals allowed to be in the presence of such child during such testimony, including the individuals the court finds contribute to the welfare and well-being of the child during his or her testimony;

(3) State any special conditions necessary to facilitate the cross-examination of such child;

(4) State any condition or limitation upon the participation of individuals in the child's presence during such child's testimony;

(5) Provide that the accused shall not be permitted to be in the physical presence of a child during his or her testimony if the accused is pro se;

(6) Provide that if counsel for the accused or the accused is precluded from being physically present during the child's testimony, then the prosecuting attorney shall likewise be precluded from being physically present; and

(7) State any other condition necessary for taking or presenting such testimony.

(f) The method used for allowing a child to testify outside the physical presence of the accused shall allow the judge, jury, and accused to observe the demeanor of the child as if he or she were testifying in the courtroom. When such testimony occurs, it shall be transmitted to the courtroom by any device or combination of devices capable of projecting a live visual and oral transmission, including, but not limited to, a two-way closed-circuit television broadcast, an Internet broadcast, or other simultaneous electronic means. The court shall ensure that:

(1) The transmitting equipment is capable of making an accurate transmission and is operated by a competent operator;

(2) The transmission is in color and the child is visible at all times;

(3) Every voice on the transmission is audible and identified;

(4) The courtroom is equipped with monitors which permit the jury, the accused, and others present in the courtroom to see and hear the transmission; and

(5) The image and voice of the child, as well as the image of all other persons other than the operator present in the testimonial room, are transmitted live.

O.C.G.A. § 24-8-820. Testimony as to child's description of sexual contact or physical abuse.

(a) A statement made by a child younger than 16 years of age describing any act of sexual contact or physical abuse performed with or on such child by another or with or on another in the presence of such child shall be admissible in evidence by the testimony of the person to whom made if the proponent of such statement provides notice to the adverse party prior to trial of the intention to use such out-of-court statement and such child testifies at the trial, unless the adverse party forfeits or waives such child's testimony as provided in this title, and, at the time of the testimony regarding the

out-of-court statements, the person to whom the child made such statement is subject to cross-examination regarding the out-of-court statements.

(b) This Code section shall apply to any motion made or hearing or trial commenced on or after April 18, 2019.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors.
- Neither a pre-trial hearing to determine the reliability of the child's statements, nor indicia of reliability, are required by law to find a child victim's out-of-court statements admissible.

In *Gregg v. State*, the Court of Appeals of Georgia affirmed the district court's admission of the child victim's out-of-court statements. *Gregg v. State*, 411 S.E.2d 65 (Ga. Ct. App. 1991). The Court noted that to consider the reliability of the child's statement, the court could look to a number of factors, including: "(1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present thereat); (2) the spontaneity of the child's statement to the persons present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the same; and, the nature of the child's statement and type of language used therein; and (10) the consistency between repeated out-of-court statements by the child." *Id.* The Court further noted that the court was not limited to these factors, nor was it required to apply them in a mechanical fashion. *Id.* Thus, so long as the court was able to show that some factors were met, the court was not abusing its discretion. *Id.*

In *Whorton v. State*, the Court of Appeals of Georgia denied the defendant's claim that the trial court had erred in admitting the child victim's out-of-court statements without holding a pre-trial hearing to determine the reliability of the child's statements. *Whorton v. State*, 741 S.E.2d 653 (Ga. Ct. App. 2013). The Court noted that there was no statutory requirement to conduct such a hearing prior to testimony, nor was there a requirement to "make a specific finding of sufficient indicia of reliability in order for the out-of-court statements of child victims to be admissible." *Id.* The trial court properly admitted the statements based on the findings that the child had made the statements spontaneously, to forensic interviewers and medical specialists, and was consistent in her allegations. *Id.*

Georgia Hearsay Exceptions

O.C.G.A. § 24-8-803. Hearsay exceptions, availability of declarant immaterial.

The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter;
- (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;
- (3) ***Then existing mental, emotional, or physical condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless such statements relate to the execution, revocation, identification, or terms of the declarant's will and not including a statement of belief as to the intent of another person;
- (4) ***Statements for purposes of medical diagnosis or treatment.*** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;
- (5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but shall not itself be received as an exhibit unless offered by an adverse party;
- (6) **Records of regularly conducted activity.** Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification. The term "business" as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph;

(7) **Absence of entry in records kept in accordance with paragraph (6) of this Code section.**

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) of this Code section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

(8) **Public records and reports.** Except as otherwise provided by law, public records, reports, statements, or data compilations, in any form, of public offices, setting forth:

(A) The activities of the public office;

(B) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, against the accused in criminal proceedings, matters observed by police officers and other law enforcement personnel in connection with an investigation; or

(C) In civil proceedings and against the state in criminal proceedings, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;

(9) **Records of vital statistics.** Records or data compilations, in any form, 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office, evidence in the form of a certification in accordance with Code Section 24-9-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry;

(11) **Records of religious organizations.** Statements of birth, 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.** 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.** Statements of fact concerning 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.** 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 law authorizes the recording of documents of that kind in such office;

(15) **Statements in documents affecting an interest in property.** 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 20 years or more the authenticity of which is established;

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

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;

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

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

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community;

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but shall not affect admissibility; or

(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 the same would be provable by evidence of reputation.

O.C.G.A. § 24-8-804. Hearsay exceptions, declarant unavailable.

(a) As used in this Code section, the term "unavailable as a witness" includes situations in which the declarant:

- (1)** Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- (2)** Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- (3)** Testifies to a lack of memory of the subject matter of the declarant's statement;
- (4)** Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5)** Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant's attendance or testimony, by process or other reasonable means.

A declarant shall not be deemed unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1)** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. If deposition testimony is admissible under either the rules stated in Code Section 9-11-32 or this Code section, it shall be admissible at trial in accordance with the rules under which it was offered;
- (2)** In a prosecution for homicide or in a civil proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death;
- (3)** A statement against interest. A statement against interest is a statement:
 - (A)** Which a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate a claim by the declarant against another or to expose the declarant to civil or criminal liability; and

(B) Supported by corroborating circumstances that clearly indicate the trustworthiness of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability;

(4) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated or a statement concerning the foregoing matters and death also of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; or

(5) A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

O.C.G.A. § 24-8-807. Residual exception.

A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:

(1) The statement is offered as evidence of a material fact;

(2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Ga. Code Ann. §24-1-106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement.

Cases

Key Points:

- A trial court's decision to admit a child victim's hearsay or out-of-court statement necessarily relies on a multitude of factors.
- The passage of significant time, owing to a defendant's threat of violence against a child victim, does not impact an out-of-court statement's reliability when other indicia are satisfied.
- A medical exception to hearsay can include a parent's statements to a medical professional recounting a child victim's outcry, if the parent's motive was to gain medical treatment for the child rather than support an investigation.

In *Sullivan v. State*, the Court of Appeals of Georgia held that the trial court properly found that the child victim's out-of-court statements bore sufficient indicia of reliability such that witness's (victim's friend) testimony relaying such statements was admissible at trial. *Sullivan v. State*, 671 S.E.2d 180 (Ga. Ct. App. 2008). In considering whether a child's statement is reliable, the court may look, but is not limited to, the following list:

"(1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present thereat); (2) the spontaneity of the child's statement to the persons present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the same; and, the nature of the child's statement and type of language used therein; and (10) the consistency between repeated out-of-court statements by the child. These factors are to be applied neither in mechanical nor mathematical fashion, but in that manner best calculated to facilitate determination of the existence or absence of the requisite degree of trustworthiness."

The Court noted that the child made her statement to her friend in a relaxed setting, with no evidence of coercion. *Id.* Furthermore, the witness's retelling of the statements was consistent, and matched the victim's own statements throughout the investigation and trial. *Id.* Although the child's statements came two years after the incident, the child also relayed how defendant threatened to kill her, explaining her hesitation. *Id.* Thus, the court properly admitted the child's statements under the child hearsay exception. *Id.*

In *State v. Almanza*, the Supreme Court of Georgia held that the child victim's mother's statements to pediatricians were properly admissible under the hearsay exception if: 1) her statements were made in an attempt to gain treatment for her child rather than contribute to an investigation, and 2) pediatricians relied on her statements to provide treatment. *State v. Almanza*, 820 S.E.2d 1 (Ga. 2018). Prior to the child's medical examination, the mother recounted the child's statements of abuse to the pediatrician, who then performed an examination for sexual abuse. *Id.* The Court held that, upon

remand, the trial court could reasonably find that the mother's motives were for medical purposes only, and thus would be admissible. *Id.*

Guam

Guam Admissibility

8 GCA § 75.80. Sex offense case, attendance of supporting persons at testimony of prosecuting witness 17 years of age or under.

(a) Notwithstanding any other provision of law, a prosecuting witness 17 years of age or under a case involving violation of any sexual offense defined in Chapter 25 of Title 9, Guam Code Annotated, or a violation of § 31.30 of said title shall be entitled for support to the attendance of up to two persons of his or her own choosing, one of whom may be a witness, at the Grand Jury proceeding, preliminary hearing and at the trial, during the testimony of the prosecuting witness. Only one of those support persons may accompany the witness to the witness stand although the other person may remain in the courtroom during the witness' testimony. The support persons shall not make notes during the hearing or proceeding. In the case of a Grand Jury proceeding, the prosecuting attorney shall inform the support person or persons that Grand Jury proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings.

(b) If the person or persons so chosen are also prosecuting witness, the prosecution shall present evidence that the person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness. Upon that showing, the court shall grant the request unless information presented by the defendant or noticed by the court establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. In all cases, the judge shall admonish the support person or persons to not prompt, sway or influence the minor witness in any way.

For purposes of this section, members of a prosecuting witness' family shall include the prosecuting witness' parents, legal guardian, grandparents, uncles, aunts or siblings.

19 GCA § 13311. Evidence May be Inadmissible in Other Actions of Proceedings; Testimony by a child.

(a) Any testimony or other evidence produced by a party in a child protective proceeding under this Chapter which would otherwise be unavailable may be ordered by the court to be inadmissible as evidence in any other territorial civil or criminal action or proceeding, if the court deems such an order to be in the best interests of the child.

(b) The court may direct that a child testify under such circumstances as the court deems to be in the best interests of the child and the furtherance of justice, which may include or be limited to an interview on the record in chambers with only those parties present as the court deems to be in the best interests of the child.

(c) Any statement made by the child to any person relating to any allegation of harm or threatened harm shall be admissible in evidence in a child protective proceeding.

19 GCA § 13312. Recording a Statement or the Testimony of a Child.

(a) The recording of a statement of a child is admissible into evidence in any proceeding under this Chapter if:

- (1) The recording is visual, oral or both and is recorded on film, tape, videotape or by other electronic means;
- (2) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent and the recording is accurate and has not been altered; and
- (3) Every person in the recording is identified.

Guam Hearsay Exceptions

6 GCA § 803. Hearsay exceptions, availability of declarant immaterial.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then existing mental, emotional, or physical condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and

accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies or government instrumentality, setting forth:

(A) the activities of the office or agency or government instrumentality, or

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or

(C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** 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.** 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.** Statements of fact concerning 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** 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 of twenty years or more the authenticity of which 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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

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

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

(24) [Other exceptions.] [Transferred to Rule 807]

6 GCA § 804. Hearsay exceptions; declarant unavailable.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the

same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Other exceptions.] [Transferred to Rule 807]

(6) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

6 GCA § 804.1. Protection of child witnesses.

(a) **Conditions.** In a case of physical, sexual or mental abuse of a child as defined in Guam law, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed-circuit television if:

(1) The testimony is taken during the proceeding; and

(2) The judge determines that testimony by the child victim in the defendant's presence will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

(b) **Location of certain persons; question of child.**

(1) Only the following persons may be in the room with the child when the child testifies by closed-circuit television:

(i) The prosecuting attorney;

(ii) The attorney for the defendant;

(iii) The operators of the closed-circuit television equipment; and

(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed-circuit television, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

(4) Only the prosecuting attorney, the attorney for any defendant, and the judge may question the child.

(c) **Examination by judge.**

(1) In determining whether testimony by the child victim in the defendant's presence will result in the child suffering serious emotional distress such that the child cannot reasonably communicate, the judge may observe and question the child either inside or outside the courtroom and hear testimony of a parent or custodian of the child or any other person, including a person who has dealt with the child in a therapeutic setting.

(i) Except as provided in subparagraph (ii) of this paragraph, any defendant, any defendant's attorney, and the prosecutor shall have the right to be present when the judge hears testimony on whether to allow a child victim to testify by closed-circuit television.

(ii) If the judge decides to observe or question the child in connection with the determination to allow closed-circuit television:

1. Any defendant's attorney and the prosecutor shall have the right to be present; and

2. The judge may not permit a defendant to be present.

(d) **Applicability.** The provisions of this section do not apply if the defendant is an attorney pro se.

(e) **Identification of defendant.** This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

(f) **Two-way closed-circuit television prohibited.** This section may not be interpreted to permit the use of two-way closed-circuit television or any other procedure that would result in the child being exposed to the defendant.

6 GCA § 807. Residual exception.

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it including the name and address of the declarant.

GU. ST. EVID. Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- A parent's testimony to their child's out-of-court statements about abuse is admissible when the statement meets the criteria for an excited utterance, including within a timeframe too short to have collected their thoughts or been influenced by a third party.

In *People v. Perez*, the Supreme Court of the Territory of Guam held that the trial court erroneously admitted the mother's testimony of the child victim's out-of-court statements regarding the incident of abuse. *People v. Perez*, 2015 Guam 10 (Guam 2015). The Court noted that the statement was not admissible under the excited utterance exception, nor the present sense impression exception. *Id.* In regard to the excited utterance exception, the court noted that the child did not make his statements

under "stress of excitement" because too much time had elapsed since the incident and his statement. *Id.* Additionally, the statement was not admissible under the present sense impression exception because the element of immediacy was missing. *Id.*

In *People v. Martin*, the Supreme Court of the Territory of Guam held that the trial court properly admitted the testimony of the child victim's father under the excited utterance hearsay exception. *People v. Martin*, 2018 Guam 7 (Guam 2018). For a statement to be admissible under the excited utterance exception "it must (1) describe an "event or condition startling enough to cause nervous excitement," (2) relate to the startling event, and (3) "be made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent." *Id.* The father testified that the child made her statements within mere hours of the incident, and was found running away when her father found her, indicating that she lacked time between the incident and her statement to collect her thoughts. *Id.* Additionally, the child was found crying and otherwise distraught, further contributing to her "excited" emotional state. *Id.* Thus, the trial court properly admitted the child's statements under the excited utterance hearsay exception. *Id.*

Hawaii

Hawaii Admissibility

HRS § 571-41. Procedure in children's cases.

(a) Cases of children in proceedings under section 571-11(1) and (2) shall be heard by the court separate from hearings of adult cases and without a jury. Stenographic notes or mechanical recordings shall be required as in other civil cases in the circuit courts, unless the parties waive the right of such record or the court so orders. The hearings may be conducted in an informal manner and may be adjourned from time to time.

(b) Except as provided in section 571-84.6, the general public shall be excluded and only such persons admitted whose presence is requested by the parent or guardian or as the judge or district family judge finds to have a direct interest in the case, from the standpoint of the best interests of the child involved, or in the work of the court; provided that:

(1) Upon request by a party, hearings initiated pursuant to chapter 587A may be opened to the public if a judge determines that doing so would be in the best interests of the child;

(2) Parties involved in hearings initiated pursuant to chapter 587A shall be allowed to be accompanied by an adult advocate to provide support, unless the court finds that the presence of the advocate would not be in the best interests of the child. The advocate need not be a licensed attorney. The State shall not be required to pay, directly or through reimbursement, for any fees, costs, or expenses related to the advocate. No person shall act as an advocate who has an interest in the matter beyond the protection of the child and the healing and rehabilitation of the family; and

(3) The victim of the alleged violation and all other witnesses who are younger than eighteen years of age shall be entitled to have parents, guardians, or one other adult and may have an attorney present while testifying at or otherwise attending a hearing initiated pursuant to section 571-11(1) or 571-11(2).

Prior to the start of a hearing, the parents, guardian, or legal custodian, and, when appropriate, the child, the child victim, or witness shall be notified of the right to be represented by counsel and the right to remain silent.

(c) Findings of fact by the judge or district family judge of the validity of the allegations in the petition shall be based upon a preponderance of evidence admissible in the trial of civil cases except for petitions alleging the court's jurisdiction under section 571-11(1) which shall require proof beyond a reasonable doubt in accordance with rules of evidence applicable to criminal cases; provided that no child who is before the court under section 571-11(1) shall have admitted against the child any evidence in violation of the child's rights secured under the constitution of the United States or the State of Hawaii. In the discretion of the judge or district family judge the child may be excluded from

the hearing at any time. When more than one child is alleged to have been involved in the same act, the hearing may be held jointly for the purpose of making a finding as to the allegations in the petition and then shall be heard separately for the purpose of disposition except in cases where the children involved have one common parent.

(d) In the disposition part of the hearing any relevant and material information, including information contained in a written report, study, or examination, and the results of a risk and needs assessment of the child conducted pursuant to section 571-45, shall be admissible, and may be relied upon to the extent of its probative value; provided that the maker of the written report, study, or examination shall be subject to both direct and cross-examination upon demand and when the maker is reasonably available. The disposition shall be based only upon the admitted evidence, and findings adverse to the child as to disputed issues of fact shall be based upon a preponderance of such evidence.

(e) Upon a final adverse disposition, if the parent or guardian is without counsel the court shall inform the parent or guardian of the parent's or guardian's right to appeal as provided for in section 571-54.

(f) The judge, or the senior judge if there is more than one, may by order confer concurrent jurisdiction on a district court created under chapter 604 to hear and dispose of cases of violation of traffic laws or ordinances by children, provision to the contrary in section 571-11 or elsewhere notwithstanding. The exercise of jurisdiction over children by district courts shall, nevertheless, be considered noncriminal in procedure and result in the same manner as though the matter had been adjudicated and disposed of by a family court.

HRS § 587A-21. Admissibility of evidence; testimony by a child.

(a) Any statement relating to an allegation of imminent harm, harm, or threatened harm that a child has made to any person shall be admissible as evidence.

(b) In deciding in temporary foster custody hearings whether there is reasonable cause to believe that a child is subject to imminent harm the court may consider relevant hearsay evidence when direct testimony is unavailable or when it is impractical to subpoena witnesses who will be able to testify to facts based on personal knowledge.

(c) A child's recorded statement shall be admissible in evidence in any proceeding under this chapter; provided that:

(1) The statement is recorded on film, audiotape, or videotape, or by other reliable electronic means;

(2) The recording equipment used is capable of producing an accurate recording, was operated by a competent person, and the recording is accurate and has not been altered; and

(3) Every person on the recording is identified.

(d) A child may be directed by the court to testify under circumstances deemed by the court to be in the best interests of the child and the furtherance of justice. These circumstances may include an on-

the-record interview of the child in chambers, with only those parties present during the interview as the court deems to be in the best interests of the child.

HRS chap. 626, HRS Rule 616. Televised testimony of child.

In any prosecution of an abuse offense or sexual offense alleged to have been committed against a child less than eighteen years of age at the time of the testimony, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by two-way closed circuit video equipment to be viewed by the court, the accused, and the trier of fact, if the court finds that requiring the child to testify in the physical presence of the accused would likely result in serious emotional distress to the child and substantial impairment of the child's ability to communicate. During the entire course of such a procedure, the attorneys for the defendant and for the State shall have the right to be present with the child, and full direct and cross-examination shall be available as a matter of right.

Cases

Key Points:

- An out-of-court video statement violates the U.S. Constitution's 6th Amendment Confrontation Clause when a trial court has not held a hearing on whether the child victim giving the statement is an unavailable witness.
- However, out-of-court video statements can be admitted when evidence shows that testifying in person would harm the victim. As well, when the defendant has the opportunity to introduce all of the video statements into evidence, and the option to call any of the interviewers as witnesses, their right to confrontation is not violated.

In *State v. Apilando*, the Supreme Court of Hawaii held that the trial court erred in admitting the child victim's out-of-court video statement. *State v. Apilando*, 900 P.2d 135 (Haw. 1995). The Court held that the video statements were admitted in lieu of the child's testimony; furthermore, the child was unavailable for purposes of cross-examination and confrontation. *Id.* While the Court noted that certain exceptions exist in regard to the victim's accommodations, the court must determine that the child is unavailable. *Id.* Merely relying on the prosecution's assumption that the child may provide inconsistent statements is not sufficient to show unavailability. *Id.* Thus, the trial court erred and the defendant's right to confrontation was violated. *Id.*

In *In re K Children*, the Intermediate Court of Appeals of Hawaii denied the defendant's claim that the trial court erred in denying the defendant's request to produce the victim to testify before the court. *In re K Children*, No. CAAP-11-0000805, 2013 WL 6244722 at *3 (Haw. Ct. App. 2013). The Court held that the trial court had properly allowed the victim to testify via video on the basis that the victim was diagnosed with PTSD and had panic attacks, and was additionally involved in an ongoing suit with the defendant in regard to his sexual abuse. *Id.* The Court noted that the defendant had the opportunity

to introduce all of the victim's videos into evidence, and had the option to call any of the interviewers as witnesses. *Id.* Thus, the trial court did not err in finding that the benefit the defendant would have gained was outweighed by the harm the victim would have endured. *Id.*

Hawaii Hearsay Exceptions

HRS § 626-1, Rule 802.1. Hearsay exception; prior statements by witnesses.

The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:

(1) **Inconsistent statement.** The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b), and the statement was:

(A) Given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; or

(B) Reduced to writing and signed or otherwise adopted or approved by the declarant; or

(C) Recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement;

(2) **Consistent statement.** The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is consistent with the declarant's testimony, and the statement is offered in compliance with rule 613(c);

(3) **Prior identification.** The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, and the statement is one of identification of a person made after perceiving that person; or

(4) **Past recollection recorded.** A memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

HRS § 626-1, Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) **Admissions.**

(1) *Admission by party-opponent.* A statement that is offered against a party and is (A) the party's own statement, in either the party's individual or a representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth.

(2) *Vicarious admissions.* A statement that is offered against a party and was uttered by (A) a person authorized by the party to make such a statement, (B) the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or (C) a co-conspirator of the party during the course and in furtherance of the conspiracy.

(3) *Admission by deceased in wrongful death action.* A statement by the deceased, offered against the plaintiff in an action for the wrongful death of that deceased.

(4) *Admission by predecessor in interest.* When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.

(5) *Admission by predecessor in litigation.* When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

(b) **Other exceptions.**

(1) ***Present sense impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(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.

(3) ***Then existing mental, emotional, or physical condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Reserved.*

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with rule 902(11) or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of vital statistics.* Records or data compilations, in any form, 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.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of religious organizations.* 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.* 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.* Statements of fact concerning 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.* 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 authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property.* 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 the circumstances indicate lack of trustworthiness.

(16) *Statements in ancient documents.* Statements in a document in existence twenty years or more the authenticity of which 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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

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

(21) *Reputation as to character.* In proving character or a trait of character under rules 404 and 405, reputation of a person's character among the person's associates or in the community.

(22) *Judgment of previous conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal

prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

(24) **Other exceptions. A statement not specifically covered by any of the exceptions in this paragraph (b) but having equivalent circumstantial guarantees of trustworthiness, if the court determines that**

(A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and

(B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

HRS § 626-1, Rule 804. Hearsay exceptions; declarant unavailable.

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- (3) Testifies to a lack of memory of the subject matter of the declarant's statement;
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying. Determination of unavailability as a witness pursuant to this rule does not affect the opponent's right, under rule 806, to call and to cross-examine the declarant concerning the subject matter of any statement received in accordance with this rule.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered;

(2) *Statement under belief of impending death.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death;

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement;

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared;

(5) *Statement of recent perception.* A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear;

(6) Statement by child. A statement made by a child when under the age of sixteen, describing any act of sexual contact, sexual penetration, or physical violence performed with or against the child by another, if the court determines that the time, content, and circumstances of the statement provide strong assurances of trustworthiness with regard to appropriate factors that include but are not limited to:

(A) age and mental condition of the declarant;

(B) spontaneity and absence of suggestion;

(C) appropriateness of the language and terminology of the statement, given the child's age;

(D) lack of motive to fabricate;

(E) time interval between the event and the statement, and the reasons therefor; and

(F) whether or not the statement was recorded, and the time, circumstances, and method of the recording.

If admitted, the statement may be read or, in the event of a recorded statement, broadcast into evidence but may not itself be received as an exhibit unless offered by an adverse party;

(7) **Forfeiture by wrongdoing.** A statement offered against a party that has procured the unavailability of the declarant as a witness;

(8) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

HRS § 626-1, Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- Out-of-court statements made after a child victim has had time to think about an incident, talk to other adults, etc., do not count as excited utterances and therefore, are not exceptions to hearsay rules.

In *In Interest of Doe*, the Supreme Court of Hawai'i held that a teacher's testimony in regard to the child victim's statements of abuse were inadmissible under the excited utterance exception to hearsay. *In Interest of Doe*, 761 P.2d 299 (Haw. 1988). The child made her statements to her teacher after speaking with her mother, and more than halfway through the day. *Id.* The Court noted that

because of the delay in the child's admission to her teacher, as well as the questions the teacher had already asked the child ("what did you do over the weekend?"), it was improper to find the statements as "reasonably contemporaneous." *Id.* Thus, the statements were made outside of the appropriate zone for an excited utterance, and were improperly admitted as such. *Id.*

Idaho

Idaho Admissibility

Idaho Code § 16-1618. Investigative interviews of alleged child abuse victims

Unless otherwise demonstrated by good cause, all investigative or risk assessment interviews of alleged victims of child abuse will be documented by audio or video taping whether conducted by personnel of law enforcement entities, the department of health and welfare or child advocacy centers. The absence of such audio or video taping shall not limit the admissibility of such evidence in any related court proceeding.

Idaho Code § 19-3024. Statements by child.

Statements made by a child under the age of ten (10) years describing any act of sexual abuse, physical abuse, or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the child protective act, chapter 16, title 16, Idaho Code, or in any criminal proceedings in the courts of the state of Idaho if:

1. The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and
2. The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness. A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Provided, that when the child is unavailable as a witness, such statements may be admitted only if there is corroborative evidence of the act.

Statements may not be admitted unless the proponent of the statements notifies the adverse party of his intention to offer the statements and the particulars of the statements sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements.

Cases

Key Points:

- Excited utterances needn't be truly "excited," as child victims can become subdued as a result of abuse rather than upset.
- However, sleep talking doesn't count as an excited utterance because as the product of the unconscious mind, it may not have a basis in reality.

In *State v. Kay*, the Court of Appeals of Idaho held that the trial court had properly admitted the child victim's excited utterance into evidence. *State v. Kay*, 927 P.2d 897 (Idaho Ct. App. 1996). The Court denied the defendant's claim that the child could not have uttered an "excited" statement given her generally calm composure. *Id.* The Court noted that the child's subdued nature, evidence of grief, and unwillingness to disclose until coaxed exemplified the child's spontaneous statement rather than "reflective thought." *Id.* The Court held that the trial court could have properly found the child's demeanor as troubled and capable of an excited utterance, thus not violating its discretion. *Id.*

In *State v. Zimmerman*, the Supreme Court of Idaho held that the child victim's sleep talk was improperly admitted by the trial court as an excited utterance. *State v. Zimmerman*, 829 P.2d 861 (Idaho 1992). The Court noted that the trial court erred in admitting sleep talk, under the overriding belief that such utterances may be fiction. *Id.* Although some sleep talk may be rooted in actual anxieties, the inability to differentiate between fiction and reality makes such talk unreliable and thus inadmissible. *Id.*

Idaho Hearsay Exceptions

ID R REV RULE 803. Exceptions to the rule against hearsay -- regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) ***Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.**

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.

(4) **Statement Made for Medical Diagnosis or Treatment.** A statement that:

- (A) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and
- (B) describes medical history; past or present symptoms or sensations; or their source.

(5) **Recorded Recollection.** A record that:

- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
- (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
- (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

- (A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;
- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12); and
- (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

- (A) the evidence is admitted to prove that the matter did not occur or exist;
- (B) a record was regularly kept for a matter of that kind; and
- (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

- (A) it sets out:
 - i. the office's regularly recorded and regularly conducted activities; or

ii. a matter observed while under a legal duty to report, or factual findings resulting from an investigation conducted under legal authority, but not including:

(a) a statement or factual finding offered by the public office in a case in which it is a party; or

(b) an investigative report by law enforcement personnel or a public office's factual finding resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(g) **Public Records of Vital Statistics.** A record of a birth, death, fetal death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony -- or certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

i. the record or statement does not exist; or

ii. a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice -- unless the court sets a different time for the notice or the objection.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least 30 years old and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit, except upon motion and for good cause shown.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Medical or Dental Tests and Test Results for Diagnostic or Treatment Purposes. A written, graphic, numerical, symbolic or pictorial representation of the results of a medical or dental test performed for purposes of diagnosis or treatment for which foundation has been established pursuant to Rule 904, unless the opponent shows that the sources of information or other circumstances indicate a lack of trustworthiness. This exception shall not apply to:

(A) psychological tests;

(B) reports generated pursuant to I.R.C.P. 35(a);

(C) medical or dental tests performed in anticipation of or for purposes of litigation; or

(D) public records specifically excluded from the Rule 803(8) exception to the hearsay rule.

(24) Other Exceptions.

(A) In General. A statement not specifically covered by any of the foregoing exceptions if:

i. the statement has equivalent circumstantial guarantees of trustworthiness.

ii. it is offered as evidence of a material fact;

iii. it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

iv admitting it will best serve the purposes of these rules and the interests of justice.

(B) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

ID R REV RULE 804. Exceptions to the rule against hearsay -- when declarant is unavailable as a witness.

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

- (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

- (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate

the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

(6) *Other Exceptions.*

(A) In General. A statement not specifically covered by any of the foregoing exceptions if:

(i) the statement has equivalent circumstantial guarantees of trustworthiness;

(ii) it is offered as evidence of a material fact;

(iii) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(iv) admitting it will best serve the purposes of these rules and the interests of justice.

(B) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

I.R.E., Rule 106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

Cases

Key Points:

- To qualify as an excited utterance, a statement has to meet both requirements under state law, not just one or the other, and must be voluntarily given.
- In determining whether a child's statements may be admitted under the medical exception, the court must consider various factors -- including the child's pain or distress, undue influence by a medical professional or other adult, and timing, among others -- to decide whether the child has the ability to knowingly make a statement for purposes of medical treatment or diagnosis.

In *State v. Field*, the Supreme Court of Idaho held that the child victim's statements, made to her sister and mother, did not fall within the excited utterance exception to hearsay and were thus inadmissible. *State v. Field*, 165 P.3d 273 (Idaho 2007). For a statement to be defined as an excited utterance, it must meet two requirements: "(1) an occurrence or event sufficiently startling to render inoperative the normal reflective thought process of an observer; and (2) the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought." *Id.* The Court noted that while the child met the first requirement, the statement was not a spontaneous reaction. *Id.* The statements occurred two days after the assault and they were not voluntarily given, but rather reluctantly expressed after the child's sister pressed with questions. *Id.* Thus, the statements were not admissible under the excited utterance exception. *Id.*

In *State v. Christensen*, the Supreme Court of Idaho denied the defendant's claim that the trial court improperly admitted the child victims' statements under the medical exception to hearsay. *State v. Christensen*, 458 P.3d 951 (Idaho 2020). In determining whether a child's statements may be admitted under the medical exception, the court must consider various factors to decide whether the child has the ability to knowingly make a statement for purposes of medical treatment or diagnosis. *Id.* The court may look to:

"The child's age; whether the child understands the role of the physician in general; whether the child was suffering pain or distress at the time; whether the child's statements were inappropriately influenced by others, as by leading questions from the physician or a previous suggestive interrogation by another adult; whether the examination occurred during the course of a custody battle or other family dispute; the child's ability and willingness to communicate freely with the physician; the child's ability to differentiate between truth and fantasy in the examination itself and in other contexts; whether the examination was initiated

by an attorney (which would suggest that its purpose was for litigation rather than treatment); and the timing of the examination in relation to the trial." *Id.*

Using these factors, the Court held that the statements were admissible because the examination was not related to the incident of abuse, the physicians used open-ended and non-leading questions, the children answered freely, and the examinations were conducted in a medical facility, aiding in the children's recognition of the purpose of the exam. *Id.* Additionally, the exams were used both to diagnose the children, and to provide the proper treatment. *Id.* Thus, the Court held that the statements were properly admitted under the medical exception to hearsay. *Id.*

Illinois

Illinois Admissibility

705 ILCS 405/2-18 Evidence.

(1) At the adjudicatory hearing, the court shall first consider only the question whether the minor is abused, neglected or dependent. The standard of proof and the rules of evidence in the nature of civil proceedings in this State are applicable to proceedings under this Article. If the petition also seeks the appointment of a guardian of the person with power to consent to adoption of the minor under Section 2-29 [705 ILCS 405/2-29], the court may also consider legally admissible evidence at the adjudicatory hearing that one or more grounds of unfitness exists under subdivision D of Section 1 of the Adoption Act [750 ILCS 50/1].

(2) In any hearing under this Act, the following shall constitute prima facie evidence of abuse or neglect, as the case may be:

(a) proof that a minor has a medical diagnosis of battered child syndrome is prima facie evidence of abuse;

(b) proof that a minor has a medical diagnosis of failure to thrive syndrome is prima facie evidence of neglect;

(c) proof that a minor has a medical diagnosis of fetal alcohol syndrome is prima facie evidence of neglect;

(d) proof that a minor has a medical diagnosis at birth of withdrawal symptoms from narcotics or barbiturates is prima facie evidence of neglect;

(e) proof of injuries sustained by a minor or of the condition of a minor of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent, custodian or guardian of such minor shall be prima facie evidence of abuse or neglect, as the case may be;

(f) proof that a parent, custodian or guardian of a minor repeatedly used a drug, to the extent that it has or would ordinarily have the effect of producing in the user a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence of neglect;

(g) proof that a parent, custodian, or guardian of a minor repeatedly used a controlled substance, as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act [720 ILCS 570/102], in the presence of the minor or a sibling of the minor is prima facie evidence of neglect. "Repeated use", for the purpose of this subsection, means more than one

use of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act;

(h) proof that a newborn infant's blood, urine, or meconium contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of those substances, the presence of which is the result of medical treatment administered to the mother or the newborn, is prime facie evidence of neglect;

(i) proof that a minor was present in a structure or vehicle in which the minor's parent, custodian, or guardian was involved in the manufacture of methamphetamine constitutes prima facie evidence of abuse and neglect;

(j) proof that a parent, custodian, or guardian of a minor allows, encourages, or requires a minor to perform, offer, or agree to perform any act of sexual penetration as defined in Section 11-0.1 of the Criminal Code of 2012 [720 ILCS 5/11-0.1] for any money, property, token, object, or article or anything of value, or any touching or fondling of the sex organs of one person by another person, for any money, property, token, object, or article or anything of value, for the purpose of sexual arousal or gratification, constitutes prima facie evidence of abuse and neglect;

(k) proof that a parent, custodian, or guardian of a minor commits or allows to be committed the offense of involuntary servitude, involuntary sexual servitude of a minor, or trafficking in persons as defined in Section 10-9 of the Criminal Code of 1961 or the Criminal Code of 2012 [720 ILCS 5/10-9 or 720 ILCS 5/1-1 et seq.], upon such minor, constitutes prima facie evidence of abuse and neglect.

(3) In any hearing under this Act, proof of the abuse, neglect or dependency of one minor shall be admissible evidence on the issue of the abuse, neglect or dependency of any other minor for whom the respondent is responsible.

(4)

(a) Any writing, record, photograph or x-ray of any hospital or public or private agency, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a minor in an abuse, neglect or dependency proceeding, shall be admissible in evidence as proof of that condition, act, transaction, occurrence or event, if the court finds that the document was made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. A certification by the head or responsible employee of the hospital or agency that the writing, record, photograph or x-ray is the full and complete record of the condition, act, transaction, occurrence or event and that it satisfies the conditions of this paragraph shall be prima facie evidence of the facts contained in such certification. A certification by someone other than the head of the hospital or agency shall be accompanied by a photocopy of a delegation of authority signed by both the head of the hospital or agency and by such other employee. All other circumstances of the making of the memorandum,

record, photograph or x-ray, including lack of personal knowledge of the maker, may be proved to affect the weight to be accorded such evidence, but shall not affect its admissibility.

(b) Any indicated report filed pursuant to the Abused and Neglected Child Reporting Act [325 ILCS 5/1 et seq.] shall be admissible in evidence.

(c) Previous statements made by the minor relating to any allegations of abuse or neglect shall be admissible in evidence. However, no such statement, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect.

(d) There shall be a rebuttable presumption that a minor is competent to testify in abuse or neglect proceedings. The court shall determine how much weight to give to the minor's testimony, and may allow the minor to testify in chambers with only the court, the court reporter and attorneys for the parties present.

(e) The privileged character of communication between any professional person and patient or client, except privilege between attorney and client, shall not apply to proceedings subject to this Article.

(f) Proof of the impairment of emotional health or impairment of mental or emotional condition as a result of the failure of the respondent to exercise a minimum degree of care toward a minor may include competent opinion or expert testimony, and may include proof that such impairment lessened during a period when the minor was in the care, custody or supervision of a person or agency other than the respondent.

(5) In any hearing under this Act alleging neglect for failure to provide education as required by law under subsection (1) of Section 2-3 [705 ILCS 405/2-3], proof that a minor under 13 years of age who is subject to compulsory school attendance under the School Code is a chronic truant as defined under the School Code shall be prima facie evidence of neglect by the parent or guardian in any hearing under this Act and proof that a minor who is 13 years of age or older who is subject to compulsory school attendance under the School Code is a chronic truant shall raise a rebuttable presumption of neglect by the parent or guardian. This subsection (5) shall not apply in counties with 2,000,000 or more inhabitants.

(6) In any hearing under this Act, the court may take judicial notice of prior sworn testimony or evidence admitted in prior proceedings involving the same minor if (a) the parties were either represented by counsel at such prior proceedings or the right to counsel was knowingly waived and (b) the taking of judicial notice would not result in admitting hearsay evidence at a hearing where it would otherwise be prohibited.

725 ILCS 5/106B-5 Testimony by a victim who is a child or moderately, severely, or profoundly intellectually disabled person or a person affected by a developmental disability

(a) In a proceeding in the prosecution of an offense of criminal sexual assault, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual abuse, aggravated criminal sexual abuse, aggravated battery, or aggravated domestic battery, a court may order that

the testimony of a victim who is a child under the age of 18 years or a person with a moderate, severe, or profound intellectual disability or a person affected by a developmental disability be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

- (1)** the testimony is taken during the proceeding; and
 - (2)** the judge determines that testimony by the child victim or victim with a moderate, severe, or profound intellectual disability or victim affected by a developmental disability in the courtroom will result in the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability suffering serious emotional distress such that the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability cannot reasonably communicate or that the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability will suffer severe emotional distress that is likely to cause the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability to suffer severe adverse effects.
- (b)** Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability.
- (c)** The operators of the closed circuit television shall make every effort to be unobtrusive.
- (d)** Only the following persons may be in the room with the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability when the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability testifies by closed circuit television:
- (1)** the prosecuting attorney;
 - (2)** the attorney for the defendant;
 - (3)** the judge;
 - (4)** the operators of the closed circuit television equipment; and
 - (5)** any person or persons whose presence, in the opinion of the court, contributes to the well-being of the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability, including a person who has dealt with the child in a therapeutic setting concerning the abuse, a parent or guardian of the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability, and court security personnel.
- (e)** During the child's or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability's testimony by closed circuit television, the defendant shall be in the courtroom and shall not communicate with the jury if the cause is being heard before a jury.

(f) The defendant shall be allowed to communicate with the persons in the room where the child or person with a moderate, severe, or profound intellectual disability or person affected by a developmental disability is testifying by any appropriate electronic method.

(g) The provisions of this Section do not apply if the defendant represents himself pro se.

(h) This Section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

(i) This Section applies to prosecutions pending on or commenced on or after the effective date of this amendatory Act of 1994.

(j) For the purposes of this Section, "developmental disability" includes, but is not limited to, cerebral palsy, epilepsy, and autism.

735 ILCS 5/8-2601. Admissibility of evidence; out-of-court statements; child abuse.

§ 8-2601. **(a)** An out-of-court statement made by a child under the age of 13 describing any act of child abuse or any conduct involving an unlawful sexual act performed in the presence of, with, by, or on the declarant child, or testimony by such of an out-of-court statement made by such child that he or she complained of such acts to another, is admissible in any civil proceeding, if:

(1) the court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) the child either:

(i) testifies at the proceeding; or

(ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(b) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given to the statement and that, in making its determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

(c) The proponent of the statement shall give the adverse party reasonable notice of an intention to offer the statement and the particulars of the statement.

Cases

Key Points:

- To qualify a child victim's statement as an excited utterance, prosecutors must enter it into evidence so the trial court can properly assess its reliability based on its timing and circumstances.
- No additional or heightened requirement exists for a foundation for admissibility of audio and video recorded out-of-court statements; corroborative testimony suffices.

In *People v. Zwart*, the Supreme Court of Illinois held that the trial court erred in allowing the child victim's out-of-court statements to be admitted under the "excited utterance" exception. *People v. Zwart*, 600 N.E.2d 1169 (Ill. 1992). The Court noted that the trial court had improperly analyzed the child's statements in regard to their reliability given the timing and circumstances the statements were uttered under. *Id.* The victim provided three prior statements during interviews with a police officer, a counselor, and a child advocate; however, the prosecution failed to offer any of these interviews into evidence, thus making it impossible for the trial court to determine whether the interviews were conducted in an influential or suggestive manner. *Id.* Given the child's young age and susceptibility to suggestion, the prosecution bore the burden to prove that the interviews were reliable and not the result of adult manipulation. *Id.*

In *People v. Johnson*, the Appellate Court of Illinois denied the defendant's claim that the trial court erred in admitting the child victim's video and audio recorded statement on the basis that the State had failed to provide the proper foundation required for admissibility. *People v. Johnson*, 55 N.E.3d 32 (Ill. App. Ct. 2016). The Court noted that there was no additional or heightened requirement in regard to the foundation for admissibility. *Id.* The trial court had properly admitted the recording upon the testimony of the forensic interviewer, who testified that she had viewed the recording and that it was a "fair and accurate record of the conversation" she had had with the victim. *Id.*

Illinois Hearsay Exceptions

725 ILCS 5/115-10 Certain hearsay exceptions.

(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, a person with an intellectual disability, a person with a cognitive impairment, or a person with a developmental disability, including, but not limited to, prosecutions for violations of Sections 11-1.20 through 11-1.60 or 12-13 through 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012 [720 ILCS 5/1-1 et seq.] and prosecutions for violations of Sections 10-1 (kidnapping), 10-2 (aggravated kidnapping), 10-3 (unlawful restraint), 10-3.1 (aggravated unlawful restraint), 10-4 (forcible detention), 10-5 (child abduction), 10-6 (harboring a runaway), 10-7 (aiding or abetting child abduction), 11-9 (public indecency), 11-11 (sexual relations within families), 11-21 (harmful material), 12-1 (assault), 12-2 (aggravated assault), 12-3 (battery), 12-3.2

(domestic battery), 12-3.3 (aggravated domestic battery), 12-3.05 or 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), 12-4.7 (drug induced infliction of great bodily harm), 12-5 (reckless conduct), 12-6 (intimidation), 12-6.1 or 12-6.5 (compelling organization membership of persons), 12-7.1 (hate crime), 12-7.3 (stalking), 12-7.4 (aggravated stalking), 12-10 or 12C-35 (tattooing the body of a minor), 12-11 or 19-6 (home invasion), 12-21.5 or 12C-10 (child abandonment), 12-21.6 or 12C-5 (endangering the life or health of a child) or 12-32 (ritual mutilation) of the Criminal Code of 1961 or the Criminal Code of 2012 or any sex offense as defined in subsection (B) of Section 2 of the Sex Offender Registration Act [730 ILCS 150/2], the following evidence shall be admitted as an exception to the hearsay rule:

(1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and

(2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child or person with an intellectual disability, a cognitive impairment, or developmental disability either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement; and

(3) In a case involving an offense perpetrated against a child under the age of 13, the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later, but the statement may be admitted regardless of the age of the victim at the time of the proceeding.

(c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, or the intellectual capabilities of the person with an intellectual disability, a cognitive impairment, or developmental disability, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(d) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(e) Statements described in paragraphs (1) and (2) of subsection (a) shall not be excluded on the basis that they were obtained as a result of interviews conducted pursuant to a protocol adopted by a Child Advocacy Advisory Board as set forth in subsections (c), (d), and (e) of Section 3 of the Children's Advocacy Center Act [55 ILCS 80/3] or that an interviewer or witness to the interview was or is an employee, agent, or investigator of a State's Attorney's office.

(f) For the purposes of this Section:

"Person with a cognitive impairment" means a person with a significant impairment of cognition or memory that represents a marked deterioration from a previous level of function. Cognitive impairment includes, but is not limited to, dementia, amnesia, delirium, or a traumatic brain injury.

"Person with a developmental disability" means a person with a disability that is attributable to (1) an intellectual disability, cerebral palsy, epilepsy, or autism, or (2) any other condition that results in an impairment similar to that caused by an intellectual disability and requires services similar to those required by a person with an intellectual disability.

"Person with an intellectual disability" means a person with significantly subaverage general intellectual functioning which exists concurrently with an impairment in adaptive behavior.

725 ILCS 5/115-10.2a. Admissibility of prior statements in domestic violence prosecutions when the witness is unavailable to testify.

(a) In a domestic violence prosecution, a statement, made by an individual identified in Section 201 of the Illinois Domestic Violence Act of 1986 as a person protected by that Act, that is not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is identified as unavailable as defined in subsection (c) and if the court determines that:

- (1) the statement is offered as evidence of a material fact; and
- (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of the statement, including the name and address of the declarant.

(c) Unavailability as a witness includes circumstances in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of health or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means; or

(6) is a crime victim as defined in Section 3 of the Rights of Crime Victims and Witnesses Act and the failure of the declarant to testify is caused by the defendant's intimidation of the declarant as defined in Section 12-6 of the Criminal Code of 2012.

(d) A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for purpose of preventing the witness from attending or testifying.

(e) Nothing in this Section shall render a prior statement inadmissible for purposes of impeachment because the statement was not recorded or otherwise fails to meet the criteria set forth in this Section.

725 ILCS 5/115-10.5. Hearsay exception regarding safe zone testimony.

(a) In any prosecution for any offense charged as a violation of Section 407 of the Illinois Controlled Substances Act,¹ Section 55 of the Methamphetamine Control and Community Protection Act, or Section 5-130 of the Juvenile Court Act of 1987² the following evidence shall be admitted as an exception to the hearsay rule any testimony by any qualified individual regarding the status of any property as:

(1) a truck stop or safety rest area, or

(2) a school or conveyance owned, leased or contracted by a school to transport students to or from school, or

(3) residential property owned, operated, and managed by a public housing agency, or

(4) a public park, or

(5) the real property comprising any church, synagogue, or other building, structure, or place used primarily for religious worship, or

(6) the real property comprising any of the following places, buildings, or structures used primarily for housing or providing space for activities for senior citizens: nursing homes, assisted-living centers, senior citizen housing complexes, or senior centers oriented toward daytime activities.

(b) As used in this Section, "qualified individual" means any person who (i) lived or worked within the territorial jurisdiction where the offense took place when the offense took place; and (ii) is familiar with various public places within the territorial jurisdiction where the offense took place when the offense took place.

(c) For the purposes of this Section, "qualified individual" includes any peace officer, or any member of any duly organized State, county, or municipal peace unit, assigned to the territorial jurisdiction where the offense took place when the offense took place.

(d) This Section applies to all prosecutions pending at the time this amendatory Act of the 91st General Assembly takes effect and to all prosecutions commencing on or after its effective date.

725 ILCS 5/115-11. Prosecution for sex offenses; victims under 18 years; persons excluded from proceedings.

§ 115-11. In a prosecution for a criminal offense defined in Article 111 or in Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012,² where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media.

725 ILCS 5/115-13. Hearsay exception; statements by victims of sex offenses to medical personnel.

§ 115-13. In a prosecution for violation of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012,¹ statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

IL. R. EVID. Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors.
- Even if out-of-court statements are held to be inadmissible because they don't meet the reliability standard, a hearsay exception can still apply.

In *People v. Sharp*, the Appellate Court of Illinois held that the child victim's out-of-court statements were sufficiently reliable and thus admissible. *People v. Sharp*, 909 N.E.2d 971 (Ill. App. Ct. 2009). The elements to determine the reliability of a hearsay statement are set forth in section 115-10 of the Code 725 ILCS 5/115-10:

"(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement[.]” *Id.*

During the hearing, the court may look to “(1) the child’s spontaneity and consistent repetition of the incident, (2) the child’s mental state, (3) use of terminology unexpected of a child of similar age, and (4) the lack of motive to fabricate” to further determine the reliability of the child’s statements. *Id.* The Court determined that, although there was a delay in the incident and the child’s statements, this alone could not disqualify the child’s statements from admissibility. *Id.* The child exhibited a distressed mental state when giving her statements, and her statements were consistent over the course of the investigation. *Id.* The Court additionally denied the defendant’s claim that the child’s inability to understand the meaning of “penetrated” made her statements unreliable because “if [child] were a victim of sexual assault, she should be better versed in sexual terminology.” *Id.* Rather, the Court noted that “this was not a case in which a child victim had been “groomed” by a sexual predator and assaulted or abused over a period of time...[the child] was sexually assaulted on one occasion, and the fact that she did not know the term “penetrated” suggests (if anything) that she was not coached as to what to say.” *Id.* Thus, the Court found the child’s statements to be sufficiently reliable and admissible. *Id.*

In *People v. Simpkins*, the Appellate Court of Illinois held that the child victim's out-of-court statements were not sufficiently reliable to be admissible, but the child's statements to a medical professional were admissible under the medical exception to hearsay. *People v. Simpkins*, 697 N.E.2d 302 (Ill. App. Ct. 1998). The Court noted that the child's initial statements were inadmissible as she had been interviewed previously, by the same officer, regarding the abuse of her older sibling by her grandfather. *Id.* Because the first interview was not videotaped and the officer could not testify as to what was asked or said, the Court noted that the possibility “that the statement was a product of suggestive interviewing techniques or manipulation” rendered it unreliable. *Id.* However, the Court held that the trial court properly admitted the child's statements taken during a medical examination because “the desire for proper diagnosis or treatment outweighs any motive to falsify.” *Id.*



Indiana

Indiana Admissibility

Ind. Code Ann. § 35-37-4-6. Admissibility of statement or videotape of protected person in certain criminal actions.

(a) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(1) or (c)(2):

- (1)** Sex crimes (IC 35-42-4).
- (2)** A battery offense included in IC 35-42-2 upon a child less than fourteen (14) years of age.
- (3)** Kidnapping and confinement (IC 35-42-3).
- (4)** Incest (IC 35-46-1-3).
- (5)** Neglect of a dependent (IC 35-46-1-4).
- (6)** Human and sexual trafficking crimes (IC 35-42-3.5).

(b) This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(3):

- (1)** Exploitation of a dependent or endangered adult (IC 35-46-1-12).
- (2)** A sex crime (IC 35-42-4).
- (3)** A battery offense included in IC 35-42-2.
- (4)** Kidnapping, confinement, or interference with custody (IC 35-42-3).
- (5)** Home improvement fraud (IC 35-43-6).
- (6)** Fraud (IC 35-43-5).
- (7)** Identity deception (IC 35-43-5-3.5).
- (8)** Synthetic identity deception (IC 35-43-5-3.8).
- (9)** Theft (IC 35-43-4-2).
- (10)** Conversion (IC 35-43-4-3).
- (11)** Neglect of a dependent (IC 35-46-1-4).
- (12)** Human and sexual trafficking crimes (IC 35-42-3.5).

(c) As used in this section, "protected person" means:

(1) a child who is less than fourteen (14) years of age;

(2) an individual with a mental disability who has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that:

(A) is manifested before the individual is eighteen (18) years of age;

(B) is likely to continue indefinitely;

(C) constitutes a substantial impairment of the individual's ability to function normally in society; and

(D) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated; or

(3) an individual who is:

(A) at least eighteen (18) years of age; and

(B) incapable by reason of mental illness, intellectual disability, dementia, or other physical or mental incapacity of:

(i) managing or directing the management of the individual's property; or

(ii) providing or directing the provision of self-care.

(d) A statement or videotape that:

(1) is made by a person who at the time of trial is a protected person;

(2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and

(3) is not otherwise admissible in evidence; is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.

(e) A statement or videotape described in subsection (d) is admissible in evidence in a criminal action listed in subsection (a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:

(1) The court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the protected person in person or by using closed circuit television testimony as described in section 8(f) and 8(g) of this chapter; that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness for one (1) of the following reasons:

(i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.

(ii) The protected person cannot participate in the trial for medical reasons.

(iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

(f) If a protected person is unavailable to testify at the trial for a reason listed in subsection (e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination:

(1) at the hearing described in subsection (e)(1); or

(2) when the statement or videotape was made.

(g) A statement or videotape may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney at least ten (10) days before the trial of:

(1) the prosecuting attorney's intention to introduce the statement or videotape in evidence; and

(2) the content of the statement or videotape.

(h) If a statement or videotape is admitted in evidence under this section, the court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement or videotape and that, in making that determination, the jury shall consider the following:

(1) The mental and physical age of the person making the statement or videotape.

(2) The nature of the statement or videotape.

(3) The circumstances under which the statement or videotape was made.

(4) Other relevant factors.

(i) If a statement or videotape described in subsection (d) is admitted into evidence under this section, a defendant may introduce a:

(1) transcript; or

(2) videotape; of the hearing held under subsection (e)(1) into evidence at trial.

Ind. Code Ann. § 31-34-13-2. Admissibility of statement or videotape.

A statement or videotape that:

(1) is made by a child who at the time of the statement or videotape:

(A) is less than fourteen (14) years of age; or

(B) is at least fourteen (14) years of age but less than eighteen (18) years of age and has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that:

(i) is likely to continue indefinitely;

(ii) constitutes a substantial disability to the child's ability to function normally in society; and

(iii) reflects the child's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated;

(2) concerns an act that is a material element in determining whether a child is a child in need of services; and

(3) is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in an action described in section 1 [IC 31-34-13-1] of this chapter if the requirements of section 3 [IC 31-34-13-3] of this chapter are met.

Ind. Code Ann. § 31-34-13-4. Notice of intention to introduce statement or videotape and contents.

A statement or videotape may not be admitted in evidence under this chapter unless the attorney for the department informs the parties of:

(1) an intention to introduce the statement or videotape in evidence; and

(2) the content of the statement or videotape; at least seven (7) days before the proceedings to give the parties a fair opportunity to prepare a response to the statement or videotape before the proceeding.

Ind. Code Ann. § 31-35-4-2. Admissibility.

A statement or videotape that:

- (1)** is made by a child who at the time of the statement or videotape:
 - (A)** is less than fourteen (14) years of age; or
 - (B)** is at least fourteen (14) years of age but less than eighteen (18) years of age and has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that:
 - (i)** is likely to continue indefinitely;
 - (ii)** constitutes a substantial disability to the child's ability to function normally in society; and
 - (iii)** reflects the child's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated;
- (2)** concerns an act that is a material element in determining whether a parent-child relationship should be terminated; and
- (3)** is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in an action described in section 1 [IC 31-35-4-1] of this chapter if the requirements of section 3 [IC 31-35-4-3] of this chapter are met.

Ind. Code Ann. § 31-35-4-3. Conditions for admissibility.

A statement or videotape described in section 2 [IC 31-35-4-2] of this chapter is admissible in evidence in an action to determine whether the parent-child relationship should be terminated if, after notice to the parties of a hearing and of their right to be present:

- (1)** the court finds that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability; and
- (2)** the child:
 - (A)** testifies at the proceeding to determine whether the parent-child relationship should be terminated;
 - (B)** was available for face-to-face cross-examination when the statement or videotape was made; or
 - (C)** is found by the court to be unavailable as a witness because:

(i) a psychiatrist, physician, or psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child;

(ii) a physician has certified that the child cannot participate in the proceeding for medical reasons; or

(iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

Cases

Key Points:

- Expert testimony supporting a child victim's unavailability to testify is sufficient to support the admissibility of video recorded out-of-court statements.
- Video recorded statements themselves can contain appropriate indicia of reliability.
- The protected persons statute is necessary to have a child victim's video recorded out-of-court statements admitted into evidence.
- A child victim's inability to understand questions, remember details, or respond under cross-examination does not deprive a defendant of the right of confrontation under the Sixth Amendment.
- An expert's testimony, when it is based on a student subordinate's work which the expert has personally reviewed and approved, is sufficient evidence of a child victim's unavailability.
- A CAC's forensic interview is admissible when it meets multiple criteria for reliability.

In *Norris v. State*, the Indiana Court of Appeals rejected the defendant's multiple contentions regarding the trial court's determination that the victim was unavailable to testify, as well as the admission of the victim's video recorded out-of-court statements pursuant to the provisions of the protected person statute, enacted at I.C. § 35-37-4-6. *Norris v. State*, 53 N.E.3d 512, 2016 Ind. App. LEXIS 123 (Ind. Ct. App. 2016). The court held that the State's witness, a clinical psychologist to whom the victim was referred to assess the child's cognitive abilities and mental health condition, "unequivocally affirmed the State's question whether he believed 'to a medical degree of certainty' that this diagnosis would 'render [victim] unable to communicate.'" *Id.* The defendant also contended that the trial court erred in admitting the testimony of "an additional witness specially trained to communicate with children such as the protected person in this case" as "other evidence." *Id.* The Indiana Court of Appeals concluded that "the trial court properly considered Smallwood's testimony as an additional source of support to reach its conclusion of J.B.'s unavailability." *Id.* Lastly, the Appellate Court held that "the trial court properly relied on Dr. Lombard's statements to declare [victim] unavailable." *Id.* With regard to the admission of the victim's out-of-court videotaped statements, the Court held that the trial court did not abuse its discretion in admitting the statements

because “[victim’s] statements are cloaked with sufficient indicia of reliability... [victim] was spontaneous in his responses and demonstrative of how he incurred the bruises”, and “at times, he even corrected [the forensic interviewer’s] inaccuracies.” *Id.* The Indiana Court of Appeals further denied the defendant’s claim that the trial court erred in finding that the child victim was an unavailable witness because the ‘other evidence’ used to support their conclusion within the meaning of Indiana Code § 35-37-4-6(e)(2)(B)(i) must take the form of “like maybe medical reports or other documents.” *Id.* The Court disagreed and held: “The language of the statute itself prescribes that a trial court’s finding of unavailability can be based solely on the testimony of a psychiatrist, physician, or psychologist. *Id.* The statute then continues that following this testimony, the finding can be supported by ‘other evidence, if any[.]’ See I.C. § 35-37-4-6. Thus, while the ‘other evidence’ is not mandated, it could be used to provide further substantiation to declare the protected person unavailable.” *Norris*, 53 N.E.3d 512. Because “the statute does not further define ‘other evidence’ and testimony is considered evidence”, the Court concluded that the trial court did not err in referencing the testimony of a witness specially trained to communicate with children such as the protected child victim in support of its conclusion of the victim’s unavailability. *Id.*

In *D.P. v. State*, the Indiana Court of Appeals reversed the decision of the trial court that found the 10-year-old juvenile defendant committed an act that would be Level 4 felony child molesting if committed by an adult. *D.P. v. State*, 80 N.E.3d 913, 2017 Ind. App. LEXIS 294 (Ind. Ct. App. 2017). The Court found that “although the juvenile victim made very specific and incriminating allegations against [defendant] in the videotaped interview, the video was not admitted into evidence at the fact-finding hearing under our Protected Person Statute.” *Id.* The video was thus excluded under Ind. Code § 35-37, 4-6. *Id.* The Court held that, “without the videotaped interview, and based solely on the evidence presented at the fact-finding hearing, we do not believe that a reasonable factfinder could find beyond a reasonable doubt that [the juvenile defendant] touched or fondled the victim *with the intent to arouse or satisfy sexual desires.*” *Id.*

In *Shoda v. Ind.*, the Indiana Court of Appeals rejected the defendant’s contention that the juvenile victim’s non-responsiveness to his questioning at the protected person’s hearing made her effectively unavailable for cross-examination, and therefore, the trial court had erred in admitting her video-recorded interview under the protected persons statute. *Shoda v. Ind.*, 132 N.E.3d 454, 2019 Ind. App. LEXIS 399 (Ind. Ct. App. 2019). The Court held that the defendant “was not deprived of his right to confrontation simply because [victim] did not understand some of the questions put to her on cross-examination at the protected person’s hearing.” *Id.* Neither the State nor the trial court did anything to impair Shoda’s ability to cross-examine [victim]. *Id.* Moreover, any lapses in [victim’s] memory or her unresponsiveness did not amount to a denial of the right to cross-examine. *Id.*

In *Vega v. State*, the Indiana Court of Appeals denied the defendant’s assertion that the trial court abused its discretion when admitting the child victim’s forensic interview. *Vega v. State*, 119 N.E.3d 193, 2019 Ind. App. LEXIS 65 (Ind. Ct. App. 2019). In this case, a licensed psychologist reviewed and then adopted the work of her subordinate, a doctoral student; testified; and gave her opinion at the protected-person hearing as to the victim’s unavailability. *Id.* The defendant argued that the doctoral student’s testimony was insufficient because she was not a licensed psychologist, and the licensed psychologist’s testimony was insufficient because she did not personally interview the child. *Id.* However, the Court ruled that “because this is not a case where only the subordinate testified, or where the licensed professional had not personally reviewed and approved the subordinate’s work...

we hold that the State presented sufficient evidence under the statute to demonstrate [victim's] unavailability at trial, and the trial court acted within its discretion when it admitted [victim's] recorded forensic interview due to her unavailability." *Id.*

In *Perryman v. State*, the Court of Appeals denied the defendant's argument that the victim's interview should be inadmissible on the grounds that it violated both the protected-person statute and the Constitution. *Perryman v. State*, 80 N.E.3d 234, 2017 Ind. App. LEXIS 290 (Ind. Ct. App. 2017). The Court found that the trial court did not err in finding the victim's CAC interview reliable for the purposes of the protected-persons statute, as the questions were fair and not suggestive, the victim had an opportunity to make -- and did make -- corrections as necessary, and the duration of the interview was not excessive. *Id.* Furthermore, the victim was able to prove the reliability of his memory in relation to other events, the interviewer was trained and certified as a forensic interviewer, and the victim was not pressured by multiple interrogators. *Id.*

Indiana Hearsay Exceptions

Ind. Code Ann. Rule 803. Exceptions to the rule against hearsay -- regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it.
- (2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, design, intent, or plan) or emotional, sensory, or physical condition (such as 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 the declarant's will.
- (4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:
 - (A) is made by a person seeking medical diagnosis or treatment;
 - (B) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and
 - (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause.
- (5) **Recorded Recollection.** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(g) or (10) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) **Public Records.**

(A) A record or statement of a public office if:

(i) it sets out:

(a) the office's regularly conducted and regularly recorded activities;

(b) a matter observed while under a legal duty to [observe and] report; or

(c) factual findings from a legally authorized investigation; and

(ii) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(B) Notwithstanding subparagraph (A), the following are not excepted from the hearsay rule:

(i) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case;

(ii) investigative reports prepared by or for a public office, when offered by it in a case in which it is a party;

(iii) factual findings offered by the government in a criminal case; and

(iv) factual findings resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony or a certification under Rule 902 that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn, crypt, or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least thirty (30) years old and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination;

(B) the statement contradicts the expert's testimony on a subject of history, medicine, or other science or art; and

(C) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments Involving Personal, Family, or General History or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

Ind. Code Ann. Rule 804. Exceptions to the rule against hearsay -- when the declarant is unavailable as a witness.

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (5); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.

A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying.

IN. ST. REV. Rules of Evid., Rule 106. Remainder of or related writing or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

Cases

Key Points:

- By concluding that a child victim's out-of-court statements to a nurse and a therapist were truthful in pursuit of medical diagnosis and treatment, a trial court properly used its discretion to admit the statements as an exception to hearsay.

In *Reynolds v. State*, the Indiana Court of Appeals affirmed the trial court, finding that the defendant was properly convicted of felony child molestation and the trial court had not abused its discretion by admitting into evidence testimony from the sexual assault nurse and the child's therapist with regard to the victim's out-of-court statements. *Reynolds v. State*, 142 N.E.3d 928, 2020 Ind. App. LEXIS 47 (Ind. Ct. App. 2020). The Court ruled that the "trial court could reasonably conclude from the facts and circumstances that [victim] was motivated to provide truthful information to [nurse] to promote medical diagnosis and treatment." *Id.* Thus, the trial court properly used its discretion in determining that the victim's out-of-court statements were admissible under the exception to the hearsay rule contained in Evidence Rule 803(4) and met both prongs of the two-step analysis for determining whether a statement is properly admitted under Indiana Evidence Rule 803(4). *See Id; Ramsey v. State*, 122 N.E.3d 1023, 1030 (Ind. Ct. App. 2019).

Iowa

Iowa Admissibility

Iowa Code § 915.38 Televised, videotaped, and recorded evidence — limited court testimony — minors and others.

1.

a. Upon its own motion or upon motion of any party, a court may protect a minor, as defined in section 599.1, from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate, by ordering that the testimony of the minor be taken in a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom. However, such an order shall be entered only upon a specific finding by the court that such measures are necessary to protect the minor from trauma. Only the judge, prosecuting attorney, defendant's attorney, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the minor may be present in the room with the minor during the minor's testimony. The judge shall inform the minor that the defendant will not be present in the room in which the minor will be testifying but that the defendant will be viewing the minor's testimony through closed-circuit television.

b. During the minor's testimony the defendant shall remain in the courtroom and shall be allowed to communicate with the defendant's counsel in the room where the minor is testifying by an appropriate electronic method.

c. In addition, upon a finding of necessity, the court may allow the testimony of a victim or witness with a mental illness, an intellectual disability, or other developmental disability to be taken as provided in this subsection, regardless of the age of the victim or witness.

2. The court may, upon its own motion or upon motion of a party, order that the testimony of a minor, as defined in section 599.1, be taken by recorded deposition for use at trial, pursuant to rule of criminal procedure 2.13(2)(b). In addition to requiring that such testimony be recorded by stenographic means, the court may on motion and hearing, and upon a finding that the minor is unavailable as provided in rule of evidence 5.804(a), order the videotaping of the minor's testimony for viewing in the courtroom by the court. The videotaping shall comply with the provisions of rule of criminal procedure 2.13(2)(b), and shall be admissible as evidence in the trial. In addition, upon a finding of necessity, the court may allow the testimony of a victim or witness with a mental illness, an intellectual disability, or other developmental disability to be taken as provided in this subsection, regardless of the age of the victim or witness.

3. The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in section 702.5, describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statements

substantially comport with the requirements for admission under rule of evidence 5.803(24) or 5.804(b)(5).

4. A court may, upon its own motion or upon the motion of a party, order the court testimony of a child to be limited in duration in accordance with the developmental maturity of the child. The court may consider or hear expert testimony in order to determine the appropriate limitation on the duration of a child's testimony. However, the court shall, upon motion, limit the duration of a child's uninterrupted testimony to one hour, at which time the court shall allow the child to rest before continuing to testify.

Cases

Key Points:

- In determining whether a child victim can testify in a room separate from the defendant, evidence of a child victim's emotional fragility can be generalized, without a need to show that it is caused by the defendant's presence in the room.
- A recorded forensic interview is admissible when it meets the necessary criteria for reliability.

In *State v. Nuno*, the Iowa Court of Appeals affirmed the district court's decision to allow the victims to testify in a separate room from the defendant. *State v. Nuno*, 928 N.W.2d 658, 2019 Iowa App. LEXIS 366 (Iowa Ct. App. 2019). The Court found that the district court did not err in granting the State's motion for Iowa Code § 915.38 accommodations because the district court's findings that the witnesses' ability to communicate would be impaired and that the accommodation was necessary to protect the witnesses from trauma was supported by the testimony of the children's therapists. *Id.* The Court found that although the therapists that testified on behalf of the victims could not tie the witnesses' difficulty to make statements with the effect of the defendant's presence, mere evidence of a witness's general emotional fragility could warrant the necessity of separating the victims and the defendant. *Id.*

In *State v. Cagle*, the Iowa Court of Appeals held that the district court did not err in overruling defendant's hearsay objection and admitting the exhibit, a recorded forensic interview, as all five requirements of trustworthiness, materiality, necessity, service of the interests of justice, and notice were met. *State v. Cagle*, 928 N.W.2d 685, 2019 Iowa App. LEXIS 472 (Iowa Ct. App. 2019).

Iowa Hearsay Exceptions

Iowa Code Ann. Rule 5.803. Exceptions to the rule against hearsay -- regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then-existing mental, emotional, or physical condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.
- (4) ***Statement made for medical diagnosis or treatment.*** A statement that:
 - (A) Is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and
 - (B) Describes medical history, past or present symptoms or sensations, or the inception or general cause of symptoms or sensations.
- (5) ***Recorded recollection.*** A record that:
 - (A) Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - (B) Was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - (C) Accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence, but it may be received as an exhibit only if offered by an adverse party.

- (6) ***Records of a regularly conducted activity.*** A record of an act, event, condition, opinion, or diagnosis if:
 - (A) The record was made at or near the time by -- or from information transmitted by -- someone with knowledge;
 - (B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) Making the record was a regular practice of that activity;

(D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with rule 5.902(11) or rule 5.902(12) or with a statute permitting certification; and

(E) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a record of regularly conducted activity.** Evidence that a matter is not included in a record described in rule 5.803(6) if:

(A) The evidence is admitted to prove that the matter did not occur or exist;

(B) A record was regularly kept for a matter of that kind; and

(C) The opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public records.**

(A) To the extent not otherwise provided in rule 5.803(8)(B), a record or statement of a public office or agency if it sets out:

(i) Its regularly conducted and regularly recorded activities;

(ii) Matters observed while under a legal duty to report; or

(iii) Factual findings from a legally authorized investigation.

Rule 5.803(8)(A) does not apply if the opponent shows that the source of the information or other circumstances indicate a lack of trustworthiness.

(B) The following are not within this public records exception to the hearsay rule:

(i) Investigative reports by police and other law enforcement personnel.

(ii) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party.

(iii) Factual findings offered by the state or a political subdivision in criminal cases.

(iv) Factual findings resulting from special investigation of a particular complaint, case, or incident.

Rule 5.803(8)(B) does not supersede specific statutory provisions regarding the admissibility of particular public records and reports.

(9) **Public records of vital statistics.** A record of a birth, fetal death, adoption, death, marriage, divorce, dissolution, or annulment, if reported to a public office in accordance with a legal duty.

(10) **Absence of a public record.** Testimony -- or a certification under rule 5.902 -- that a diligent search failed to disclose a public record or statement if:

(A) The testimony or certification is admitted to prove that:

(i) The record or statement does not exist; or

(ii) A matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind, and

(B) In a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice -- unless the court sets a different time for the notice or the objection.

(11) **Records of religious organizations concerning personal or family history.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of marriage, baptism, and similar ceremonies.** A statement of fact contained in a certificate:

(A) Made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) Attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) Purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of documents that affect an interest in property.** The record of a document that purports to establish or affect an interest in property if:

(A) The record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) The record is kept in a public office; and

(C) A statute authorizes recording documents of that kind in that office.

(15) **Statements in documents that affect an interest in property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** A statement in a document that is at least 30 years old and whose authenticity is established.

(17) **Market reports and similar commercial publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in learned treatises, periodicals, or pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) The statement is called to the attention of an expert witness upon cross-examination or relied on by the expert on direct examination; and

(B) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation concerning personal or family history.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation concerning boundaries or general history.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation concerning character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a previous conviction.** Evidence of a final judgment of conviction if:

(A) The judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) The conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) The evidence is admitted to prove any fact essential to the judgment; and

(D) When offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal of a previous conviction may be shown but does not affect admissibility.

(23) **Judgments involving personal, family, or general history, or a boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) Was essential to the judgment; and

(B) Could be proved by evidence of reputation.

(24) [Transferred to rule 5.807.]

Iowa Code Ann. Rule 5.804. Exceptions to the rule against hearsay -- when the declarant is unavailable as a witness.

a. **Criteria for being unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) Is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) Refuses to testify about the subject matter despite a court order to do so;
- (3) Testifies to not remembering the subject matter;
- (4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But rule 5.804(a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

b. **The exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony that:

(A) Was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) Is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement under the belief of imminent death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement against interest.* A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) Is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability and is offered to exculpate the defendant.

(4) *Statement of personal or family history.* A statement about:

(A) The declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) Another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage, or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Transferred to rule 5.807.]

(6) *Statement offered against a party that wrongfully caused the declarant's unavailability.* A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

Iowa Code Ann. Rule 5.807. Residual exception.

a. *In general.* Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in rule 5.803 or 5.804:

- (1) The statement has equivalent circumstantial guarantees of trustworthiness;**
- (2) It is offered as evidence of a material fact;**
- (3) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and**
- (4) Admitting it will best serve the purposes of these rules and the interests of justice.**

b. *Notice.* The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Iowa Code Ann. Rule 5.106. Remainder of related acts, declarations, conversations, writings, or recorded statements.

a. If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any other part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time.

b. Upon an adverse party's request, the court may require the offering party to introduce at the same time with all or part of the act, declaration, conversation, writing, or recorded statement, any other part or any other act, declaration, conversation, writing, or recorded statement that is admissible under rule 5.106(a). Rule 5.106(b), however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a).

Cases

Key Points:

- Out-of-court statements made after a child victim has had time to think about an incident, talk to other adults, etc., do not qualify as excited utterances and therefore, are not exceptions to hearsay rules.
- A statement further doesn't qualify as an "excited utterance" when an adult with knowledge of the incident, who is not a trained forensic interviewer, asks leading questions to elicit a response that the child victim might otherwise have withheld.
- In child abuse cases, out of court statements will fall into the medical treatment exception if the statement was made with the purpose of promoting treatment and if the practitioner emphasized the importance of being truthful in responding to their inquiries.
- When evaluating out of court statements for admissibility under the residual exception to hearsay rule, the trial court should refrain from considering factors other than those established by precedent.

Excited Utterance Exception. In *State v. Dudley*, the Supreme Court of Iowa held that the trial court erred in admitting the child victim's out-of-court statements to her neighbor describing the incident of abuse under the excited utterance exception to hearsay. *State v. Dudley*, 856 N.W.2d 668 (Iowa 2014). In determining whether a statement falls within the excited utterance exception, the court must look to "(1) the time lapse between the event and the statement, (2) the extent to which questioning elicited the statements that otherwise would not have been volunteered, (3) the age and condition of the declarant, (4) the characteristics of the event being described, and (5) the subject matter of the statement." *Id.* The Court noted that in addition to the two-day delay from the incident to the statements, the neighbor also asked the child calculated questions in an attempt to elicit the statements. *Id.* The neighbor knew before meeting with the child of the incident, and was prepared with questions. *Id.* Thus, the Court found that the child may have withheld her statement had she not

been encouraged with leading questions, and subsequently did not give a statement within the "excited utterance" exception. *Id.*

Medical Treatment Exception. In *State v. Tracy*, the Supreme Court of Iowa adopted the Eighth Circuit's two-part test for establishing the admissibility of hearsay statements under the medical treatment exception, known as Iowa Rule of Evidence 803(4). *State v. Tracy*, 482 N.W.2d 675, 681 (Iowa 1992). Under this test, the court must evaluate whether "first the declarant's motive in making the statement [was] consistent with the purposes of promoting treatment; and second, the content of the statement must be as such as is reasonably relied on by a physician in treatment or diagnosis." *Id.* The Court further clarified that "when the record reveals that the examining doctor emphasized to the alleged victim the importance of truthful responses in providing treatment and the record further indicates that the child's motive in making the statements was consistent with a normal patient/doctor dialogue, the first element of the two-part test will typically be satisfied." *Id.*

In *State v. Neitzel*, the Supreme Court of Iowa applied the two-part *Tracy* test and affirmed the admissibility of a child victim's statements made separately to a Pediatric Sexual Assault Nurse Examiner at a hospital and a counselor at the Child Advocacy Center under the medical diagnosis or treatment exception to hearsay. *State v. Neitzel*, 801 N.W.2d 612, 622 (Iowa Ct. App. 2011) (holding that both prongs of the test were met and the statements were admissible because the child victim, who could no longer remember what petitioner did to her three years prior, had made statements to the nurse and the counselor for the purposes of seeking medical treatment for the "ouchie" of her private parts and to talk about "things that might have bother, or hurt, or scared [her]," and both practitioners emphasized the importance of being truthful). *Id.*

Residual Exception. In *State v. Veverka*, the Supreme Court of Iowa held that the trial court erred in its preliminary ruling to deny the admittance of a video recording of a child abuse victim's forensic interview under the residual exception to hearsay rule. *State v. Veverka*, 938 N.W.2d 197, 204 (Iowa 2020). When considering whether a statement falls within the residual exception to hearsay, the court must consider the statement's (1) trustworthiness, (2) materiality, (3) necessity, (4) service of the interests of justice, and (5) notice. *Id.* at 201. While the trial court evaluated these factors, the Supreme Court of Iowa noted that the trial court erred in its analysis by focusing on whether the statement was "'testimonial' in nature." *Id.* The Court explained that it is unnecessary and irrelevant to consider whether the statement was "'testimonial' in nature" when evaluating a statement's trustworthiness and service of the interests of justice. *Id.* Moreover, the Court explained that the trial court should have confined its analysis to relevant precedent and "omitted consideration of extraneous factors unrelated to the inquiry." *Id.* at 204 (clarifying that precedent established an "indicia of trustworthiness" as the standard for evaluating an interview's trustworthiness for the residual exception to hearsay rule, not inherent trustworthiness or whether the interview was expert testimony, based on science, or testimonial in nature).

Kansas

Kansas Admissibility

Kan. Stat. Ann. § 22-2902. Preliminary examination.

- (1)** The state and every person charged with a felony shall have a right to a preliminary examination before a magistrate, unless such charge has been issued as a result of an indictment by a grand jury.
- (2)** The preliminary examination shall be held before a magistrate of a county in which venue for the prosecution lies within 14 days after the arrest or personal appearance of the defendant. Continuances may be granted only for good cause shown.
- (3)** The defendant shall not enter a plea at the preliminary examination. The defendant shall be personally present and except for witnesses who are children less than 13 years of age, the witnesses shall be examined in the defendant's presence. The defendant's voluntary absence after the preliminary examination has been begun in the defendant's presence shall not prevent the continuation of the examination. Except for witnesses who are children less than 13 years of age, the defendant shall have the right to cross-examine witnesses against the defendant and introduce evidence in the defendant's own behalf. If from the evidence it appears that a felony has been committed and there is probable cause to believe that a felony has been committed by the defendant, the magistrate shall order the defendant bound over to the district judge having jurisdiction to try the case; otherwise, the magistrate shall discharge the defendant. When the victim of the felony is a child less than 13 years of age, the finding of probable cause as provided in this subsection may be based upon hearsay evidence in whole or in part presented at the preliminary examination by means of statements made by a child less than 13 years of age on a videotape recording or by other means.
- (4)** If the defendant and the state waive preliminary examination, the magistrate shall order the defendant bound over to the district judge having jurisdiction to try the case.
- (5)** Any judge of the district court may conduct a preliminary examination, and a district judge may preside at the trial of any defendant even though such judge presided at the preliminary examination of such defendant.
- (6)** The complaint or information, as filed by the prosecuting attorney pursuant to K.S.A. 22-2905, and amendments thereto, shall serve as the formal charging document at trial. When a defendant and prosecuting attorney reach agreement on a plea of guilty or nolo contendere, the defendant and the prosecuting attorney shall notify the district court of such agreement and arrange for a time to plead, pursuant to K.S.A. 22-3210, and amendments thereto.
- (7)** The judge of the district court, when conducting the preliminary examination, shall have the discretion to conduct arraignment, subject to assignment pursuant to K.S.A. 20-329, and amendments thereto, at the conclusion of the preliminary examination.

Kan Stat. Ann. § 22-3434. Videotape of testimony of child victim admissible in certain cases; limitations; standard of proof; objections, restrictions.

(a) On motion of the attorney for any party to a criminal proceeding in which a child less than 13 years of age is alleged to be a victim of the crime, subject to the conditions of subsection (b), the court may order that the testimony of the child be taken:

(1) In a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding; or

(2) outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding if:

(A) The recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(B) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;

(C) every voice on the recording is identified; and

(D) each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom, and a copy of a written transcript is provided to the parties.

(b) The state must establish by clear and convincing evidence that to require the child who is the alleged victim to testify in open court will so traumatize the child as to prevent the child from reasonably communicating to the jury or render the child unavailable to testify. The court shall make such an individualized finding before the state is permitted to proceed under this section.

(c) At the taking of testimony under this section:

(1) Only the attorneys for the defendant, the state and the child, any person whose presence would contribute to the welfare and well-being of the child and persons necessary to operate the recording or closed-circuit equipment may be present in the room with the child during the child's testimony;

(2) only the attorneys may question the child;

(3) the persons operating the recording or closed-circuit equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during the child's testimony but does not permit the child to see or hear them; and

(4) the court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(d) If the testimony of a child is taken as provided by this section, the child shall not be compelled to testify in court during the proceeding.

(e)

(1) Any objection by any party to the proceeding to a recording under subsection (a)(2) is inadmissible must be made by written motion filed with the court at least seven days before the commencement of the trial. An objection under this subsection shall specify the portion of the recording which is objectionable and the reasons for the objection. Failure to file an objection within the time provided by this subsection shall constitute waiver of the right to object to the admissibility of the recording unless the court, in its discretion, determines otherwise.

(2) The provisions of this subsection (d) shall not apply to any objection to admissibility for the reason that the recording has been materially altered.

Cases

Key Points:

- A video statement does not violate the U.S. Constitution's 6th Amendment Confrontation Clause so long as defense counsel can both cross-examine the witness, and maintain communication with the defendant throughout the testimony.
- Finding that a child victim would, owing to the defendant's presence, be unable to "reasonably communicate" does not meet the standard of showing the child would be so traumatized as to be incapable of effective communication.

In *State v. Wedgeworth*, the Court of Appeals of Kansas denied the defendant's argument that his confrontation rights were violated due to the child victim's testimony via closed-circuit television. *State v. Wedgeworth*, No. 88,903., 2003 WL 22831456, at *1 (Kan. Ct. App. 2003). In order for a child to be allowed to testify outside of the courtroom, there must be clear and convincing evidence that the child would otherwise endure trauma to the point of being incapable of effective communication. *Id.* Although the trial court erred in only finding that the child would be traumatized to the point that she would be unable to "reasonably communicate," the Court of Appeals noted that defendant's right to confrontation was not violated because the child was cross-examined, and defendant was able to freely communicate with his counsel throughout the child's testimony. *Id.*

Kansas Hearsay Exceptions

KSA § 60-460. Hearsay evidence excluded; exceptions.

Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:

(a) **Previous statements of persons present.** A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness.

(b) **Affidavits.** Affidavits, to the extent admissible by the statutes of this state.

(c) **Depositions and prior testimony.** Subject to the same limitations and objections as though the declarant were testifying in person: (1) Testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered; or (2) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a preliminary hearing or former trial in the same action, or in a deposition taken in compliance with law for use as testimony in the trial of another action, when:

(A) The testimony is offered against a party who offered it in the party's own behalf on the former occasion or against the successor in interest of such party; or

(B) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, but the provisions of this subsection (c) shall not apply in criminal actions if it denies to the accused the right to meet the witness face to face.

(d) **Contemporaneous statements and statements admissible on ground of necessity generally.** A statement which the judge finds was made:

(1) While the declarant was perceiving the event or condition which the statement narrates, describes or explains;

(2) while the declarant was under the stress of a nervous excitement caused by such perception; or

(3) if the declarant is unavailable as a witness, by the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort.

(e) **Dying declarations.** A statement by a person unavailable as a witness because of the person's death if the judge finds that it was made:

(1) Voluntarily and in good faith; and

(2) while the declarant was conscious of the declarant's impending death and believed that there was no hope of recovery.

(f) **Confessions.** In a criminal proceeding as against the accused, a previous statement by the accused relative to the offense charged, but only if the judge finds that the accused:

(1) When making the statement was conscious and was capable of understanding what the accused said and did; and

(2) was not induced to make the statement:

(A) Under compulsion or by infliction or threats of infliction of suffering upon the accused or another, or by prolonged interrogation under such circumstances as to render the statement involuntary; or

(B) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same.

(g) **Admissions by parties.** As against a party, a statement by the person who is the party to the action in the person's individual or a representative capacity and, if the latter, who was acting in such representative capacity in making the statement.

(h) **Authorized and adoptive admissions.** As against a party, a statement:

(1) By a person authorized by the party to make a statement or statements for the party concerning the subject of the statement; or

(2) of which the party with knowledge of the content thereof has, by words or other conduct, manifested the party's adoption or belief in its truth.

(i) **Vicarious admissions.** As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(1) The statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship;

(2) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination; or

(3) one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability.

(j) **Declarations against interest.** Subject to the limitations of the exception in subsection (f), a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected the declarant to civil or criminal liability or so far rendered invalid a claim by the declarant against another or created such risk of making the declarant an object of hatred, ridicule or social disapproval in the community that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

(k) **Voter's statements.** A statement by a voter concerning the voter's qualifications to vote or the fact or content of the voter's vote.

(l) **Statements of physical or mental condition of declarant.** Unless the judge finds it was made in bad faith, a statement of the declarant's:

(1) Then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant; or

(2) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition.

(m) **Business entries and the like.** Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that the following conditions are shown by the testimony of the custodian or other qualified witness, or by a certification that complies with K.S.A. 60-465(b)(7) or (8), and amendments thereto:

(1) They were made in the regular course of a business at or about the time of the act, condition or event recorded; and

(2) the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness.

If the procedure specified by K.S.A. 60-245a(b), and amendments thereto, for providing business records has been complied with and no party has required the personal attendance of a custodian of the records or the production of the original records, the affidavit or declaration of the custodian shall be prima facie evidence that the records satisfy the requirements of this subsection.

(n) **Absence of entry in business records.** Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter and to preserve them.

(o) **Content of official record.** Subject to K.S.A. 60-461, and amendments thereto:

(1) If meeting the requirements of authentication under K.S.A. 60-465, and amendments thereto, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein;

(2) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record; or

(3) to prove the absence of a record in the criminal justice information system central repository maintained by the Kansas bureau of investigation pursuant to K.S.A. 22-4705, and amendments thereto, a writing made by a person purporting to be an official custodian of the records of the Kansas bureau of investigation, reciting diligent search of criminal history

record information and electronically stored information, as defined in K.S.A. 22-4701, and amendments thereto, and failure to find such record.

(p) **Certificate of marriage.** Subject to K.S.A. 60-461, and amendments thereto, certificates that the maker thereof performed marriage ceremonies, to prove the truth of the recitals thereof, if the judge finds that:

(1) The maker of the certificates, at the time and place certified as the times and places of the marriages, was authorized by law to perform marriage ceremonies; and

(2) the certificate was issued at that time or within a reasonable time thereafter.

(q) **Records of documents affecting an interest in property.** Subject to K.S.A. 60-461, and amendments thereto, the official record of a document purporting to establish or affect an interest in property, to prove 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 judge finds that:

(1) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; and

(2) an applicable statute authorized such a document to be recorded in that office.

(r) **Judgment of previous conviction.** Evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment.

(s) **Judgment against persons entitled to indemnity.** To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if offered by a judgment debtor in an action in which the debtor seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by the debtor because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action.

(t) **Judgment determining public interest in land.** To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter.

(u) **Statement concerning one's own family history.** A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of the declarant's family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable.

(v) **Statement concerning family history of another.** A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge finds that the declarant:

(1) Was related to the other by blood or marriage, or was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter

declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other or as upon repute in the other's family; and

(2) is unavailable as a witness.

(w) **Statement concerning family history based on statement of another declarant.** A statement of a declarant that a statement admissible under the exceptions in subsections (u) or (v) was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses.

(x) **Reputation in family concerning family history.** Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage.

(y) **Reputation—boundaries, general history, family history.** Evidence of reputation in a community as tending to prove the truth of the matter reputed, if the reputation concerns:

(1) Boundaries of or customs affecting, land in the community and the judge finds that the reputation, if any, arose before controversy;

(2) an event of general history of the community or of the state or nation of which the community is a part and the judge finds that the event was of importance to the community; or

(3) the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of the person's family history or of the person's personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community.

(z) **Reputation as to character.** If a trait of a person's character at a specified time is material, evidence of the person's reputation with reference thereto at a relevant time in the community in which the person then resided or in a group with which the person then habitually associated, to prove the truth of the matter reputed.

(aa) **Recitals in documents affecting property.** Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated, if the judge finds that:

(1) The matter stated would be relevant upon an issue as to an interest in the property; and

(2) the dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

(bb) **Commercial lists and the like.** Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical or other published compilation, to prove the truth of any relevant matter so stated, if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them.

(cc) **Learned treatises.** A published treatise, periodical or pamphlet on a subject of history, science or art, to prove the truth of a matter stated therein, if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

(dd) **Actions involving children.** In a criminal proceeding or a proceeding pursuant to the revised Kansas juvenile justice code or in a proceeding to determine if a child is a child in need of care under the revised Kansas code for care of children, a statement made by a child, to prove the crime or that a child is a juvenile offender or a child in need of care, if:

(1) The child is alleged to be a victim of the crime or offense or a child in need of care; and

(2) the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.

(ee) **Certified motor vehicle certificate of title history.** Subject to K.S.A. 60–461, and amendments thereto, a certified motor vehicle certificate of title history prepared by the division of vehicles of the Kansas department of revenue.

Cases

Key Points:

- A child victim's hearsay statements are admissible when the child is present and available for cross-examination on the statements.
- A child victim's hearsay statements must be shown to be admissible "if made by the declarant while testifying as a witness."

In *State v. Wedgeworth*, the Court of Appeals of Kansas held that the trial court properly admitted the child victim's hearsay statements. *State v. Wedgeworth*, No. 88,903., 2003 WL 22831456, at *1 (Kan. Ct. App. 2003). Under K.S.A. 2020 Supp. 60–460(a), a hearsay exception exists when "a statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness." *Id.* Thus, because the child was present and subject to cross-examination, her statements regarding the defendant's identity were properly admitted. *Id.*

In *State v. Wheeler*, the Court of Appeals of Kansas affirmed the trial court's admission of the child victim's hearsay statements. *State v. Wheeler*, No. 117,687, 2019 WL 166645, at *1 (Kan. Ct. App. 2019).

Pursuant to K.S.A. 2017 Supp. 60-460(dd), the Court held that the trial court properly admitted the child's statements to multiple third parties because the child was within her tender years and thus lacked the ability to falsify her statements. Additionally, her statements were unprompted and made in an informal environment. *Id.*

Kentucky

Kentucky Admissibility

KY. Rev. Stat. Ann. § 421.350. Testimony of child allegedly victim of illegal sexual activity.

(1) This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.155, 529.030 to 529.050, 529.070, 529.100, 529.110, 530.020, 530.060, 530.064(1)(a), 531.310, 531.320, 531.370, or any specified in KRS 439.3401 and all dependency proceedings pursuant to KRS Chapter 620, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies to the statements or testimony of that child or another child who is twelve (12) years of age or younger who witnesses one of the offenses included in this subsection.

(2) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(3) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by subsection (3) of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

- (a)** The recording is both visual and oral and is recorded on film or videotape or by other electronic means;
- (b)** The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;
- (c)** Each voice on the recording is identified; and

(d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(4) If the court orders the testimony of a child to be taken under subsection (2) or (3) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken, but shall be subject to being recalled during the course of the trial to give additional testimony under the same circumstances as with any other recalled witness, provided that the additional testimony is given utilizing the provisions of subsection (2) or (3) of this section.

(5) For the purpose of subsections (2) and (3) of this section, "compelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

Cases

Key Points:

- To determine competency to testify, a child victim needs to demonstrate their understanding of truthfulness versus lying, as well as the consequences of lying under oath.
- Testimony televised via closed circuit isn't mandated, but needs to be based on a compelling need -- a child victim's inability to testify in open court.
- A child victim's resistance to testify without courtroom environment modifications does not demonstrate a compelling need.
- The placement of screens to obstruct a defendant's views of a child accuser during testimony violates the defendant's right to confrontation.
- A child victim may have access to an emotional support person as long as that person does not coach the victim during testimony.
- The waiver of an objection to a child victim's testimony heard in a room separate from the defendant, even if the defendant cannot personally see or hear the testimony, can be executed by counsel without the defendant's personal waiver.

In *J.E. v. Commonwealth*, the juvenile defendant argued that the district court, and the subsequent circuit court affirmation finding that the district court had not abused its discretion, erred in finding the victim competent to testify. *J.E. v. Commonwealth*, 521 S.W.3d 210, 2017 Ky. App. LEXIS 99 (Ky. Ct. App. 2017). Additionally, the defendant contended that the district court, in an attempt to comply with KRS §26A.140, had violated §421.350 as well as the defendant's right to confrontation. *Id.* The defendant further argued that the district court had not made a finding of compelling need sufficient to justify the intrusion upon the defendant's right to confrontation, and had erred in allowing the victim's grandmother to sit with her and reassure her throughout her testimony. *Id.* The Kentucky Court of Appeals disagreed with the defendant on the first issue raised, finding that competency proceedings are within the sole discretion of the district court. *Id.* Furthermore, the Court found that the victim had

demonstrated an understanding of truthfulness and lying, as well as an understanding of the consequences of lying under oath. *Id.* The Court rejected the appellant's contention that compliance with § 26A.140 necessarily required implementation of the procedures set forth in § 421.350. The Court stated that "they can only interpret the plain meaning of the words, which do not *mandate* taking of child witnesses' testimony via closed circuit television in either provision." *Id.* However, the Court contended that the "compelling need language of Ky. Rev. Stat. Ann. § 421.350 requires a determination that the child witness would be unable to testify in open court" and it disagreed with the circuit court's conclusion that the district court had found "compelling need" in the victim's extreme hesitance to testify absent some modification of the courtroom environment. *Id.* §421.350's "compelling need" language requires a determination that the child witness would be unable to testify in open court. *Id.* The Kentucky Statute does not provide a blanket process for taking the testimony of every child witness by TV simply because testifying may be stressful. *Id.* The Court of Appeals agreed that the district court abused its discretion and violated the juvenile defendant's right to confrontation in erecting screens to obstruct his views of the child witness during her testimony. *Id.* The Court did not agree with the defendant's argument that the victim's grandmother should not have been allowed to sit and reassure the victim. *Id.* Rather, the Court held that there was no evidence that the grandmother had fed the victim answers, thus not affecting the outcome of the hearing. *Id.*

In *Howard v. Commonwealth*, the defendant argued that the trial court had erred in allowing two of his victims to testify in a separate room during trial. *Howard v. Commonwealth*, 595 S.W.3d 462 (Ky. Feb. 20, 2020). The Kentucky Supreme Court held that the trial court had not erred, noting that the defense counsel had made no objections to the Commonwealth's assertion that separate testimony was valid under KRS §421.350. *Id.* Although the defendant himself was not present for this bench conference, nor able to hear the discussion, the Court held that the waiver of an objection to taking testimony of a child victim can be executed by counsel without a personal waiver from the defendant. *Id.*

Kentucky Hearsay Exceptions

KRE 801A. Prior statements of witnesses and admissions.

(a) **Prior statements of witnesses.** A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613, and the statement is:

- (1) Inconsistent with the declarant's testimony;
- (2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or
- (3) One of identification of a person made after perceiving the person.

(b) **Admissions of parties.** A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:

- (1) The party's own statement, in either an individual or a representative capacity;
- (2) A statement of which the party has manifested an adoption or belief in its truth;
- (3) A statement by a person authorized by the party to make a statement concerning the subject;
- (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 by a coconspirator of a party during the course and in furtherance of the conspiracy.

(c) **Admission by privity:**

(1) *Wrongful death.* A statement by the deceased is not excluded by the hearsay rule when offered as evidence against the plaintiff in an action for wrongful death of the deceased.

(2) *Predecessors in interest.* Even though the declarant is available as a witness, when a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is not excluded by the hearsay rule when offered against the party if the evidence would be admissible if offered against the declarant in an action involving that right, title, or interest.

(3) *Predecessors in litigation.* Even though the declarant is available as a witness, when the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is not excluded by the hearsay rule when offered against the party if the evidence would be admissible against the declarant in an action involving that liability, obligation, duty, or breach of duty.

KRE 803. Hearsay exceptions: availability of declarant immaterial.

The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

(1) ***Present sense impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(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.

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 treatment or diagnosis.** Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(A) *Foundation exemptions.* A custodian or other qualified witness, as required above, is unnecessary when the evidence offered under this provision consists of medical charts or records of a hospital that has elected to proceed under the provisions of KRS 422.300 to 422.330, business records which satisfy the requirements of KRE 902(11), or some other record which is subject to a statutory exemption from normal foundation requirements.

(B) *Opinion.* No evidence in the form of an opinion is admissible under this paragraph unless such opinion would be admissible under Article VII of these rules if the person whose opinion is recorded were to testify to the opinion directly.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or other data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or

matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

(A) Investigative reports by police and other law enforcement personnel;

(B) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; and

(C) Factual findings offered by the government in criminal cases.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements or law.

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with KRE 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationships 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.** 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.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** 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 twenty (20) years or more the authenticity of which 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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

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

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment under the law defining the crime, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused.

(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 the same would be provable by evidence of reputation.

KRE 804. Hearsay exceptions: declarant unavailable.

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

- (3) Testifies to a lack of memory of the subject matter of the declarant's statement;
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement under belief of impending death.* In a criminal prosecution or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statements of personal or family history.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

KRE 804A. Hearsay exceptions: testimony by child victim declarant not reasonably obtainable.

Publisher's Note Regarding Validity: The Kentucky Legislature, through 2018 c 116, § 1, eff. 7-14-18, enacted Kentucky Rule of Evidence 804A. On September 21, 2018 the Kentucky Supreme Court issued court order 2018-14 in which it "declin[ed] to adopt the proposed amendment."

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

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement;

(2) Either:

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

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

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

(4) At least ten (10) days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(b)

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

- (A) The child claims a lack of memory of the subject matter of the statement;
 - (B) The court finds:
 - (i) The child is absent from the trial or hearing;
 - (ii) The proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good-faith effort to do so; and
 - (iii) It is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time; or
 - (C) The court finds:
 - (i) The child is unable to testify at the trial or hearing because of:
 - a. Death;
 - b. Physical or mental illness; or
 - c. Infirmary, including the child's inability to communicate about the offense because of fear or a similar reason; and
 - (ii) The illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.
- (2)** The proponent of the statement has not established that the child's testimony or attendance is not reasonably obtainable if the child's claim of lack of memory, absence, or inability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.
- (c)** The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.
- (d)** If any provision of this rule should conflict with Article VIII of these rules, this rule shall prevail.

KRE Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- A medical exception to hearsay doesn't necessarily include a child's statements of identification or fault.
- While in some cases, a perpetrator's identity is key to diagnosis and treatment, even their status as a household member doesn't guarantee that a child victim's statements of identification can be admitted, since the identification may or may not be germane to treatment or diagnosis.
- An "excited utterance" out-of-court statement is admissible even when the child victim who gave it has been ruled incompetent to testify, as long as corroborative testimony or evidence exists to support the statement and it meets the other "excited utterance" requirements.

In *Colvard v. Com*, the Supreme Court of Kentucky held that the trial court erred in admitting the child victim's out-of-court statements -- which identified the defendant as the perpetrator of sexual abuse -- under the medical exception to hearsay, even though the defendant was a household member with the child. *Colvard v. Com*, 309 S.W.3d 239 (Ky. 2010). The Court upheld the traditional hearsay exception allowing statements given during medical examination, noting that "we know that an ill or injured person seeking to be healed or cured is ordinarily highly motivated to give truthful information to the physician or medical provider treating that illness or injury." *Id.* However, the Court was not persuaded in cases where victims identify their assailant, noting that "one cannot reasonably conclude that the statements identifying the perpetrator, such as those at issue in this case, were made by young children 'for the purpose of medical treatment or diagnosis.'" *Id.* Elaborating, the Court noted that "the reliability of a child's identification of the perpetrator of the abuse to a medical professional contains the same tangible risks of unreliability generally inherent in all hearsay testimony;" however, the Court did specify that this ruling would not preclude all cases in which a child identified the perpetrator during a medical examination. *Id.*

In *Pratt v. Commonwealth*, the Court of Appeals of Kentucky denied the defendant's argument that the trial court erred in relying on the excited utterance exception to hearsay to admit the out-of-court statements which the incompetent child victim had made to her mother following the incident of abuse. *Pratt v. Commonwealth*, NO. 2016-CA-001816-MR, 2018 WL 6266488, at *1 (Ky. Ct. App. 2018). In determining whether a statement falls within the excited utterance exception, the court may look to KRE 803(2):

"(i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving." *Id.*

The Court noted that the child had given her statements in the same location where the abuse occurred, mere minutes after the abuse, and was in a state of upset which she exhibited through her tears and uncontrolled defecation. *Id.* Furthermore, the Court found the short time between the assault and statement to suggest that the child had no time to fabricate her story. *Id.* The child gave her statement to her mother without the mother's use of leading questions; although the mother asked the child why she had physical symptoms, she used open-ended questions. *Id.* Additionally, the child's statements were corroborated by findings during a medical examination. *Id.* With all of these factors joined together, the Court held that the trial court properly admitted the child's statements under the excited utterance exception. *Id.* The Court directly countered the defendant's argument that the child's statements should have been excluded because she had been ruled an incompetent witness, noting that the case's unique circumstances (the timing, content, and context of the child's statements) allowed the statements to be trustworthy and reliable despite her status in court. *Id.*

Louisiana

Louisiana Admissibility

LA. Rev. Stat. Ann. § 15:440.2. Authorization.

A.

(1) A court with original criminal jurisdiction or juvenile jurisdiction may require that a statement of a protected person be recorded on videotape by any of the following:

(a) Motion of the court or motion of the district attorney, a parish welfare unit or agency, the Department of Children and Family Services, or a child advocacy center operating in the judicial district.

(b) Adoption of a local court rule that authorizes the videotaping of any protected person without the necessity of the issuance of an order by the court in any individual case.

(c) Execution of a written protocol between the court and law enforcement agencies, a parish welfare unit or agency, the Department of Children and Family Services, or a child advocacy center operating in the judicial district that authorizes the videotaping of any protected person without the necessity of the issuance of an order by the court in any individual case.

(2) Further, the coroner may, in conjunction with the district attorney and appropriate hospital personnel and pursuant to their duties in R.S. 40:2109.1 and 2113.4, provide for the videotaping of protected persons who are rape victims or who have been otherwise physically or sexually abused.

(3) Such a videotape shall be available for introduction as evidence in a juvenile proceeding or adult criminal proceeding.

B. For purposes of this Part, "videotape" means the visual recording on a magnetic tape, film, videotape, compact disc, digital versatile disc, digital video disc, or by other electronic means together with the associated oral record.

C. For purposes of this Part "protected person" means any person who is a victim of a crime or a witness in a criminal proceeding and who is any of the following:

(1) Under the age of seventeen years.

(2) Has a developmental disability as defined in R.S. 28:451.2(12).

(3) An adult as defined in R.S. 15:1503 who is eligible for protective services pursuant to the Adult Protective Services Act.

La. Rev. Stat. Ann. § 15:440.3. Videotape; admissibility; exception to hearsay rule.

The videotape authorized by this Subpart is hereby admissible in evidence as an exception to the hearsay rule.

La. Rev. Stat. Ann. § 15:440.4. Method of recording videotape; competency.

A. A videotape of a protected person may be offered in evidence either for or against a defendant. To render such a videotape competent evidence, it must be satisfactorily proved:

- (1) That such electronic recording was voluntarily made by protected person.
- (2) That no relative of the protected person was present in the room where the recording was made.
- (3) That such recording was not made of answers to interrogatories calculated to lead the protected person to make any particular statement.
- (4) That the recording is accurate, has not been altered, and reflects what the protected person said.
- (5) That the taking of the protected person's statement was supervised by a physician, a social worker, a law enforcement officer, a licensed psychologist, a medical psychologist, a licensed professional counselor, or an authorized representative of the Department of Children and Family Services.

B. The department shall develop and promulgate regulations on or before September 12, 1984, regarding training requirements and certification for department personnel designated in Paragraph (A)(5) of this Section who supervise the taking of the protected person's statement.

La. Rev. Stat. Ann. § 15:440.5. Admissibility of videotaped statements; discovery by defendant.

A. The videotape of an oral statement of the protected person made before the proceeding begins may be admissible into evidence if:

- (1) No attorney for either party was present when the statement was made;
- (2) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;
- (3) The recording is accurate, has not been altered, and reflects what the witness or victim said;
- (4) The statement was not made in response to questioning calculated to lead the protected person to make a particular statement;

- (5) Every voice on the recording is identified;
- (6) The person conducting or supervising the interview of the protected person in the recording is present at the proceeding and available to testify or be cross-examined by either party;
- (7) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and
- (8) The protected person is available to testify.

B. The admission into evidence of the videotape of a protected person as authorized herein shall not preclude the prosecution from calling the protected person as a witness or from taking the protected person's testimony outside of the courtroom as authorized in R.S. 15:283. Nothing in this Section shall be construed to prohibit the defendant's right of confrontation.

C. In a criminal prosecution, when the state intends to offer as evidence a copy of a videotaped oral statement of a protected person made pursuant to the provisions of this Subpart, the defendant, through his attorney only, may be provided a copy of the videotape if the court determines it necessary to prepare a proper defense. If the defendant's attorney is provided a copy of the videotaped statement by court order or by permission of the district attorney, only the following persons involved in preparing the defense of the instant charges shall be permitted to view the videotape: the attorney and his regularly employed staff, the defendant, the defense investigator designated to work on the case, the defense paralegal designated to work on the case, and other staff members of the attorney who are transcribing the videotaped oral statement. Other than a transcript of the videotaped oral statement, no copies of the videotape shall be made by any person, except for use as trial exhibits. The copy of the videotaped statement and any transcripts shall be securely retained by the defendant's attorney at all times and shall not be possessed, transferred, distributed, copied, or viewed by any unauthorized party. It shall be the affirmative duty of the defendant's attorney to return the videotape to the court immediately upon conclusion of the case, but in all cases prior to sentencing. A defendant who appears pro se in a criminal proceeding shall be allowed reasonable access to the videotape of a protected person only with an order of the court and under court-directed supervision. The tape shall be filed as part of the record under seal by the clerk of court for use in subsequent legal proceedings or appeals and shall be released only upon motion of the state or counsel of record with an order of court and in compliance with this Section. Any violation of this Subsection shall be punished as contempt of court. Any person who makes an unauthorized disclosure of the videotape or its contents may also be subject to liability for civil damages, including punitive damages.

La. Rev. Stat. Ann. § 15:440.6. Confidentiality.

Videotapes which are a part of the court record shall be preserved under a protective order of the court in order to protect the privacy of the protected person. The court shall order the destruction of the videotapes after five years have elapsed from the date of entry of judgment. However, if an

appeal is filed, the videotapes shall not be destroyed until a final judgment on appeal has been rendered.

Cases

Key Points:

- Evidentiary hearings are needed in post-conviction relief claims when questions of fact -- including whether a defense attorney's failure to object to a child victim's unavailability to testify -- constitutes trial strategy -- cannot be resolved.
- A video recorded forensic interview admitted as evidence does not violate the defendant's right to confrontation when the interview is conducted appropriately, and both interviewer and victim have testified and been cross-examined.
- The foundation for a forensic interview can be established when someone who supervised the interview -- not necessarily the interviewer themselves -- is available to testify.
- An expert witness's attacks on a child victim's veracity generally due to her age, lack of brain development, inability to recall events, and suggestibility invades the fact finder's province.
- A defendant's right to confrontation extends only to the opportunity for cross-examination, not effective testimony.
- A video recorded interview of a protected person is admissible as an exception to the hearsay rule, and the defendant has the burden to show inadmissible hearsay.
- Expert witnesses hired by the defense are not required by statute to have access to a protected person's video recorded statements. A defendant's and their counsel's access to such recordings are sufficient to protect the defendant's right to prepare their defense.

In *State v. Vallo*, the Court of Appeal of Louisiana, Second Circuit held that the trial court originally erred by determining, without evidence, that it was trial strategy for the defense attorney to fail to object to the child victim's unavailability to testify prior to the presentation of the interview video to the jury. *State v. Vallo*, 212 So. 3d 1198, 2017 La. App. LEXIS 29 (La.App. 2 Cir. 2017). The Court of Appeal noted that because an evidentiary hearing for the taking of testimony or other evidence is required in a post conviction relief claim whenever there are questions of fact which could not properly be resolved and, whether the trial attorney's failure to object was trial strategy was a question of fact, the issue needed to be remanded. *Id.*

In *State v. Hilliard*, the Court of Appeal of Louisiana, Second Circuit found that the trial court did not abuse its discretion in admitting a CAC recorded video interview with the child victim, despite the defendant's claim that the recorded video interview did not adhere to the requirements of La. R.S. 15:440.4, and accordingly violated his rights under the Sixth Amendment Confrontation Clause. *State v. Hilliard*, 278 So. 3d 1065, 2019 La. App. LEXIS 1416 (La.App. 2 Cir. 2019), writ denied, 2020 La. LEXIS 1490 (La. July 24, 2020). The Court based its holding on the finding that the forensic interviewer

established that she and the victim were alone in the interview room, under the supervision of law enforcement and her supervisor, that the recording had not been altered, and that she was trained to interview witnesses without asking questions which are calculated to get specific answers. *Id.* Furthermore, both the victim and the interviewer were available to testify at trial and both were cross-examined. *Id.* Thus, the Court of Appeals found that the appellant's assignment of error was without merit. *Id.*

In *State v. Hunter*, the Court of Appeal of Louisiana, Fourth Circuit denied the defendant's claim that the State failed to lay a proper foundation for the CAC interview of the child victim pursuant to La. R.S. 15:440.4 and 15:440.5(6) because the forensic interviewer was unavailable to testify. *State v. Hunter*, 252 So. 3d 1053, 2018 La. App. LEXIS 1634 (La.App. 4 Cir. 2018), writ denied, 267 So. 3d 612, 2019 La. LEXIS 943 (La. 2019), cert. denied, 140 S. Ct. 205, 205 L. Ed. 2d 108, 2019 U.S. LEXIS 5537 (U.S. 2019). The Court held that "under La. R.S. 15:440.5(6), it is only necessary that someone supervising the interview be available to testify" and the supervising detective's attendance was sufficient to fulfill that requirement. *Id.*

In *State ex rel. E.S.*, the Supreme Court of Louisiana ruled that the trial court did not err in excluding the juvenile defendant's expert testimony because the expert's testimony unlawfully invaded the province of the factfinder by attacking the victim's veracity generally due to her age and lack of brain development. *State ex rel. E.S.*, 285 So. 3d 1046, 2019 La. LEXIS 2700 (La. 2019). Furthermore, the Court found that the expert unlawfully attacked the victim's age in terms of her inability to recall events and her high susceptibility to suggestiveness. *Id.* The Court affirmed the court of appeal's decision, which held that the expert's testimony leaned too heavily on opinions of the defendant's guilt or innocence. *Id.*

In *State v. Eley*, the Court of Appeal of Louisiana, First Circuit denied the defendant's claim that the trial court erred in admitting into evidence the video recorded interview of the child victim, which was recorded three-and-one-half years prior. *State v. Eley*, 203 So. 3d 462, 2016 La. App. LEXIS 1667 (La.App. 1 Cir. 2016), writ denied, 224 So. 3d 982, 2017 La. LEXIS 1763 (La. 2017), writ denied, 2019 La. App. LEXIS 1262 (La.App. 1 Cir. July 17, 2019). The defendant claimed that because the child victim was unable to remember or testify to the alleged sexual assault during the trial (although he previously testified to the events in the recorded interview), the child victim was essentially unavailable to be "effectively" cross-examined. *Id.* The Court disagreed, noting that "there is nothing in the Constitution so restrictive as to suggest that only *effective* cross-examination would be tolerated under the law." *Id.* Rather, "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." *Id.* Thus, the Court held that because the victim was available to testify and did testify at trial, subject to cross-examination, the defendant was properly afforded his rights under the Confrontation Clause. *Id.*

In *State v. Jones*, the Court of Appeal of Louisiana, Fourth Circuit denied the defendant's contention that the trial court had erred in allowing a video recorded interview of the victim's five-year-old-son into evidence. *State v. Jones*, 182 So. 3d 251, 2015 La. App. LEXIS 2410 (La.App. 4 Cir. 2015), writ denied, 210 So. 3d 810, 2016 La. LEXIS 2777 (La. 2016). The Court noted that pursuant to La. R.S. 15:44.1, the child was a protected person by virtue of his age and being a witness in the criminal proceeding; the Court further noted that his classification allowed his video recording to be admissible in

evidence as an exception to the hearsay rule. *Id.* Despite certain portions of the tape possibly qualifying as hearsay, the defendant was unable to cite a single example of such hearsay and thus the statements, as part of the *res gestae*, were admissible. *Id.*

In *State v. Johnson*, the Court of Appeal of Louisiana, Second Circuit ruled that the trial court did not err in denying the defendant's pretrial motion, which requested his expert witness be allowed to review the video of the child victim's three forensic interview statements. *State v. Johnson*, 253 So. 3d 887, 2018 La. App. LEXIS 1555 (La.App. 2 Cir. 2018), writ denied, 296 So. 3d 602, 2020 La. LEXIS 863 (La. 2020). The Court noted that, "La. R.S. 15:440.5(C) is quite specific as to whom access to the protected person's video statements will be granted... Due to the particularity of the statute, it is clear the legislature did not intend for every person hired by the defendant's attorney to have access to the protected person's video statements. Since the statute does not specify that expert witnesses may have access to the statements, the trial court did not err in denying Johnson's motion." *Id.* Additionally, the Court held that "[d]efendant's right to prepare his defense was not compromised because [d]efendant, his attorney, and his attorney's staff had access to the video before trial. *Id.*

Louisiana Hearsay Exceptions

LA CE Art. 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then existing mental, emotional, or physical condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or his future action. A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament.
- (4) ***Statements for purposes of medical treatment and medical diagnosis in connection with treatment.*** Statements made for purposes of medical treatment and medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis in connection with treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence and received as an exhibit but may not itself be taken into the jury room. This exception is subject to the provisions of Article 612.

(6) **Records of regularly conducted business activity.** A memorandum, report, record, or data compilation, in any form, including but not limited to that which is stored by the use of an optical disk imaging system, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if made and kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and to keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. This exception is inapplicable unless the recorded information was furnished to the business either by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule. The term "business" as used in this Paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports which are specifically excluded from the public records exception by Article 803(8)(b) shall not qualify as an exception to the hearsay rule under this Paragraph.

(7) **Absence of entry in records of regularly conducted business activity.** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.**

(a) Records, reports, statements, or data compilations, in any form, of a public office or agency setting forth:

(i) Its regularly conducted and regularly recorded activities;

(ii) Matters observed pursuant to duty imposed by law and as to which there was a duty to report; or

(iii) Factual findings resulting from an investigation made pursuant to authority granted by law. Factual findings are conclusions of fact reached by a governmental agency and may be based upon information furnished to it by persons other than agents and employees of that agency.

(b) Except as specifically provided otherwise by legislation, the following are excluded from this exception to the hearsay rule:

(i) Investigative reports by police and other law enforcement personnel or the notification of administrative sanctions form which records the administrative sanctions proceedings conducted pursuant to Code of Criminal Procedure Article 899.1 or R.S. 15:574.7.

(ii) Investigative reports prepared by or for any government, public office, or public agency when offered by that or any other government, public office, or public agency in a case in which it is a party.

(iii) Factual findings offered by the prosecution in a criminal case.

(iv) Factual findings resulting from investigation of a particular complaint, case, or incident, including an investigation into the facts and circumstances on which the present proceeding is based or an investigation into a similar occurrence or occurrences.

(9) **Records of vital statistics.** Records or data compilations, in any form, of birth, filiation, adoption, or death, including fetal death, still birth, and abortion, or of marital status, including divorce and annulment, if the report thereof was made to a public office pursuant to requirements of law, and any record included within the Louisiana Vital Statistics Laws.

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Article 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, filiation, 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.** 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.** Statements of fact concerning 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.** Records of documents purporting to establish or affect an interest in property to the extent that their admission is authorized by other legislation.

(15) **Statements in documents affecting an interest in property.** 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 thirty years or more the authenticity of which is established, or statements in a recorded document as provided by other legislation.

(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, in a civil case, relied upon by him 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, such a statement may be read into evidence and received as an exhibit but may not be taken into the jury room.

(19) **Reputation concerning personal or family history.** Reputation, arising before the controversy, among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, filiation, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

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

(21) **Reputation as to character.** Reputation of a person's character among his associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of six months, to prove any fact essential to sustain the judgment. This exception does not permit the prosecutor in a criminal prosecution to offer as evidence the judgment of conviction of a person other than the accused, except for the purpose of attacking the credibility of a witness. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

(24) **Testimony as to age.** A witness' testimony as to his own age.

LA CE Art. 804. Hearsay exceptions; declarant unavailable.

A. **Definition of unavailability.** Except as otherwise provided by this Code, a declarant is "unavailable as a witness" when the declarant cannot or will not appear in court and testify to the substance of his statement made outside of court. This includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;
- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;
- (3) Testifies to a lack of memory of the subject matter of his statement;
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness, infirmity, or other sufficient cause; or
- (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrong-doing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

B. **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a party with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given in another proceeding by an expert witness in the form of opinions or inferences, however, is not admissible under this exception.
- (2) *Statement under belief of impending death.* A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.
- (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- (4) *Statement of personal or family history.*

(a) A statement, made before the controversy, concerning the declarant's own birth, adoption, marriage, divorce, filiation, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(b) A statement, made before the controversy, concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Complaint of sexually assaultive behavior.* A statement made by a person under the age of twelve years and the statement is one of initial or otherwise trustworthy complaint of sexually assaultive behavior.

(6) *Other exceptions.* In a civil case, a statement not specifically covered by any of the foregoing exceptions if the court determines that considering all pertinent circumstances in the particular case the statement is trustworthy, and the proponent of the evidence has adduced or made a reasonable effort to adduce all other admissible evidence to establish the fact to which the proffered statement relates and the proponent of the statement makes known in writing to the adverse party and to the court his intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it. If, under the circumstances of a particular case, giving of this notice was not practicable or failure to give notice is found by the court to have been excusable, the court may authorize a delayed notice to be given, and in that event the opposing party is entitled to a recess, continuance, or other appropriate relief sufficient to enable him to prepare to meet the evidence.

(7)

(a) ***Forfeiture by wrongdoing.*** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(b) A party seeking to introduce statements under the forfeiture by wrongdoing hearsay exception shall establish, by a preponderance of the evidence, that the party against whom the statement is offered, engaged or acquiesced in the wrongdoing.

Cases

Key Points:

- A medical exception to hearsay can include a child's statements of identification or fault due to the interest in protecting child victims of sexual abuse by encouraging the admission of reliable hearsay evidence for the [jury] to weigh.

In *State v. D.D.*, the Court of Appeal of Louisiana, Fourth Circuit held that the trial court properly admitted the child victim's out-of-court statements made to a nurse practitioner during a medical examination under the medical exception to hearsay. *State v. D.D.*, 288 So.3d 808 (La. Ct. App. 2019). Generally, the Court noted that medical records and statements are admissible because "the hearsay exclusion rule rests on the premise that a person is not likely to be untruthful to a healthcare provider whose treatment of the person will depend in part upon what the person tells the provider." *Id.* So long as the victim's statements are 1) made for purposes of medical diagnosis and treatment, and 2) describe a medical condition or medical history, the statements are admissible. *Id.* The Court further elaborated that in cases of child abuse and assault, the hearsay exception receives a particular application, including statements identifying the defendant, because "the legislature has expressed an overriding interest in protecting child victims of sexual abuse by encouraging the admission of reliable hearsay evidence for the [jury] to weigh." *Id.* Therefore, a broad application of the medical exception to hearsay is applicable. *Id.*

Maine

Maine Admissibility

15 M.R.S. § 1205. Certain out-of-court statements made by minors or persons with developmental disabilities describing sexual contact.

A hearsay statement made by a person under the age of 16 years or a person with a developmental disability as defined in Title 5, section 19503, subsection 3, describing any incident involving a sexual act or sexual contact performed with or on the minor or person by another, may not be excluded as evidence in criminal proceedings in courts of this State if:

1. **Mental or physical well-being of a person.** On motion of the attorney for the State and at an in camera hearing, the court finds that the mental or physical well-being of that person will more likely than not be harmed if that person were to testify in open court; and
2. **Examination and cross-examination.** Pursuant to order of court made on such a motion, the statement is made under oath, subject to all of the rights of confrontation secured to an accused by the Constitution of Maine or the United States Constitution and the statement has been recorded by any means approved by the court, and is made in the presence of a judge or justice.

22 M.R.S.A. § 4007. Conducting proceedings.

1. **Procedures.** All child protection proceedings shall be conducted according to the rules of civil procedure and the rules of evidence, except as provided otherwise in this chapter. All the proceedings shall be recorded. All proceedings and records shall be closed to the public, unless the court orders otherwise.

1-A. **Nondisclosure of certain identifying information.** This subsection governs the disclosure of certain identifying information.

A. At each proceeding, the court shall inquire whether there are any court orders in effect at the time of the proceeding that prohibit contact between the parties and participants. If such an order is in effect at the time of the proceeding, the court shall keep records that pertain to the protected person's current or intended address or location confidential, subject to disclosure only as authorized in this section. Any records in the file that contain such information must be sealed by the clerk and not disclosed to other parties or their attorneys or authorized agents unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety or liberty of the protected person and determines that the disclosure is in the interests of justice.

B. If, at any stage of the proceedings, a party or a participant alleges in an affidavit or a pleading under oath that the health, safety or liberty of the person would be jeopardized by disclosure of information pertaining to the person's current or intended address or location, the court shall keep records that contain the information confidential, subject to disclosure only as authorized in this section. Upon receipt of the affidavit or pleading, the records in the file that contain such information must be sealed by the clerk and not disclosed to other parties or participants or their attorneys or authorized agents unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety or liberty of the person seeking protection and determines that the disclosure is in the interests of justice.

C. If the current or intended address or location of a party or participant is required to be kept confidential under paragraph A or B, and the current or intended address or location of that person is a material fact necessary to the proceeding, the court shall hear the evidence outside of the presence of the person and the person's attorney from whom the information is being kept confidential unless the court determines after a hearing that takes into consideration the health, safety or liberty of the protected person that the exclusion of the party or participant is not in the interests of justice. If such evidence is taken outside the presence of a party or participant, the court shall take measures to prevent the excluded person and the person's attorney from accessing the recorded information and the information must be redacted in printed transcripts.

D. Records that are required to be maintained by the court as confidential under this subsection may be disclosed to:

- (1) A state agency if necessary to carry out the statutory function of that agency;
- (2) A guardian ad litem appointed to the case; or
- (3) A criminal justice agency, as defined by Title 16, section 703, subsection 4, if necessary to carry out the administration of criminal justice or the administration of juvenile justice, and such disclosure is otherwise permitted pursuant to section 4008.

In making such disclosure, the court shall order the party receiving the information to maintain the information as confidential.

2. Interviewing children. The court may interview a child witness in chambers, with only the guardian ad litem and counsel present, provided that the statements made are a matter of record. The court may admit and consider oral or written evidence of out-of-court statements made by a child, and may rely on that evidence to the extent of its probative value.

3. Motion for examination. At any time during the proceeding, the court may order that a child, parent, alleged parent, person frequenting the household or having custody at the time of the alleged abuse or neglect, any other party to the action or person seeking care or custody of the child be examined pursuant to the Maine Rules of Civil Procedure, Rule 35.

3-A. Report of licensed mental health professional. In any hearing held in connection with a child protection proceeding under this chapter, the written report of a licensed mental health professional

who has treated or evaluated the child shall be admitted as evidence, provided that the party seeking admission of the written report has furnished a copy of the report to all parties at least 21 days prior to the hearing. The report shall not be admitted as evidence without the testimony of the mental health professional if a party objects at least 7 days prior to the hearing. This subsection does not apply to the caseworker assigned to the child.

4. **Interstate compact.** The provisions of the Interstate Compact for the Placement of Children, sections 4251 to 4269, if in effect and ratified by the other state involved, apply to proceedings under this chapter; otherwise, the provisions of the Interstate Compact on Placement of Children, sections 4191 to 4247, apply to proceedings under this chapter. Any report submitted pursuant to the compact is admissible in evidence for purposes of indicating compliance with the compact and the court may rely on evidence to the extent of its probative value.

5. Repealed. Laws 2005, c. 300, § 1.

6. **Benefits and support for children in custody of department.** When a child has been ordered into the custody of the department under this chapter, Title 15, chapter 5071 or Title 19-A, chapter 55.2 within 30 days of the order, each parent shall provide the department with information necessary for the department to make a determination regarding the eligibility of the child for state, federal or other 3rd-party benefits and shall provide any necessary authorization for the department to apply for these benefits for the child.

Prior to a hearing under section 4034, subsection 4, section 4035 or section 4038, each parent shall file income affidavits as required by Title 19-A, sections 2002 and 2004 unless current information is already on file with the court. If a child is placed in the custody of the department, the court shall order child support from each parent according to the guidelines pursuant to Title 19-A, chapter 63.3 designate each parent as a nonprimary care provider and apportion the obligation accordingly.

Income affidavits and instructions must be provided to each parent by the department at the time of service of the petition or motion. The court may order a deviation pursuant to Title 19-A, section 2007. Support ordered pursuant to this section must be paid directly to the department pursuant to Title 19-A, chapter 65, subchapter IV.4 The failure of a parent to file an affidavit does not prevent the entry of a protection order. A parent may be subject to Title 19-A, section 2004, subsection 1, paragraph D for failure to complete and file income affidavits.

Cases

Key Points:

- Video recorded testimony is admissible when it was made while the incident was still fresh in a child victim's mind, so that it can support testimony that is vague or otherwise reflects the victim's memory loss about the incident.
- A defendant's right to confrontation extends only to the opportunity for cross-examination, not effective testimony.

- A child victim's experience and perspective on a defendant's defense is admissible.

In *State v. Adams*, the Supreme Judicial Court of Maine affirmed the trial court's decision to admit the child victim's video recorded testimony under Me. R. Evid. 803. *State v. Adams*, 214 A.3d 496 (Me. 2019). The Court rejected the defendant's arguments that the State failed to lay the proper foundation for admissibility, and that the admission of the video violated his right to confrontation. *Id.* For an out-of-court statement to be admissible, the State must prove that (1) it relates to a matter the witness once knew about but cannot recall well enough at trial to testify fully and accurately; (2) it was made or adopted by the witness when the matter was fresh in the witness's memory; and (3) it is an accurate record of the witness's past knowledge. The Court noted that the child could recall the incidents vaguely, but struggled to recount in detail each instance given the five-year gap between the initial interview and trial. *Id.* Furthermore, the child had provided the testimony less than four months after the assault, and during the interview emphasized the truth of her statements. *Id.* In regard to defendant's second argument, the Court noted that the child's imperfect memory and subsequent admission of the video were not violations of the confrontation clause. *Id.* The Court further noted that the confrontation clause does not promise that testimony will be free of forgetfulness or confusion; because the child was available to be cross-examined, the defendant's right to confrontation was not violated. *Id.*

In *State v. Pratt*, the Supreme Judicial Court of Maine rejected the defendant's claim that the trial court erred in admitting the child victim's testimony regarding the defendant's parenting practices. *State v. Pratt*, 243 A.3d 469 (Me. 2020). In the defendant's opening statement, she introduced the issue of "family dynamics" and "the idea that parents are legally justified in using reasonable and moderate forms of punishment against their children." *Id.* During trial, the court allowed the victim to testify about the defendant's neglect and general parenting attitude, with specific statements about the defendant's lack of cooking, cleaning, or laundering. *Id.* The Court held that the trial court had not erred in its decision to allow this testimony, noting that the child's experience was equally important to understand "family dynamics." *Id.*

Maine Hearsay Exceptions

Me. R. Evid. 803. Exceptions to the rule against hearsay -- regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) ***Then-existing mental, emotional, or physical condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.

(4) ***Statement made for medical diagnosis or treatment.*** A statement that:

(A) Is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and

(B) Describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) **Recorded recollection.** A record that:

(A) Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) Was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) Accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a regularly conducted activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) The record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) Making the record was a regular practice of that activity;

(D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12), or with a statute permitting certification; and

(E) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a record of a regularly conducted activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) The evidence is admitted to prove that the matter did not occur or exist;

(B) A record was regularly kept for a matter of that kind; and

(C) Neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) **Public records.** A record or statement of a public office if:

(A) It sets out:

- (i) The office's regularly conducted and regularly recorded activities;
- (ii) A matter observed while under a legal duty to report; or
- (iii) Factual findings from a legally authorized investigation.

(B) The following are not within this exception to the hearsay rule:

- (i) Investigative reports by police and other law enforcement personnel;
- (ii) Investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party;
- (iii) Factual findings offered by the state in a criminal case;
- (iv) Factual findings resulting from special investigation of a particular complaint, case, or incident; and
- (v) Any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Public records of vital statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a public record.** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) The record or statement does not exist; or

(B) A matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) **Records of religious organizations concerning personal or family history.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of marriage, baptism, and similar ceremonies.** A statement of fact contained in a certificate:

(A) Made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) Attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) Purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of documents that affect an interest in property.** The record of a document that purports to establish or affect an interest in property if:

(A) The record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) The record is kept in a public office; and

(C) A statute authorizes recording documents of that kind in that office.

(15) RESERVED.

(16) **Statements in ancient documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) **Market reports and similar commercial publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in learned treatises, periodicals, or pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) The statement is called to the attention of an expert witness on cross-examination; and

(B) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation concerning personal or family history.** A reputation among a person's family by blood, adoption, or marriage -- or among the person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of the person's personal or family history.

(20) **Reputation concerning boundaries or general history.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation concerning character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a previous conviction.** Evidence of a final judgment of conviction if:

- (A) The judgment was entered after a trial or guilty plea;
- (B) The conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C) The evidence is admitted to prove any fact essential to the judgment; and
- (D) When offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

(23) **Judgments involving personal, family, or general history, or a boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) Was essential to the judgment; and
- (B) Could be proved by evidence of reputation.

ME. R. Evid. 804. Exceptions to the rule against hearsay -- when the declarant is unavailable as a witness.

(a) **Criteria for being unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) Is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) Refuses to testify about the subject matter despite a court order to do so;
- (3) Testifies to not remembering the subject matter;
- (4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

- (1) *Former Testimony.* Testimony that:
 - (A) Was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) Is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement under the belief of imminent death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement against interest.* A statement -- except, in a criminal case, for a statement or confession made by a defendant or other person implicating both the declarant and the accused that is offered against the accused -- that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace; and

(B) Is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of personal or family history.* A statement about:

(A) The declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) Another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

ME R REV Rule 106. Remainder of or related writings or recorded statements.

If a party utilizes in court all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the time.

Cases

Key Points:

- A child victim's delayed complaint of a sexual incident is admissible if the child had a reason for not speaking up sooner.

- A child victim may make an initial statement to a friend or other trusted party who is not a parent or other caregiver.
- A medical exception to hearsay can include a child's statements of identification or fault because an abuser's identity can be key to diagnosis and treatment of mental as well as physical health.

In *State v. Fahnley*, the Supreme Judicial Court of Maine held that the child victim's delayed complaint to his mother was properly admitted under the first complaint rule. *State v. Fahnley*, 119 A.3d 727 (Me. 2015). The child was 14 at the time of the assault, but did not make a statement until he was 18; however, the child testified at trial that he spoke of the incident to his ex-girlfriend prior to making a statement to his mother. *Id.* The Court noted that although four years passed between the incident and the child's statement, an exception could be made because "a child may be fearful or susceptible to intimidation, or may feel pressure not to tell others about a sexual assault, a child's first complaint may be admitted even if it was not made immediately after the event as long as the child had a reason for not making the complaint contemporaneously with the assault." *Id.* The child testified, and his mother corroborated, that he did not wish to make a statement as a child so as to avoid burdening his family and going through the trial process as a minor. *Id.* In considering whether the trial court erred in admitting the statement because the child testified that he had told someone prior to his mother, the Court noted that "although the victim told another person about the sexual abuse before he told his mother, evidence of the complaint to his mother is admissible to rebut the natural assumption that a child would tell a parent if anything had happened." *Id.* Therefore, the statement was properly admitted. *Id.*

In *Walton v. Ireland*, the Supreme Judicial Court of Maine held that the trial court properly admitted the child victim's out-of-court statements made to a clinical therapist under the medical exception to hearsay. *Walton v. Ireland*, 104 A.3d 883 (Me. 2014). Following the incident of abuse, the child began to see a therapist bi-weekly to treat her mental health injuries, including anxiety. *Id.* During treatment, the child both spoke of the assault and identified her father as the assailant. *Id.* The Court noted that the identity of the child's abuser was pertinent to creating the proper treatment plan, further elaborating that the extent and exact nature of the child's mental trauma could only be identified by understanding the connection the child had to the assailant. *Id.* Thus, the Court found the child's statements of abuse and identification of the defendant were properly admitted under the medical exception to hearsay. *Id.*

Maryland

Maryland Admissibility

Md. Criminal Procedure Code Ann. § 11-302. Presence of victim or representative at trial.

(a) **Definitions.** --

(1) In this section the following words have the meanings indicated.

(2) "Representative" means a person who is designated by:

(i) the next of kin or guardian of a victim who is deceased or disabled; or

(ii) the court in a dispute over who will be the representative.

(3) "Victim" means a person who is the victim of a crime or delinquent act.

(b) **Scope of section.** -- This section applies to:

(1) a criminal trial; and

(2) a juvenile delinquency adjudicatory hearing that is held in open court or that a victim or representative may attend under § 3-8A-13 of the Courts Article.

(c) **Right to be present.** -- Except as provided in subsections (d) and (e) of this section:

(1) a representative has the right to be present at the trial of the defendant or juvenile delinquency adjudicatory hearing of the child respondent; and

(2) after initially testifying, a victim has the right to be present at the trial of the defendant or juvenile delinquency adjudicatory hearing of the child respondent.

(d) **Sequestration of representative or victim.** -- The court may sequester a representative or, after a victim has initially testified, the victim from any part of the trial or juvenile delinquency adjudicatory hearing on request of the defendant, child respondent, or the State only after the court determines, with specific findings of fact on the record, that:

(1) there is reason to believe that the victim will be recalled or the representative will be called to testify at the trial or juvenile delinquency adjudicatory hearing; and

(2) the presence of the victim or representative would influence the victim's or representative's future testimony in a manner that would materially affect a defendant's right to a fair trial or a child respondent's right to a fair hearing.

(e) **Removal of representative or victim.** -- The court may remove a victim or representative from the trial or juvenile delinquency adjudicatory hearing for the same causes and in the same manner as the law provides for the exclusion or removal of a defendant or a child respondent.

(f) **Employment protection.** -- As provided in § 9-205 of the Courts Article, a person may not be deprived of employment solely because of job time lost because the person attended a proceeding that the person has a right to attend under this section.

(g) **Construction of section.** -- This section does not limit a victim's or representative's right to attend a trial or juvenile delinquency adjudicatory hearing as provided in § 3-8A-13 of the Courts Article or § 11-102 of this title.

Md. Criminal Procedure Code Ann. § 11-303. Testimony of child victim by closed circuit television.

(a) **Scope of section.** -- This section applies to a case of abuse of a child under Title 5, Subtitle 7 of the Family Law Article or § 3-601 or § 3-602 of the Criminal Law Article.

(b) **In general.** -- A court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by closed circuit television if:

(1) the court determines that testimony by the child victim in the presence of a defendant or a child respondent will result in the child victim's suffering serious emotional distress such that the child victim cannot reasonably communicate; and

(2) the testimony is taken during the proceeding.

(c) **Determination by court.** --

(1) In determining whether testimony by the child victim in the presence of the defendant or child respondent will result in the child victim's suffering such serious emotional distress that the child cannot reasonably communicate, the court may:

(i) observe and question the child victim inside or outside the courtroom; and

(ii) hear testimony of a parent or custodian of the child victim or other person, including a person who has dealt with the child victim in a therapeutic setting.

(2)

(i) Except as provided in subparagraph (ii) of this paragraph, each defendant or child respondent, one attorney for a defendant or child respondent, one prosecuting attorney, and one attorney for the child victim may be present when the court hears testimony on whether to allow a child victim to testify by closed circuit television.

(ii) If the court decides to observe or question the child victim in connection with the determination to allow testimony by closed circuit television:

1. the court may not allow the defendant or child respondent to be present; but
2. one attorney for each defendant or child respondent, one prosecuting attorney, and one attorney for the child victim may be present.

(d) **Procedures during testimony.** --

(1) Only the following persons may be in the room with the child victim when the child victim testifies by closed circuit television:

- (i) one prosecuting attorney;
- (ii) one attorney for each defendant or child respondent;
- (iii) one attorney for the child victim;
- (iv) the operators of the closed circuit television equipment; and
- (v) subject to the Maryland Rules, any person whose presence, in the opinion of the court, contributes to the well-being of the child victim, including a person who has dealt with the child victim in a therapeutic setting concerning the abuse.

(2) During the child victim's testimony by closed circuit television, the court and the defendant or child respondent shall be in the courtroom.

(3) The court and the defendant or child respondent shall be allowed to communicate with the persons in the room where the child victim is testifying by any appropriate electronic method.

(4)

(i) In a juvenile delinquency proceeding or criminal proceeding, only one prosecuting attorney, one attorney for each defendant or child respondent, and the court may question the child victim.

(ii) In a child in need of assistance case, only one attorney for each party and the court may question the child victim.

(e) **Applicability.** -- This section does not apply if a defendant or child respondent is without counsel.

(f) **Identification of defendant.** -- This section may not be interpreted to prevent a child victim and a defendant or child respondent from being in the courtroom at the same time when the child victim is asked to identify the defendant or child respondent.

(g) **Two-way closed circuit television.** -- This section does not allow the use of two-way closed circuit television or other procedure that would let a child victim see or hear a defendant or child respondent.

Md. Criminal Procedure Code Ann. § 11-304. Out of court statements of certain child victims.

(a) **"Statement" defined.** -- In this section, "statement" means:

- (1) an oral or written assertion; or
- (2) nonverbal conduct intended as an assertion, including sounds, gestures, demonstrations, drawings, and similar actions.

(b) **Admissibility.** -- Subject to subsections (c), (d), and (e) of this section, the court may admit into evidence in a juvenile court proceeding or in a criminal proceeding an out of court statement to prove the truth of the matter asserted in the statement made by a child victim who:

- (1) is under the age of 13 years; and
- (2) is the alleged victim or the child alleged to need assistance in the case before the court concerning:
 - (i) child abuse under § 3-601 or § 3-602 of the Criminal Law Article;
 - (ii) rape or sexual offense under §§ 3-303 through 3-307 of the Criminal Law Article;
 - (iii) attempted rape in the first degree or in the second degree under §§ 3-309 and 3-310 of the Criminal Law Article; or
 - (iv) in a juvenile court proceeding, abuse or neglect as defined in § 5-701 of the Family Law Article.

(c) **Recipients and offerors of statement.** -- An out of court statement may be admissible under this section only if the statement was made to and is offered by a person acting lawfully in the course of the person's profession when the statement was made who is:

- (1) a physician;
- (2) a psychologist;
- (3) a nurse;
- (4) a social worker;
- (5) a principal, vice principal, teacher, or school counselor at a public or private preschool, elementary school, or secondary school;
- (6) a counselor licensed or certified in accordance with Title 17 of the Health Occupations Article; or
- (7) a therapist licensed or certified in accordance with Title 17 of the Health Occupations Article.

(d) **Conditions precedent.** --

(1) Under this section, an out of court statement by a child victim may come into evidence in a criminal proceeding or in a juvenile court proceeding other than a child in need of assistance proceeding under Title 3, Subtitle 8 of the Courts Article to prove the truth of the matter asserted in the statement:

- (i) if the statement is not admissible under any other hearsay exception; and
- (ii) if the child victim testifies.

(2)

(i) In a child in need of assistance proceeding in the juvenile court under Title 3, Subtitle 8 of the Courts Article, an out of court statement by a child victim may come into evidence to prove the truth of the matter asserted in the statement:

1. if the statement is not admissible under any other hearsay exception; and
2. regardless of whether the child victim testifies.

(ii) If the child victim does not testify, the child victim's out of court statement will be admissible only if there is corroborative evidence that the alleged offender had the opportunity to commit the alleged abuse or neglect.

(3) To provide the defendant, child respondent, or alleged offender with an opportunity to prepare a response to the statement, the prosecuting attorney shall serve on the defendant, child respondent, or alleged offender and the attorney for the defendant, child respondent, or alleged offender within a reasonable time before the juvenile court proceeding and at least 20 days before the criminal proceeding in which the statement is to be offered into evidence, notice of:

- (i) the State's intention to introduce the statement;
- (ii) any audio or visual recording of the statement; and
- (iii) if an audio or visual recording of the statement is not available, the content of the statement.

(4)

(i) The defendant, child respondent, or alleged offender may depose a witness who will testify under this section.

(ii) Unless the State and the defendant, child respondent, or alleged offender agree or the court orders otherwise, the defendant, child respondent, or alleged offender shall file a notice of deposition:

1. in a criminal proceeding, at least 5 days before the date of the deposition; or
2. in a juvenile court proceeding, within a reasonable time before the date of the deposition.

(iii) Except where inconsistent with this paragraph, Maryland Rule 4-261 applies to a deposition taken under this paragraph.

(e) Particularized guarantees of trustworthiness. --

(1) A child victim's out of court statement is admissible under this section only if the statement has particularized guarantees of trustworthiness.

(2) To determine whether the statement has particularized guarantees of trustworthiness under this section, the court shall consider, but is not limited to, the following factors:

(i) the child victim's personal knowledge of the event;

(ii) the certainty that the statement was made;

(iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;

(iv) whether the statement was spontaneous or directly responsive to questions;

(v) the timing of the statement;

(vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;

(vii) the appropriateness of the terminology of the statement to the child victim's age;

(viii) the nature and duration of the abuse or neglect;

(ix) the inner consistency and coherence of the statement;

(x) whether the child victim was suffering pain or distress when making the statement;

(xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement;

(xii) whether the statement was suggested by the use of leading questions; and

(xiii) the credibility of the person testifying about the statement.

(f) Role of court. -- In a hearing outside of the presence of the jury or before the juvenile court proceeding, the court shall:

(1) make a finding on the record as to the specific guarantees of trustworthiness that are in the statement; and

(2) determine the admissibility of the statement.

(g) **Examination of child victim.** --

(1) In making a determination under subsection (f) of this section, the court shall examine the child victim in a proceeding in the judge's chambers, the courtroom, or another suitable location that the public may not attend unless:

(i) the child victim:

1. is deceased; or
2. is absent from the jurisdiction for good cause shown or the State has been unable to procure the child victim's presence by subpoena or other reasonable means; or

(ii) the court determines that an audio or visual recording of the child victim's statement makes an examination of the child victim unnecessary.

(2) Except as provided in paragraph (3) of this subsection, any defendant or child respondent, attorney for a defendant or child respondent, and the prosecuting attorney may be present when the court hears testimony on whether to admit into evidence the out of court statement of a child victim under this section.

(3) When the court examines the child victim as paragraph (1) of this subsection requires:

- (i) one attorney for each defendant or child respondent, one attorney for the child victim, and one prosecuting attorney may be present at the examination; and
- (ii) the court may not allow a defendant or child respondent to be present at the examination.

(h) **Construction of section.** --

(1) This section does not limit the admissibility of a statement under any other applicable hearsay exception or rule of evidence.

(2) This section does not prohibit the court in a juvenile court proceeding from hearing testimony in the judge's chambers.

Cases

Key Points:

- A defendant's right to confrontation extends to the ability to recall a child witness for cross-examination if new evidence, such as a video recorded interview, is admitted following the child's initial testimony.
- A child's out-of-court statement that has particularized guarantees of trustworthiness is sufficient to determine truth competency.

In *Myer v. State*, the Court of Appeals of Maryland held that the trial court erred in not allowing the defendant to recall the child witness after the child's video recorded interview was admitted following the child's testimony. *Myer v. State*, 943 A.2d 615 (Md. 2008). The Court held that although the trial court properly allowed the admission of the tape itself, the trial court had abused its discretion in preventing the defendant from cross-examining the child again after the video was admitted. *Id.*

In *In re J.J.*, the Court of Appeals of Maryland denied the defendant's argument that the trial court erred in admitting the non-testifying child's out-of-court statements without first determining that the child is "truth competent." *In re J.J.*, 174 A.3d 372 (Md. 2017). The Court noted that under both the plain language of §11-304 and the legislative history, there was no suggestion that the court was to find a child to be truth competent. *Id.* Rather, the court need only determine that a child's out-of-court statement possesses the "particularized guarantees of trustworthiness" laid out in the statute. *Id.*

Maryland Hearsay Exceptions

MD R Rev. Rule 5-802.1. Hearsay exceptions -- prior statements by witnesses.

The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:

(a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement;

(b) A statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive;

(c) A statement that is one of identification of a person made after perceiving the person;

(d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony; or

(e) A statement that is in the form of a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the witness's memory and reflects that knowledge correctly. If admitted, the statement may be read into evidence but the memorandum or record may not itself be received as an exhibit unless offered by an adverse party.

MD R Rev. Rule 5-803. Hearsay exceptions: unavailability of declarant not required.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) **Statement by Party-Opponent.** A statement that is offered against a party and is:

- (1) The party's own statement, in either an individual or representative capacity;
- (2) A statement of which the party has manifested an adoption or belief in its truth;
- (3) A statement by a person authorized by the party to make a statement concerning the subject;
- (4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or
- (5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

Committee note: Where there is a disputed issue as to scope of employment, representative capacity, authorization to make a statement, the existence of a conspiracy, or any other foundational requirement, the court must make a finding on that issue before the statement may be admitted. These rules do not address whether the court may consider the statement itself in making that determination. Compare *Daugherty v. Kessler*, 264 Md. 281, 291-92 (1972) (civil conspiracy); and *Hlista v. Altevogt*, 239 Md. 43, 51 (1965) (employment relationship) with *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 775 (1987) (trial court may consider the out-of-court statement in deciding whether foundational requirements for coconspirator exception have been met.)

(b) **Other Exceptions.**

- (1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, 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 for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the

inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) *Recorded Recollection.* See Rule 5-802.1 (e) for recorded recollection.

(6) *Records of Regularly Conducted Business Activity.* A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Cross reference: Rule 5-902 (b).

Committee note: Public records specifically excluded from the public records exceptions in subsection (b)(8) of this Rule may not be admitted pursuant to this exception.

(7) *Absence of Entry in Records Kept in Accordance With Subsection (b)(6).* Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) *Public Records and Reports.*

(A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report;

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law; or

(iv) in a final protective order hearing conducted pursuant to Code, Family Law Article, § 4-506, factual findings reported to a court pursuant to Code, Family Law Article, § 4-505, provided that the parties have had a fair opportunity to review the report.

Committee note: If necessary, a continuance of a final protective order hearing may be granted in order to provide the parties a fair opportunity to review the report and to prepare for the hearing.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) Except as provided in subsection (b)(8)(D) of this Rule, a record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) Subject to Rule 5-805, an electronic recording of a matter made by a body camera worn by a law enforcement person or by another type of recording device employed by a law enforcement agency may be admitted when offered against an accused if (i) it is properly authenticated, (ii) it was made contemporaneously with the matter recorded, and (iii) circumstances do not indicate a lack of trustworthiness.

Committee note: Subsection (b)(8)(D) establishes requirements for the admission of certain electronic recordings made by a body camera worn by a law enforcement person or by another type of recording device employed by a law enforcement agency against an accused. Subsection (b)(8)(D) does not preclude an accused from offering on his or her own behalf a record of matters observed by a law enforcement person, including a recording made by a body camera. This section does not mandate following the interpretation of the term "factual findings" set forth in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). See *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581 (1985).

(9) *Records of Vital Statistics.* Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

Cross reference: See Code, Health General Article, § 4-223 (inadmissibility of certain information when paternity is contested) and § 5-311 (admissibility of medical examiner's reports).

(10) *Absence of Public Record or Entry.* Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) *Records of Religious Organizations.* 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.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, 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.* Statements of fact concerning 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.* 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 a statute authorizes the recording of documents of that kind in that office.

(15) *Statements in Documents Affecting an Interest in Property.* 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 or the circumstances otherwise indicate lack of trustworthiness.

(16) *Statements in Ancient Documents.* Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(17) *Market Reports and Published Compilations.* Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably 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 witness in direct examination, statements contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation Concerning Personal or Family History.* Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) *Reputation Concerning Boundaries or General History.*

(A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) *Reputation as to Character.* Reputation of a person's character among associates or in the community.

(22) *[Vacant].* There is no subsection 22.

(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 the matter would be provable by evidence of reputation under subsections (19) or (20).

(24) ***Other Exceptions.*** Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Committee note: The residual exception provided by Rule 5-803 (b)(24) does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.

It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804 (b). The residual exception is not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under this subsection, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

MD R Rev. Rule 5-804. Hearsay exceptions; declarant unavailable.

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- (2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- (3) testifies to a lack of memory of the subject matter of the declarant's statement;
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.

A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) *Former Testimony.* Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) *Statement Under Belief of Impending Death.* In a prosecution for an offense based upon an unlawful homicide, attempted homicide, or assault with intent to commit a homicide or in any civil action, a statement made by a declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.
- (3) *Statement Against Interest.* A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Cross reference: See Code, Courts Article, § 10-920, distinguishing expressions of regret or apology by health care providers from admissions of liability or fault.

- (4) *Statement of Personal or Family History.*

(A) A statement concerning the declarant's own birth; adoption; marriage; divorce; legitimacy; ancestry; relationship by blood, adoption, or marriage; or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated.

(B) A statement concerning the death of, or any of the facts listed in subsection (4)(A) about another person, if the declarant was related to the other person by blood, adoption, or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

(5) Witness Unavailable Because of Party's Wrongdoing.

(A) Civil Actions. In civil actions in which a witness is unavailable because of a party's wrongdoing, a statement that (i) was (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) reduced to writing and was signed by the declarant; or (c) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (ii) is offered against a party who has engaged in, directed, or conspired to commit wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness, provided however the statement may not be admitted unless, as soon as practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent makes known to the adverse party the intention to offer the statement and the particulars of it.

Committee note: A "party" referred to in subsection (b)(5)(A) also includes an agent of the government.

(B) Criminal Causes. In criminal cases in which a witness is unavailable because of a party's wrongdoing, admission of the witness's statement under this exception is governed by Code, Courts Article, § 10-901.

Committee note: Subsection (b)(5) of this Rule does not affect the law of spoliation, "guilty knowledge," or unexplained failure to produce a witness to whom one has superior access. See *Washington v. State*, 293 Md. 465, 468 n. 1 (1982); *Breeding v. State*, 220 Md. 193, 197 (1959); *Shpak v. Schertle*, 97 Md. App. 207, 222-27 (1993); *Meyer v. McDonnell*, 40 Md. App. 524, 533, (1978), rev'd on other grounds, 301 Md. 426 (1984); *Larsen v. Romeo*, 254 Md. 220, 228 (1969); *Hoverter v. Director of Patuxent Inst.*, 231 Md. 608, 609 (1963); and *DiLeo v. Nugent*, 88 Md. App. 59, 69-72 (1991). The hearsay exception set forth in subsection (b)(5)(B) is not available in criminal causes other than those listed in Code, Courts Article, § 10-901 (a).

MD R REV Rule 5-106. Remainder of or related writings or recorded statements.

When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Committee note: The change that this Rule effects in the common law is one of timing, rather than of admissibility. The Rule does not provide for the admission of otherwise inadmissible evidence, except to the extent that it is necessary, in fairness, to explain what the opposing party has elicited. In that event, a limiting instruction that the evidence was admitted not as substantive proof but as explanatory of the other evidence would be appropriate. See *Richardson v. State*, 324 Md. 611 (1991). The Rule thus provides for the alternative of an earlier admission of evidence with regard to writings or recorded statements than does the common law rule of completeness. The timing under the common law remains applicable to oral statements and also remains as an alternative with regard to writings and recorded statements.

Cases

Key Points:

- Although dual purpose medical/forensic interviews do not automatically disqualify statements from admissibility, the practitioner's questions can relay whether the examination is for investigative versus treatment-related reasons, and can thus affect a statement's reliability.

In *State v. Coates*, the Court of Appeals of Maryland held that the trial court erred in admitting the child victim's statements to a nurse practitioner during a medical examination under the medical exception to hearsay. *State v. Coates*, 950 A.2d 114 (Md. 2008). The Court noted that although statements made during medical examinations are a recognized exception to hearsay, the statements may not be admissible if either party is preparing to testify. *Id.* The nurse practitioner had both a medical and forensic reason to examine the child; although dual purpose interviews do not automatically disqualify statements from admissibility, the Court noted that the nurse practitioner's questions related more to discovering the identity of the assailant and evidence of criminal misconduct. *Id.* Thus, given the content of the questions, it was reasonable to believe that the child knew the examination served a purpose other than a medical examination and answered accordingly, calling into question the reliability of her statements. *Id.*

Massachusetts

Massachusetts Admissibility

ALM G. Evid. § 1115. Evidentiary issues in care and protection, child custody, and termination of parental rights cases.

(a) **General Rule.** Evidence in child custody and child protective cases, both parental unfitness and termination of parental rights (TPR) proceedings, is admissible according to the rules of the common law and the Massachusetts General Laws.

(b) **Official/Public Records and Reports.**

(1) *Probation Records, Including Criminal Activity Record Information (CARI).* Adult probation records, including CARI, are official records that are admissible as evidence of a parent's character. Juvenile delinquency probation records are inadmissible in care and protection cases by operation of statute.

(2) *Department of Children and Families (DCF) Records and Reports.*

(A) G. L. c. 119, § 51A, Reports. Section 51A reports are admissible for the limited purpose of setting the stage.

(B) DCF Action Plans, Affidavits, Foster Care Review Reports, Case Review Reports, Family Assessments, Dictation Notes, and G. L. c. 119, § 51B, Investigation Reports. First- and second-level hearsay in official DCF records that do not fall within an existing common-law or statutory hearsay exception are admissible for statements of primary fact if the hearsay source is specifically identified and is available for cross-examination, should the party challenging the evidence request it. Statements of opinion, conclusions, and judgments contained in these official records are not admissible. Primary facts contained in these DCF records are admissible as official records. Assessments prepared by private entities under contract with the DCF also are admissible as official records. Statements of opinion, conclusions, and judgment contained in these reports are not admissible.

(3) *Drug and Alcohol Treatment Records.* Drug and alcohol treatment records are confidential under State and Federal law. Such records may, however, be released to the parties by judicial order after application showing good cause therefore, including the need to avert a substantial risk of death or serious bodily harm, which specifically includes incidents of suspected child abuse and neglect.

(4) *School Records.* School records generally are admissible as official records, with the exception of records of clinical history and evaluations of students with special needs.

(5) *Police Reports*. Police reports regarding police responses are admissible as business records insofar as the report is a record of the police officers' firsthand observations. Opinions and evaluations are not admissible. Hearsay statements within the report generally are not admissible unless the statement satisfies another hearsay exception.

(c) **Written Court Reports.**

(1) *Court Investigation Reports*. Written reports of court-appointed investigators are admissible.

(2) *Guardian Ad Litem (GAL) Reports*. Written guardian ad litem reports may properly be admitted into evidence and are entitled to such weight as the court sees fit to give them.

(3) *Court-Appointed Special Advocate (CASA) Reports*. Written CASA reports may properly be admitted into evidence and are entitled to such weight as the court sees fit to give them.

(4) *Court-Ordered Psychiatric, Psychological, and Court Clinic Evaluation Reports*. Written psychiatric, psychological, and Court Clinic evaluation reports generally are not admissible in evidence.

(d) **Children's Out-of-Court Statements.**

(1) *Statements Not Related to Sexual Abuse*. Out-of-court statements made by children that are not related to sexual abuse are admissible if they fall within an established exception to the hearsay rule or are offered for a nonhearsay purpose.

(2) *Statements Related to Sexual Abuse*.

(A) Cases Involving TPR. An out-of-court statement 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 the identity of the perpetrator offered in any civil proceeding except those under G. L. c. 119, § 23(a)(3) or § 24, is admissible, provided that the 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 that the proponent can procure through reasonable efforts, that the person to whom the statement was made or who heard the child make the statement testifies, that the court finds that the child is "unavailable" as a witness, and that the court finds the statement to be reliable.

(B) Custody Proceedings Not Involving TPR. In care and protection cases and other child custody proceedings that do not involve termination of parental rights, a child's hearsay statement that describes any act of sexual contact performed on or with the child or the circumstances under which it occurred, or that identifies the perpetrator, is admissible, provided that the person to whom the statement was made or who heard the statement testifies, that the judge finds that the 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 that the proponent can procure through reasonable effort, and that the judge finds the statement to be reliable.

(e) **Testimony.**

(1) *Children.* Children may testify in care and protection and TPR proceedings if the court determines, after consultation with the child's attorney, that the child is competent and willing to do so. Children may testify in child custody proceedings in Probate and Family Court at the discretion of the judge.

(2) *Foster/Preadoptive Parents.* Foster parents and pre adoptive parents have the right to attend care and protection trials and to be heard, subject to the usual evidentiary rules, but are not parties to care and protection or TPR proceedings.

(3) *Parents Called by Adverse Party.* A parent may be called as a witness by an opposing party. An adverse party who calls the parent as a witness may question the parent witness according to the rules of cross-examination.

(4) *Social Workers.* A licensed social worker or social worker employed by a government agency may be called as a witness by any party. An adverse party who calls the social worker may question the social worker according to the rules of cross-examination. Regarding communications between a social worker and a client that are privileged under State law, the social worker may testify to any such communication that bears significantly on the client's ability to provide suitable care or custody if the court first determines (1) that the social worker has such evidence, (2) that it is more important to the welfare of the child that the communication be disclosed than that the social worker-client relationship be preserved, and, if a TPR case, (3) that the patient has been informed that any such disclosure would not be privileged.

(5) *Psychotherapists.* Psychotherapists may be called as witnesses in care and protection and TPR proceedings regarding disclosures by a patient that bear significantly on the patient's ability to provide suitable care and custody if the patient attempts to exercise the privilege at trial and the court then determines (1) that the psychotherapist has such evidence, (2) that it is more important to the welfare of the child that the information be disclosed than that the psychotherapist-patient relationship be preserved, and, if a TPR case, (3) that the patient has been informed that any such disclosure would not be privileged.

(6) *Court-Appointed Investigators and G. L. c. 119, § 51B, Investigators.* Court-appointed investigators appointed pursuant to G. L. c. 119, § 24, and investigators as-signed to investigate G. L. c. 119, § 51A, reports pursuant to G. L. c. 119, § 51B, may be called as witnesses by any party for examination regarding the information contained in any such investigation report.

(7) *Experts.* Opinion testimony by persons qualified by the court as experts is admissible if it is based on scientific, technical, or specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact at issue.

(f) **Other Evidence.**

(1) *Adoption Plans.* Adoption plans prepared by the DCF are admissible.

(2) *Bonding and Attachment Studies.* Written reports of bonding and attachment studies are inadmissible. Evidence relevant to any such bonding and attachment study may be the subject of testimony from the evaluator.

(3) *Judicial Findings from Prior Proceedings.* Judicial findings from prior proceedings may be admissible if the findings are relevant, timely, and material.

(g) **Adverse Inference from a Party's Failure to Appear.** The court may draw an adverse inference against a party who has received notice and fails to appear, without good cause, at trial, as long as a case adverse to the non-testifying party has been presented.

ALM GL ch. 278, §16D. Child witness -- alternative procedure for taking testimony.

(a) For the purposes of this section, the following words shall have the following meanings:—

"Child witness", a person who is under the age of fifteen years and who is alleged to have been a victim of, or a witness to an alleged violation of section thirteen B, 13B¹/₂, 13B³/₄, thirteen F, thirteen H, twenty-two, twenty-two A, 22B, 22C, twenty-three, 23A, 23B, twenty-four, 24B, 50 or 60 of chapter 265, or section two, three, four, four A, four B, five, six, seven, eight, twelve, thirteen, sixteen, seventeen, twenty-four, twenty-eight, twenty-nine, twenty-nine A, twenty-nine B, thirty-three, thirty-four or thirty-five A of chapter two hundred and seventy-two.

"Simultaneous electronic means", Any device capable of projecting a live visual and aural transmission such as closed-circuit television.

(b)

(1) At any time after the issuance of a complaint or indictment alleging an offense punished by any of the statutes listed herein, the court on its own motion or on motion of the proponent of a child witness, and after a hearing, may order the use of a suitable alternative procedure for taking the testimony of the child witness, in proceedings pursuant to said complaint or indictment, provided that the court finds by a preponderance of the evidence at the time of the order that the child witness is likely to suffer psychological or emotional trauma as a result of testifying in open court, as a result of testifying in the presence of the defendant, or as a result of both testifying in open court and testifying in the presence of the defendant. If the court orders the use of a suitable alternative for taking the testimony of a child witness pursuant to this section, the court shall make and enter specific findings upon the record describing with particularity the reasons for such order.

(2) An order issued under paragraph (1) shall provide that the testimony of the child witness be recorded on videotape or film to be shown in court at a later time or that the testimony be transmitted to the courtroom by simultaneous electronic means.

(3) Testimony taken by an alternative procedure pursuant to an order issued under paragraph (1) shall be taken in the presence of the judge, the prosecutor, defense counsel and such

other persons as the court may allow. The defendant shall also have the right to be present unless the court's order under paragraph (1) is based wholly or in part upon a finding that the child witness is likely to suffer trauma as a result of testifying in the presence of the defendant. If the order is based on such a finding, the testimony of the child witness shall not be taken in the presence of the defendant except as provided in paragraph (4).

(4) Testimony taken by an alternative procedure pursuant to an order issued under paragraph (1) shall be taken in a suitable setting outside the courtroom, except that an order based only on a finding that the child witness is likely to suffer trauma as a result of testifying in the presence of the defendant may provide that the testimony be taken in a suitable setting inside the courtroom in a manner so that the child witness is not able to see or hear the defendant.

(5) When testimony is taken by an alternative procedure pursuant to an order issued under paragraph (1), counsel shall be given the opportunity to examine or cross-examine the child witness to the same extent as would be permitted at trial, and the defendant shall be able to see and hear the child witness and to have constant private communication with defense counsel.

(6) The film, videotape or transmission of testimony taken by an alternative procedure pursuant to an order issued under paragraph (1) shall be admissible as substantive evidence to the same extent as and in lieu of live testimony by the child witness in any proceeding for which the order is issued or in any related criminal proceeding against the same defendant when consistent with the interests of justice, provided that such an order is entered or re-entered based on current findings at the time when or within a reasonable time before the film, videotape or transmission is offered into evidence. Subsequent testimony of a child witness in any such proceeding shall also be taken by a suitable alternative procedure pursuant to this section.

(7) Whenever pursuant to an order issued under paragraph (1), testimony is recorded on videotape or film or is transmitted to the courtroom by simultaneous electronic means, the court shall ensure that:

(a) The recording or transmitting equipment is capable of making an accurate recording or transmission and is operated by a competent operator;

(b) The recording or transmission is in color and the witness is visible at all times;

(c) Every voice on the recording or transmission is audible and identified;

(d) The courtroom is equipped with monitors which permit the jury and others present in the courtroom to see and hear the recording or transmission;

(e) In the case of recorded testimony, the recording is accurate and has not been altered;

(f) In the case of recorded testimony, each party is afforded the opportunity to view the recording before it is shown in the courtroom.

(8) Nothing in this section shall be deemed to prohibit the court from using other appropriate means, consistent with this section and other laws and with the defendant's rights, to protect a child witness from trauma during a court proceeding.

M.G.L.A 233 § 83. Custody hearings; out-of-court statements describing sexual contact; admissibility.

(a) Any 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 offered in an action brought under subparagraph C of section twenty-three or section twenty-four of chapter one hundred and nineteen shall be admissible; provided, however that the person to whom the statement was made, or who heard the child make the statement testifies, and the judge finds that the 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 effort.

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

Cases

Key Points:

- Out-of-court statements made by a child under the age of 10 can be admissible without the court determining the child's availability to testify.
- Under the "fresh complaint" doctrine, both a complainant and the recipient of their first complaint of child sexual abuse can testify about that initial complaint: its details, timing, and circumstances. However, testimony from additional witnesses is not admissible.

In *Care and Protection of Rebecca*, the Supreme Judicial Court of Massachusetts denied the defendant's argument that the trial court should have determined the children's availability prior to admitting their out-of-court statements. *Care and Protection of Rebecca*, 643 N.E.2d 26 (Mass. 1994). The Court noted that under §83, the requirement of availability was notably missing. *Id.* Thus, the court determined that for children under the age of 10, the legislature had intentionally removed the requirement of availability for admission of out-of-court statements. *Id.*

In *Com. v. King*, the Supreme Judicial Court of Massachusetts denied the defendant's argument that the trial judge improperly admitted the testimony of two "fresh complaint" witnesses. *Com. v. King*, 834 N.E.2d 1175 (Mass. 2005). Under the fresh complaint doctrine in effect at the time of trial, to corroborate the victim's own testimony concerning the alleged sexual assault (so-called "fresh complaint" testimony), the Commonwealth was permitted to introduce out-of-court statements she had made shortly after the incident occurred. *Id.* However, noting that the scope of the fresh

complaint doctrine was overly broad, the Court opted to alter the doctrine to encompass only the "first complaint." *Id.* Under the first complaint, "the recipient of a complainant's first complaint of an alleged sexual assault may testify about the fact of the first complaint and the circumstances surrounding the making of that first complaint. *Id.* The witness may also testify about the details of the complaint. The complainant may likewise testify to the details of the first complaint (i.e., what she told the first complaint witness), as well as why the complaint was made at that particular time. *Id.* Testimony from additional complaint witnesses is not admissible." *Id.* The Court discussed the importance of 1) altering rather than eliminating the doctrine, noting that child sexual abuse cases were met with overwhelming jury skepticism, and 2) continuing to allow additional witnesses to corroborate children's statements. *Id.*

The fresh complaint doctrine is not dependent upon the age of a victim and allows the state to introduce a generalized version of the victim's statement about a sexual offense for the narrow purpose of negating any inference that the victim's initial silence or delay means that the allegation was fabricated. *State v. R.K.*, 457 N.J. Super 377 (2015); *State v. Hill*, 121 N.J. 150 (1990). As stated above, the fresh complaint doctrine is not dependent upon the age of the victim and has been applied to both adult and juvenile victims. *State v. Bethune*, 121 N.J. 137 (1990). To admit fresh complaint evidence, the State is required to file a motion, and the Court will have a testimonial hearing at which various factors are considered including whether the statement was spontaneous, voluntary, made within a reasonable time after the abusive incident, and whether it was made to someone who the victim would ordinarily confide in. *State v. Hill*, 121 N.J. 150 (1990). If admitted, the witness testimony is limited to the general nature of the complaint and cannot include specific details of the abuse, but it is still, in my opinion, a means to introduce the circumstances surrounding a victim's (even a child's) disclosure and, at least, a very generalized version of the abuse.

Massachusetts Hearsay Exceptions

ALM G. Evid. §803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) **Present Sense Impression.** [Exception not recognized]
- (2) **Excited Utterance (Spontaneous Utterance).** A spontaneous utterance if (A) there is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer, and (B) the declarant's statement was a spontaneous reaction to the occurrence or event and not the result of reflective thought.
- (3) **Then-Existing Mental, Emotional, or Physical Condition.**
 - (A) Expressions of present physical condition such as pain and physical health.
 - (B)

(i) **Statements of a person as to his or her present friendliness, hostility, intent, knowledge, or other mental condition are admissible to prove such mental condition.**

(ii) **Statements, not too remote in time, which indicate an intention to engage in particular conduct, are admissible to prove that the conduct was, in fact, put in effect. Statements of memory or belief to prove the fact remembered or believed do not fall within this exception.**

(iii) **Declarations of a testator cannot be received to prove the execution of a will, but may be shown to show the state of mind or feelings of the testator.**

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for the purpose of medical diagnosis or treatment describing medical history, pain, symptoms, condition, or cause, but not as to the identity of the person responsible or legal significance of such symptoms or injury.

(5) **Past Recollection Recorded.**

(A) A previously recorded statement may be admissible if

(i) the witness has insufficient memory to testify fully and accurately,

(ii) the witness had firsthand knowledge of the facts recorded,

(iii) the witness can testify that the recorded statement was truthful when made, and

(iv) the witness made or adopted the recorded statement when the events were fresh in the witness's memory.

(B) The recorded statement itself may be admitted in evidence, although the original of the statement must be produced if procurable.

(6) **Business and Hospital Records.**

(A) *Entry, Writing, or Record Made in Regular Course of Business.* A business record shall not be inadmissible because it is hearsay or self-serving if the court finds that

(i) the entry, writing, or record was made in good faith;

(ii) it was made in the regular course of business;

(iii) it was made before the beginning of the civil or criminal proceeding in which it is offered; and

(iv) it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

(B) *Hospital Records.* Records kept by hospitals pursuant to G. L. c. 111, § 70, shall be admissible as evidence so far as such records relate to the treatment and medical history of such cases, but nothing contained therein shall be admissible as evidence which has reference to the question of liability. Records required to be kept by hospitals under the law of any other United States jurisdiction may be admissible.

(C) *Medical and Hospital Services.*

(i) Definitions.

(a) Itemized Bills, Records, and Reports. As used in this section, "itemized bills, records, and reports" means itemized hospital or medical bills; physician or dentist reports; hospital medical records relating to medical, dental, hospital services, prescriptions, or orthopedic appliances rendered to or prescribed for a person injured; or any report of any examination of said injured person including, but not limited to, hospital medical records.

(b) Physician or Dentist. As used in this section, "physician or dentist" means a physician, dentist, or any person who is licensed to practice as such under the laws of the jurisdiction within which such services were rendered, as well as chiropodists, chiropractors, optometrists, osteopaths, physical therapists, podiatrists, psychologists, and other medical personnel licensed to practice under the laws of the jurisdiction within which such services were rendered.

(c) Hospital. As used in this section, "hospital" means any hospital required to keep records under G. L. c. 111, § 70, or which is in any way licensed or regulated by the laws of any other State, or by the laws and regulations of the United States of America, including hospitals of the Veterans Administration or similar type institutions, whether incorporated or not.

(d) Health Maintenance Organization. As used in this section, "health maintenance organization" shall have the same meaning as defined in G. L. c. 176G, § 1.

(ii) Admissibility of Itemized Bills, Records, and Reports. In any civil or criminal proceeding, itemized bills, records, and reports of an examination of or for services rendered to an injured person are admissible as evidence of the fair and reasonable charge for such services, the necessity of such services or treatments, the diagnosis, prognosis, opinion as to the proximate cause of the condition so diagnosed, or the opinion as to disability or incapacity, if any, proximately resulting from the condition so diagnosed, provided that

(a) the party offering the evidence gives the opposing party written notice of the intention to offer the evidence, along with a copy of the evidence, by mailing it by certified mail, return receipt requested, not less than ten days before the introduction of the evidence;

(b) the party offering the evidence files an affidavit of such notice and the return receipt is filed with the clerk of the court after said receipt has been returned; and

(c) the itemized bill, record, or report is subscribed and sworn to under the penalties of perjury by the physician, dentist, authorized agent of a hospital or health maintenance organization rendering such services, or by the pharmacist or retailer of orthopedic appliances.

(iii) Calling the Physician or Dentist as a Witness. Nothing contained in this subsection limits the right of a party to call the physician or dentist, or any other person, as a witness to testify about the contents of the itemized bill, record, or report in question.

(7) **Absence of Entry in Records Kept in Accordance with Provisions of Section 803(6).** The absence of an entry in records of regularly conducted activity, or testimony of a witness that he or she has examined records and not found a particular entry or entries, is admissible for purposes of proving the nonoccurrence of the event.

(8) **Official/Public Records and Reports.**

(A) *Record of Primary Fact.* A record of a primary fact, made by a public officer in the performance of an official duty, is competent evidence as to the existence of that fact.

(B) *Prima Facie Evidence.* Certain statutes provide that the admission of facts contained in certain public records constitute prima facie evidence of the existence of those facts.

(C) *Record of Investigations.* Record of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records, unless specifically authorized by statute.

(9) **Public Records of Vital Statistics.** A town clerk's record of birth, marriage, or death is prima facie evidence of the facts recorded, but nothing contained in the record of a death that refers to the question of liability for causing the death is admissible in evidence.

(10) **Absence of a Public Record.** Testimony -- or a certification under Section 902 -- that a diligent search failed to disclose a public record or statement is admissible in evidence if the testimony or certification is offered to prove that

(A) the record or statement does not exist, or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) **Records of Religious Organizations.** [Exception not recognized]

(12) **Marriage, Baptismal, and Similar Certificates.** [Exception not recognized]

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker or a similar item is admissible in evidence.

(14) **Records or Documents Affecting an Interest in Property.** A registry copy of a document purporting to prove or establish an interest in land is admissible as proof of the content of the original recorded document and its execution and delivery by each person who signed it. However, the grantee or entity claiming present ownership interest of the property must account for the absence of the original document before offering the registry copy.

(15) **Statements in Documents Affecting an Interest in Property.** Statements of a person's married or unmarried status, kinship or lack of kinship, or of the date of the person's birth or death which relate or purport to relate to the title to land and are sworn to before any officer authorized by law to administer oaths may be filed for record and shall be recorded in the registry of deeds for the county where the land or any part thereof lies. Any such statement, if so recorded, or a certified copy of the record thereof, insofar as the facts stated therein bear on the title to land, shall be admissible in evidence in support of such title in any court in the Commonwealth in proceedings relating to such title.

(16) **Statements in Ancient Documents.** A statement in a document that is at least thirty years old and whose authenticity is established is admissible in evidence.

(17) **Statements of Facts of General Interest.** Statements of facts of general interest to persons engaged in an occupation contained in a list, register, periodical, book, or other compilation, issued to the public, shall, in the discretion of the court, if the court finds that the compilation is published for the use of persons engaged in that occupation and commonly is used and relied upon by them, be admissible in civil cases as evidence of the truth of any fact so stated.

(18) **Learned Treatises.**

(A) *Use in Medical Malpractice Actions.* Statements of facts or opinions on a subject of science or art contained in a published treatise, periodical, book, or pamphlet shall, insofar as the court shall find that the said statements are relevant and that the writer of such statements is recognized in his or her profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error, or mistake against physicians, surgeons, dentists, optometrists, hospitals, and sanitarium, as evidence tending to prove said facts or as opinion evidence; provided, however, that the party intending to offer as evidence any such statements shall, not less than thirty days before the trial of the action, give the adverse party or that party's attorney notice of such intention, stating the name of the writer of the statements; the title of the treatise, periodical, book, or pamphlet in which they are contained; the date of publication of the same; the name of the publisher of the same; and wherever possible or practicable the page or pages of the same on which the said statements appear.

(B) *Use in Cross-Examination of Experts.* To the extent called to the attention of an expert witness upon cross-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 the testimony or admission of the witness or by other expert testimony or by

judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** A reputation within a family as to matters of pedigree, such as birth, marriage, and relationships between and among family members, may be testified to by any member of the family.

(20) **Reputation Concerning Boundaries or General History.** Evidence of a general or common reputation concerning the existence or nonexistence of a boundary or other matter of public or general interest concerning land or real property is admissible.

(21) **Reputation Concerning Character.** A witness with knowledge may testify to a person's reputation as to a trait of character, as provided in Sections 404, 405, and 608.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction is admissible if

- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the conviction was for a crime punishable by death or by confinement for more than a year;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to Personal, Family, or General History, or Boundaries.** [Exception not recognized]

(24) Out-of-Court Statement of Child Describing Sexual Contact in Proceeding to Place Child in Foster Care.

(A) Admissibility in General. Any out-of-court statements of a child under the age of ten describing any act of sexual contact performed on or with the child, or the circumstances under which it occurred, or identifying the perpetrator offered in an action brought under G. L. c. 119, §§ 23(C) and 24, shall be admissible; provided, however that

- (i) the person to whom the statement was made, or who heard the child make the statement, testifies;
- (ii) the judge finds that the 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 effort;
- (iii) the judge finds pursuant to Subsection (24)(B) that such statement is reliable; and
- (iv) the judge's reasons for relying on the statement appear in the judge's findings pursuant to Subsection (24)(C).

(B) Reliability of Statement. A judge must assess the reliability of the out-of-court statement by considering the following factors:

- (i) the timing of the statement, the circumstances in which it was made, the language used by the child, and the child's apparent sincerity or motive in making the statement;
- (ii) the consistency over time of a child's statement concerning abuse, expert testimony about a child's ability to remember and to relate his or her experiences, or other relevant personality traits;
- (iii) the child's capacity to remember and to relate, and the child's ability to perceive the necessity of telling the truth; and
- (iv) whether other admissible evidence corroborates the existence of child abuse.

(C) Findings on the Record. The judge's reasons for relying on the statement must appear clearly in the specific and detailed findings the judge is required to make in a care and protection case.

(D) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

ALM G. Evid. § 804. Hearsay exceptions; declarant unavailable.

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify [this criterion not recognized];
- (3) in a civil case, testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able to procure the declarant's attendance by process or other reasonable means.

But this Subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Prior Recorded Testimony.* Testimony that

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one, and

(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Made Under the Belief of Imminent Death.* In a prosecution for homicide, a statement that a declarant, who believed that the declarant's death was imminent and who died shortly after making the statement, made about the cause or circumstances of the declarant's own impending death or that of a co-victim.

(3) *Statement Against Interest.* A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else, or to expose the declarant to civil or criminal liability. In a criminal case, the exception does not apply to a statement that tends to expose the declarant to criminal liability and is offered to exculpate the defendant, or is offered by the Commonwealth to inculpate the defendant, unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal History.*

(A) A statement concerning the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, or relationship by blood, even though the declarant had no way of acquiring personal knowledge of the matter stated.

(B) A statement regarding those matters concerning another person to whom the declarant is related [exception not recognized].

(5) *Statutory Exceptions in Civil Cases.*

(A) *Declarations of Decedent.* In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.

(B) *Deceased Party's Answers to Interrogatories.* If a party to an action who has filed answers to interrogatories under any applicable statute or any rule of the Massachusetts Rules of Civil Procedure dies, so much of such answers as the court finds have been made upon the personal knowledge of the deceased shall not be inadmissible as hearsay or self-serving if offered in evidence in said action by a representative of the deceased party.

(C) Declarations of Decedent in Actions Against an Estate. If a cause of action brought against an executor or administrator is supported by oral testimony of a promise or statement made by the testator or intestate of the defendant, evidence of statements, written or oral, made by the decedent, memoranda and entries written by the decedent, and evidence of the decedent's acts and habits of dealing, tending to disprove or to show the improbability of the making of such promise or statement, shall be admissible.

(D) Reports of Deceased Physicians in Tort Actions. In an action of tort for personal injuries or death, or for consequential damages arising from such personal injuries, the medical report of a deceased physician who attended or examined the plaintiff, including expressions of medical opinion, shall, at the discretion of the trial judge, be admissible in evidence, but nothing therein contained which has reference to the question of liability shall be so admissible. Any opposing party shall have the right to introduce evidence tending to limit, modify, contradict, or rebut such medical report. The word "physician" as used in this section shall not include any person who was not licensed to practice medicine under the laws of the jurisdiction within which such medical attention was given or such examination was made.

(E) Medical Reports of Disabled or Deceased Physicians as Evidence in Workers' Compensation Proceedings. In proceedings before the industrial accident board, the medical report of an incapacitated, disabled, or deceased physician who attended or examined the employee, including expressions of medical opinion, shall, at the discretion of the member, be admissible as evidence if the member finds that such medical report was made as the result of such physician's attendance or examination of the employee.

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party if the court finds

(A) that the witness is unavailable;

(B) that the party was involved in, or responsible for, procuring the unavailability of the witness; and

(C) that the party acted with the intent to procure the witness's unavailability.

(7) Religious Records. Statements of fact made by a deceased person authorized by the rules or practices of a religious organization to perform a religious act, contained in a certificate that the maker performed such act, and purporting to be issued at the time of the act or within a reasonable time thereafter.

(8) Admissibility in Criminal Proceedings of a Child's Out-of-Court Statement Describing Sexual Contact. General Laws c. 233, § 81, was adopted prior to the United States Supreme Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), as well as the Supreme Judicial Court's decisions in *Commonwealth v. Gonsalves*, 445 Mass. 1 (2005), cert. denied, 548 U.S. 926 (2006), and *Commonwealth v.*

Amirault, 424 Mass. 618 (1997). These decisions call into question the constitutionality of this subsection.

(A) Admissibility in General. An out-of-court statement of a child under the age of ten describing an 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 criminal proceeding; provided, however, that

(i) the 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,

(ii) the person to whom the statement was made or who heard the child make the statement testifies,

(iii) the judge finds pursuant to Subsection (b)(8)(B) that the child is unavailable as a witness,

(iv) the judge finds pursuant to Subsection (b)(8)(C) that the statement is reliable, and

(v) the statement is corroborated pursuant to Subsection (b)(8)(D).

(B) Unavailability of Child. 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

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

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

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

(iv) 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;

(v) 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

(vi) the child is not competent to testify.

(C) Reliability of Statement. If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further finds,

(i) after holding a separate hearing, that such statement was made under oath, that it was accurately recorded and preserved, and that there was sufficient opportunity to cross-examine, or

(ii) 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 this subsection, a judge may consider whether the relator documented the child witness's statement and shall consider the following factors:

(a) 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;

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

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

(D) Corroborating Evidence. The out-of-court statement must be corroborated by other independently admitted evidence.

(E) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

(g) Out-of-Court Statement of Child Describing Sexual Contact in Civil Proceeding, Including Termination of Parental Rights.

(A) Admissibility in General. 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 G. L. c. 119, §§ 23(C) and 24; provided, however, that

(i) 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,

(ii) the person to whom such statement was made or who heard the child make such statement testifies,

(iii) the judge finds pursuant to Subsection (b)(9)(B) that the child is unavailable as a witness,

(iv) the judge finds pursuant to Subsection (b)(9)(C) that such statement is reliable, and

(v) such statement is corroborated pursuant to Subsection (b)(9)(D).

(B) Unavailability of Child. 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

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

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

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

(iv) 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;

(v) 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

(vi) the child is not competent to testify.

(C) Reliability of Statement. If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further finds,

(i) after holding a separate hearing, that such statement was made under oath, that it was accurately recorded and preserved, and that there was sufficient opportunity to cross-examine, or

(ii) 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 this subsection, a judge may consider whether the relator

documented the child witness's statement and shall consider the following factors:

- (a) 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;
- (b) the time, content, and circumstances of the statement;
- (c) 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; and
- (d) the child's sincerity and ability to appreciate the consequences of the statement.

(D) Corroborating Evidence. The out-of-court statement must be corroborated by other independently admitted evidence.

(E) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

MA R EVID § 106. Doctrine of completeness.

(a) **Remainder of Writings or Recorded Statements.** If a party introduces all or part of a writing or recorded statement, the court may permit an adverse party to introduce any other part of the writing or statement that is

- (1) on the same subject,
- (2) part of the same writing or conversation, and
- (3) necessary to an understanding of the admitted writing or statement.

(b) **Curative Admissibility.** When the erroneous admission of evidence causes a party to suffer significant prejudice, the court may permit incompetent evidence to be introduced to cure or minimize the prejudice.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors.
- An out-of-court statement can be admissible, even if the child declarant is declared incompetent to testify, under the tender years exception.

In *Adoption of Arnold*, the Appeals Court of Massachusetts held that the trial court properly admitted the child victim's out-of-court statements alleging that his father had sexually assaulted him. *Adoption of Arnold*, 741 N.E.2d 456 (Mass. App. Ct. 2001). In determining whether the child's statements were trustworthy and reliable, the Court looked to multiple factors including: the child's ability to understand the distinction between the truth and a lie, the child's statements being made in a safe and controlled environment with trusted professionals, the spontaneity of the child's statements without use of leading questions, and the child's corroborative behaviors (anxiety, aggression, night terrors, masturbation, and sexualized behavior including grabbing his foster mother's breasts). *Id.* Thus, the Court found that the trial court properly admitted the child's statements after finding them to be trustworthy and reliable. *Id.*

In *In re Adoption of Olivette*, the Appeals Court of Massachusetts held that the trial court properly admitted the child victim's out-of-court statements under the tender years exception to hearsay, despite the child's status of incompetence. *In re Adoption of Olivette*, 944 N.E.2d 1068 (Mass. Ct. App. 2011). The Court first rejected defendant's argument that hearsay statements from an incompetent child are automatically inadmissible, noting that:

"the language and structure of § 82 suggest strongly that a statement might be admissible even though the child declarant is incompetent, since it establishes incompetence as one of the bases upon which a child may be found unavailable to testify, under § 82(b)(6), as an initial predicate to admissibility of her statement; we consider it unlikely that the Legislature would have intended that subsection to apply only in instances where a young child was competent at the time she made the out-of-court statement concerning sexual abuse but became incompetent before the time of trial." *Id.*

Furthermore, the Court held that the trial court had properly analyzed the child's statements for reliability by examining their clarity, time, content, and context in addition to corroborative evidence and the child's ability to understand the consequences of lying. *Id.* Thus, the child's status of incompetence had no weight on the admissibility of her out-of-court statements, which were properly admitted. *Id.*

Michigan

Michigan Admissibility

Mich. Comp. Laws Serv. § 600.2163a. Definitions; prosecutions and proceedings to which section applicable; use of dolls or mannequins; support person; notice; videorecorded statement; special arrangements to protect welfare of witness; video recorded deposition; section additional to other protections or procedures; violation as misdemeanor; penalty.

Sec. 2163a.

(1) As used in this section:

(a) "Courtroom support dog" means a dog that has been trained and evaluated as a support dog pursuant to the Assistance Dogs International Standards for guide or service work and that is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a courtroom support dog prior to September 27, 2018.

(b) "Custodian of the video recorded statement" means the department of health and human services, investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628.

(c) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a, except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.

(d) "Nonoffending parent or legal guardian" means a natural parent, stepparent, adoptive parent, or legally appointed or designated guardian of a witness who is not alleged to have committed a violation of the laws of this state, another state, the United States, or a court order that is connected in any manner to a witness's video recorded statement.

(e) "Video recorded statement" means a witness's statement taken by a custodian of the video recorded statement as provided in subsection (7). Video recorded statement does not include a video recorded deposition taken as provided in subsections (20) and (21).

(f) "Vulnerable adult" means that term as defined in section 145m of the Michigan penal code, 1931 PA 328, MCL 750.145m.

(g) "Witness" means an alleged victim of an offense listed under subsection (2) who is any of the following:

- (i) A person under 16 years of age.
- (ii) A person 16 years of age or older with a developmental disability.
- (iii) A vulnerable adult.

(2) This section only applies to the following:

(a) For purposes of subsection (1)(g)(i) and (ii), prosecutions and proceedings under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g.

(b) For purposes of subsection (1)(g)(iii), 1 or more of the following matters:

(i) Prosecutions and proceedings under section 110a, 145n, 145o, 145p, 174, or 174a of the Michigan penal code, 1931 PA 328, MCL 750.110a, 750.145n, 750.145o, 750.145p, 750.174, and 750.174a.

(ii) Prosecutions and proceedings for an assaultive crime as that term is defined in section 9a of chapter X of the code of criminal procedure, 1927 PA 175, MCL 770.9a.

(3) If pertinent, the court must permit the witness to use dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) The court must permit a witness who is called upon to testify to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. The court must also permit a witness who is called upon to testify to have a courtroom support dog and handler sit with, or be in close proximity to, the witness during his or her testimony.

(5) A notice of intent to use a support person or courtroom support dog is only required if the support person or courtroom support dog is to be utilized during trial and is not required for the use of a support person or courtroom support dog during any other courtroom proceeding. A notice of intent under this subsection must be filed with the court and must be served upon all parties to the proceeding. The notice must name the support person or courtroom support dog, identify the relationship the support person has with the witness, if applicable, and give notice to all parties that the witness may request that the named support person or courtroom support dog sit with the witness when the witness is called upon to testify during trial. A court must rule on a motion objecting to the use of a named support person or courtroom support dog before the date when the witness desires to use the support person or courtroom support dog.

(6) An agency that supplies a courtroom support dog under this section conveys all responsibility for the courtroom support dog to the participating prosecutor's office or government entity in charge of the local courtroom support dog program during the period of time the participating prosecutor's office or government entity in charge of the local program is utilizing the courtroom support dog.

(7) A custodian of the video recorded statement may take a witness's video recorded statement before the normally scheduled date for the defendant's preliminary examination. The video recorded statement must state the date and time that the statement was taken; must identify the persons

present in the room and state whether they were present for the entire video recording or only a portion of the video recording; and must show a time clock that is running during the taking of the video recorded statement.

(8) A video recorded statement may be considered in court proceedings only for 1 or more of the following purposes:

(a) It may be admitted as evidence at all pretrial proceedings, except that it cannot be introduced at the preliminary examination instead of the live testimony of the witness.

(b) It may be admitted for impeachment purposes.

(c) It may be considered by the court in determining the sentence.

(d) It may be used as a factual basis for a no contest plea or to supplement a guilty plea.

(9) A video recorded deposition may be considered in court proceedings only as provided by law.

(10) In a video recorded statement, the questioning of the witness should be full and complete; must be in accordance with the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628, or as otherwise provided by law; and, if appropriate for the witness's developmental level or mental acuity, must include, but is not limited to, all of the following areas:

(a) The time and date of the alleged offense or offenses.

(b) The location and area of the alleged offense or offenses.

(c) The relationship, if any, between the witness and the accused.

(d) The details of the offense or offenses.

(e) The names of any other persons known to the witness who may have personal knowledge of the alleged offense or offenses.

(11) A custodian of the video recorded statement may release or consent to the release or use of a video recorded statement or copies of a video recorded statement to a law enforcement agency, an agency authorized to prosecute the criminal case to which the video recorded statement relates, or an entity that is part of county protocols established under section 8 of the child protection law, 1975 PA 238, MCL 722.628, or as otherwise provided by law. The defendant and, if represented, his or her attorney has the right to view and hear a video recorded statement before the defendant's preliminary examination. Upon request, the prosecuting attorney shall provide the defendant and, if represented, his or her attorney with reasonable access and means to view and hear the video recorded statement at a reasonable time before the defendant's pretrial or trial of the case. In preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the video recorded statement, the court may order that a copy of the video recorded statement be given to the defense.

(12) If authorized by the prosecuting attorney in the county in which the video recorded statement was taken, and with the consent of a minor witness's nonoffending parent or legal guardian, a video recorded statement may be used for purposes of training the custodians of the video recorded statement in that county, or for purposes of training persons in another county who would meet the definition of custodian of the video recorded statement had the video recorded statement been taken in that other county, on the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628, or as otherwise provided by law. The consent required under this subsection must be obtained through the execution of a written, fully informed, time-limited, and revocable release of information. An individual participating in training under this subsection is also required to execute a nondisclosure agreement to protect witness confidentiality.

(13) Except as provided in this section, an individual, including, but not limited to, a custodian of the video recorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney, shall not release or consent to release a video recorded statement or a copy of a video recorded statement.

(14) A video recorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness.

(15) A video recorded statement must not be copied or reproduced in any manner except as provided in this section. A video recorded statement is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, is not subject to release under another statute, and is not subject to disclosure under the Michigan court rules governing discovery. This section does not prohibit the production or release of a transcript of a video recorded statement.

(16) If, upon the motion of a party made before the preliminary examination, the court finds on the record that the special arrangements specified in subsection (17) are necessary to protect the welfare of the witness, the court must order those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court must consider all of the following factors:

(a) The age of the witness.

(b) The nature of the offense or offenses.

(c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.

(d) The physical condition of the witness.

(17) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (16), the court must order both of the following:

(a) That all persons not necessary to the proceeding must be excluded during the witness's testimony from the courtroom where the preliminary examination is held. Upon request by any person and the payment of the appropriate fees, a transcript of the witness's testimony must be made available.

(b) That the courtroom be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand in order to protect the witness from directly viewing the defendant. The defendant's position must be located so as to allow the defendant to hear and see the witness and be able to communicate with his or her attorney.

(18) If upon the motion of a party made before trial the court finds on the record that the special arrangements specified in subsection (19) are necessary to protect the welfare of the witness, the court must order those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court must consider all of the following factors:

(a) The age of the witness.

(b) The nature of the offense or offenses.

(c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.

(d) The physical condition of the witness.

(19) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (18), the court must order 1 or more of the following:

(a) That all persons not necessary to the proceeding be excluded during the witness's testimony from the courtroom where the trial is held. The witness's testimony must be broadcast by closed-circuit television to the public in another location out of sight of the witness.

(b) That the courtroom be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand in order to protect the witness from directly viewing the defendant. The defendant's position must be the same for all witnesses and must be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney.

(c) That a questioner's stand or podium be used for all questioning of all witnesses by all parties and must be located in front of the witness stand.

(20) If, upon the motion of a party or in the court's discretion, the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in subsections (3), (4), (17), and (19), the court must order that the witness may testify outside the physical presence of the defendant by closed circuit television or other electronic means that allows the witness to be observed by the trier of fact and the defendant when questioned by the parties.

(21) For purposes of the video recorded deposition under subsection (20), the witness's examination and cross-examination must proceed in the same manner as if the witness testified at the court proceeding for which the video recorded deposition is to be used. The court must permit the defendant to hear the testimony of the witness and to consult with his or her attorney.

(22) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

(23) A person who intentionally releases a video recorded statement in violation of this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

Mich. Comp. Laws Serv. § 712A.17b. Definitions; proceedings to which section applicable; use of dolls or mannequins; support person; notice; video recorded statement; shielding of witness; video recorded deposition; special arrangements to protect welfare of witness; section additional to other protections or procedures.

(1) As used in this section:

(a) "Custodian of the video recorded statement" means the investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628.

(b) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a, except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.

(c) "Nonoffending parent or legal guardian" means a natural parent, stepparent, adoptive parent, or legally appointed or designated guardian of a witness who is not alleged to have committed a violation of the laws of this state, another state, the United States, or a court order that is connected in any manner to a witness's video recorded statement.

(d) "Video recorded statement" means a witness's statement taken by a custodian of the video recorded statement as provided in subsection (5). Video recorded statement does not include a video recorded deposition taken as provided in subsections (16) and (17).

(e) "Witness" means an alleged victim of an offense listed under subsection (2) who is either of the following:

(i) A person under 16 years of age.

(ii) A person 16 years of age or older with a developmental disability.

(2) This section only applies to either of the following:

(a) A proceeding brought under section 2(a)(1) of this chapter in which the alleged offense, if committed by an adult, would be a felony under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g.

(b) A proceeding brought under section 2(b) of this chapter.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be filed with the court and shall be served upon all parties to the proceeding. The court shall rule on a motion objecting to the use of a named support person before the date at which the witness desires to use the support person.

(5) A custodian of the video recorded statement may take a witness's video recorded statement. The video recorded statement shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness. The video recorded statement shall state the date and time that the statement was taken; shall identify the persons present in the room and state whether they were present for the entire video recording or only a portion of the video recording; and shall show a time clock that is running during the taking of the statement.

(6) In a video recorded statement, the questioning of the witness should be full and complete; shall be in accordance with the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628; and, if appropriate for the witness's developmental level, shall include, but need not be limited to, all of the following areas:

(a) The time and date of the alleged offense or offenses.

(b) The location and area of the alleged offense or offenses.

(c) The relationship, if any, between the witness and the respondent.

(d) The details of the offense or offenses.

(e) The names of other persons known to the witness who may have personal knowledge of the offense or offenses.

(7) A custodian of the video recorded statement may release or consent to the release or use of a video recorded statement or copies of a video recorded statement to a law enforcement agency, an agency authorized to prosecute the criminal case to which the video recorded statement relates, or an entity that is part of county protocols established under section 8 of the child protection law, 1975 PA 238, MCL 722.628. Each respondent and, if represented, his or her attorney has the right to view and hear the video recorded statement at a reasonable time before it is offered into evidence. In preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the video recorded statement, the court may order that a copy of the video recorded statement be given to the defense.

(8) If authorized by the prosecuting attorney in the county in which the video recorded statement was taken and with the consent of a minor witness's nonoffending parent or legal guardian, a video recorded statement may be used for purposes of training the custodians of the video recorded statement in that county, or for purposes of training persons in another county that would meet the definition of custodian of the video recorded statement had the video recorded statement been taken in that other county, on the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628. The consent required under this subsection must be obtained through the execution of a written, fully informed, time-limited, and revocable release of information. An individual participating in training under this subsection is also required to execute a nondisclosure agreement to protect witness confidentiality.

(9) Except as provided in this section, an individual, including, but not limited to, a custodian of the video recorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney, shall not release or consent to release a video recorded statement or a copy of a video recorded statement.

(10) A video recorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness.

(11) A video recorded statement shall not be copied or reproduced in any manner except as provided in this section. A video recorded statement is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, is not subject to release under another statute, and is not subject to disclosure under the Michigan court rules governing discovery. This section does not prohibit the production or release of a transcript of a video recorded statement.

(12) Except as otherwise provided in subsection (15), if, upon the motion of a party or in the court's discretion, the court finds on the record that psychological harm to the witness would occur if the witness were to testify in the presence of the respondent at a court proceeding or in a video recorded deposition taken as provided in subsection (13), the court shall order that the witness during his or her testimony be shielded from viewing the respondent in such a manner as to enable the respondent to consult with his or her attorney and to see and hear the testimony of the witness without the witness being able to see the respondent.

(13) In a proceeding brought under section 2(b) of this chapter, if, upon the motion of a party or in the court's discretion, the court finds on the record that psychological harm to the witness would occur if the witness were to testify at the adjudication stage, the court shall order to be taken a video recorded deposition of a witness that shall be admitted into evidence at the adjudication stage instead of the live testimony of the witness. The examination and cross-examination of the witness in the video recorded deposition shall proceed in the same manner as permitted at the adjudication stage.

(14) In a proceeding brought under section 2(a)(1) of this chapter in which the alleged offense, if committed by an adult, would be a felony under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g, if, upon the motion of a party made before the adjudication stage, the court finds on the record that the special arrangements specified in subsection (15) are necessary to protect the welfare of the witness,

the court shall order 1 or both of those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court shall consider both of the following:

- (a) The age of the witness.
- (b) The nature of the offense or offenses.

(15) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (14), the court shall order 1 or both of the following:

(a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent's position shall be located so as to allow the respondent to hear and see all witnesses and be able to communicate with his or her attorney.

(b) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand.

(16) In a proceeding brought under section 2(a)(1) of this chapter in which the alleged offense, if committed by an adult, would be a felony under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g, if, upon the motion of a party or in the court's discretion, the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in subsections (3), (4), and (15), the court shall order that a video recorded deposition of a witness shall be taken to be admitted at the adjudication stage instead of the witness's live testimony.

(17) For purposes of the video recorded deposition under subsection (16), the witness's examination and cross-examination shall proceed in the same manner as if the witness testified at the adjudication stage, and the court shall order that the witness, during his or her testimony, shall not be confronted by the respondent but shall permit the respondent to hear the testimony of the witness and to consult with his or her attorney.

(18) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

(19) A person who intentionally releases a video recorded statement in violation of this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

Cases

In *People v. Shorter*, the Michigan Court of Appeals concluded that for several reasons, the trial court erred by allowing the adult complainant to testify while accompanied by a support animal and its handler. *People v. Shorter*, 324 Mich. App. 529, 922 N.W.2d 628, 2018 Mich. App. LEXIS 2579 (Mich. Ct.

App. 2018). The Court heavily disputed the trial court's reliance on *Johnson*, 315 Mich. App. 163, 889 N.W.2d 513. *Id.* First, the Court generally argued that "there is a fundamental difference between allowing a support animal to accompany a child witness, as in *Johnson*, and allowing the animal to accompany a fully abled adult witness." *Id.* Moreover, the court held that "even assuming a trial court had the inherent authority to allow such a procedure, they would not approve its use if the basis for it was simply that doing so would allow the witness to be 'more comfortable' or because 'this is something she wants.'" *Id.* The Court was additionally not convinced that allowing a support animal or person so that the witness would be better able to 'control her emotions' necessarily aided the truth-finding process. *Id.* The Court argued that "the jury is entitled to evaluate her emotional state uninfluenced by outside support, not only as it pertains to her own credibility, but also to determine the weight to be given to testimony by others who described her emotional state." *Id.* The Court concluded that "the error was not harmless because it undermined the reliability of the verdict." *Id.*

Michigan Hearsay Exceptions

MI R REV MRE 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment.*** Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.
- (5) ***Recorded Recollection.*** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record

may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** 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.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, 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.** Statements of fact concerning 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** 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 twenty years or more the authenticity of which 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) **Deposition Testimony of an Expert.** Testimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding if the court finds that the deponent is an expert witness and if the deponent is not a party to the proceeding.

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

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of Previous Conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

(24) **Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(A) the statement is offered as evidence of a material fact,

(B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

MI R REV MRE 803A. Hearsay exceptions; child's statement about sexual act.

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

(1) the declarant was under the age of ten when the statement was made;

(2) the statement is shown to have been spontaneous and without indication of manufacture;

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.

MI R REV MRE 804. Hearsay exceptions; declarant unavailable.

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant

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(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) has a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Deposition Testimony.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For purposes of this subsection only, "unavailability of a witness" also includes situations in which:

(A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(6) *Statement by Declarant Made Unavailable by Opponent.* A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(7) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(A) the statement is offered as evidence of a material fact,

(B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the

proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

MI R REV MRE 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- Leading questions can contaminate the reliability of a child victim's out-of-court statement, even when part of the statement includes spontaneous responses to non-leading questions.
- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors assessing its reliability.

In *People v. Gursky*, the Supreme Court of Michigan held that the trial court committed harmless error in admitting the child victim's out-of-court statements under the spontaneous statement section of the tender years exception to hearsay. *People v. Gursky*, 786 N.W.2d 579 (Mich. 2010). The Court noted that while open-ended, non-leading questions could result in a child's spontaneous statement, questions that initially focus on possible sexual assault do not elicit spontaneous answers. *Id.* Although the child provided certain spontaneous statements, the general conversation was guided by leading questions, thus calling into question the reliability of all the child's statements. *Id.*

In *People v. Katt*, the Court of Appeals of Michigan held that the child victim's out-of-court statements were properly admitted under the residual exception to hearsay. *People v. Katt*, 639 N.W.2d 815 (Mich. Ct. App. 2001). The Court denied the defendant's arguments that the statement was neither trustworthy, nor was it "more probative on the point for which it was offered than any other evidence that the prosecutor could have procured through reasonable efforts." *Id.* In determining the reliability and trustworthiness of an out-of-court statement, the court may look to:

"1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence; (6) personal knowledge of the declarant about the matter on which he spoke; (7) to whom the statements were made, e.g., a police officer who was likely to investigate further; and (8) the time frame within which the statements were made." *Id.*

Given the spontaneity and consistency of the child's statements, in addition to the child's use of unexpected sexual terminology for his age and the professional use of non-leading questions, the Court found that there existed "circumstantial guarantees of trustworthiness." *Id.* Thus, the child's statements were properly admitted under the residual exception to hearsay. *Id.*

Minnesota

Minnesota Admissibility

Minn. Stat. § 595.02. Testimony of witnesses.

Subdivision 1. Competency of witnesses. — Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision:

(a) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. This exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other or against a child of either or against a child under the care of either spouse, nor to a criminal action or proceeding in which one is charged with homicide or an attempt to commit homicide and the date of the marriage of the defendant is subsequent to the date of the offense, nor to an action or proceeding for nonsupport, neglect, dependency, or termination of parental rights.

(b) An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

(c) A member of the clergy or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to the member of the clergy or other minister in a professional character, in the course of discipline enjoined by the rules or practice of the religious body to which the member of the clergy or other minister belongs; nor shall a member of the clergy or other minister of any religion be examined as to any communication made to the member of the clergy or other minister by any person seeking religious or spiritual advice, aid, or comfort or advice given thereon in the course of the member of the clergy's or other minister's professional character, without the consent of the person.

(d) A licensed physician or surgeon, dentist, or chiropractor shall not, without the consent of the patient, be allowed to disclose any information or any opinion based thereon which the professional acquired in attending the patient in a professional capacity, and which was necessary to enable the professional to act in that capacity; after the decease of the patient, in an action to recover insurance benefits, where the insurance has been in existence two years or more, the beneficiaries shall be deemed to be the personal representatives of the deceased person for the purpose of waiving this privilege, and no oral or written waiver of the privilege

shall have any binding force or effect except when made upon the trial or examination where the evidence is offered or received.

(e) A public officer shall not be allowed to disclose communications made to the officer in official confidence when the public interest would suffer by the disclosure.

(f) Persons of unsound mind and persons intoxicated at the time of their production for examination are not competent witnesses if they lack capacity to remember or to relate truthfully facts respecting which they are examined.

(g) A registered nurse, psychologist, consulting psychologist, or licensed social worker engaged in a psychological or social assessment or treatment of an individual at the individual's request shall not, without the consent of the professional's client, be allowed to disclose any information or opinion based thereon which the professional has acquired in attending the client in a professional capacity, and which was necessary to enable the professional to act in that capacity. Nothing in this clause exempts licensed social workers from compliance with the provisions of section 626.557 and chapter 260E.

(h) An interpreter for a person disabled in communication shall not, without the consent of the person, be allowed to disclose any communication if the communication would, if the interpreter were not present, be privileged. For purposes of this section, a "person disabled in communication" means a person who, because of a hearing, speech or other communication disorder, or because of the inability to speak or comprehend the English language, is unable to understand the proceedings in which the person is required to participate. The presence of an interpreter as an aid to communication does not destroy an otherwise existing privilege.

(i) Licensed chemical dependency counselors shall not disclose information or an opinion based on the information which they acquire from persons consulting them in their professional capacities, and which was necessary to enable them to act in that capacity, except that they may do so:

(1) when informed consent has been obtained in writing, except in those circumstances in which not to do so would violate the law or would result in clear and imminent danger to the client or others;

(2) when the communications reveal the contemplation or ongoing commission of a crime; or

(3) when the consulting person waives the privilege by bringing suit or filing charges against the licensed professional whom that person consulted.

(j) A parent or the parent's minor child may not be examined as to any communication made in confidence by the minor to the minor's parent. A communication is confidential if made out of the presence of persons not members of the child's immediate family living in the same household. This exception may be waived by express consent to disclosure by a parent entitled to claim the privilege or by the child who made the communication or by failure of the child or parent to object when the contents of a communication are demanded. This exception does not apply to a civil action or proceeding by one spouse against the other or by a parent or child

against the other, nor to a proceeding to commit either the child or parent to whom the communication was made or to place the person or property or either under the control of another because of an alleged mental or physical condition, nor to a criminal action or proceeding in which the parent is charged with a crime committed against the person or property of the communicating child, the parent's spouse, or a child of either the parent or the parent's spouse, or in which a child is charged with a crime or act of delinquency committed against the person or property of a parent or a child of a parent, nor to an action or proceeding for termination of parental rights, nor any other action or proceeding on a petition alleging child abuse, child neglect, abandonment or nonsupport by a parent.

(k) Sexual assault counselors may not be allowed to disclose any opinion or information received from or about the victim without the consent of the victim. However, a counselor may be compelled to identify or disclose information in investigations or proceedings related to neglect or termination of parental rights if the court determines good cause exists. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the treatment relationship, and the treatment services if disclosure occurs. Nothing in this clause exempts sexual assault counselors from compliance with the provisions of section 626.557 and chapter 260E. "Sexual assault counselor" for the purpose of this section means a person who has undergone at least 40 hours of crisis counseling training and works under the direction of a supervisor in a crisis center, whose primary purpose is to render advice, counseling, or assistance to victims of sexual assault.

(l) A domestic abuse advocate may not be compelled to disclose any opinion or information received from or about the victim without the consent of the victim unless ordered by the court. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the relationship between the victim and domestic abuse advocate, and the services if disclosure occurs. Nothing in this paragraph exempts domestic abuse advocates from compliance with the provisions of section 626.557 and chapter 260E. For the purposes of this section, "domestic abuse advocate" means an employee or supervised volunteer from a community-based battered women's shelter and domestic abuse program eligible to receive grants under section 611A.32; that provides information, advocacy, crisis intervention, emergency shelter, or support to victims of domestic abuse and who is not employed by or under the direct supervision of a law enforcement agency, a prosecutor's office, or by a city, county, or state agency.

(m) A person cannot be examined as to any communication or document, including work notes, made or used in the course of or because of mediation pursuant to an agreement to mediate. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communication during mediation by the common law.

(n) A child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is

examined. A child describing any act or event may use language appropriate for a child of that age.

(o) A communication assistant for a telecommunications relay system for persons who have communication disabilities shall not, without the consent of the person making the communication, be allowed to disclose communications made to the communication assistant for the purpose of relaying.

Subd. 1a. *Alternative dispute resolution privilege.* — No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:

(1) constitute a crime;

(2) give rise to disqualification proceedings under the Rules of Professional Conduct for attorneys; or

(3) constitute professional misconduct.

Subd. 2. *Exceptions.*

(a) The exception provided by paragraphs (d) and (g) of subdivision 1 shall not apply to any testimony, records, or other evidence relating to the abuse or neglect of a minor in any proceeding under chapter 260 or any proceeding under section 245A.08, to revoke a day care or foster care license, arising out of the neglect or physical or sexual abuse of a minor, as defined in section 260E.03.

(b) The exception provided by paragraphs (d) and (g) of subdivision 1 shall not apply to criminal proceedings arising out of the neglect or physical or sexual abuse of a minor, as defined in section 260E.03, if the court finds that:

(1) there is a reasonable likelihood that the records in question will disclose material information or evidence of substantial value in connection with the investigation or prosecution; and

(2) there is no other practicable way of obtaining the information or evidence. This clause shall not be construed to prohibit disclosure of the patient record when it supports the otherwise uncorroborated statements of any material fact by a minor alleged to have been abused or neglected by the patient; and

(3) the actual or potential injury to the patient-health professional relationship in the treatment program affected, and the actual or potential harm to the ability of the program to attract and retain patients, is outweighed by the public interest in authorizing the disclosure sought.

No records may be disclosed under this paragraph other than the records of the specific patient suspected of the neglect or abuse of a minor. Disclosure and dissemination of any

information from a patient record shall be limited under the terms of the order to assure that no information will be disclosed unnecessarily and that dissemination will be no wider than necessary for purposes of the investigation or prosecution.

Subd. 3. *Certain out-of-court statements admissible.* — An out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child or person mentally impaired as defined in section 609.341, subdivision 6, either:

(i) testifies at the proceedings; or

(ii) is unavailable as a witness and there is corroborative evidence of the act; and

(c) 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.

For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

Subd. 4. *Court order.*

(a) In a proceeding in which a child less than 12 years of age is alleging, denying, or describing:

(1) an act of physical abuse or an act of sexual contact or penetration performed with or on the child or any other person by another; or

(2) an act that constitutes a crime of violence committed against the child or any other person,

the court may, upon its own motion or upon the motion of any party, order that the testimony of the child be taken in a room other than the courtroom or in the courtroom and televised at the same time by closed-circuit equipment, or recorded for later showing to be viewed by the jury in the proceeding, to minimize the trauma to the child of testifying in the courtroom setting and, where necessary, to provide a setting more amenable to securing the child witness's uninhibited, truthful testimony.

(b) At the taking of testimony under this subdivision, only the judge, the attorneys for the defendant and for the state, any person whose presence would contribute to the welfare and well-being of the child, persons necessary to operate the recording or closed-circuit equipment and, in a child protection proceeding under chapter 260 or a dissolution or custody proceeding under chapter 518, the attorneys for those parties with a right to participate may be present with the child during the child's testimony.

(c) The court shall permit the defendant in a criminal or delinquency matter to observe and hear the testimony of the child in person. If the court, upon its own motion or the motion of any party, finds in a hearing conducted outside the presence of the jury, that the presence of the defendant during testimony taken pursuant to this subdivision would psychologically traumatize the witness so as to render the witness unavailable to testify, the court may order that the testimony be taken in a manner that:

(1) the defendant can see and hear the testimony of the child in person and communicate with counsel, but the child cannot see or hear the defendant; or

(2) the defendant can see and hear the testimony of the child by video or television monitor from a separate room and communicate with counsel, but the child cannot see or hear the defendant.

(d) As used in this subdivision, "crime of violence" has the meaning given in section 624.712, subdivision 5, and includes violations of section 609.26.

Subd. 5. Waiver of privilege for health care providers.

A party who commences an action for malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider on the person's own behalf or in a representative capacity, waives in that action any privilege existing under subdivision 1, paragraphs (d) and (g), as to any information or opinion in the possession of a health care provider who has examined or cared for the party or other person whose health or medical condition has been placed in controversy in the action. This waiver must permit all parties to the action, and their attorneys or authorized representatives, to informally discuss the information or opinion with the health care provider if the provider consents. Prior to an informal discussion with a health care provider, the defendant must mail written notice to the other party at least 15 days before the discussion. The plaintiff's attorney or authorized representative must have the opportunity to be present at any informal discussion. Appropriate medical authorizations permitting discussion must be provided by the party commencing the action upon request from any other party.

A health care provider may refuse to consent to the discussion but, in that event, the party seeking the information or opinion may take the deposition of the health care provider with respect to that information and opinion, without obtaining a prior court order.

For purposes of this subdivision, "health care provider" means a physician, surgeon, dentist, or other health care professional or hospital, including all persons or entities providing health care

as defined in section 145.61, subdivisions 2 and 4, or a certified health care professional employed by or providing services as an independent contractor in a hospital.

Minn. Stat. § 611A.90. Release of videotapes of child abuse victims.

Subdivision 1. Definition.— For purposes of this section, “physical abuse” and “sexual abuse” have the meanings given in section 260E.03, except that abuse is not limited to acts by a person responsible for the child’s care or in a significant relationship with the child or position of authority.

Subd. 2. Court order required.

(a) A custodian of a videotape of a child victim or alleged victim alleging, explaining, denying, or describing an act of physical or sexual abuse as part of an investigation or evaluation of the abuse may not release a copy of the videotape without a court order, notwithstanding that the subject has consented to the release of the videotape or that the release is authorized under law.

(b) The court order may govern the purposes for which the videotape may be used, reproduction, release to other persons, retention and return of copies, and other requirements reasonably necessary for protection of the privacy and best interests of the child.

Subd. 3. Petition. — An individual subject of data, as defined in section 13.02, or a patient, as defined in sections 144.291 to 144.298, who is seeking a copy of a videotape governed by this section may petition the district court in the county where the alleged abuse took place or where the custodian of the videotape resides for an order releasing a copy of the videotape under subdivision 2. Nothing in this section establishes a right to obtain access to a videotape by any other person nor limits a right of a person to obtain access if access is otherwise authorized by law or pursuant to discovery in a court proceeding.

Minn. Stat. § 634.35. Videotapes of child victims; conditions of disclosure.

(a) If a videotaped interview of a child victim of physical or sexual abuse is disclosed by a prosecuting attorney to a defendant or the defendant’s attorney, the following applies:

(1) no more than two copies of the tape or any portion of the tape may be made by the defendant or the defendant’s attorney, investigator, expert, or any other representative or agent of the defendant;

(2) the tapes may not be used for any purpose other than to prepare for the defense in the criminal action against the defendant;

(3) the tapes may not be publicly exhibited, shown, displayed, used for educational, research, or demonstrative purposes, or used in any other fashion, except in judicial proceedings in the criminal action against the defendant;

(4) the tapes may be viewed only by the defendant, the defendant's attorney, and the attorney's employees, investigators, and experts;

(5) no transcript of the tapes, nor the substance of any portion of the tapes, may be divulged to any person not authorized to view the tapes;

(6) no person may be granted access to the tapes, any transcription of the tapes, or the substance of any portion of the tapes unless the person has first signed a written agreement that the person is aware of this statute and acknowledges that the person is subject to the court's contempt powers for any violation of it; and

(7) upon final disposition of the criminal case against the defendant, the tapes and any transcripts of the tapes must be returned to the prosecuting attorney.

(b) The court may hold a person who violates this section in contempt.

Cases

Key Points:

- An out-of-court statement can be admissible, even if the child declarant is declared incompetent to testify, under the tender years exception to hearsay.
- A defendant's right to confrontation is not violated by the admission of a child victim's nontestimonial out-of-court statements.

In *State v. Lanam*, the Supreme Court of Minnesota rejected the defendant's contentions that the child victim's out-of-court statements were unreliable and erroneously admitted on the basis of the child's incompetency. *State v. Lanam*, 459 N.W.2d 656 (Minn. 1990). The Court held that the trial court's determination of the child's reliability was properly based on "the spontaneity of the statements, the consistency of the statements, the knowledge of the declarants, the motives of the declarant and witnesses to speak truthfully and the proximity in time between the statement and the events described" in addition to other corroborating evidence and circumstances. *Id.* Thus, the child's competency or incompetency did not determine the reliability of her statements. *Id.*

In *State v. Ahmed*, the Court of Appeals of Minnesota denied the defendant's claim that his confrontation rights were violated by the admission of the child victim's out-of-court statements. *State v. Ahmed*, 782 N.W.2d 253 (Minn. Ct. App. 2010). For the confrontation clause to be implicated, a victim or witness must testify or otherwise provide a testimonial statement. *Id.* The Court noted that the child had disclosed his abuse to his grandmother immediately prior to his forensic interview and that although the interviewer and police officer were present in the area, the child's grandmother was not acting on behalf of anyone but herself. *Id.* Thus, the trial court properly determined that the

child's statements to his grandmother were properly admitted as nontestimonial and the defendant's confrontation rights were not violated. *Id.*

50 M.S.A., Rules of Evid., Rule 801. Evidence

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.

A "declarant" is a person who makes a statement.

(c) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.

A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness, or (C) one of identification of a person made after perceiving the person, if the court is satisfied that the circumstances of the prior identification demonstrate the reliability of the prior identification, or (D) a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Statement by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) 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 (E) a statement by a coconspirator of the party. In order to have a coconspirator's declaration admitted, there must be a showing, by a preponderance of the evidence, (i) that there was a conspiracy involving both the declarant and the party against whom the statement is offered, and (ii) that the statement was made in the course of and in furtherance of the conspiracy. In determining whether the required showing

has been made, the Court may consider the declarant's statement; provided, however, the declarant's statement alone shall not be sufficient to establish the existence of a conspiracy for purposes of this rule. The statement may be admitted, in the discretion of the Court, before the required showing has been made. In the event the statement is admitted and the required showing is not made, however, the Court shall grant a mistrial, or give curative instructions, or grant the party such relief as is just in the circumstances.

Minnesota Hearsay Exceptions

50 M.S.A., Rules of Evid., Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) (Not Used).

(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.

(3) ***Then existing mental, emotional, or physical condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 purpose of medical diagnosis or treatment.*** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted business activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not

conducted for profit. A memorandum, report, record, or data compilation prepared for litigation is not admissible under this exception.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases and petty misdemeanors matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings except petty misdemeanors and against the State in criminal cases and petty misdemeanors, factual findings resulting from an investigation made pursuant to authority granted by law.

(9) **Records of vital statistics.** Records or data compilations, in any form, 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** 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.** 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.** Statements of fact concerning 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** 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 twenty years or more the authenticity of which 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 unless the sources of information or other circumstances indicate lack of trustworthiness.

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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

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

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

50 M.S.A., Rules of Evid., Rule 804. Hearsay exceptions; declarant unavailable.

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant

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(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* In a civil proceeding testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered or a party with substantially the same interest or motive with respect to the outcome of the litigation, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In a criminal proceeding involving a retrial of the same defendant for the same or an included offense, testimony given as a witness at the prior trial or in a deposition taken in the course thereof.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Intentionally left blank]

(6) ***Forfeiture by wrongdoing.*** A statement offered against a party who wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness and did so intending that result.

50 M.S.A., Rules of Evid., Rule 807. Residual exception.

A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing, to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant.

50 M.S.A., Rules of Evid., Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:¹

¹ Minnesota practitioners report success with introducing forensic interviews into evidence as a prior consistent statement, if the child victim previously testified and the defense challenges their credibility.

- Timing / immediacy, a child victim's emotional state, and lack of reason to fabricate are all reasonable criteria in determining whether an out-of-court statement counts as an excited utterance and is therefore admissible as a hearsay exception.
- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors.

In *State v. Edwards*, the Supreme Court of Minnesota held that the trial court properly admitted the child victim's out-of-court statements to a 911 operator immediately following the abuse, in addition to consistent statements made to the responding police officers, under the excited utterances exception to hearsay. *State v. Edwards*, 485 N.W.2d 911 (Minn. 1992). In determining whether a statement qualifies as an excited utterance, the Court must find the following elements: "(a) that there be a startling event or condition, (b) that the statement relates to the event or condition, and (c) that the statement is made under the stress caused by the event or condition." *Id.* Given the immediacy of the child's statements after the incident, coupled with the child's frightened state (crying and clinging to a hospital bed) and the lack of reason to fabricate, the Court found that the trial court properly defined the child's statement as an excited utterance. *Id.*

In *State v. Hollander*, the Court of Appeals of Minnesota denied the defendant's argument that the trial court erred in admitting the child victim's out-of-court statements to a social worker under the residual exception to hearsay. *State v. Hollander*, 590 N.W.2d 341 (Minn. Ct. App. 1999). In determining whether an out-of-court statement is admissible, the court must determine the reliability and trustworthiness of said statement. *Id.* To do so:

"[T]he focus is not on all the circumstances, including evidence at trial corroborating the child's statements, but only on those circumstances actually surrounding the making of the statements. These circumstances include, but are not limited to, whether the statements were spontaneous, whether the person talking with the child had a preconceived idea of what the child should say, whether the statements were in response to leading or suggestive questions, whether the child had any apparent motive to fabricate, and whether the statements are the type of statements one would expect a child of that age to fabricate." *Id.*

The Court held that the trial court properly analyzed the circumstances surrounding the child's statements. *Id.* In doing so, the court found the child's statements to be reliable for the following reasons: the interviewer had extensive training in child abuse and used non-leading, open-ended questions; the interview included the use of drawings, diagrams, and anatomically correct dolls; the child consistently made her statements both verbally and using the aforementioned tools; the child exhibited sexual knowledge beyond what may be considered normal for a four-year-old; the child was able to correct the interviewer's incorrect statements; and the child's illness corroborated the abuse she endured. *Id.* Thus, the Court held that the child's statements were reliable and properly admitted. *Id.*

Mississippi

Mississippi Admissibility

Miss. Code Ann. §43-21-207. Admissibility of statements made by or information obtained from child during screening, assessment, or treatment.

(1) No statements, admissions or confessions made by or incriminatory information obtained from a child in the course of a screening or assessment that is undertaken in conjunction with any proceedings under this chapter, including, but not limited to, that which is court-ordered, shall be admitted into evidence against the child on the issue of whether the child committed a delinquent act under the Youth Court Act or on the issue of guilt in any criminal proceedings.

(2) The provisions of subsection (1) of this section are in addition to and do not override any existing statutory and constitutional prohibition on the admission into evidence in delinquency or criminal proceedings of information obtained during screening, assessment or treatment.

Miss. R. Evid. 617. Taking testimony of a child by closed circuit television.

(a) **Grounds.** -- On the motion of a person named in subdivision (b), or on its own, the court may order that a child's testimony be taken outside the courtroom and shown in the courtroom by means of closed-circuit television if the court determines that:

(1) the child is under the age of 16 years;

(2) the testimony is that an unlawful sexual act, contact, intrusion, penetration, or other sexual offense was committed on the child; and

(3) there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify:

(A) in open court; and

(B) in a criminal case, in the presence of the accused.

(b) **Procedure on the motion.**

(1) *Motion.* The motion may be filed by:

(A) the child;

(B) the child's attorney, parent, legal guardian, or guardian *ad/litem*;

(C) the prosecutor; or

- (D) any party.
- (2) *Hearing and order.* In ruling on the motion, the court must:
 - (A) conduct a hearing *in camera*; and
 - (B) make specific findings of fact, on the record, as to the basis of the ruling.

(c) **Taking testimony.**

- (1) *Methods.* Closed-circuit television testimony may be taken by any method for taking testimony outside the courtroom and showing it in the courtroom that is not inconsistent with the Confrontation Clauses of the United States and Mississippi Constitutions or applicable rules adopted by the Mississippi Supreme Court.
- (2) *Counsel.* All parties must be represented by counsel when testimony is taken.
- (3) *Criminal case.* If the conditions in subdivision (a) are met in a criminal case, the court may exclude the defendant from the room where the testimony is taken if:
 - (A) an appropriate private electronic or telephonic device enables the defense attorney to be in continual contact with the defendant; and
 - (B) the defendant, the court, and the jury can observe the demeanor of the child witness.
- (4) *Expert assistance.* If the parties agree, the court may appoint a person to aid in formulating methods of questioning the child and to assist the court in interpreting the child's answers. The person appointed must be a child sexual abuse expert who has dealt with the child in a therapeutic setting concerning the offense or act.

(d) **Identifying the defendant.** -- When the child is asked to identify the defendant, both may be present in the courtroom simultaneously.

Miss. Code § 99-43-101. Rights of children testifying in criminal proceedings.

- (1) The following terms have the meanings ascribed:
 - (a) "Child" means any individual under the age of eighteen (18) years of age who must testify in any legal or criminal proceeding.
 - (b) "Proceeding," "criminal proceeding" or "legal proceeding" means:
 - (i) Any criminal hearing, criminal trial or other criminal proceeding in the circuit or county court in which a child testifies as a victim of a crime or as a witness as to a material issue; or
 - (ii) A youth court proceeding in which a child testifies as a victim of a crime or delinquent act or as a witness to a crime or delinquent act.

(2) In any proceeding in which a child testifies, a child shall have the following rights to be enforced by the court on its own motion or upon motion or notice of an attorney in the proceeding:

- (a) To be asked questions in a manner a child of that age can reasonably understand, including, but not limited to, a child-friendly oath.
- (b) To be free of nuisance, vexatious or harassment tactics in the proceeding.
- (c) To have present in the courtroom and in a position clearly visible in close proximity to the child, a support person, if the support person is not a witness in the proceeding.
- (d) To have the courtroom or the hearing room adjusted to ensure the comfort and protection of the child.
- (e) To have the relaxation of the formalities of the proceedings in an effort to ensure the comfort of the child.
- (f) To permit a properly trained facility animal or comfort item or both to be present inside the courtroom or hearing room.
- (g) To permit the use of a properly constructed screen that would permit the judge and jury in the courtroom or hearing room to see the child but would obscure the child's view of the defendant or the public or both.
- (h) To have a secure and child-friendly waiting area provided for the child during court proceedings and to have a support person stay with the child while waiting.
- (i) To have an advocate or support person inform the court about the child's ability to understand the nature of the proceedings, special accommodations that may be needed for the child's testimony, and any other testimony relevant to any of the rights set forth in this section.

(3) In circumstances where a defendant in a proceeding has chosen to proceed without counsel, the court may appoint standby counsel for that party and may order standby counsel to question a child on behalf of the pro se party if the court finds that there is a substantial likelihood that emotional harm would come to the child if the pro se party were allowed to question the child directly.

- (4)
 - (a) If the child is the victim of a crime, the court shall ensure that all steps necessary to secure the physical safety of the child, both in the courtroom and during periods of time that the child may spend waiting for court, have been taken.
 - (b) The court and all attorneys involved in a proceeding involving a child shall not disclose to any third party any discovery, including, but not limited to, the personal information of the child including the child's name, address and date of birth, any and all interviews of the child, and any other identifying information of a child. Upon written motion by a party, the court may authorize by written order the production of any discovery to a third party, if the third party agrees to maintain the security and nondisclosure of the discovery and return the

discovery to the party upon conclusion of the case. The court shall enforce any violations of this section through its contempt powers.

(c) In any proceeding in which a child is alleged to have been emotionally, sexually, or physically abused, the child shall be given notice of all pretrial discovery motions, and the notice must be given in sufficient time to allow the guardian ad litem or counsel for the child to file any pleadings deemed appropriate to that situation.

(5) (a) In a proceeding involving an alleged offense against a child, the prosecuting attorney, the child's attorney, the child's parent or legal guardian, or the guardian ad litem may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape and by stenographic means.

(b) The court shall make a preliminary finding as to whether, at the time of trial, the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, or public for any of the following reasons:

(i) The child will be unable to testify because of fear.

(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(iii) The child suffers a mental or other infirmity or medical condition which could potentially prevent the child from being present to testify at the trial.

(iv) Conduct of the defendant or defense counsel may cause or already has caused the child to be unable to testify or continue to testify out of fear or emotional distress.

(c) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in paragraph (b) of this subsection (5), the court shall order that the child's deposition be taken and preserved by videotape and stenographic means.

(d) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are:

(i) The prosecuting attorney or attorneys;

(ii) The attorney or attorneys for the defendant;

(iii) The child's attorney or attorneys and guardian ad litem;

(iv) Persons necessary to operate the videotape equipment; and

(v) Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(e) (i) If the court finds the child is unable to testify in open court, based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that two-way closed-circuit television equipment be used as provided in Section 13-1-405.

(ii) The complete record of the examination of the child, including the image and voices of all persons who in any way participated in the examination, shall be made and preserved on videotape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours.

(f) If, at the time of trial, the court finds that the child is unable to testify for a reason described in subsection (5)(b), the court may admit into evidence the child's videotaped deposition in lieu of the child's testimony at trial. The court's ruling must be supported by findings on the record.

(g) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

(h) In connection with the taking of a videotaped deposition, the court may enter a protective order for the purpose of protecting the privacy or emotional well-being of the child or for any other purposes.

(i) The videotape of a deposition taken under this paragraph shall be destroyed five (5) years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal, including Supreme Court review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

Uniform Rules of Youth Court Practice, Rule 6. Subpoena Duces Tecum.

(a) Procedures for issuing a subpoena duces tecum. Every subpoena duces tecum for records involving children, as such records are defined under section 43-21-105 of the Mississippi Code, and which originates from any issuing court shall be in compliance with the following procedures:

(1) the party shall make an application to the court specifying which records are sought;

- (2) the court shall issue a subpoena duces tecum to the youth court for these records;**
- (3) the youth court, unless a hearing is conducted pursuant to Rule 6(b) of these rules, shall transfer copies of the records to the court;**
- (4) the court shall conduct an in camera inspection of the records, in accordance with the procedures set forth in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), to determine which records should be disclosed to the party;**
- (5) the court shall, at all times, protect the confidentiality of the records to the extent required of the youth court under Mississippi's Youth Court Law.**
- (b) Hearing on access to confidential files. The youth court may require a hearing to determine whether the court or parties have a legitimate interest to be allowed access to the confidential files. In determining whether a person has a legitimate interest, the youth court shall consider the nature of the proceedings, the welfare and safety of the public, and the interest of the child.**

Comments & Procedures

Rule 6.

The child's right of confidentiality of youth records is a qualified privilege, not an absolute one. See *Daniels v. Wal-Mart Stores, Inc.*, 634 So.2d 88, 93 (Miss. 1993). Mississippi has adopted the procedures advanced in *Ritchie* when there is a request for disclosure of confidential youth court records. See *In re J.E.*, 726 So. 2d 547, 553 (Miss. 1998). These procedures require the trial judge to: (1) conduct an in camera review of the requested records and (2) release any information contained therein material to the fairness of the trial. Such is an ongoing duty. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

Cases

Key Points:

- Accommodating a child victim to testify via closed-circuit television is appropriate when done in a way that preserves the child's welfare as well as the defendant's right to confrontation.

In *Bradley v. State*, the Court of Appeals of Mississippi held that the trial court properly allowed the child victim to testify via closed-circuit television. *Bradley v. State*, 921 So.2d 385 (Miss. Ct. App. 2005). For a child to be allowed to testify via closed-circuit television, there must be a showing of necessity that use of a closed-circuit television is imperative for the child's welfare. *Id.* Given testimony from the child's parents and court advocate regarding defendant's threats to the child and the child's anxiety and fear of testifying, in addition to the likelihood the child would endure traumatic and emotional distress if forced to testify in front of defendant, the Court found that the child was properly afforded the accommodation. *Id.*

Mississippi Hearsay Exceptions

Miss. R. Evid. 803. Exceptions to the rule against hearsay -- regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.
- (4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:
 - (A) is made to any person at any time for -- and is reasonably pertinent to -- medical diagnosis or treatment;
 - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and
 - (C) is supported by circumstances that substantially indicate its trustworthiness.

In this paragraph, "medical" includes emotional, mental, and physical health.

- (5) ***Recorded Recollection.*** A record that:
 - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

- (6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11); and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or

(iii) in a civil case or against the prosecution in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) **Public Records of Vital Statistics.** A record of a vital statistic, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice -- unless the court sets a different time for the notice or the objection.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least 20 years old that was prepared before January 1, 1998, and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit. A treatise used in direct examination must be disclosed to an opposing party without charge in discovery.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments Involving Personal, Family, or General History, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) **Other Exceptions.** A statement not specifically covered by this Rule if:

(A) the statement has equivalent circumstantial guarantees of trustworthiness;

(B) it is offered as evidence of a material fact;

(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;

(D) admitting it will best serve the purposes of these rules and the interests of justice; and

(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

(25) Tender Years Exception. A statement by a child of tender years describing any act of sexual contact with or by another is admissible if:

(A) the court -- after a hearing outside the jury's presence -- determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and

(B) the child either:

(i) testifies; or

(ii) is unavailable as a witness, and other evidence corroborates the act.

Advisory Committee Historical Note on "Tender years"

(25) Tender Years Exception. Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. *Smith v. State*, 925 So. 2d 825, 837 (Miss. 2006); *Hennington v. State*, 702 So. 2d 403, 415 (Miss. 1997). A finding that there is a substantial indicia of reliability should be made on the record.

Mississippi's pre-rule tender years exception did not define "tender years." See *Williams v. State*, 427 So. 2d 100 (Miss. 1983). Many jurisdictions limit their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically older than fourteen years, but the declarant has a mental age less than fourteen years.

Corroboration required for admissibility under MRE 803(25)(B)(ii) need not be eyewitness testimony or physical evidence, but may include confessions, doctors' reports, inappropriate conduct by the child, and other appropriate expert testimony.

When any of the hearsay exceptions in Rule 803 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington*, 124 S. Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington*, 126 S. Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). See also *Osborne v. State*, 942 So. 2d 193 (Miss. Ct. App. 2006) (applying Rule 803(25) in light of *Crawford* and finding video of child's statements produced at the direction of the district attorney testimonial but no confrontation clause violation because child testified and was subject to cross-examination); *Bell v. State*, 928 So. 2d 951 (Miss. 2006) (child's statements to police testimonial and therefore improperly admitted under 803(2)); *Hobgood v. State*, 926 So. 2d 847 (Miss. 2006) (applying Rule 803(25) in light of *Crawford* and finding statements by children to family members and health care providers not testimonial but similar statements to police testimonial); *Foley v. State*, 914 So. 2d 677 (Miss. 2005) (statements made as part of "neutral medical evaluations" not testimonial and properly admitted under 803(4) and 803(25)).

Miss. R. Evid. 804. Exceptions to the rule against hearsay -- when declarant is unavailable as a witness.

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness;
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4); or

(6) is a child for whom testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) **Other Exceptions. A statement not specifically covered by this Rule if:**

(A) the statement has equivalent circumstantial guarantees of trustworthiness;

(B) it is offered as evidence of a material fact;

(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;

(D) admitting it will best serve the purposes of these rules and the interests of justice; and

(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

Miss. R. Evid. 106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

Cases

Key Points:

- "Tender years" applies to children who are chronologically over the age of 12 but emotionally and/or mentally younger owing to developmental delay or other disability.

In *Webb v. State*, the Court of Appeals of Mississippi affirmed the trial court's finding that the child victim had made statements in her "tender years" and that these statements were subsequently admissible under the hearsay exceptions in Rule 803. *Webb v. State*, 113 So.3d 592 (Miss. Ct. App. 2012). The Court noted that the child had satisfied all elements of the exception, and the only question before the Court was whether she had been within the definition of "tender years" at the time of giving her statements. *Id.* The Court further clarified that this finding was based on the child's mental and emotional age -- although children under the age of 12 are generally presumed to fall

under “tender years,” teenagers may also qualify on a case-by-case basis. *Id.* The trial court provided an on-the-record finding of the child’s emotional and mental age to be within the “tender years,” thus satisfying the requirement. *Id.*

In *Walker v. State*, the Court of Appeals of Mississippi denied the defendant’s claim that the trial court had erred in admitting the child victim’s out-of-court statements under the “tender years” exception for hearsay. *Walker v. State*, 197 So.3d 914 (Miss. Ct. App. 2016). The Court noted that although the child had been 13 years old at the time of her statements, the trial court properly found that she was still within her “tender years.” *Id.* The trial court specifically cited the child’s below average IQ, frustration in her inability to articulate herself, ADHD diagnosis, and general demeanor in comparison to her peers’ in deciding that the victim was within her “tender years.” *Id.* The Court accordingly found no error. *Id.*

Missouri

Missouri Admissibility

Mo. Rev. Stat. § 491.075. Statement of child under fourteen or vulnerable person admissible, when.

1. A statement made by a child under the age of fourteen, or a vulnerable person, relating to an offense under chapter 565, 566, 568 or 573, performed by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2)

(a) The child or vulnerable person testifies at the proceedings; or

(b) The child or vulnerable person is unavailable as a witness; or

(c) The child or vulnerable person is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child or vulnerable person unavailable as a witness at the time of the criminal proceeding.

2. Notwithstanding subsection 1 of this section or any provision of law or rule of evidence requiring corroboration of statements, admissions or confessions of the defendant, and notwithstanding any prohibition of hearsay evidence, a statement by a child when under the age of fourteen, or a vulnerable person, who is alleged to be victim of an offense under chapter 565, 566, 568 or 573 is sufficient corroboration of a statement, admission or confession regardless of whether or not the child or vulnerable person is available to testify regarding the offense.

3. A statement may not be admitted under this section unless the prosecuting attorney makes known to the accused or the accused's counsel his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the accused or the accused's counsel with a fair opportunity to prepare to meet the statement.

4. Nothing in this section shall be construed to limit the admissibility of statements, admissions or confessions otherwise admissible by law.

5. For the purposes of this section, "vulnerable person" shall mean a person who, as a result of an inadequately developed or impaired intelligence or a psychiatric disorder that materially affects

ability to function, lacks the mental capacity to consent, or whose developmental level does not exceed that of an ordinary child of fourteen years of age.

Mo. Rev. Stat. § 491.699. Juvenile court hearings—court may order video recording of alleged child victim, when—procedure—cross-examination—counsel appointed for perpetrator, when

1. Upon the motion of the juvenile officer, the court may order that an in-camera videotaped recording of the testimony of the alleged child victim be made for use as substantive evidence at a juvenile court hearing held pursuant to the provisions of chapter 211. The provisions of section 491.075 relating to the admissibility of statements made by a child under the age of twelve shall apply to proceedings in juvenile court.
2. In determining whether or not to allow such motion, the court shall consider the elements of the offense charged and the emotional or psychological trauma to the child if required to testify in open court or to be brought into the personal presence of the alleged perpetrator. Such recording shall be retained by the juvenile officer and shall be admissible in lieu of the child's personal appearance and testimony at juvenile court hearings. A transcript of such testimony shall be made as soon as possible after the completion of such deposition and shall be provided to all parties to the action.
3. The court shall preside over the depositions, which shall be conducted in accordance with the rules of evidence applicable to civil cases.
4. In any prosecution under either subdivision (2) or (3) of subsection 1 of section 211.031, the attorney for the alleged perpetrator shall have at least two opportunities to cross-examine the deposed alleged child victim.
5. Prior to the taking of the deposition which is to be used as substantive evidence at the hearing pursuant to sections 491.696 to 491.705, the attorney for any party to the action shall be provided with such discoverable materials and information as the court may, on motion, direct; shall be afforded a reasonable time to examine such materials; and shall be permitted to cross-examine the child during the deposition.
6. In any prosecution under either subdivision (2) or (3) of subsection 1 of section 211.031, if the alleged perpetrator is not represented by counsel and if, upon inquiry, it appears to the court that he or she will be unable to obtain counsel within a reasonable period of time, the court shall appoint the public defender or other counsel to represent the alleged perpetrator at the deposition.

Mo. Rev. Stat. § 492.304. Visual and aural recordings of child under fourteen admissible, when

1. In addition to the admissibility of a statement under the provisions of section 492.303, the visual and aural recording of a verbal or nonverbal statement of a child when under the age of fourteen who is alleged to be a victim of an offense under the provisions of chapter 565, 566 or 568 is admissible into evidence if:

(1) No attorney for either party was present when the statement was made; except that, for any statement taken at a state-funded child assessment center as provided for in subsection 2 of section 210.001, an attorney representing the state of Missouri in a criminal investigation may, as a member of a multidisciplinary investigation team, observe the taking of such statement, but such attorney shall not be present in the room where the interview is being conducted;

(2) The recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(3) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(4) The statement was not made in response to questioning calculated to lead the child to make a particular statement or to act in a particular way;

(5) Every voice on the recording is identified;

(6) The person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and

(7) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence.

2. If the child does not testify at the proceeding, the visual and aural recording of a verbal or nonverbal statement of the child shall not be admissible under this section unless the recording qualifies for admission under section 491.075.

3. If the visual and aural recording of a verbal or nonverbal statement of a child is admissible under this section and the child testifies at the proceeding, it shall be admissible in addition to the testimony of the child at the proceeding whether or not it repeats or duplicates the child's testimony.

4. As used in this section, a nonverbal statement shall be defined as any demonstration of the child by his or her actions, facial expressions, demonstrations with a doll or other visual aid whether or not this demonstration is accompanied by words.

Cases

Key Points:

- Mo. Rev. Stat. §491.075 doesn't limit the admissibility of otherwise admissible out-of-court recorded statements; rather, it's an alternative procedure of admissibility.

Admission of the child victim's forensic interview under §491.075 did not violate the Confrontation Clause, because the victim was subject to cross-examination during their testimony at trial. *State v. Lewis*, 388 S.W.3d 252, 2012 Mo. App. LEXIS 1485 (Mo. Ct. App. 2012).

In *State ex rel. Jackson v. Parker*, the Missouri Court of Appeals for the Southern District found that the respondent had erred in relying upon Mo. Rev. Stat. §492.304 as the basis for excluding an audio recording of the victim's forensic interview at trial because the recording was already found to be admissible pursuant to Mo. Rev. Stat. §491.075. *State ex rel. Jackson v. Parker*, 496 S.W.3d 559, 2016 Mo. App. LEXIS 279 (Mo. Ct. App. 2016). The Court held that §492.304 was not the exclusive procedure for determining admissibility, but rather §491.075 provided an alternative procedure of admissibility. *Id.*

In *State v. James*, the Missouri Court of Appeals denied the defendant's claim that the trial court had erred in refusing to proffer the defendant's suggested jury instruction, which would have instructed the jury to consider the victim's forensic interview only to assess the victim's credibility. *State v. James*, 2020 Mo. App. LEXIS 882 (Mo. Ct. App. July 16, 2020). The Court found that Mo. Rev. Stat. §492.304 provides that, if satisfied, the recording of a child's statement is admissible into evidence; the Court found no clear or plain language within the statute to suggest that the statute was limited in any way to any particular purpose. *Id.* Furthermore, the Court found the defendant's reliance on §491.075 was incorrect, as §491.075(4) expresses in plain language that the statute "shall [not] be construed to limit the admissibility of [testimony] otherwise admissible by law." *Id.*

"Here, Defendant complains that his counsel was not able to effectively cross-examine Victim, because she did not remember making the hearsay statements at issue, nor was she able to recall any details of the charged offense. Victim's testimony at trial revealed the following: she was eight years old at the time of trial; she knew the difference between telling a lie and telling the truth; she understood that telling the truth was important and promised to do so; she remembered living with Defendant, and identified him in court; she remembered that Defendant did something to hurt her; Defendant touched her with part of his body, but she did not remember where he touched her; and Defendant touched her on three occasions. Victim indicated that Defendant touched her with his penis by placing a mark on a drawing of a boy. Finally, Victim testified that she did not remember making a statement to anyone about what Defendant had done to her, going to the hospital, or having surgery. During cross-examination, Victim admitted that she was having trouble remembering things. Victim stated that no one had told her what to say or what her answers should be. ...The record clearly shows that Defendant had the opportunity to effectively cross-examine Victim under oath and call to the attention of the jury Victim's forgetfulness. Therefore, the Confrontation Clause was satisfied." *State v. Howell*, 226 S.W.3d 892, 896-97 (2007).

Missouri Hearsay Exceptions

Cases

Key Points:

- The precedent established in *In re Marriage of P.K.A.*, 725 S.W.2d 78 (Mo. App. S.D. 1987) allows for a hearsay exception under four criteria.
 - The *P.K.A.* exception applies to non-jury sexual abuse cases.
 - Whether the defendant is a parent of the child victim influences this exception.
- Statements made under Missouri's medical treatment hearsay exception must be reasonably pertinent to diagnosis or treatment. Perpetrator identification does not fall within this exception. (*Editor's Note:* Unlike Missouri, most jurisdictions often consider perpetrator identification as reasonably pertinent to medical diagnosis or treatment in child abuse cases.)

Present Sense Impression. "For a hearsay statement to be admissible pursuant to the present sense impression exception, the statement must be made simultaneously, or almost simultaneously, with the occurrence of an event or act, the statement must describe or explain the event; and the declarant must perceive the event with his own senses. *State v. Smith*, 265 S.W.3d 874, 879 (Mo. App. 2008) (citing 2 McCormick on Evidence § 271, at 251 (6th ed. 2006)). These statements have certain indicia of trustworthiness to support their admissibility. *Id.* Errors in memory and time for calculated misstatements are not present because the statements are made as the declarant perceives the event or immediately thereafter. *Id.* Further, in most cases, 'a witness will have observed the event and can corroborate the hearsay statement, and the declarant will often be available at trial for cross-examination to verify his or her credibility.' *Id.* *State v. Taylor*, 298 S.W.3d 482, 492-493 (2009).

Present Mental Condition. "An out-of-court statement of the declarant's present mental condition is also admissible as an exception to the hearsay rule so long as the statements are relevant and their relevancy outweighs their prejudicial effect. *State v. Bell*, 950 S.W.2d 482, 483 (Mo. banc 1997). This exception is generally limited to cases 'where the hearsay declarations of mental condition are especially relevant-- particularly where the defendant has put the decedent's mental state at issue by claiming accident, self-defense or suicide.' *Id.*" *State v. Taylor*, 298 S.W.3d 482, 493 (2009).

Curative Admissibility Doctrine. "The curative admissibility doctrine applies when one party introduces inadmissible evidence and allows the opposing party to introduce otherwise inadmissible evidence to rebut or explain inferences raised by the first party's evidence. *State v. Middleton*, 998 S.W.2d 520, 528 (Mo. banc 1999)." *State v. Taylor*, 298 S.W.3d 482, 493 (2009).

Medical Treatment Exception. In *Interest of D.S.H. v. Greene County Juvenile Officer*, the Missouri Court of Appeals held that the trial court erred in admitting the out-of-court statements given by half-siblings who had no parent-child relationship to the allegedly abusive father under a hearsay exception. *Interest of D.S.H. v. Greene County Juvenile Officer*, 562 S.W.3d 366 (Mo. Ct. App. 2018). A specific hearsay exception, known as the *P.K.A.* exception, "applies to non-jury sexual abuse cases where (1) the best interest of the child is the primary concern; (2) sexual abuse may have occurred, or has been threatened; (3) the child might not be competent or reasonably expected to testify to it; and (4) there is a substantial basis that the statements are true." *Id.*; *In re Marriage of P.K.A.*, 725 S.W.2d 78

(Mo. App. S.D. 1987). However, the Court agreed with the defendant's contentions that the *P.K.A.* exception was erroneously applied because 1) he was not related to the declarants, and 2) the declarant children's best interests were not at issue before the court. *Id.* Thus, the trial court erroneously admitted these statements. *Id.*

In *In re B.M.O.*, the Missouri Court of Appeals held that the child victim's out-of-court statements were properly admitted under a hearsay exception. *In re B.M.O.*, 310 S.W.3d 281 (Mo. Ct. App. 2010). Under the *P.K.A.* exception, "where there is a substantial basis to believe a child's statements are true, the court is justified in considering them to prevent future harm to the child... [the exception] should only be used where abuse may have occurred or been threatened and the child may not be competent or reasonably expected to testify to it." *Id.*; *In re Marriage of P.K.A.*, 725 S.W.2d 78 (Mo. App. S.D. 1987). Given the "ages of the children, the nature of the abuse, and the fact that the abuser was the parent of the victims provided sufficient grounds for the trial court to believe the children might not be competent to testify nor reasonably expected to," thus, the Court found the trial court properly admitted the children's hearsay statements. *In re B.M.O.*, 310 S.W.3d at 287.

"Generally, medical records are admissible as business records and medical history necessary for diagnosis and treatment is encompassed within the hearsay exception. *State v. Jones*, 835 S.W.2d 376, 382 (Mo. App. E.D. 1992). This includes statements regarding the cause of a person's medical condition, as long as the statements relate to diagnosis and treatment. *U.S. v. Pollard*, 790 P.2d 1309, 1313 (7th Cir. 1986)." *State v. Langston*, 889 S.W.2d 93, 97 (1994).

"In an exception to the hearsay rule, Missouri law allows a treating physician to testify what a patient said to him or her "insofar as such statements are reasonably pertinent to diagnosis and treatment." *Breeding v. Dodson Trailer Repair Inc.*, 679 S.W.2d 281, 285 (Mo. banc 1984); see also *State v. Naucke*, 829 S.W.2d 445, 458 (Mo. banc 1992), *cert. denied*, 506 U.S. 960, 121 L. Ed. 2d 348, 113 S. Ct. 427. The statements are considered reliable enough to admit despite the dangers of hearsay because a patient is deemed to know that proper diagnosis and treatment require her to provide accurate information. See *Breeding* at 285. ... The state, at trial and in its brief, claims the *Naucke* case defines the treating physician exception as any "statements made to a treating physician." 829 S.W.2d at 458. The state is mistaken; although *Naucke* held that a victim's statements about oral sex, fondling and hymenal pain were admissible hearsay under the treating physician exception, *Naucke* clearly cites *Breeding* as the source of the rule, distilled in Mo. Evidence Restated, § 803(4)(1984) as follows:

(4) Statement for purposes of medical diagnosis or treatment.

A statement made for the purposes of securing health care and describing medical history, or past or present symptoms, pain or sensations, or the inception, or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Further, in *Naucke*, "the reason the Court dispensed with the [statutory] hearing requirement was because the child's statements clearly fell within [**8] the medical treatment and history exception. The child's statements pertained only to how the child had been abused (which was relevant to treatment), not who was responsible. Had the statements fallen outside this deeply rooted hearsay exception, a hearing would have been required." *Russell*, 872 S.W.2d at 872 (citing *Naucke*). ... This court agrees that statements made to a doctor performing a SAFE exam identifying an alleged

abuser are not reasonably pertinent to diagnosis and treatment such that they fall within a deeply rooted exception to the hearsay rule." *State v. Miller*, 924 S.W.2d 513, 515 (1996).

"This treating physician hearsay exception has been expanded to cover statements made to 'a nurse for the doctor's use in treating the speaker.' *State v. Gonzales*, 652 S.W.2d 719, 724 (Mo. App. 1983). Thus, any out-of-court statements made to a physician or his nurse that are reasonably pertinent to diagnosis and treatment of the declarant will be admissible even though it is hearsay. ... Here, the case manager is neither a physician nor a nurse. The case manager's role was not to diagnose or treat." *State v. Crews*, 406 S.W.3d 91, 94 (2013).

Residual Hearsay Exception [unrecognized]. "The residual hearsay rule as applied in the federal courts and several other jurisdictions, 'allows admission of statements not specifically covered by any other exception when they have equivalent circumstantial guarantees of trustworthiness.' *State v. Freeman*, 269 S.W.3d 422, 428 (Mo. banc 2008). However, the Supreme Court of Missouri 'has never adopted the residual hearsay exception rule[.]' *Id. State v. Cross*, 421 S.W.3d 515, 518 (2013).

Montana

Montana Admissibility

§ 41-3-110, MCA. Audio or video testimony allowed.

A court may permit testimony by telephone, videoconference, or other audio or audiovisual means at any time in a proceeding pursuant to this chapter.

§ 41-3-204, MCA. Admissibility and preservation of evidence.

(1) In any proceeding resulting from a report made pursuant to the provisions of this chapter or in any proceeding for which the report or its contents are sought to be introduced into evidence, the report or its contents or any other fact related to the report or to the condition of the child who is the subject of the report may not be excluded on the ground that the matter is or may be the subject of a privilege related to the examination or treatment of the child and granted in Title 26, chapter 1, part 8, except the attorney-client privilege granted by 26-1-803.

(2) A person or official required to report under 41-3-201 may take or cause to be taken photographs of the area of trauma visible on a child who is the subject of a report. The cost of photographs taken under this section must be paid by the department.

(3) When a person required to report under 41-3-201 finds visible evidence that a child has suffered abuse or neglect, the person shall include in the report either a written description or photographs of the evidence.

(4) A physician, either in the course of providing medical care to a minor or after consultation with child protective services, the county attorney, or a law enforcement officer, may require x-rays to be taken when, in the physician's professional opinion, there is a need for radiological evidence of suspected abuse or neglect. X-rays may be taken under this section without the permission of the parent or guardian. The cost of the x-rays ordered and taken under this section must be paid by the county child protective service agency.

(5) All written, photographic, or radiological evidence gathered under this section must be sent to the local affiliate of the department at the time that the written confirmation report is sent or as soon after the report is sent as is possible. The initial report and associated evidence must be handled in accordance with 41-3-202.

§46-16-227, MCA. Raising issue of testimony of child witness outside presence of defendant -- motion by prosecution or defense.

Upon a motion by the prosecution or defense if the defense intends to call a child witness other than the victim in its case in chief, a court shall conduct a hearing to consider whether the testimony of a child witness may be taken outside the presence of the defendant and communicated to the courtroom by two-way electronic audio-video communication.

§46-16-228, MCA. Hearing -- procedure -- evidence that may be received -- protection for child witness.

(1) A court shall conduct a hearing on a motion made under 46-16-227.

(2) The prosecution, if the prosecution made the motion pursuant to 46-16-227, or the defense, if the defense made the motion pursuant to 46-16-227, shall present evidence at the hearing made on the motion to prove the need for an order under 46-16-229.

(3) In ruling on the motion, the court shall consider the following factors:

- (a) the age and maturity of the child witness;
- (b) the possible effect that testifying in person might have on the child witness;
- (c) the extent of the trauma that the child witness has already suffered;
- (d) the nature of the testimony to be given by the child witness;
- (e) the nature of the offense;
- (f) threats made to the child witness or the child witness's family in order to prevent or dissuade the child witness from attending or giving testimony at any trial or court proceeding;
- (g) conduct on the part of the defendant or the defendant's attorney that causes the child witness to be unable to continue the child witness's testimony; and
- (h) any other matter that the court considers relevant.

(4) The court may consider hearsay evidence of reports or testimony by psychologists who have examined or treated the child witness.

§46-16-229, MCA. Order for two-way electronic audio-video communication testimony -- finding by court -- procedure for conducting testimony.

(1) The court shall order that the testimony of a child witness be taken by two-way electronic audio-video communication if, after considering the factors set forth in 46-16-228(3), the court finds by clear

and convincing evidence that the child witness is unable to testify in open court in the presence of the defendant for any of the following reasons:

(a) the child witness is unable to testify because of fear caused by the presence of the defendant;

(b) the child witness would suffer substantial emotional trauma from testifying in the presence of the defendant; or

(c) conduct by the defendant or the defendant's attorney causes the child witness to be unable to continue testifying.

(2) If the court orders that the child witness's testimony be taken by two-way electronic audio-video communication, the testimony must be taken outside the courtroom in a suitable location designated by the judge. Examination and cross-examination of the child witness must proceed as though the child witness were testifying in the courtroom. The only persons who may be permitted in the room with the child witness during the child's testimony are:

(a) the judge or a judicial officer appointed by the court;

(b) the prosecutor;

(c) the defense attorney;

(d) the child's attorney;

(e) persons necessary to operate the two-way electronic audio-video communication equipment; and

(f) any person whose presence is determined by the court to be necessary to the welfare and well-being of the child witness.

(3) The defendant must be afforded a means of private, contemporaneous communication with the defendant's attorney during the testimony.

(4) This section does not preclude the presence of both a victim and the defendant in the courtroom together for purposes of establishing or challenging the identification of the defendant when identification is a legitimate issue in the proceeding.

Cases

Key Points:

- A video deposition does not violate the U.S. Constitution's Sixth Amendment Confrontation Clause so long as the defendant has access to both a live video feed and to counsel during the child victim's testimony.

- A child victim's age is one factor in determining whether their nontestimonial statements made to a nongovernmental agent (such as a therapist or other trusted adult) implicate the confrontation clause.

In *State v. Stock*, the Supreme Court of Montana held that the defendant's right to confrontation was not violated when the six-year-old victim testified via two-way electronic audio-video communication. *State v. Stock*, 256 P.3d 899 (Mont. 2011). The Court noted that the defendant's right to confrontation was not violated even though the child testified without being in the defendant's presence. *Id.* The child still "testified under oath, was subject to contemporaneous cross-examination by the defendant's attorney, and was viewed and heard, albeit via a monitor, by the defendant and the fact-finder." *Id.* Additionally, the defendant had the opportunity to communicate contemporaneously with his attorney during the testimony. *Id.* Thus, the district court did not err in allowing the child to testify via two-way video. *Id.*

In *State v. Spencer*, the Supreme Court of Montana denied the defendant's argument that the admission of the child victim's hearsay statements violated his right to confrontation. *State v. Spencer*, 169 P.3d 384 (Mont. 2007). The Court noted that the confrontation clause is only implied through testimonial statements made to police officers or government agents, or nontestimonial statements made to a nongovernmental agent with "clear reason to believe that the statement would be used in court as substantive evidence against the defendant." *Id.* Although the child made statements to her private-practice counselor and foster parent, the trial court found that neither was acting as a governmental agent. *Id.* Furthermore, the court noted that a three-year-old was incapable of making statements with the "clear reason to believe" that the statements would be used in trial. *Id.* Thus, the trial court properly found these statements to be nontestimonial, admissible, and not in violation of the defendant's confrontation rights. *Id.*

Montana Hearsay Exceptions

§46-16-22, MCA. Child hearsay exception -- criminal proceedings.

(1) Otherwise inadmissible hearsay may be admissible in evidence in a criminal proceeding, as provided in subsection (2), if:

(a) the declarant of the out-of-court statement is a child who is:

(i) an alleged victim of a sexual offense or other crime of violence, including partner or family member assault, that is the subject of the criminal proceeding; or

(ii) a witness to an alleged sexual offense or other crime of violence, including partner or family member assault, that is the subject of the criminal proceeding;

(b) the court finds that the time, content, and circumstances of the statement provide circumstantial guarantees of trustworthiness;

(c) the child is unavailable as a witness;

(d) the child hearsay testimony is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence available through reasonable efforts; and

(e) the party intending to offer the child hearsay testimony gives sufficient notice to provide the adverse party with a fair opportunity to prepare. The notice must include the content of the statement, the approximate time, date, and location of the statement, the person to whom the statement was made, and the circumstances surrounding the statement that the offering party believes support the statement's reliability.

(2) The court shall issue findings of fact and conclusions of law setting forth the court's reasoning on the admissibility of the child's testimony.

(3) When deciding the admissibility of offered child hearsay testimony under subsections (1) and (2), a court shall consider the following:

(a) the attributes of the child hearsay declarant, including:

(i) the child's age;

(ii) the child's ability to communicate verbally;

(iii) the child's ability to comprehend the statements or questions of others;

(iv) the child's ability to tell the difference between truth and falsehood;

(v) the child's motivation to tell the truth, including whether the child understands the general obligation to speak truthfully and not fabricate stories;

(vi) whether the child possessed sufficient mental capacity at the time of the alleged incident to create an accurate memory of the incident; and

(vii) whether the child possesses sufficient memory to retain an independent recollection of the events at issue;

(b) information regarding the witness who is relating the child's hearsay statement, including:

(i) the witness's relationship to the child;

(ii) whether the relationship between the witness and the child has an impact on the trustworthiness of the child's hearsay statement;

(iii) whether the witness has a motive to fabricate or distort the child's statement; and

(iv) the circumstances under which the witness heard the child's statement, including the timing of the statement in relation to the incident at issue and the availability of another person in whom the child could confide;

(c) information regarding the child's statement, including:

(i) whether the statement contains knowledge not normally attributed to a child of the declarant's age;

(ii) whether the statement was spontaneous;

(iii) the suggestiveness of statements by other persons to the child at the time that the child made the statement;

(iv) if statements were made by the child to more than one person, whether those statements were consistent; and

(v) the nearness in time of the statement to the incident at issue;

(d) the availability of corroborative evidence through physical evidence or circumstantial evidence of motive or opportunity, including:

(i) whether the alleged act can be corroborated; and

(ii) if the child's statement identifies a perpetrator, whether that identity can be corroborated; and

(e) other considerations that in the judge's opinion may bear on the admissibility of the child hearsay testimony.

(4) As used in this section, "child" means a person under 15 years of age.

MRE Rule 803. Hearsay exceptions: availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) ***Present sense impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(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.

(3) ***Then-existing mental, emotional, or physical condition.*** A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. However, written reports from the Montana state crime laboratory are within this exception to the hearsay rule when the state has notified the court and opposing parties in writing of its intention to offer such report or reports in evidence at trial in sufficient time for the party not offering the report or reports (1) to obtain the depositions before trial of the person or persons responsible for compiling such reports, or (2) to subpoena the attendance of said persons at trial. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

(i) investigative reports by police and other law enforcement personnel;

(ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party;

(iii) factual findings offered by the government in criminal cases;

(iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and

(v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

(11) **Records of religious organizations.** 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.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, 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.** Statements of fact concerning 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** 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 twenty years or more, the authenticity of which 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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

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

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

MRE Rule 804. Hearsay exceptions: declarant unavailable.

(a) **Definition of unavailability.** Unavailability as a witness includes situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding,

(A) in civil actions and proceedings, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered; and

(B) in criminal actions and proceedings, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, and redirect examination.

(2) *Statement under belief of impending death.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstance of what the declarant believed to be impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce or dissolution of marriage, legitimacy, relationship by blood, or family history, even though the declarant had no means of acquiring the personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so

intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

MT R REV Rule 106. Remainder of or related acts, writings, or statements.

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:

(1) an adverse party may require the introduction at that time of any other part of such item or series thereof which ought in fairness to be considered at that time; or

(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.

(b) This rule does not limit the right of any party to cross-examine or further develop as part of the case matters covered by this rule.

Cases

Key Points:

- A therapist's testimony regarding a child victim's out-of-court statement can support a medical exception to hearsay when it demonstrates focus on treatment, diagnosis, and/or the child's future best interests.
- A defendant's ability to confront a child victim regarding their out-of-court statements supports the statements' admissibility.

In *In re O.A.W.*, the Supreme Court of Montana held that the trial court properly applied the medical exception to hearsay to admit the child victims' out-of-court statements to their therapist regarding sexual abuse by their father. *In re O.A.W.*, 153 P.3d 6 (Mo. 2007). All statements the children gave to their therapist were for medical diagnosis and treatment. *Id.* The trial court found that the therapist's testimony concerned the treatment of the children, the past abuse they endured, and their future best interests. Additionally, the defendant was afforded the opportunity to cross-examine the child in regard to their statements. *Id.* Thus, the child's statements were properly admitted under the medical exception. *Id.*

Nebraska

Nebraska Admissibility

R.R.S. Neb. § 29-1926. Child victim or child witness; video deposition and in camera testimony; conditions; use; findings by court; release; procedure; violation; penalty.

(1)

(a) Upon request of the prosecuting or defense attorney and upon a showing of compelling need, the court shall order the taking of a video deposition of a child victim of or child witness to any offense punishable as a felony. The deposition ordinarily shall be in lieu of courtroom or in camera testimony by the child. If the court orders a video deposition, the court shall:

(i) Designate the time and place for taking the deposition. The deposition may be conducted in the courtroom, the judge's chambers, or any other location suitable for video recording;

(ii) Assure adequate time for the defense attorney to complete discovery before taking the deposition; and

(iii) Preside over the taking of the video deposition in the same manner as if the child were called as a witness for the prosecution during the course of the trial.

(b) Unless otherwise required by the court, the deposition shall be conducted in the presence of the prosecuting attorney, the defense attorney, the defendant, and any other person deemed necessary by the court, including the parent or guardian of the child victim or child witness, an advocate as defined in section 29-4309, or a counselor or other person with whom the child is familiar. Such parent, guardian, advocate, counselor, or other person shall be allowed to sit with or near the child unless the court determines that such person would be disruptive to the child's testimony.

(c) At any time subsequent to the taking of the original video deposition and upon sufficient cause shown, the court shall order the taking of additional video depositions to be admitted at the time of the trial.

(d) If the child testifies at trial in person rather than by video deposition, the taking of the child's testimony may, upon request of the prosecuting attorney and upon a showing of compelling need, be conducted in camera.

(e) Unless otherwise required by the court, the child shall testify in the presence of the prosecuting attorney, the defense attorney, the defendant, and any other person deemed necessary by the court, including the parent or guardian of the child victim of child witness, an advocate as defined in section 29-4309, or a counselor or other person with whom the child is familiar. Such parent, guardian, advocate, counselor, or other person shall be allowed to sit with

or near the child unless the court determines that such person would be disruptive to the child's testimony. Unless waived by the defendant, all persons in the room shall be visible on camera except the camera operator.

(f) If deemed necessary to preserve the constitutionality of the child's testimony, the court may direct that during the testimony the child shall at all times be in a position to see the defendant live or on camera.

(g) For purposes of this section, child means a person eleven years of age or younger at the time the motion to take the deposition is made or at the time of the taking of in camera testimony at trial.

(h) Nothing in this section shall restrict the court from conducting the pretrial deposition or in camera proceedings in any manner deemed likely to facilitate and preserve a child's testimony to the fullest extent possible, consistent with the right to confrontation guaranteed in the Sixth Amendment of the Constitution of the United States and Article I, section 11, of the Nebraska Constitution. In deciding whether there is a compelling need that child testimony accommodation is required by pretrial video deposition, in camera live testimony, in camera video testimony, or any other accommodation, the court shall make particularized findings on the record of:

(i) The nature of the offense;

(ii) The significance of the child's testimony to the case;

(iii) The likelihood of obtaining the child's testimony without modification of trial procedure or with a different modification involving less substantial digression from trial procedure than the modification under consideration;

(iv) The child's age;

(v) The child's psychological maturity and understanding; and

(vi) The nature, degree, and duration of potential injury to the child from testifying.

(i) The court may order an independent examination by a psychologist or psychiatrist if the defense attorney requests the opportunity to rebut the showing of compelling need produced by the prosecuting attorney. Such examination shall be conducted in the child's county of residence.

(j) After a finding of compelling need by the court, neither party may call the child witness to testify as a live witness at the trial before the jury unless that party demonstrates that the compelling need no longer exists.

(k) Nothing in this section shall limit the right of access of the media or the public to open court.

(l) Nothing in this section shall preclude discovery by the defendant as set forth in section 29-1912.

(m) The Supreme Court may adopt and promulgate rules of procedure to administer this section, which rules shall not be in conflict with laws governing such matters.

(2)

(a) No custodian of a video recording of a child victim or child witness alleging, explaining, denying, or describing an act of sexual assault pursuant to section 28-319, 28-319.01, or 28-320.01 or child abuse pursuant to section 28-707 as part of an investigation or evaluation of the abuse or assault shall release or use a video recording or copies of a video recording or consent, by commission or omission, to the release or use of a video recording or copies of a video recording to or by any other party without a court order, notwithstanding the fact that the child victim or child witness has consented to the release or use of the video recording or that the release or use is authorized under law, except as provided in section 28-730 or pursuant to an investigation under the Office of Inspector General of Nebraska Child Welfare Act. Any custodian may release or consent to the release or use of a video recording or copies of a video recording to law enforcement agencies or agencies authorized to prosecute such abuse or assault cases on behalf of the state.

(b) The court order may govern the purposes for which the video recording may be used, the reproduction of the video recording, the release of the video recording to other persons, the retention and return of copies of the video recording, and any other requirements reasonably necessary for the protection of the privacy and best interests of the child victim or child witness.

(c)

(i) Pursuant to section 29-1912, the defendant described in the video recording may petition the district court in the county where the alleged offense took place or where the custodian of the video recording resides for an order requiring the custodian of the video recording to provide a physical copy to the defendant or the defendant's attorney. Such order shall include a protective order prohibiting further distribution of the video recording without a court order.

(ii) Upon obtaining the copy of the video recording pursuant to subdivision (2)(c)(i) of this section, the defendant or the defendant's attorney may request that the recording be transcribed by filing a motion with the court identifying the court reporter or transcriber and the address or location where the transcription will occur. Upon receipt of such request, the court shall enter an order authorizing the distribution of a copy of the video recording to such reporter or transcriber and requiring the copy of the video recording be returned by the reporter or transcriber upon completion of the transcription. Such order may include a protective order related to the distribution of the video recording or information contained in the video recording, including an order that identifying information of the child victim or child witness be redacted from the transcript prepared pursuant to this subsection. Upon return of such copy, the defendant or the defendant's attorney shall certify to the court and the parties that such copy has been returned.

(iii) After obtaining the copy of the video recording pursuant to subdivision (2)(c)(i) of this section, the defendant or the defendant's attorney may file a motion with the court requesting permission to release such copy to an expert or investigator. If the defendant or the defendant's attorney believes that including the name or identifying information of such expert or investigator will prejudice the defendant, the court shall permit the defendant or the defendant's attorney to include such information in the form of a written statement to be inspected by the court alone. The statement shall be sealed and preserved in the records of the court. Upon granting such motion, the court shall enter an order authorizing the distribution of a copy of the video recording to such expert or investigator and requiring the copy of the video recording be returned by the expert or investigator upon the completion of services of the expert or investigator. The order shall not include the name or identifying information of the expert or investigator. Such order may include a protective order related to the distribution of the video recording or information contained in the video recording. Upon return of such copy, the defendant or the defendant's attorney shall certify to the court and the parties that such copy has been returned. Such certification shall not include the name or identifying information of the expert or the investigator.

(d) Any person who releases or uses a video recording except as provided in this section shall be guilty of a Class I misdemeanor.

Cases

Key Points:

- Law enforcement's inclusion in a forensic interview in a medical/diagnostic context doesn't preclude the interview's admissibility under the medical exception, if the interview's primary purpose is to obtain medical diagnosis or treatment.
- The use of a screen that blocks the defendant from a child witness's view during their testimony is prejudicial because it suggests danger and therefore, guilt to a jury.
- A video recorded or closed circuit television interview are nonprejudicial alternatives to preserve a child's mental wellbeing during testimony.

In *State v. Vigil*, the Supreme Court of Nebraska denied the defendant's claim that the child victim's statement should not be admissible under Rule 803(3) because the interview, which was conducted by a forensic interviewer for purposes of medical treatment, was also shared with law enforcement to spare the child from the trauma of retelling their statements. *State v. Vigil*, 810 N.W.2d 687 (Neb. 2012). The Court noted that "a statement is generally considered admissible under the medical purpose hearsay exception if gathered for dual medical and investigatory purposes." *Id.* Furthermore, the Court clarified that admissibility did not rest on the interview's "predominant purpose," but rather if the interview was "made in legitimate and reasonable contemplation of medical diagnosis or treatment." *Id.* Thus, law enforcement's presence or inclusion in an interview does not automatically preclude the interview's admissibility under the medical exception. *Id.*

In *State v. Parker*, the Supreme Court of Nebraska held that the trial court erred in allowing an opaque screen to be placed in the courtroom to hide the defendant from the child victim's view during the victim's testimony. *State v. Parker*, 757 N.W.2d 7 (Neb. 2008). The Court reasoned that it was inherently prejudicial to the defendant's right to a fair trial in that the screen suggested to the jury that the defendant was "dangerous or culpable" and that the victim had a reason to fear the defendant. *Id.* This suggestion evaded the defendant's presumption of innocence until proven guilty. *Id.* The Court noted that, although the child's psychological welfare should be considered, the screen created dramatics that a reasonable jury would infer guilt from. *Id.* However, the Court did clarify that use of video recorded testimony or one-way television would have been an acceptable alternative to protect the child. *Id.*

Nebraska Hearsay Exceptions

Neb. Rev. St. § 27-803. Hearsay exceptions; enumerated; availability of declarant immaterial.

Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) 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;

(2) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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;

(3) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

(4) A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his or her memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party;

(5)

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events, or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of

the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight.

(b) A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, that was received or acquired in the regular course of business by an entity from another entity and has been incorporated into and kept in the regular course of business of the receiving or acquiring entity; that the receiving or acquiring entity typically relies upon the accuracy of the contents of the memorandum, report, record, or data compilation; and that the circumstances otherwise indicate the trustworthiness of the memorandum, report, record, or data compilation, as shown by the testimony of the custodian or other qualified witness. Subdivision (5)(b) of this section shall not apply in any criminal proceeding;

(6) Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (5) of this section to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate a lack of trustworthiness;

(7) Upon reasonable notice to the opposing party prior to trial, records, reports, statements, or data compilations made by a public official or agency of facts required to be observed and recorded pursuant to a duty imposed by law, unless the sources of information or the method or circumstances of the investigation are shown by the opposing party to indicate a lack of trustworthiness;

(8) Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

(9) To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with section 27-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation or entry;

(10) 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;

(11) Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, 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;

(12) Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of 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;

(13) 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;

(14) 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;

(15) Statements in a document in existence thirty years or more whose authenticity is established;

(16) Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations;

(17) 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 the testimony or admission of the witness or by other expert testimony or by judicial notice, to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination. If admitted, the statements may be read into evidence but may not be received as exhibits;

(18) Reputation among members of his or her family by blood, adoption, or marriage, or among his or her associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his or her personal or family history;

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

(20) Reputation of a person's character among his or her associates or in the community;

(21) Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against a person other than the accused. The pendency of an appeal may be shown but does not affect admissibility;

(22) Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation; and

(23) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

- (a) the statement is offered as evidence of a material fact,**
- (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and**
- (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his or her intention to offer the statement and the particulars of it, including the name and address of the declarant.**

Neb. Rev. St. § 27-804. Hearsay exceptions; enumerated; declarant unavailable; unavailability; defined.

(1) Unavailability as a witness includes situations in which the declarant:

- (a)** Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or
- (b)** Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or
- (c)** Testifies to lack of memory of the subject matter of his statement; or
- (d)** Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (e)** Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(2) Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (a)** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or a different proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered;

(b) A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death;

(c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement;

(d)

(i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; or

(e) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(i) the statement is offered as evidence of a material fact,

(ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and

(iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Neb. Rev. St. § 27-106. Remainder of or related writings or recorded statements; action of judge.

(1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

(2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.

Cases

Key Points:

- A forensic interview conducted in a medical/diagnostic context, or in conjunction with a medical examination, doesn't preclude the interview's admissibility under the medical exception to hearsay.
- A child victim's capacity to fabricate abuse disclosure is more important in determining whether a statement counts as an excited utterance, than elapsed time between abuse and disclosure and whether leading questions were used.

In *State v. Edwards*, the Court of Appeals of Nebraska held that although a forensic interview may have the partial purpose of assisting law enforcement during an investigation, so long as statements made by the child in the interview are still within the chain of medical care, they may be admissible under the medical diagnosis and treatment exception. *State v. Edwards*, 28 Neb. App. 893, 949 N.W.2d 799 (Neb. Ct. App. 2020). The forensic interviewer testified that her forensic interviews were used in conjunction with doctor's medical examinations of potential child sexual abuse victims, and the interviewer relayed the pertinent information to the doctor in the chain of medical care. *Id.* at 818-19.

In *State v. Tlamka*, the Court of Appeals of Nebraska had previously addressed admission of a child's out-of-court statements under the excited utterance exception. *State v. Tlamka*, 1 Neb. App. 612, 511 N.W.2d 135 (Neb. Ct. App. 1993). In discussing whether a statement is an excited utterance, the Court held that consideration of lapse of time between the abuse and disclosure and whether leading questions were used are non-determinative, and more important considerations are whether surrounding facts and circumstances demonstrate the absence of capacity to fabricate. *Id.*

Nevada

Nevada Admissibility

Nev. Rev. Stat. § 51.035. "Hearsay" defined.

"Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:

- 1. The statement is one made by a witness while testifying at the trial or hearing;**

- 2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:**
 - (a) Inconsistent with the declarant's testimony;**

 - (b) Consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive;**

 - (c) One of identification of a person made soon after perceiving the person; or**

 - (d) A transcript of testimony given under oath at a trial or hearing or before a grand jury; or**

- 3. The statement is offered against a party and is:**
 - (a) The party's own statement, in either the party's individual or a representative capacity;**

 - (b) A statement of which the party has manifested adoption or belief in its truth;**

 - (c) A statement by a person authorized by the party to make a statement concerning the subject;**

 - (d) A statement by the party's agent or servant concerning a matter within the scope of the party's agency or employment, made before the termination of the relationship; or**

 - (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.**

Nev. Rev. Stat. § 171.196. Preliminary examination: Waiver; time for conducting; postponement; introduction of evidence and cross-examination of witnesses by defendant; admissibility of hearsay evidence.

6. Hearsay evidence consisting of a statement made by the alleged victim of the offense is admissible at a preliminary examination conducted pursuant to this section only if the defendant is charged with one or more of the following offenses:

(a) A sexual offense committed against a child who is under the age of 16 years if the offense is punishable as a felony. As used in this paragraph, "sexual offense" has the meaning ascribed to it in NRS 179D.097.

(b) Abuse of a child pursuant to NRS 200.508 if the offense is committed against a child who is under the age of 16 years and the offense is punishable as a felony.

(c) An act which constitutes domestic violence pursuant to NRS 33.018, which is punishable as a felony and which resulted in substantial bodily harm to the alleged victim.

Nev. Rev. Stat. Ann. § 174.227. Videotaped depositions: Order of court; notice to parties; cross-examination; use.

1. A court on its own motion or on the motion of the district attorney may, for good cause shown, order the taking of a videotaped deposition of:

(a) A victim of sexual abuse as that term is defined in NRS 432B.100;

(b) A prospective witness in any criminal prosecution if the witness is less than 14 years of age;

(c) A victim of sex trafficking as that term is defined in subsection 2 of NRS 201.300; or

(d) A victim of facilitating sex trafficking as that term is defined in subsection 1 of NRS 201.301. There is a rebuttable presumption that good cause exists where the district attorney seeks to take the deposition of a person alleged to be the victim of sex trafficking.

The court may specify the time and place for taking the deposition and the persons who may be present when it is taken.

2. The district attorney shall give every other party reasonable written notice of the time and place for taking the deposition. The notice must include the name of the person to be examined. On the motion of a party upon whom the notice is served, the court:

(a) For good cause shown may release the address of the person to be examined; and

(b) For cause shown may extend or shorten the time.

3. If at the time such a deposition is taken, the district attorney anticipates using the deposition at trial, the court shall so state in the order for the deposition and the accused must be given the opportunity to cross-examine the deponent in the same manner as permitted at trial.

4. Except as limited by NRS 174.228, the court may allow the videotaped deposition to be used at any proceeding in addition to or in lieu of the direct testimony of the deponent. It may also be used by any party to contradict or impeach the testimony of the deponent as a witness. If only a part of the deposition is offered in evidence by a party, an adverse party may require the party to offer all of it which is relevant to the part offered and any party may offer other parts.

Nev. Rev. Stat. Ann. § 174.228. Videotaped depositions: Use.

A court may allow a videotaped deposition to be used instead of the deponent's testimony at trial only if:

1. In the case of a victim of sexual abuse, as that term is defined in NRS 432B.100:

(a) Before the deposition is taken, a hearing is held by a justice of the peace or district judge who finds that:

(1) The use of the videotaped deposition in lieu of testimony at trial is necessary to protect the welfare of the victim; and

(2) The presence of the accused at trial would inflict trauma, more than minimal in degree, upon the victim; and

(b) At the time a party seeks to use the deposition, the court determines that the conditions set forth in subparagraphs (1) and (2) of paragraph (a) continue to exist. The court may hold a hearing before the use of the deposition to make its determination.

2. In the case of a victim of sex trafficking as that term is defined in subsection 2 of NRS 201.300 or a victim of facilitating sex trafficking as that term is defined in subsection 1 of NRS 201.301:

(a) Before the deposition is taken, a hearing is held by a justice of the peace or district judge and the justice or judge finds that cause exists pursuant to paragraph (c) of subsection 1 of NRS 174.227; and

(b) Before allowing the videotaped deposition to be used at trial, the court finds that the victim is unavailable as a witness.

3. In all cases:

(a) A justice of the peace or district judge presides over the taking of the deposition;

- (b) The accused is able to hear and see the proceedings;
- (c) The accused is represented by counsel who, if physically separated from the accused, is able to communicate orally with the accused by electronic means;
- (d) The accused is given an adequate opportunity to cross-examine the deponent subject to the protection of the deponent deemed necessary by the court; and
- (e) The deponent testifies under oath.

Nev. Rev. Stat. Ann. § 174.229. Videotaped testimony.

If a prospective witness who is scheduled to testify before a grand jury or at a preliminary hearing is less than 14 years of age, the court shall, upon the motion of the district attorney, and may, upon its own motion, order the child's testimony to be videotaped at the time it is given.

Cases

Key Points:

- The admission of a child victim's out-of-court statements does not violate a defendant's right to confrontation so long as the child is available for cross-examination at trial.
- A child victim's availability for cross-examination at trial renders moot the question of whether their out-of-court statement(s) are testimonial.
- If the out-of-court statement is nontestimonial and the victim isn't testifying, admitting the statement is within the trial court's discretion.
- If the out-of-court statement is testimonial but the victim is unavailable to testify, admitting the statement does violate the Confrontation Clause.

In *Gaxiola v. State*, the Supreme Court of Nevada held that the admission of the child victim's statements to his mother, uncle, forensic interviewer, and police officer did not violate the defendant's right to confrontation. *Gaxiola v. State*, 119 P.3d 1225 (Nev. 2005). The child testified and was available for cross-examination at trial. *Id.*

In *Pantano v. State*, the Supreme Court of Nevada held that the child victim's out-of-court statements to her father and detective, in which the victim described the incident of assault committed upon her by the defendant, were nontestimonial for Confrontation Clause purposes. *Pantano v. State*, 138 P.3d 477 (Nev. 2006). The Court, however, noted that whether the victim's statements were testimonial or nontestimonial was immaterial, as the victim testified at trial and was available for cross examination. *Id.* Nevertheless, the Court clarified "subject to general rules of admissibility, a district court may properly admit a statement under this [NRS § 51.385] when a competent child witness testifies, regardless of whether the hearsay statement at issue is testimonial... Second, if the hearsay

statement is nontestimonial, a district court may exercise its discretion under [NRS § 51.385] to admit the statement, even though the child does not testify. Finally, per *Crawford* and *Flores*, when testimonial hearsay is at issue, admission of a child-victim's hearsay statement under [NRS § 51.385] violates confrontation rights when the victim is unavailable and the defendant has not had a prior opportunity to cross-examine." *Id.*

In *Crowley v. State*, 120 Nev. 30 (2004), the Supreme Court of Nevada affirmed convictions for sexual assault of multiple children, holding that when a trial witness "fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement that makes it a prior inconsistent statement pursuant to NRS 51.035(2)(a). The previous statement is not hearsay and may be admitted both substantively and for impeachment." *Id.* at 35. The Supreme Court noted prior cases such as *Atkins v. State*, 112 Nev. 1122, 1127 (1996), where a witness's "failure to recall might be construed as a denial of a prior statement." *Id.* at 34.

Nevada Hearsay Exceptions

Nev. Rev. Stat. Ann. § 51.095. Excited utterances.

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 is not inadmissible under the hearsay rule.

Nev. Rev. Stat. Ann. § 51.105. Then existing mental, emotional, or physical condition.

1. A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule.

2. A statement of memory or belief to prove the fact remembered or believed is inadmissible under the hearsay rule unless it relates to the execution, revocation, identification or terms of declarant's will.

Nev. Rev. Stat. Ann. § 51.115. Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof are not inadmissible under the hearsay rule insofar as they were reasonably pertinent to diagnosis or treatment.

Nev. Rev. Stat. Ann. § 51.125. Recorded recollection.

- 1.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately is not inadmissible under the hearsay rule if it is shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.
- 2.** The memorandum or record may be read into evidence but may not itself be received unless offered by an adverse party.

Nev. Rev. Stat. Ann. § 51.325. Former testimony.

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, is not inadmissible under the hearsay rule if:

- 1.** The declarant is unavailable as a witness; and
- 2.** If the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former parties and the issues are substantially the same.

Nev. Rev. Stat. Ann. § 51.385. Admissibility; notice of unavailability or inability of child to testify.

1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child or any act of physical abuse of the child is admissible in a criminal proceeding regarding that act of sexual conduct or physical abuse if:

(a) The court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) The child testifies at the proceeding or is unavailable or unable to testify.

2. In determining the trustworthiness of a statement, the court shall consider, without limitation, whether:

(a) The statement was spontaneous;

(b) The child was subjected to repetitive questioning;

(c) The child had a motive to fabricate;

(d) The child used terminology unexpected of a child of similar age; and

(e) The child was in a stable mental state.

3. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the prosecution's intention to offer the statement in evidence.

Nev. Rev. Stat. Ann. 47.120. Remainder of writings or recorded statements.

1. When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts.

2. This section does not limit cross-examination.

Nev. Rev. Stat. Ann. 171.196. Preliminary examination: Waiver; time for conducting; postponement; introduction of evidence and cross-examination of witnesses by defendant; admissibility of hearsay evidence.

1. If an offense is not triable in the Justice Court, the defendant must not be called upon to plead. If the defendant waives preliminary examination, the magistrate shall immediately hold the defendant to answer in the district court.

2. If the defendant does not waive examination, the magistrate shall hear the evidence within 15 days, unless for good cause shown the magistrate extends such time. Unless the defendant waives counsel, reasonable time must be allowed for counsel to appear.

3. Except as otherwise provided in this subsection, if the magistrate postpones the examination at the request of a party, the magistrate may order that party to pay all or part of the costs and fees expended to have a witness attend the examination. The magistrate shall not require a party who requested the postponement of the examination to pay for the costs and fees of a witness if:

(a) It was not reasonably necessary for the witness to attend the examination; or

(b) The magistrate ordered the extension pursuant to subsection 4.

4. If application is made for the appointment of counsel for an indigent defendant, the magistrate shall postpone the examination until:

(a) The application has been granted or denied; and

(b) If the application is granted, the attorney appointed or the public defender has had reasonable time to appear.

5. The defendant may cross-examine witnesses against him or her and may introduce evidence in his or her own behalf.

6. Hearsay evidence consisting of a statement made by the alleged victim of the offense is admissible at a preliminary examination conducted pursuant to this section only if the defendant is charged with one or more of the following offenses:

(a) A sexual offense committed against a child who is under the age of 16 years if the offense is punishable as a felony. As used in this paragraph, "sexual offense" has the meaning ascribed to it in [NRS 179D.097](#).

(b) Abuse of a child pursuant to [NRS 200.508](#) if the offense is committed against a child who is under the age of 16 years and the offense is punishable as a felony.

(c) An act which constitutes domestic violence pursuant to [NRS 33.018](#), which is punishable as a felony and which resulted in substantial bodily harm to the alleged victim.

Cases

Key Points:

- The admission of a child victim's testimonial out-of-court statements does not violate a defendant's right to confrontation so long as the child is available for cross-examination at trial.
- The requirement for a "child friendly" cross-examination is nonprejudicial and likewise does not violate a defendant's right to confrontation.
- A child victim's out-of-court statements are admissible if:
 - A hearing is conducted to assess the circumstances affecting the statement's trustworthiness, and the statements are found to be trustworthy;
 - The child either testifies or is found to be unavailable, and testimony is available from the person who took the out-of-court statement(s).

In *Springman v. State*, the Nevada Supreme Court held that statements made by the child to both a police officer and during a sexual assault examination were both testimonial in nature but were not impermissibly admitted. *Springman v. State*, 2009 WL 1491486 (Nev. 2009). The defendant had the opportunity to cross-examine the child at trial, and despite his objection, the court's requirement that the cross-examination be "child friendly" was neither prejudicial nor violated his right to confrontation. *Id.*

In *Pantano v. State*, the Nevada Supreme Court held that introduction of statements made by a child describing sexual conduct or physical abuse is an exception to the hearsay rule if there is a hearing to assess the circumstances surrounding trustworthiness of the statements, the child testifies or is unavailable, and the statements are found to be sufficiently trustworthy. *Pantano v. State*, 122 Nev. 782, 788, 138 P.3d 477 (Nev. 2006). Because the child testified and the trial court determined that the

child's statements to a police officer were reliable, the officer's testimony regarding the child's disclosure was properly admitted under NRS § 51.385. *Id.* at 791.

New Hampshire

New Hampshire Admissibility

RSA § 517:13a. Videotape trial testimony authorized.

I. In any criminal case, the state may move to videotape trial testimony of any witness, including the victim, who was 16 years of age or under at the time of the alleged offense. Any victim or other witness who was 16 years of age or under at the time of the offense may also move to take videotape trial testimony. The court shall order videotape trial testimony if it finds by a preponderance of the evidence that:

- (a) The child will suffer emotional or mental strain if required to testify in open court; or
- (b) Further delay will impair the child's ability to recall and relate the facts of the alleged offense.

II. Videotape trial testimony taken pursuant to this section shall be conducted before the judge at such a place as ordered by the court in the presence of the prosecutors, the defendant and his attorneys, and such other persons as the court allows. Examination and cross-examination of the child shall proceed in the same manner as permitted at trial. Such testimony shall be admissible into evidence at trial in lieu of any other testimony by the child.

III. Unless otherwise ordered by the court for good cause shown, no victim or witness whose testimony is taken pursuant to this section shall be required to appear or testify at trial.

IV. Any witness who is 16 years of age or under shall be allowed to have his parent or any other appropriate adult, or both, present during his testimony.

V. The supreme court shall make any rules necessary to implement the provisions of this section.

Cases

Key Points:

- A trial court has broad discretion to accommodate child victims to reduce the trauma associated with testifying -- as well as to accommodate defendant requests to ensure their rights are respected.
- Accommodating a child victim can include allowing a trusted adult to accompany them during testimony, as long as the adult doesn't influence the testimony.

- An out-of-court disclosure regarding prior uncharged but relevant incidents of abuse is admissible as long as the jury doesn't use it prejudicially -- as evidence of a defendant's propensity to abuse.
- A child victim's out-of-court statements made during a medical examination are admissible under the medical exception to hearsay, as long as the statements are made with the intent to seek treatment or diagnosis *and* the circumstances surrounding the statements support their trustworthiness.
 - In determining a young child's intent, a court needs to determine whether the child understands the purpose of any questions asked. Criteria may include a physician's thoroughness, questions, and instruments that might communicate the interview's intent.

In *State v. Letendre*, the Supreme Court of New Hampshire held that the trial court had not erred in allowing the child victim's guardian to accompany her while she testified. *State v. Letendre*, 13 A.3d 249 (N.H. 2011). The Court noted that the trial court enjoyed broad discretion in regulating procedure, *including accommodating children in favor of "reducing the trauma experienced by child victims."* *Id.* Furthermore, the trial court had "paid close attention to the witness's testimony to ensure that the guardian's presence did not influence it, and at defense counsel's request, even asked the prosecutor to direct the witness to look at the prosecutor and not at the guardian." *Id.*

In *State v. Wamala*, the Supreme Court of New Hampshire held that evidence of the victim's "time capsule," a school project in which she wrote on a piece of paper that she had sex with her father -- the defendant -- then sealed the paper in an envelope and opened the envelope two years later, was admissible. *State v. Wamala*, 972 A.2d 1071 (N.H. 2009). During trial, the defendant testified that the victim had fabricated all allegations against him, including the prior uncharged assaults encapsulated in the envelope. *Id.* The trial court then allowed the victim to rebut the defendant's claim and admitted the time capsule into evidence, with specific jury instructions that to "the extent that these statements referred to any uncharged sexual assaults, [the jury] could not use them as evidence of the defendant's propensity to commit such assaults." *Id.* The Court noted that "the trial court reasonably could have determined that introducing otherwise inadmissible hearsay evidence of statements made before the rebellion incidents was necessary" and thus the admission of such evidence was without error. *Id.*

In *State v. Munroe*, the Supreme Court of New Hampshire held that the child victim's statements to her pediatrician were properly admitted under the medical hearsay exception. *State v. Munroe*, 20 A.3d 871 (N.H. 2011). The Court noted that when deciding if a statement is admissible under the medical exception, the controlling issue is the declarant's intent. *Id.* For a statement to be admissible, the declarant must have "1.) intended to make the statements to obtain a medical diagnosis or treatment, 2.) the statements must describe medical history, or symptoms, pain, sensations, or their cause or source to an extent reasonably pertinent to diagnosis or treatment, and 3.) the court must find that the circumstances surrounding the statements support their trustworthiness." *Id.* The Court further clarified that in relation to the first element, extra care must be given in determining intent because of the difficulty in discovering whether a young child understands the purpose of the information obtained. *Id.* Given the thoroughness of the examination, questions the pediatrician

asked, and the instruments used, the Court noted that it was reasonable to infer the child understood that any statements she made were for medical purposes. *Id.*

New Hampshire Hearsay Exceptions

NH R REV Rule 803. Exceptions to the rule against hearsay -- regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent or plan), or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.
- (4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:
 - (A) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment;
 - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and
 - (C) the court affirmatively finds were made under circumstances indicating their trustworthiness.
- (5) ***Recorded Recollection.*** A record that:
 - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence or played before a jury but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

This exception shall apply only if neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose - unless later dealings with the property are inconsistent with the truth of the statement, or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations, that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit unless the Court finds that the probative value of the statement as an exhibit outweighs the prejudicial effect of its admission.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage - or among a person's associates or in the community - concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community - arising before the controversy, concerning boundaries of lands in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments Involving Personal, Family, or General History, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) Other Exceptions. (Transferred to Rule 807)

NH R REV Rule 804. Exceptions to the rule against hearsay -- when the declarant is unavailable as a witness.

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

- (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

- (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate

the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Other exceptions.* (Transferred to Rule 807)

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

NH R REV Rule 807. Residual exception.

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;**
- (2) it is offered as evidence of a material fact;**
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and**
- (4) admitting it will best serve the purposes of these rules and the interests of justice.**

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

NH R REV Rule 106. Remainder of or related writings or recorded statements.

(a) If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at the time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

(b) A party has a right to introduce the remainder of an unrecorded statement or conversation that his or her opponent introduced so far as it relates:

- (1) to the same subject matter; and
- (2) tends to explain or shed light on the meaning of the part already received.

Cases

Key Points:

- A child victim's out-of-court statement made during a medical examination is admissible under the medical exception to hearsay, as long as the statements are made with the intent to seek treatment or diagnosis.
- However, elements of their statement that have nothing to do with seeking treatment or diagnosis are impermissible for a jury to consider.
- A trial court's determination that a child victim is unavailable to testify doesn't preclude the admission of a video recorded forensic interview with the victim.
- A time lapse between the time of abuse and the forensic interview does not impact the interview's admissibility, as long as the victim's memory can be shown to have remained fresh.

In *State v. DeGroot*, the defendant appealed his conviction on the grounds that the trial court impermissibly allowed a sexual assault nurse examiner (SANE) to testify about the victim's statements to her. *State v. DeGroot*, 2018 WL 4517548 (N.H. 2018). The Supreme Court of New Hampshire upheld the trial court's ruling that statements made by the child for the sole purpose of medical diagnosis and treatment were permissible. However, statements about whom the child informed of the abuse, or other recollection not directly necessary for medical diagnosis and treatment, were not to be considered by the jury. *Id.*

In *State v. Burdier*, the Supreme Court of New Hampshire heard a challenge to the trial court's admission of the seven-year-old victim's video recorded forensic interview after determining that she lacked the ability to recall events and testify. *State v. Burdier*, 2020 WL 3169347 (N.H. 2020). Additionally, although the forensic interview took place 15 months after the victim initially disclosed the abuse to her mother and there was inconsistency between the interview and her initial statements to the police the day after the abuse occurred, the events still remained fresh in her memory and admission of the forensic interview video recording was permissible. *Id.*

New Jersey

New Jersey Admissibility

N.J. Stat. § 9:6-8.46. Evidence.

a. In any hearing under this act, including an administrative hearing held in accordance with the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.),

(1) proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the responsibility of, the parent or guardian and

(2) proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or guardian shall be prima facie evidence that a child of, or who is the responsibility of such person is an abused or neglected child, and

(3) any writing, record or photograph, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect proceeding of any hospital or any other public or private institution or agency shall be admissible in evidence in proof of that condition, act, transaction, occurrence or event, if the judge finds that it was made in the regular course of the business of any hospital or any other public or private institution or agency, and that it was in the regular course of such business to make it, at the time of the condition, act, transaction, occurrence or event, or within a reasonable time thereafter, shall be prima facie evidence of the facts contained in such certification. A certification by someone other than the head of the hospital or agency shall be accompanied by a photocopy of a delegation of authority signed by both the head of the hospital or agency and by such other employees. All other circumstances of the making of the memorandum, record or photograph, including lack of personal knowledge of the making, may be proved to affect its weight, but they shall not affect its admissibility and

(4) previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence; provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect.

b. In a fact-finding hearing (1) any determination that the child is an abused or neglected child must be based on a preponderance of the evidence and (2) only competent, material and relevant evidence may be admitted.

c. In a dispositional hearing and during all other stages of a proceeding under this act, only material and relevant evidence may be admitted.

[Editor's Note: This statute is used in family court proceedings in abuse and neglect cases. See N.J. Stat. § 9:6-8.24 ("Notwithstanding any other law to the contrary, the Superior Court, Chancery Division, Family Part has exclusive original jurisdiction over noncriminal proceedings under this act alleging the abuse or neglect of a child.")]

N.J. Stat. § 2A:84A-32.4. Prosecutions or actions for sexual assault, criminal sexual contact, human trafficking, child abuse or neglect; closed circuit testimony for minor.

1.

a. In prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, human trafficking involving sexual activity, child abuse, or in any action alleging an abused or neglected child under P.L.1974, c.119 (C.9:6-8.21 et seq.), the court may, on motion and after conducting a hearing in camera, order the taking of the testimony of a witness on closed circuit television at the trial, out of the view of the jury, defendant, or spectators upon making findings as provided in subsection b. of this section.

b. An order under this section may be made only if the court finds that the witness is 16 years of age or younger and that there is a substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify in open court. The order shall be specific as to whether the witness will testify outside the presence of spectators, the defendant, the jury, or all of them and shall be based on specific findings relating to the impact of the presence of each.

c. A motion seeking closed circuit testimony under subsection a. of this section may be filed by:

- (1) The victim or witness or the victim's or witness's attorney, parent or legal guardian;
- (2) The prosecutor;
- (3) The defendant or the defendant's counsel; or
- (4) The trial judge on the judge's own motion.

d. The defendant's counsel shall be present at the taking of testimony in camera. If the defendant is not present, he and his attorney shall be able to confer privately with each other during the testimony by a separate audio system.

e. If testimony is taken on closed circuit television pursuant to the provisions of this act, a stenographic recording of that testimony shall also be required. A typewritten transcript of that testimony shall be included in the record on appeal. The closed-circuit testimony itself shall not constitute part of the record on appeal except on motion for good cause shown.

Cases

Key Points:

- No per se rule exists that an out-of-court statement without audio or visual recording is inadmissible; a forensic interviewer's notes and report are sufficient documentation.
- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors.
- The slow verbal speed of a child's out-of-court abuse disclosure doesn't negate its spontaneity, if it can be shown that the statement was unprompted.
- The tender-years exception to the hearsay rule doesn't apply when an out-of-court statement can't be proven to be trustworthy.

In *State v. P.S.*, the Supreme Court of New Jersey found the child victim's out-of-court statements to be trustworthy for admissibility, and further, that there is no per se rule that an out-of-court statement without audio or visual recording is inadmissible. *State v. P.S.*, 997 A.2d 163 (N.J. 2010). The Court first held that "a trial court's determination of reliability or trustworthiness sufficient to allow admission of evidence should not be disturbed unless, ...it is apparent that the finding is 'clearly a mistake.'" *Id.* Given the forensic interviewer's professional experience, procedures used, and the child's removal from her parents during the interview, the trial court properly found that the video was trustworthy. *Id.* However, the interviewer did not notice until after the interview that a technology error had prevented recording. The trial court allowed the admission of the interview nonetheless, in favor of not re-traumatizing the child with another interview. *Id.* The Court upheld this decision, noting that the interviewer had sufficiently documented the interview through notes and a full report. *Id.*

In *State v. M.Z.*, the Superior Court of New Jersey held that the child victim's out-of-court statements to her mother were sufficiently spontaneous to be trustworthy and admissible. *State v. M.Z.*, 575 A.2d 82 (N.J. Super. Ct. L. Div. 1990). The Court noted that the child's statements, despite taking time to be verbalized, appeared to have come without the mother's prompting. *Id.* The Court further stated that "[a child's statement] may be highly credible because of its content and the surrounding circumstances...having no sexual orientation, [children] do not necessarily regard a sexual encounter as shocking or unpleasant, and frequently relate such incidents to a parent or relative in a matter-of-fact manner." *Id.*

In *State in Interest of A.R.*, the Supreme Court of New Jersey held that the child victim's video-recorded statement to a police officer did not possess a sufficient probability of trustworthiness under the tender-years exception to the hearsay rule to justify its introduction at a delinquency trial. *State in Interest of A.R.*, 188 A.3d 332 (N.J. 2018). The child was diagnosed with multiple developmental disorders, and was assumed to have a functional age far younger than his chronological age. *Id.* The trial court conditionally allowed the video to be admitted due to the child's incompetence to testify. *Id.* The Court, however, found this to be an error, noting that during the interview the detective had not pursued the varying statements the child gave, nor had shown that the child knew the difference between a truth and a lie. *Id.* Coupled with the child's fantastical claims and clear susceptibility to

suggestive questioning, the Court found that the interview did not evidence a sufficient probability of trustworthiness. *Id.*

In *State v. J.L.G.*, the Superior Court of New Jersey held that the expert testimony about Child Abuse Accommodation Syndrome in general, other than its component behavior of delayed disclosure, was inadmissible. *State v. J.L.G.*, 234 N.J. 265 (N.J. 2018). Based on the evidence presented in this record, the court (a) finds as a fact that clinical and research psychologists do not generally accept the scientific reliability of CSAAS, and (b) thus concludes that CSAAS does not meet the *Frye* standards for admissibility and should no longer be used in child sexual abuse cases. *Id.*

New Jersey Hearsay Exceptions

NJ R. Evid. N.J.R.E. 803. Hearsay exceptions not dependent on declarant's unavailability.

The following statements are not excluded by the hearsay rule:

(a) **A Declarant-Witness' Prior Statement.** The declarant-witness testifies and is subject to cross-examination about a prior otherwise admissible statement, and the statement:

(1) is inconsistent with the declarant-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 declarant-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 declarant-witness in circumstances establishing its reliability; or

(B) was given under oath at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; or

(2) is consistent with the declarant-witness' testimony and is offered to rebut an express or implied charge against the declarant-witness of

(A) recent fabrication or

(B) 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.** The statement is offered against a party-opponent and is:

- (1) the party-opponent's own statement, made either in an individual or in a representative capacity; or
- (2) a statement whose content the party-opponent has adopted by word or conduct or in whose truth the party-opponent has manifested belief; or
- (3) a statement by a person authorized by the party-opponent to make a statement concerning the subject; or
- (4) a statement by the party-opponent'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-opponent 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 case, 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.** The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it 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) A Statement for Purposes of Medical Diagnosis or Treatment. A statement that:

(A) is made in good faith for purposes of, and is reasonably pertinent to, medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(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 that:

(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.

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. This exception does not apply if the circumstances indicate that the statement is not trustworthy.

(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 such writing or other record.

This exception does not apply if 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), if:

(A) the evidence is admitted to prove that the matter did not occur or exist; and

(B) a record was regularly kept for a matter of that kind.

The exception does not apply if 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 or other record 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.

This exception does not apply if 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 a record of a birth, fetal death, death, or marriage or civil union, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of Public Record or Statement.* Subject to Rule 807, a certification in accordance with Rule 902 stating that a diligent search failed to disclose a public record or statement when offered to prove:

(A) the record or statement does not exist; or

(B) the matter did not occur or exist if a public office or agency regularly kept a record or statement for a matter of that kind.

The exception does not apply if the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.

(11) *Records of Religious Organizations Concerning Personal or Family History.* Subject to Rule 807, a statement of birth, legitimacy, ancestry, marriage or civil union, divorce, death, relationship by blood or marriage or civil union, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Civil Union, Baptismal, and Similar Ceremonies.* Subject to Rule 807, statements of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or civil union, or similar ceremony, or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* Subject to Rule 807, statements of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a family portrait, engraving on an urn, crypt, tombstone, or other burial marker.

(14) *Records of Documents that Affect an Interest in Property.* Subject to Rule 807, the record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents that Affect an Interest in Property.* Subject to Rule 807, a statement contained in a document that purports to establish or affect an interest in property

if the matter stated was relevant to the document's purpose, unless dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document at least 30 years old and whose authenticity is established.

(17) *Market Reports, and Similar Commercial Publications.* Market quotations, tabulations, lists, directories, or other published compilations that are generally used and relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, if:

(A) the statement is relied on by an expert witness on direct examination or called to the attention of the expert on cross-examination; and

(B) the publication is established as a reliable authority by testimony or by judicial notice.

If admitted, the statement may not be received as an exhibit 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 a person's family by blood, adoption, or marriage, or civil union, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage or civil union, divorce, death, legitimacy, ancestry, relationship by blood, adoption, or marriage or civil union, or other similar facts of a person's personal or family history.

(20) *Reputation Concerning Boundaries or General History.* Evidence of reputation in a community, arising before the controversy, concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation in which the community is located.

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

(22) *Judgment of Previous Conviction of Crime.* In a civil case, 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 Involving Personal, Family, or General History, or Boundaries.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [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 a defendant in a criminal proceeding only if the defendant was the declarant.

(26) *Judgments Against Persons Entitled to Indemnity.* Subject to Rule 807 and except in a case brought under the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 to -5, 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:

- (A) of the liability of the judgment debtor;
- (B) of the facts on which the judgment is based; and
- (C) 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 case if

- (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) 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) 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.**

NJ R. Evid. N.J.R.E. 804. Hearsay exceptions: declarant unavailable.

(a) **Definition of Unavailable.** Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the statement; or
- (2) persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the statement; or
- (4) is absent from the trial, hearing, or proceeding because of death, physical or mental illness or infirmity, or other cause; and
 - (A) the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial, hearing, or proceeding; and
 - (B) with respect to statements proffered under Rules 804(b)(4) and (7), the proponent must be unable, without undue hardship or expense, to obtain declarant's deposition for use in lieu of testimony at trial, hearing, or proceeding; or
- (5) [Deleted -- see N.J.R.E. 803(c)(27)].

(b) **Hearsay Exceptions.** Subject to Rule 807, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) *Testimony in Prior Proceedings.*

(A) Testimony that:

- (i) was given by a witness at a prior trial of the same or a different matter, or in a hearing or deposition taken in compliance with law in the same or another proceeding; and
- (ii) is now offered against a party who had an opportunity and similar motive in the prior trial, hearing or deposition to develop the testimony by examination or cross-examination.

(B) In a civil proceeding, or when offered by the defendant in a criminal proceeding, testimony given in a prior trial, hearing or deposition taken in compliance with law to which the party against whom the testimony is now offered was not a party, if the party who offered the prior testimony or against whom it was offered had an opportunity to develop the testimony on examination or cross-examination and had an interest and motive to do so, which is the same or similar to that of the party against whom it is now offered.

(C) Expert opinion testimony given in a prior trial, hearing, or deposition otherwise admissible under (A) or (B) may be excluded if the court finds that there are experts of a like kind generally available within a reasonable distance from the place in which the action is pending and the interests of justice so require.

(2) *Statement Under Belief of Imminent Death.* In a criminal proceeding, a statement made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death.

(3) *Statement Against Interest.* [Adopted in 1993 as Rule 803(c)(25)]

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage or civil union, divorce, relationship by blood, adoption, or marriage or civil union, or similar facts of personal or family history, even though declarant had no way of acquiring personal knowledge about the fact; or of the matter stated; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the other by blood, adoption, or marriage or civil union, or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Other Exceptions.* [Not Adopted]

(6) *Trustworthy Statements by Deceased Declarants.* In a civil proceeding, a statement made by a person unavailable as a witness because of death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy.

(7) *Voters' Statements.* A statement by a voter concerning the voter's qualifications to vote or the fact or content of the vote.

(8) [Deleted]

(9) *Forfeiture by Wrongdoing.* A statement offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

NJ R. Evid. N.J.R.E. 807. Discretion of court to exclude evidence under certain exceptions.

Except if offered by a defendant in a criminal proceeding, when any statement is admissible under Rules 803(c)(8), 803(c)(9), 803(c)(10), 803(c)(11), 803(c)(12), 803(c)(13), 803(c)(14), 803(c)(15), 803(c)(26) or 804(b), the court may exclude the statement at the trial if it appears that the proponent's intention to offer the statement in evidence was not made known to the adverse party at such time as to provide that party with a fair opportunity to challenge the statement.

NJ R. Evid. N.J.R.E. 808. Expert opinion included in a hearsay statement admissible under an exception.

Expert opinion that is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the court finds that the circumstances involved in rendering the opinion tend to establish its trustworthiness. Factors to consider include the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion.

NJ R. Evid. N.J.R.E. 106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time.

Cases

Key Points:

- The medical diagnosis and treatment hearsay exception is not limited to a child victim's statements; a non-offending caregiver's statements, intended to seek treatment and/or diagnosis, are also admissible under this exception.
- A video recorded interview is admissible so long as the child's statement meets the trustworthiness requirement of the "tender years" exception to the hearsay rule.
- The fresh complaint doctrine allows the State to introduce a generalized version of the victim's statement about a sexual offense for a narrow purpose. of negating any inference that the victim's initial silence or delay means that the allegation was fabricated.

In *State v. E.R.*, the Superior Court of New Jersey held that the medical diagnosis and treatment hearsay exception is not limited to the statements made by the patient, and the trial court properly admitted statements made by the child's mother to the treating physician. *State v. E.R.*, 457 N.J. Super. 377, 199 A.3d 1224 (N.J. Super. Ct. Law Div. 2016). The doctor's testimony that the mother stated that the two-year-old child was not wearing panties after the mother picked her up from the defendant's home, that the mother noticed a discharge on the panties she later put on the child, and that the mother had not seen the child in the three preceding months, were all admissible under the medical-treatment exception to the hearsay rule. *Id.* at 385-86.

The Supreme Court of New Jersey held that a video recorded interview of a child by police may be admitted into evidence so long as the child meets the trustworthiness requirement of the "tender years" exception to the hearsay rule. *State v. Nyhammer*, 197 N.J. 383, 963 A.2d 316 (N.J. 2009). The nine-year-old child was sufficiently trustworthy because she used statements, drawings, and dolls to

indicate how the defendant had abused her, and had sexual knowledge beyond that of a typical nine-year-old. *Id.* at 411-12.

The fresh complaint doctrine permits the introduction of a generalized version of the victim's statement about a sexual offense, for a narrow purpose of negating any inference that the victim's initial silence or delay means that the allegation was fabricated. *State v. R.K.*, 457 N.J. Super 377 (2015); *State v. Hill*, 121 N.J. 150 (1990). The fresh complaint doctrine is not dependent upon the age of the victim and has been applied to both adult and juvenile victims. *State v. Bethune*, 121 N.J. 137 (1990). To admit fresh complaint evidence, the State is required to file a motion, and the Court will have a testimonial hearing at which various factors are considered including whether the statement was spontaneous, voluntary, made within a reasonable time after the abusive incident, and whether it was made to someone who the victim would ordinarily confide in. *State v. Hill*, 121 N.J. 150 (1990). If admitted, the witness testimony is limited to the general nature of the complaint and cannot include specific details of the abuse, but it is still a means to introduce the circumstances surrounding a victim's disclosure and, at least, a very generalized version of the abuse.

New Mexico

New Mexico Admissibility

N.M. Stat. Ann. § 30-9-17. Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.

A. In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence [Rule 11-611 NMRA]. Any videotaped deposition taken under the provisions of this act shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

B. For the purposes of this section, "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

C. The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of this act.

D. The cost of such videotaping shall be paid by the state.

E. Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

NMRA Rule 5-504. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

A. When Allowed. Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

B. Use at Trial. At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, any part or all of the videotaped deposition of a child under sixteen (16) years of age taken pursuant to Paragraph A of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

- (1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;
- (2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and
- (3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

C. Additional Use at Trial. In addition to the use of a videotaped deposition as permitted by Paragraph B of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph N of Rule 5-503.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors to evaluate its trustworthiness.
- A child victim's testimony given via Skype violated the defendant's right to confrontation because the trial court hadn't conducted a hearing on whether this accommodation was needed.

In *State ex rel. Children, Youth and Families Department v. Frank G.*, the New Mexico Court of Appeals held that the child victim's out-of-court statements had sufficient guarantees of trustworthiness to be admitted. *State ex rel. Children, Youth, and Families Department v. Frank G.*, 108 P.3d 543 (N.M. Ct. App. 2004). The Court noted that a statement must overcome four concerns to evidence trustworthiness: "(1) Ambiguity-the danger that the meaning intended by the declarant will be misinterpreted by the witness and hence the jury; (2) Lack of candor-the danger the declarant will consciously lie; (3) Faulty memory-the danger that the declarant simply forgets key material; and (4) Misperception-the danger that the declarant misjudged, misinterpreted, or misunderstood what he [or she] saw." *Id. State v. Trujillo*, 42 P.3d 814 (N.M. 2002). The trial court properly found that the child's statements overcame these elements with consistent, clear, and direct recounting of the sexual abuse. *State v. Frank G.*, 108 P.3d 543. Furthermore, the child consistently identified the perpetrators and used language typical to a child her age. *Id.*

In *State v. Thomas*, the Supreme Court of New Mexico held that the trial court erred in allowing the child victim to testify via Skype, thus violating the defendant's right to confrontation. *State v. Thomas*, 376 P.3d 184 (N.M. 2016). Although certain accommodations may be granted, like testifying through a

one-way television, the record must state the necessity for such accommodations. *Id.* The Court noted that the trial court did not hold any hearings regarding necessity, thus denying the defendant his right to “face-to-face” confrontation. *Id.*

New Mexico Hearsay Exceptions

NMRA 11-803. Exceptions to the rule against hearsay -- regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused.
- (3) ***Then-existing mental, emotional, or physical condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.
- (4) ***Statement made for medical diagnosis or treatment.*** A statement that
 - (a) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment, and
 - (b) describes medical history, past or present symptoms, pain, or sensations, their inception, or their general cause.
- (5) **Recorded recollection.** A record that
 - (a) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately,
 - (b) was made or adopted by the witness when the matter was fresh in the witness's memory, and
 - (c) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a regularly conducted activity.** A record of an act, event, condition, opinion, or diagnosis if

- (a) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge,
- (b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit,
- (c) making the record was a regular practice of that activity, and
- (d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 11-902(11) or (12) NMRA or with a statute permitting certification.

This exception does not apply if the opponent shows that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a record of a regularly conducted activity.** Evidence that a matter is not included in a record described in Paragraph 6 if

- (a) the evidence is admitted to prove that the matter did not occur or exist and
- (b) a record was regularly kept for a matter of that kind.

This exception does not apply if the opponent shows that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public records.** A record or statement of a public office if it sets out

- (a) the office's activities,
- (b) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel, or
- (c) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

This exception does not apply if the opponent shows that the source of information or other circumstances indicate a lack of trustworthiness.

(9) **Public records of vital statistics.** Records or data compilations of births, deaths, or marriages, if reported to a public office in accordance with a legal duty.

(10) **Absence of a public record.** Testimony -- or a certification under Rule 11-902 NMRA -- that a diligent search failed to disclose a public record or statement if,

- (a) the testimony or certification is admitted to prove that
 - (i) the record or statement does not exist, or

(ii) a matter did not occur or exist, even though a public office regularly kept a record or statement for a matter of that kind, and

(b) in a criminal case, a prosecutor who intends to offer a certification files and serves written notice of that intent at least fourteen (14) days before trial, and the defendant does not file and serve an objection in writing within seven (7) days of service of the notice -- unless the court sets a different time for the notice or the objection.

(11) **Records of religious organizations concerning personal or family history.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of marriage, baptism, and similar ceremonies.** A statement of fact contained in a certificate

(a) made by a person who is authorized by a religious organization or by law to perform the act certified,

(b) attesting that the person performed a marriage or similar ceremony or administered a sacrament, and

(c) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of documents that affect an interest in property.** The record of a document that purports to establish or affect an interest in property if

(a) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it,

(b) the record is kept in a public office, and

(c) a statute authorizes recording documents of that kind in that office.

(15) **Statements in documents that affect an interest in property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** A statement in a document that is at least twenty (20) years old and whose authenticity is established.

(17) **Market reports and similar commercial publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in learned treatises, periodicals, or pamphlets.** A statement contained in a treatise, periodical, or pamphlet, if

(a) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, and

(b) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation concerning personal or family history.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation concerning boundaries or general history.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation concerning character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a previous conviction.** Evidence of a final judgment of conviction if

(a) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea,

(b) the judgment was for a crime punishable by death or by imprisonment for more than a year,

(c) the evidence is admitted to prove any fact essential to the judgment, and

(d) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments involving personal, family, or general history, or a boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter

(a) was essential to the judgment, and

(b) could be proved by evidence of reputation.

NMRA 11-804. Exceptions to the rule against hearsay -- when the declarant is unavailable as a witness.

A. **Criteria for Being Unavailable.** "Unavailability as a witness" includes situations in which the declarant

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies,
- (2) refuses to testify about the subject matter despite a court order to do so,
- (3) testifies to not remembering the subject matter,
- (4) cannot be present to testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness, or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure
 - (a) the declarant's attendance, in the case of a hearsay exception under Rule 11-804(B)(1) or (5) NMRA, or
 - (b) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 11-804(B)(2), (3), or (4) NMRA.

But Paragraph A does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability in order to prevent the declarant from attending or testifying.

B. **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

- (1) *Former Testimony.* Testimony that
 - (a) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
 - (b) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
- (2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
- (3) *Statement Against Interest.* A statement that
 - (a) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate

the declarant's claim against someone else or to expose the declarant to civil or criminal liability, and

(b) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about

(a) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact, or

(b) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Statement Offered Against a Party who Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

NMRA 11-807. Residual exception.

A. In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 11-803 NMRA or Rule 11-804 NMRA:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;**
- (2) it is offered as evidence of a material fact;**
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and**
- (4) admitting it will best serve the purposes of these rules and the interests of justice.**

B. Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

NMRA 11-106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

Cases

Key Points:

- A child victim's out-of-court statements made to a sexual assault nurse examiner (SANE) are not admissible under the medical exception to hearsay when the SANE's purpose is to gather evidence, and their examination is separate from treatment and diagnosis.
- On the other hand, statements made during an examination that is part of an investigation may be admissible so long as they were for medical diagnosis or treatment.
- When a child victim does not testify, their out-of-court statements may be admissible under the catch-all exception to hearsay so long as the statements have sufficient guarantees of trustworthiness.

In *State v. Mendez*, the Supreme Court of New Mexico distinguished between an examination performed by a sexual assault nurse examiner (SANE), versus one performed by any other treating physician. *State v. Mendez*, 146 N.M. 409, 211 P.3d 206 (N.M. 2009). Because the purpose of the SANE examination was to gather evidence, it occurred an hour and a half after the initial pediatric consultation had ended, the SANE nurse knew of the revelation of sexual abuse, and a police officer was present during the examination, statements made by the child to the SANE nurse were not admissible under the medical diagnosis or treatment exception to hearsay. *Id.* The Court of Appeals of New Mexico, however, has noted that statements made during an examination that was part of an investigation may be admissible so long as they were for medical diagnosis or treatment. *State ex rel. Children, Youth, Families Dept. In Matter of Esperanza M.*, 124 N.M. 735, 955 P.2d 204 (N.M Ct. App. 1998).

The Supreme Court of New Mexico has also noted that a child's out-of-court statements may be admissible under the catch-all exception to hearsay when the child does not testify, so long as the statements have sufficient guarantees of trustworthiness. *In the Matter of Pamela A.G.*, 139 N.M. 459, 134 P.3d 746 (N.M. 2006). Because the child's statements were unambiguous in both the description of the abuse and the identity of the abuser, the terms used by child to describe the details of the abuse were consistent with her age, her foster mother testified to the child's sexualized behavior, and the child's statements identifying her father as the abuser were spontaneous, the trial court found sufficient guarantees of trustworthiness needed for admission. *Id.* at 751-52.

New York

New York Admissibility

N.Y. Crim. Proc. Law. § 60.10. Rules of Evidence; in general.

Unless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings.

N.Y. Crim. Proc. Law. § 60.20. Rules of Evidence; testimonial capacity; evidence given by children.

1. Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence.
2. Every witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath. If under either of the above provisions, a witness is deemed to be ineligible to testify under oath, the witness may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof. A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.
3. A defendant may not be convicted of an offense solely upon unsworn evidence given pursuant to subdivision two.

N.Y. Crim. Proc. Law. § 60.42. Rules of Evidence; admissibility of evidence of victim's sexual conduct in sex offenses cases.

Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law unless such evidence:

1. Proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or

2. proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the penal law within three years prior to the sex offense which is the subject of the prosecution; or
3. rebuts evidence introduced by the people of the victim's failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or
4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or
5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

N.Y. Crim. Proc. Law. § 60.44. Use of anatomically correct dolls.

Any person who is less than sixteen years old may in the discretion of the court and where helpful and appropriate, use an anatomically correct doll in testifying in a criminal proceeding based upon conduct prohibited by article one hundred thirty, article two hundred sixty or section 255.25, 255.26 or 255.27 of the penal law.

N.Y. Crim. Proc. Law. § 60.76. Rules of Evidence; rape crisis counselor evidence in certain cases.

Where disclosure of a communication which would have been privileged pursuant to section forty-five hundred ten of the civil practice law and rules is sought on the grounds that the privilege has been waived or that disclosure is required pursuant to the constitution of this state or the United States, the party seeking disclosure must file a written motion supported by an affidavit containing specific factual allegations providing grounds that disclosure is required. Upon the filing of such motion and affidavit, the court shall conduct an in-camera review of the communication outside the presence of the jury and of counsel for all parties in order to determine whether disclosure of any portion of the communication is required.

N.Y. Crim. Proc. Law. § 65.10. Closed-circuit television; general rule; declaration of vulnerability.

< [Expires and deemed repealed Sept. 1, 2023, pursuant to L.1985, c. 505, § 5]>

1. A child witness shall be declared vulnerable when the court, in accordance with the provisions of section 65.20, determines by clear and convincing evidence that it is likely that such child witness will suffer serious mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will diminish the likelihood or extent of, such harm.

2. When the court declares a child witness to be vulnerable, it shall, except as provided in subdivision four of section 65.30, authorize the taking of the testimony of the vulnerable child witness from the testimonial room by means of live, two-way closed-circuit television. Under no circumstances shall the provisions of this article be construed to authorize a closed-circuit television system by which events in the courtroom are not transmitted to the testimonial room during the testimony of the vulnerable child witness.

3. Nothing herein shall be construed to preclude the court from exercising its power to close the courtroom or from exercising any authority it otherwise may have to protect the well-being of a witness and the rights of the defendant.

N.Y. Crim. Proc. Law § 65.20. Closed-circuit television; procedure for application and grounds for determination.

< [Expires and deemed repealed Sept. 1, 2023, pursuant to L.1985, c. 505, § 5.]>

1. Prior to the commencement of a criminal proceeding; other than a grand jury proceeding, either party may apply to the court for an order declaring that a child witness is vulnerable.
2. A child witness should be declared vulnerable when the court, in accordance with the provisions of this section, determines by clear and convincing evidence that the child witness would suffer serious mental or emotional harm that would substantially impair the child witness' ability to communicate with the finder of fact without the use of live, two-way closed-circuit television.
3. A motion pursuant to subdivision one of this section must be made in writing at least eight days before the commencement of trial or other criminal proceeding upon reasonable notice to the other party and with an opportunity to be heard.
4. The motion papers must state the basis for the motion and must contain sworn allegations of fact which, if true, would support a determination by the court that the child witness is vulnerable. Such allegations may be based upon the personal knowledge of the deponent or upon information and belief, provided that, in the latter event, the sources of such information and the grounds for such belief are stated.
5. The answering papers may admit or deny any of the alleged facts and may, in addition, contain sworn allegations of fact relevant to the motion, including the rights of the defendant, the need to protect the child witness and the integrity of the truth-finding function of the trier of fact.
6. Unless all material facts alleged in support of the motion made pursuant to subdivision one of this section are conceded, the court shall, in addition to examining the papers and hearing oral argument, conduct an appropriate hearing for the purpose of making findings of fact essential to the determination of the motion. Except as provided in subdivision six of this section, it may subpoena or call and examine witnesses, who must either testify under oath or be permitted to give unsworn testimony pursuant to subdivision two of section 60.20 and must authorize the attorneys for the parties to do the same.

7. Notwithstanding any other provision of law, the child witness who is alleged to be vulnerable may not be compelled to testify at such hearing or to submit to any psychological or psychiatric examination. The failure of the child witness to testify at such hearing shall not be a ground for denying a motion made pursuant to subdivision one of this section. Prior statements made by the child witness relating to any allegations of conduct constituting an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25, 255.26 or 255.27 of such law or to any allegation of words or conduct constituting an attempt to prevent, impede or deter the child witness from cooperating in the investigation or prosecution of the offense shall be admissible at such hearing, provided, however, that a declaration that a child witness is vulnerable may not be based solely upon such prior statements.

8.

(a) Notwithstanding any of the provisions of article forty-five of the civil practice law and rules, any physician, psychologist, nurse or social worker who has treated a child witness may testify at a hearing conducted pursuant to subdivision five of this section concerning the treatment of such child witness as such treatment relates to the issue presented at the hearing, provided that any otherwise applicable statutory privileges concerning communications between the child witness and such physician, psychologist, nurse or social worker in connection with such treatment shall not be deemed waived by such testimony alone, except to the limited extent of permitting the court alone to examine in camera reports, records or documents, if any, prepared by such physician, psychologist, nurse or social worker. If upon such examination the court determines that such reports, records or documents, or any one or portion thereof, contain information material and relevant to the issue of whether the child witness is a vulnerable child witness, the court shall disclose such information to both the attorney for the defendant and the district attorney.

(b) At any time after a motion has been made pursuant to subdivision one of this section, upon the demand of the other party the moving party must furnish the demanding party with a copy of any and all of such records, reports or other documents in the possession of such other party and must, in addition, supply the court with a copy of all such reports, records or other documents which are the subject of the demand. At any time after a demand has been made pursuant to this paragraph, the moving party may demand that property of the same kind or character in possession of the party that originally made such demand be furnished to the moving party and, if so furnished, be supplied, in addition, to the court.

9.

(a) Prior to the commencement of the hearing conducted pursuant to subdivision six of this section, the district attorney shall, subject to a protective order, comply with the provisions of subdivision one of section 245.20 of this chapter as they concern any witness whom the district attorney intends to call at the hearing and the child witness.

(b) Before a defendant calls a witness at such hearing, he or she must, subject to a protective order, comply with the provisions of subdivision four of section 245.20 of this chapter as they concern all the witnesses the defendant intends to call at such hearing.

10. The court may consider, in determining whether there are factors which would cause the child witness to suffer serious mental or emotional harm, a finding that any one or more of the following circumstances have been established by clear and convincing evidence:

(a) The manner of the commission of the offense of which the defendant is accused was particularly heinous or was characterized by aggravating circumstances.

(b) The child witness is particularly young or otherwise particularly subject to psychological harm on account of a physical or mental condition which existed before the alleged commission of the offense.

(c) At the time of the alleged offense, the defendant occupied a position of authority with respect to the child witness.

(d) The offense or offenses charged were part of an ongoing course of conduct committed by the defendant against the child witness over an extended period of time.

(e) A deadly weapon or dangerous instrument was allegedly used during the commission of the crime.

(f) The defendant has inflicted serious physical injury upon the child witness.

(g) A threat, express or implied, of physical violence to the child witness or a third person if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(h) A threat, express or implied, of the incarceration of a parent or guardian of the child witness, the removal of the child witness from the family or the dissolution of the family of the child witness if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(i) A witness other than the child witness has received a threat of physical violence directed at such witness or to a third person by or on behalf of the defendant.

(j) The defendant, at the time of the inquiry, (i) is living in the same household with the child witness, (ii) has ready access to the child witness or (iii) is providing substantial financial support for the child witness.

(k) The child witness has previously been the victim of an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25, 255.26 or 255.27 of such law.

(l) According to expert testimony, the child witness would be particularly susceptible to psychological harm if required to testify in open court or in the physical presence of the defendant.

11. Irrespective of whether a motion was made pursuant to subdivision one of this section, the court, at the request of either party or on its own motion, may decide that a child witness may be vulnerable based on its own observations that a child witness who has been called to testify at a criminal proceeding is suffering severe mental or emotional harm and therefore is physically or mentally unable to testify or to continue to testify in open court or in the physical presence of the defendant and that the use of live, two-way closed-circuit television is necessary to enable the child witness to testify. If the court so decides, it must conduct the same hearing that subdivision five of this section requires when a motion is made pursuant to subdivision one of this section, and it must make findings of fact pursuant to subdivisions nine and eleven of this section, before determining that the child witness is vulnerable.

12. In deciding whether a child witness is vulnerable, the court shall make findings of fact which reflect the causal relationship between the existence of any one or more of the factors set forth in subdivision nine of this section or other relevant factors which the court finds are established and the determination that the child witness is vulnerable. If the court is satisfied that the child witness is vulnerable and that, under the facts and circumstances of the particular case, the defendant's constitutional rights to an impartial jury or of confrontation will not be impaired, it may enter an order granting the application for the use of live, two-way closed-circuit television.

13. When the court has determined that a child witness is a vulnerable child witness, it shall make a specific finding as to whether placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm. If the court finds that placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm, the order entered pursuant to subdivision eleven of this section shall direct that the defendant remain in the courtroom during the testimony of the vulnerable child witness.

N.Y. Crim. Proc. Law § 190.25. Grand jury; proceedings and operation in general

1. Proceedings of a grand jury are not valid unless at least sixteen of its members are present. The finding of an indictment, a direction to file a prosecutor's information, a decision to submit a grand jury report and every other affirmative official action or decision requires the concurrence of at least twelve members thereof.

2. The foreman or any other grand juror may administer an oath to any witness appearing before the grand jury.

3. Except as provided in subdivision three-a of this section, during the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to witnesses, may, as the occasion requires, also be present:

(a) The district attorney;

(b) A clerk or other public servant authorized to assist the grand jury in the administrative conduct of its proceedings;

(c) A stenographer authorized to record the proceedings of the grand jury;

(d) An interpreter. Upon request of the grand jury, the prosecutor must provide an interpreter to interpret the testimony of any witness who does not speak the English language well enough to be readily understood. Such interpreter must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will faithfully interpret the testimony of the witness and that he will keep secret all matters before such grand jury within his knowledge;

(e) A public servant holding a witness in custody. When a person held in official custody is a witness before a grand jury, a public servant assigned to guard him during his grand jury appearance may accompany him in the grand jury room. Such public servant must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will keep secret all matters before it within his knowledge.

(f) An attorney representing a witness pursuant to section 190.52 of this chapter while that witness is present.

(g) An operator, as that term is defined in section 190.32 of this chapter, while the videotaped examination of either a special witness or a child witness is being played.

(h) A social worker, rape crisis counselor, psychologist or other professional providing emotional support to a child witness twelve years old or younger, or a social worker or informal caregiver, as provided in subdivision two of section two hundred six of the elder law, for a vulnerable elderly person as provided in subdivision three of section 260.31 of the penal law, who is called to give evidence in a grand jury proceeding concerning a crime defined in article one hundred twenty-one, article one hundred thirty, article two hundred sixty, section 120.10, 125.10, 125.15, 125.20, 125.25, 125.26, 125.27, 255.25, 255.26 or 255.27 of the penal law provided that the district attorney consents. Such support person shall not provide the witness with an answer to any question or otherwise participate in such proceeding and shall first take an oath before the grand jury that he or she will keep secret all matters before such grand jury within his or her knowledge.

3(a). Upon the request of a deaf or hearing-impaired grand juror, the prosecutor shall provide a sign language interpreter for such juror. Such interpreter shall be present during all proceedings of the grand jury which the deaf or hearing-impaired grand juror attends, including deliberation and voting. The interpreter shall, if he or she has not previously taken the constitutional oath of office, first take an oath before the grand jury that he or she will faithfully interpret the testimony of the witnesses and the statements of the prosecutor, judge and grand jurors; keep secret all matters before such grand jury within his or her knowledge; and not seek to influence the deliberations and voting of such grand jury.

4.

(a) Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or section 215.70 of the penal law, may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. For the purpose of assisting the grand jury in conducting its investigation, evidence obtained by a grand jury may be independently examined by the district attorney, members of his staff, police officers specifically assigned to the investigation, and such other persons as the court may specifically authorize. Such evidence may not be disclosed to other persons without a court order. Nothing contained herein shall prohibit a witness from disclosing his own testimony.

(b) When a district attorney obtains evidence during a grand jury proceeding which provides reasonable cause to suspect that a child has been abused or maltreated, as those terms are defined by section ten hundred twelve of the family court act, he must apply to the court supervising the grand jury for an order permitting disclosure of such evidence to the state central register of child abuse and maltreatment. A district attorney need not apply to the court for such order if he has previously made or caused a report to be made to the state central register of child abuse and maltreatment pursuant to section four hundred thirteen of the social services law and the evidence obtained during the grand jury proceeding, or substantially similar information, was included in such report. The district attorney's application to the court shall be made ex parte and in camera. The court must grant the application and permit the district attorney to disclose the evidence to the state central register of child abuse and maltreatment unless the court finds that such disclosure would jeopardize the life or safety of any person or interfere with a continuing grand jury proceeding.

5. The grand jury is the exclusive judge of the facts with respect to any matter before it.

6. The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes.

N.Y. Crim. Proc. Law § 190.30. Grand jury; rules of evidence

1. Except as otherwise provided in this section, the provisions of article sixty, governing rules of evidence and related matters with respect to criminal proceedings in general, are, where appropriate, applicable to grand jury proceedings.

2. A report or a copy of a report made by a public servant or by a person employed by a public servant or agency who is a physicist, chemist, coroner or medical examiner, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed by him in connection with a case which is the subject of a grand jury proceeding,

may, when certified by such person as a report made by him or as a true copy thereof, be received in such grand jury proceeding as evidence of the facts stated therein.

2-a. When the electronic transmission of a certified report, or certified copy thereof, of the kind described in subdivision two or three-a of this section or a sworn statement or copy thereof, of the kind described in subdivision three of this section results in a written document, such written document may be received in such grand jury proceeding provided that:

- (a)** a transmittal memorandum completed by the person sending the report contains a certification that the report has not been altered and a description of the report specifying the number of pages; and
- (b)** the person who receives the electronically transmitted document certifies that such document and transmittal memorandum were so received; and
- (c)** a certified report or a certified copy or sworn statement or sworn copy thereof is filed with the court within twenty days following arraignment upon the indictment; and
- (d)** where such written document is a sworn statement or sworn copy thereof of the kind described in subdivision three of this section, such sworn statement or sworn copy thereof is also provided to the defendant or his counsel within twenty days following arraignment upon the indictment.

3. A written or oral statement, under oath, by a person attesting to one or more of the following matters may be received in such grand jury proceeding as evidence of the facts stated therein:

- (a)** that person's ownership or lawful custody of, or license to occupy, premises, as defined in section 140.00 of the penal law, and of the defendant's lack of license or privilege to enter or remain thereupon;
- (b)** that person's ownership of, or possessory right in, property, the nature and monetary amount of any damage thereto and the defendant's lack of right to damage or tamper with the property;
- (c)** that person's ownership or lawful custody of, or license to possess property, as defined in section 155.00 of the penal law, including an automobile or other vehicle, its value and the defendant's lack of superior or equal right to possession thereof;
- (d)** that person's ownership of a vehicle and the absence of his consent to the defendant's taking, operating, exercising control over or using it;
- (e)** that person's qualifications as a dealer or other expert in appraising or evaluating a particular type of property, his expert opinion as to the value of a certain item or items of property of that type, and the basis for his opinion;
- (f)** that person's identity as an ostensible maker, drafter, drawer, endorser or other signator of a written instrument and its falsity within the meaning of section 170.00 of the penal law;

(g) that person's ownership of, or possessory right in, a credit card account number or debit card account number, and the defendant's lack of superior or equal right to use or possession thereof. Provided, however, that no such statement shall be admitted when an adversarial examination of such person has been previously ordered pursuant to subdivision 8 of section 180.60, unless a transcript of such examination is admitted.

3-a. A sex offender registration form, sex offender registration continuation/supplemental form, sex offender registry address verification form, sex offender change of address form or a copy of such form maintained by the division of criminal justice services concerning an individual who is the subject of a grand jury proceeding, may, when certified by a person designated by the commissioner of the division of criminal justice services as the person to certify such records, as a true copy thereof, be received in such grand jury proceeding as evidence of the facts stated therein.

4. An examination of a child witness or a special witness by the district attorney videotaped pursuant to section 190.32 of this chapter may be received in evidence in such grand jury proceeding as the testimony of such witness.

5. Nothing in subdivisions two, three or four of this section shall be construed to limit the power of the grand jury to cause any person to be called as a witness pursuant to subdivision three of section 190.50.

6. Wherever it is provided in article sixty that the court in a criminal proceeding must rule upon the competency of a witness to testify or upon the admissibility of evidence, such ruling may in an equivalent situation in a grand jury proceeding, be made by the district attorney.

7. Wherever it is provided in article sixty that a court presiding at a jury trial must instruct the jury with respect to the significance, legal effect or evaluation of evidence, the district attorney, in an equivalent situation in a grand jury proceeding, may so instruct the grand jury.

8.

(a) A business record may be received in such grand jury proceedings as evidence of the following facts and similar facts stated therein:

(i) a person's use of, subscription to and charges and payments for communication equipment and services including but not limited to equipment or services provided by telephone companies and internet service providers, but not including recorded conversations or images communicated thereby; and

(ii) financial transactions, and a person's ownership or possessory interest in any account, at a bank, insurance company, brokerage, exchange or banking organization as defined in section two of the banking law.

(b) Any business record offered for consideration by a grand jury pursuant to paragraph (a) of this subdivision must be accompanied by a written statement, under oath, that

(i) contains a list or description of the records it accompanies,

(ii) attests in substance that the person making the statement is a duly authorized custodian of the records or other employee or agent of the business who is familiar with such records, and

(iii) attests in substance that such records were made in the regular course of business and that it was the regular course of such business to make such records at the time of the recorded act, transaction, occurrence or event, or within a reasonable time thereafter. Such written statement may also include a statement identifying the name and job description of the person making the statement, specifying the matters set forth in subparagraph (ii) of this paragraph and attesting that the business has made a diligent search and does not possess a particular record or records addressing a matter set forth in paragraph (a) of this subdivision, and such statement may be received at grand jury proceedings as evidence of the fact that the business does not possess such record or records. When records of a business are accompanied by more than one sworn written statement of its employees or agents, such statements may be considered together in determining the admissibility of the records under this subdivision. For the purpose of this subdivision, the term "business records" does not include any records prepared by law enforcement agencies or prepared by any entity in anticipation of litigation.

(c) Any business record offered to a grand jury pursuant to paragraph (a) of this subdivision that includes material beyond that described in such paragraph (a) shall be redacted to exclude such additional material, or received subject to a limiting instruction that the grand jury shall not consider such additional material in support of any criminal charge.

(d) No such records shall be admitted when an adversarial examination of such a records custodian or other employee of such business who was familiar with such records has been previously ordered pursuant to subdivision eight of section 180.60 of this chapter, unless a transcript of such examination is admitted.

(e) Nothing in this subdivision shall affect the admissibility of business records in the grand jury on any basis other than that set forth in this subdivision.

N.Y. Crim. Proc. Law § 190.32. Videotaped examination; definitions, application, order and procedure

(1) Definitions. As used in this section:

(a) "Child witness" means a person twelve years old or less whom the people intend to call as witness in a grand jury proceeding to give evidence concerning any crime defined in article one hundred thirty or two hundred sixty or section 255.25, 255.26 or 255.27 of the penal law of which the person was a victim.

(b) "Special witness" means a person whom the people intend to call as a witness in a grand jury proceeding and who is either:

(i) Unable to attend and testify in person in the grand jury proceeding because the person is either physically ill or incapacitated; or

(ii) More than twelve years old and who is likely to suffer very severe emotional or mental stress if required to testify in person concerning any crime defined in article one hundred thirty or two hundred sixty or section 255.25, 255.26 or 255.27 of the penal law to which the person was a witness or of which the person was a victim.

(c) "Operator" means a person employed by the district attorney who operates the video camera to record the examination of a child witness or a special witness.

2. In lieu of requiring a witness who is a child witness to appear in person and give evidence in a grand jury proceeding, the district attorney may cause the examination of such witness to be videotaped in accordance with the provisions of subdivision five of this section.

3. Whenever the district attorney has reason to believe that a witness is a special witness, he may make an ex parte application to the court for an order authorizing the videotaping of an examination of such special witness and the subsequent introduction in evidence in a grand jury proceeding of that videotape in lieu of the live testimony of such special witness. The application must be in writing, must state the grounds of the application and must contain sworn allegations of fact, whether of the district attorney or another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided, that in the latter event, the sources of such information and the grounds for such belief are stated.

4. If the court is satisfied that a witness is a special witness, it shall issue an order authorizing the videotaping of such special witness in accordance with the provisions of subdivision five of this section. The court order and the application and all supporting papers shall not be disclosed to any person except upon further court order.

5. The videotaping of an examination either of a child witness or a special witness shall proceed as follows:

(a) An examination of a child witness or a special witness which is to be videotaped pursuant to this section may be conducted anywhere and at any time provided that the operator begins the videotape by recording a statement by the district attorney of the date, time and place of the examination. In addition, the district attorney shall identify himself, the operator and all other persons present.

(b) An accurate clock with a sweep second hand shall be placed next to or behind the witness in such position as to enable the operator to videotape the clock and the witness together during the entire examination. In the alternative, a date and time generator shall be used to superimpose the day, hour, minute and second over the video portion of the recording during the entire examination.

(c) A social worker, rape crisis counselor, psychologist or other professional providing emotional support to a child witness or to a special witness, as defined in subparagraph (ii) of paragraph (b) of subdivision one of this section, or any of those persons enumerated in paragraphs (a), (b), (c), (d), (e), (f) and (g) of subdivision three of section 190.25 may be present

during the videotaping except that a doctor, nurse or other medical assistant also may be present if required by the attendant circumstances. Each person present, except the witness, must, if he has not previously taken a constitutional oath of office or an oath that he will keep secret all matters before a grand jury, must take an oath on the record that he will keep secret the videotaped examination.

(d) The district attorney shall state for the record the name of the witness, and the caption and the grand jury number, if any, of the case. If the witness to be examined is a child witness, the date of the witness' birth must be recorded. If the witness to be examined is a special witness, the date of the order authorizing the videotaped examination and the name of the justice who issued the order shall be recorded.

(e) If the witness will give sworn testimony, the administration of the oath must be recorded. If the witness will give unsworn testimony, a statement that the testimony is not under oath must be recorded.

(f) If the examination requires the use of more than one tape, the operator shall record a statement of the district attorney at the end of each tape declaring that such tape has ended and referring to the succeeding tape. At the beginning of such succeeding tape, the operator shall record a statement of the district attorney identifying himself, the witness being examined and the number of tapes which have been used to record the examination of such witness. At the conclusion of the examination the operator shall record a statement of the district attorney certifying that the recording has been completed, the number of tapes on which the recording has been made and that such tapes constitute a complete and accurate record of the examination of the witness.

(g) A videotape of an examination conducted pursuant to this section shall not be edited unless upon further order of the court.

6. When the videotape is introduced in evidence and played in the grand jury, the grand jury stenographer shall record the examination in the same manner as if the witness had testified in person.

7. Custody of the videotape shall be maintained in the same manner as custody of the grand jury minutes.

Cases

Key Points:

- In cases where a child's out-of-court statements regard abuse or neglect, the statements are admissible with a relatively low degree of corroboration.
- A child victim's statement qualifies as a sufficiently prompt outcry hearsay exception when it was given at the first suitable opportunity following an incident of abuse.

- A child victim can testify via closed-circuit television when they are properly found to be a "vulnerable witness" including via testimony from a qualified medical expert.

In *Cassidy S. v. Bryan T.*, a New York Intermediate Appellate Court held that the child victim's out-of-court statements of abuse were sufficiently corroborated and thus admissible. *Cassidy S. v. Bryan T.*, 120 N.Y.S.3d 461 (N.Y. App. Div. 2020). The Court noted that in cases where a child's out-of-court statements regard abuse or neglect, the statements are admissible with a "relatively low degree of corroboration." *Id.* The Court found the evidence that the child had been in the sole care of the defendant, had a physical bruise, and gave consistent testimony all satisfied the requirement for corroboration. *Id.* *Cassidy S. v. Bryan T.* was a Family Court Article 6 proceeding with separate provisions from New York's criminal jurisprudence, applies in civil abuse and neglect cases, and does not apply in NY criminal cases.

In *People v. Hobbs*, a New York Intermediate Appellate Court held that the trial court properly allowed the child victim's mother to testify in regard to the victim's statement that the defendant had assaulted her. The victim had given her statement promptly, entitling it to qualify as admissible under the prompt outcry exception. *People v. Hobbs*, 127 N.Y.S.3d 565 (N.Y. App. Div. 2020). The Court clarified that the victim's statement was "sufficiently prompt" because it was given at the first suitable opportunity. *Id.*

In *In re Noel O.*, the New York Family Court held that the child victim had properly been found to be a "vulnerable witness" and thus entitled to the protection of testifying via closed-circuit television. *In re Noel O.*, 855 N.Y.S.2d 318 (N.Y. Fam. Ct. 2008). In accordance with §65.10, there must be clear and convincing evidence that the child would suffer serious mental or emotional harm without the use of a closed-circuit television. *Id.* The Court noted that a psychologist's testimony that the child victim had poor sleep, nightmares, was agitated, and exhibited other symptoms of PTSD sufficiently evidenced the child's status as a vulnerable witness. *Id.*

New York Hearsay Exceptions

N.Y. Civ. Prac. Law § 4504. Physician, dentist, podiatrist, chiropractor and nurse

(a) **Confidential information privileged.** Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision. For purposes of this subdivision:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and
2. "insurance benefits" shall include payments under a self-insured plan.

(b) **Identification by dentist; crime committed against patient under sixteen.** A dentist shall be required to disclose information necessary for identification of a patient. A physician, dentist, podiatrist, chiropractor or nurse shall be required to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime.

(c) **Mental or physical condition of deceased patient.** A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived:

1. by the personal representative, or the surviving spouse, or the next of kin of the decedent; or
2. in any litigation where the interests of the personal representative are deemed by the trial judge to be adverse to those of the estate of the decedent, by any party in interest; or
3. if the validity of the will of the decedent is in question, by the executor named in the will, or the surviving spouse or any heir-at-law or any of the next kin or any other party in interest.

(d) **Proof of negligence; unauthorized practice of medicine.** In any action for damages for personal injuries or death against a person not authorized to practice medicine under article 131 of the education law for any act or acts constituting the practice of medicine, when such act or acts were a competent producing proximate or contributing cause of such injuries or death, the fact that such person practiced medicine without being so authorized shall be deemed prima facie evidence of negligence.

N.Y. Civ. Prac. Law § 4510. Rape crisis counselor.

(a) Definitions. When used in this section, the following terms shall have the following meanings:

1. "Rape crisis program" means any office, institution or center which has been approved pursuant to subdivision fifteen of section two hundred six of the public health law, offering counseling and assistance to clients concerning sexual offenses, sexual abuses or incest.

2. "Rape crisis counselor" means any person who has been certified by an approved rape crisis program as having satisfied the training standards specified in subdivision fifteen of section two hundred six of the public health law , and who, regardless of compensation, is acting under the direction and supervision of an approved rape crisis program.

3. "Client" means any person who is seeking or receiving the services of a rape crisis counselor for the purpose of securing counseling or assistance concerning any sexual offenses, sexual abuse, incest or attempts to commit sexual offenses, sexual abuse, or incest, as defined in the penal law.

(b) Confidential information privileged. A rape crisis counselor shall not be required to disclose a communication made by his or her client to him or her, or advice given thereon, in the course of his or her services nor shall any clerk, stenographer or other person working for the same program as the rape crisis counselor or for the rape crisis counselor be allowed to disclose any such communication or advice given thereon nor shall any records made in the course of the services given to the client or recording of any communications made by or to a client be required to be disclosed, nor shall the client be compelled to disclose such communication or records, except:

1. that a rape crisis counselor may disclose such otherwise confidential communication to the extent authorized by the client;

2. that a rape crisis counselor shall not be required to treat as confidential a communication by a client which reveals the intent to commit a crime or harmful act;

3. in a case in which the client waives the privilege by instituting charges against the rape crisis counselor or the rape crisis program and such action or proceeding involves confidential communications between the client and the rape crisis counselor.

(c) Who may waive the privilege. The privilege may only be waived by the client, the personal representative of a deceased client, or, in the case of a client who has been adjudicated incompetent or for whom a conservator has been appointed, the committee or conservator.

(d) Limitation on waiver. A client who, for the purposes of obtaining compensation under article twenty-two of the executive law or insurance benefits, authorizes the disclosure of any privileged communication to an employee of the office of victim services or an insurance representative shall not be deemed to have waived the privilege created by this section.

N.Y. Civ. Prac. Law § 4516. Rape crisis counselor.

Whenever it becomes necessary to determine the age of a child, he may be produced and exhibited to enable the court or jury to determine his age by a personal inspection.

Cases

Key Points:

- The “prompt outcry” exception allows the admission of testimony regarding out-of-court statements made months after abuse when it regards the circumstances of disclosure and investigation, rather than the truth of the statements.
- A medical exception to hearsay can include a child's statements of identification or fault when the statements are relevant to medical diagnosis and treatment.

In *Cassidy S. v. Bryan T.*, an intermediate appellate court held that the child victim's out-of-court statements of abuse were sufficiently corroborated and thus admissible. *Cassidy S. v. Bryan T.*, 120 N.Y.S.3d 461 (N.Y. App. Div. 2020). The Court noted that in cases where a child's out-of-court statements regard abuse or neglect, the statements are admissible with a “relatively low degree of corroboration.” *Id.* The Court found the evidence that the child had been in the sole care of the defendant, had a physical bruise, and gave consistent testimony all satisfied the requirement for corroboration. *Id.* *Cassidy S. v. Bryan T.* was a Family Court Article 6 proceeding with separate provisions from New York's criminal jurisprudence, applies in civil abuse and neglect cases, and does not apply in NY criminal cases.

In *People v. Ludwig*, New York's highest court held that the admission of testimony of the child victim's half-brother and mother regarding the child's statement of the abuse was permissible. *People v. Ludwig*, 24 N.Y.3d 221 (N.Y. 2014). Although the child did not disclose until 14 months had passed, the testimony was “not admitted for its truth [,] [but rather] to explain how the victim eventually disclosed the abuse and how the investigation started.” *Id.* at 230 (quoting *People v. Ludwig*, 104 A.D. 3d 1162, 261 N.Y.S. 2d 657 (N.Y. App. Div. 2013)) (internal quotations omitted). This allowed the prosecution to avoid the confines of the “prompt outcry” exception to the hearsay rule. *See id.* at 234 (Smith, J. concurring) (advocating for a broader prompt outcry exception and arguing that its current interpretation risks a miscarriage of justice for the child victims).

In *People v. Duhs*, New York's highest court addressed the medical diagnosis and treatment exception, holding that statements germane to a victim's medical diagnosis and treatment were admissible. *People v. Duhs*, 16 N.Y.3d 405 (N.Y. 2011). The court determined that the emergency room pediatrician's testimony -- that the child stated the defendant would not “let him out” of a bathtub containing scalding hot water -- was sufficiently relevant to medical diagnosis and treatment as to be admissible hearsay. *Id.* at 408.

New York does not have a formulaic rule of evidence but largely relies on case law. The following website includes proposed rules of evidence: <https://www.nycourts.gov/judges/evidence/>.

North Carolina

North Carolina Admissibility

N.C. Gen. Stat. § 15A-1225.1. Child witnesses; remote testimony

(a) Definitions:

(1) Child. -- For the purposes of this section, a minor who is under the age of 16 years old at the time of the testimony.

(2) Criminal proceeding. -- Any hearing or trial in a prosecution of a person charged with violating a criminal law of this State, and any hearing or proceeding conducted under Subchapter II of Chapter 7B of the General Statutes where a juvenile is alleged to have committed an offense that would be a criminal offense if committed by an adult.

(3) Remote testimony. -- A method by which a child witness testifies in a criminal proceeding outside of the physical presence of the defendant.

(b) Remote Testimony Authorized. -- In a criminal proceeding, a child witness who has been found competent to testify may testify, under oath or affirmation, other than in an open forum when the court determines:

(1) That the child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and

(2) That the child's ability to communicate with the trier of fact would be impaired.

(c) Hearing Procedure. -- Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. Hearings in the superior court division, and hearings conducted under Subchapter II of Chapter 7B of the General Statutes, shall be recorded. The presence of the child witness is not required at the hearing unless ordered by the presiding judge.

(d) Order. -- An order allowing or disallowing the use of remote testimony shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of remote testimony shall do the following:

(1) State the method by which the child is to testify.

(2) List any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the child.

(4) State any condition or limitation upon the participation of individuals in the child's presence during his or her testimony.

(5) State any other condition necessary for taking or presenting the testimony.

(e) Testimony. -- The method used for remote testimony shall allow the judge, jury, and defendant or juvenile respondent to observe the demeanor of the child as the child testifies in a similar manner as if the child were in the open forum. The court shall ensure that the defense counsel, except a pro se defendant, is physically present where the child testifies, has a full and fair opportunity for cross-examination of the child witness, and has the ability to communicate privately with the defendant or juvenile respondent during the remote testimony. Nothing in this section shall be construed to limit the provisions of G.S. 15A-1225.

(f) Nonexclusive Procedure and Standard. -- Nothing in this section shall:

(1) Prohibit the use or application of any other method or procedure authorized or required by statute, common law, or rule for the introduction into evidence of the statements or testimony of a child in a criminal or noncriminal proceeding.

(2) Be construed to require a court, in noncriminal proceedings, to apply the standard set forth in subsection (b) of this section, or to deviate from a standard or standards authorized by statute, common law, or rule, for allowing the use of remote testimony in noncriminal proceedings.

(g) This section does not apply if the defendant is an attorney pro se, unless the defendant has a court-appointed attorney assisting the defendant in the defense, in which case only the court-appointed attorney shall be permitted in the room with the child during the child's testimony.

Cases

In *State v. Jackson*, the Court of Appeals of North Carolina held that the trial court properly found that the child victim would be traumatized if forced to testify in front of the defendant, and thus was entitled to testify via closed-circuit television. *State v. Jackson*, 717 S.E.2d 35 (N.C. Ct. App. 2011). The Court noted that evidence of the child's bed wetting, nightmares, and anxiety in combination with expert witness testimony from a psychologist that the child evidenced trauma symptoms and risked being retraumatized satisfied the requirement for the child to testify via television. *Id.*

In *State v. McLaughlin*, the Court of Appeals of North Carolina held that the child victim's hearsay statements during a CAC interview were admissible as statements made for the purposes of medical diagnosis or treatment. *State v. McLaughlin*, 786 S.E.2d 269 (N.C. Ct. App. 2016). The interview was conducted by a registered nurse, who subsequently spoke with the child's doctor prior to the doctor's examination of the child. *Id.* The Court further noted that the nurse clearly communicated the medical nature of the interview before and during the interview. *Id.* The Court denied defendant's argument that certain questions, including those regarding telling the truth, were not pertinent to medical treatment. *Id.* Rather, the Court noted that the questions "were crucial to establishing a

rapport with the victim and impressing upon him the need to be open and honest about very personal and likely embarrassing details pertinent to his well-being." *Id.* Thus, the child's out-of-court statements were admissible under the medical diagnosis exception. *Id.*

North Carolina Hearsay Exceptions

N.C. Gen. Stat. § 8C-1, Rule 803. Hearsay exceptions: availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present Sense Impression.*** -- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then Existing Mental, Emotional, or Physical Condition.*** -- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) ***Recorded Recollection.*** -- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- (6) ***Records of Regularly Conducted Activity.*** -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal under Rule 902 of the Rules of Evidence made by the custodian or witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Authentication of evidence by affidavit shall be confined to the records of nonparties, and the proponent of that evidence shall give advance

notice to all other parties of intent to offer the evidence with authentication by affidavit. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6). --

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. -- Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth

(A) the activities of the office or agency, or

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or

(C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. -- Records or data compilations, in any form, 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. -- To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. -- 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. -- 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. -- Statements of fact concerning 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.** -- 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** -- 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 20 years or more the authenticity of which 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 him 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** -- Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) **Reputation Concerning Boundaries or General History.** -- Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** -- Reputation of a person's character among his associates or in the community.

(22) (Reserved).

(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 the same would be provable by evidence of reputation.

(24) Other Exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, Rule 804. Hearsay exceptions; declarant unavailable.

(a) **Definition of unavailability.** -- "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** -- The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* -- Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* -- A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) *Statement Against Interest.* -- A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.* --

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other Exceptions.* -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Rules of Evid., G.S. §8C-1, Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- The excited utterance hearsay exception may still apply after a delay, especially in cases involving young children.
- For hearsay to be admitted, the State must show the necessity for using the testimony and the declarant's inherent trustworthiness.

In *State v. Smith*, the Supreme Court of North Carolina examined the excited utterance exception to the hearsay rule. *State v. Smith*, 315 N.C. 76 337 S.E.2d 833 (N.C. 1985). The court held that the trial judge correctly admitted the grandmother's testimony concerning the child's description of the abuse, even though the child made the disclosure three days after the abuse occurred. *Id.* at 89-90. Additionally, the Court of Appeals of North Carolina has noted that the excited utterance hearsay exception may still apply after a delay. This typically applies in cases involving young children, because the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than adults. *State v. McLaughlin*, 246 N.C. App. 306, 786 S.E.2d 269 (N.C. Ct. App. 2016).

The Court of Appeals has also allowed the admission of testimony by a licensed psychosocial associate (LPA) regarding the interview she conducted with the child. *State v. Waddell*, 130 N.C. App. 488, 504 S.E.2d 84 (N.C. Ct. App. 1998). For hearsay to be admitted, the State must show the necessity for using the testimony (here, the child victim was determined to be incompetent to testify and therefore the LPA's testimony was necessary), and the inherent trustworthiness of the declarant (here, the court noted that in making statements for the purpose of medical diagnosis and treatment, children have a strong motivation to be truthful). *Id.* at 494.

North Dakota

North Dakota Admissibility

N.D. Cent. Code § 31-04-04.1. Videotaped statement of child sexual offense victim — Criteria for admission as evidence.

1. In any prosecution for a violation of section 12.1-20-03, 12.1-20-03.1, 12.1-20-04, 12.1-20-05, 12.1-20-06, 12.1-20-07, or 12.1-20-11 in which the victim is less than fifteen years of age, the oral statement of the child victim may be recorded before trial and, subject to subsection 2, is admissible as evidence in any court proceeding regarding the offense if the following conditions are satisfied:

- a. The court determines there is reasonable cause to believe that the child victim would experience serious emotional trauma as a result of in-court participation in the proceeding;**
- b. The accused must be given reasonable written notice of the time and place for taking the videotaped statement;**
- c. The accused must be afforded the opportunity to hear and view the testimony from outside the presence of the child by means of a two-way mirror or other similar method that will ensure that the child cannot hear or see the accused;**
- d. The accused must have the opportunity to communicate orally with counsel by electronic means while the videotaped statement is being made; and**
- e. All questioning must be done by the prosecutor or counsel for the defendant unless the defendant is an attorney pro se. An attorney pro se must conduct all questioning from outside the presence of the child. Upon request of any of the parties or upon the determination of the court that it would be appropriate, the court may appoint a person who is qualified as an expert and who has dealt with the child in a therapeutic setting to aid the court throughout proceedings conducted under this section and the court may appoint guardian ad litem to protect the interests of the child.**

2. A child victim's videotaped statement is admissible pursuant to subsection 1 if the court finds that the child is unavailable as a witness to testify at trial and, upon viewing the videotape recording before it is shown to the jury, determines that it is sufficiently reliable and trustworthy and that the interests of justice will best be served by admission of the statement into evidence. For purposes of this subsection, "unavailable" includes a determination, based on medical or psychological evidence or expert testimony, that the child would suffer serious emotional or psychological strain if required to testify at trial. The court, in making its findings and determinations under this subsection, shall consider at least the following:

- a. The nature of the offense;
- b. The significance of the child's testimony to the case;
- c. The child's age;
- d. The child's psychological maturity and understanding; and
- e. The nature, degree, and duration of potential injury to the child from testifying.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors to evaluate its trustworthiness.
- Video recorded out-of-court statements do not violate a defendant's right to confrontation so long as the child victim is available for cross-examination.

In *State v. Sevigny*, the Supreme Court of North Dakota held that the trial court properly admitted the child victim's out-of-court statements under the hearsay rule's exception for a child's statement about sexual abuse. *State v. Sevigny*, 722 N.W.2d 515 (N.D. 2006). To be admissible, the statement must show a sufficient guarantee of trustworthiness. *Id.* In evaluating this, the court may look to "the spontaneity and consistent repetition of the statements, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and a lack of a motive to fabricate." *Id.* The Court noted that the child's unprompted admission without the confidant's use of leading questions evidenced trustworthiness, and was thus admissible.

In *State v. Poulor*, the Supreme Court of North Dakota held that the defendant's right to confrontation had not been violated by the admission of the child victim's video recorded out-of-court statements. *State v. Poulor*, 932 N.W.2d 534 (N.D. 2019). The Court noted that although the statement had been testimonial in nature, the child was available for cross-examination, thus not violating the defendant's right to confrontation. *Id.* The defendant further argued that his rights had been violated because the forensic interviewer was unavailable to testify, and thus unavailable for cross-examination. *Id.* The Court was not persuaded by this argument, noting that the defendant had not identified any testimonial statements from the forensic interviewer that would be subject to his right to confrontation. *Id.*

North Dakota Hearsay Exceptions

N.D. R. Rev. Rule 803. Exceptions to the Rule Against Hearsay Regardless of Whether the Declarant is Available as a Witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived the event or condition.
- (2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that the event or condition caused.
- (3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.

- (4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:

(A) is made for, and is reasonably pertinent to, medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

- (5) ***Recorded Recollection.*** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

- (6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by, or from information transmitted by, someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12); and
- (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

- (A) the evidence is admitted to prove that the matter did not occur or exist;
- (B) a record was regularly kept for a matter of that kind; and
- (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

- (A) it sets out:
 - (i) the office's activities;
 - (ii) a matter observed while under a legal duty to report, but, in a criminal case, not including a matter observed by law-enforcement personnel; or
 - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
- (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Before offering factual findings in evidence under this exception, a party must provide the opposing party a copy of the findings, or the portion that relates to the controversy. The opposing party may cross-examine under oath the person who prepared a record, statement or factual findings submitted under this exception, or any person furnishing information recorded in the record, statement or findings. If the person is unavailable for cross-examination, the record, statement, or findings may be admitted under this exception unless the court decides the opposing party would be prejudiced unfairly.

(9) **Public Records of Vital Statistics.** A record of a birth, fetal death, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony, or a certification under Rule 902, that a diligent search failed to disclose a public record or statement if:

- (A) the testimony or certification is admitted to prove that:
 - (i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice, unless the court sets a different time for the notice or the objection.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose, unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage, or among a person's associates or in the community, concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community, arising before the controversy, concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal or post-conviction proceeding may be shown but does not affect admissibility.

(23) **Judgments Involving Personal, Family, or General History, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) **Child's Statement about Sexual Abuse.** A statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child if:

(A) the trial court finds, after hearing on notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and

(B) the child either:

(i) testifies at the trial; or

(ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(25) [Other Exceptions.] [Transferred to Rule 807]

N.D. R. Rev. Rule 804. Exceptions to the rule against hearsay -- when the declarant is unavailable as a witness.

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

This subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had, or, in a civil case, whose predecessor in interest had, an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if it is offered in a criminal case to exculpate the accused, is supported by corroborating circumstances that clearly indicate its trustworthiness as a statement that tends to expose the declarant to criminal liability. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *[Other Exceptions.]* [Transferred to Rule 807]

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

N.D. R. Rev. Rule 807. Residual exception.

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

N.D.R.Ev. Rule 106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an opposing party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time.

Cases

Key Points:

- An out-of-court video recorded interview of a child under 12 years of age is admissible when it is about sexual abuse, and when the child is available for cross-examination.

In *State v. Krogstad*, the Supreme Court of North Dakota held that the trial court properly admitted the video recorded forensic interview done with the six-year-old victim, as it fell under the hearsay exception (N.D.R.Ev. 803(24)) for statements made by children below age 12 regarding sexual abuse. *State v. Krogstad*, 941 N.W.2d 574, 2020 N.D. 78 (N.D. 2020). Because the child also testified at trial and was cross-examined, even though her answers were somewhat "evasive," this did not amount to a denial of the defendant's right to confront her. *Id.* at 577.

Ohio

Ohio Admissibility

Ohio Rev. Code Ann. § 2317.01. Competent witnesses.

All persons are competent witnesses except those of unsound mind and children under ten years of age **who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.**

In a hearing in an abuse, neglect, or dependency case, any examination made by the court to determine whether a child is a competent witness shall be conducted by the court in an office or room other than a courtroom or hearing room, shall be conducted in the presence of only those individuals considered necessary by the court for the conduct of the examination or the well-being of the child, and shall be conducted with a court reporter present. **The court may allow the prosecutor, guardian ad litem, or attorney for any party to submit questions for use by the court in determining whether the child is a competent witness.** [emphasis added]

Ohio Rev. Code Ann. § 2152.81. Deposition of child victim; videotaping; testimony taken outside courtroom and televised into it or replayed in courtroom.

(A)

(1) As used in this section, "victim" includes any of the following persons:

(a) A person who was a victim of a violation identified in division (A)(2) of this section or an act that would be an offense of violence if committed by an adult;

(b) A person against whom was directed any conduct that constitutes, or that is an element of, a violation identified in division (A)(2) of this section or an act that would be an offense of violence if committed by an adult.

(2) In any proceeding in juvenile court involving a complaint, indictment, or information in which a child is charged with a violation of section 2905.03, 2905.05, 2907.02, 2907.03, 2907.05, 2907.06, 2907.07, 2907.09, 2907.21, 2907.23, 2907.24, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, or 2919.22 of the Revised Code or an act that would be an offense of violence if committed by an adult and in which an alleged victim of the violation or act was a child who was less than thirteen years of age when the complaint or information was filed or the indictment was returned, the juvenile judge, upon motion of an attorney for the prosecution, shall order that the testimony of the child victim be taken by deposition. The prosecution also may request that the deposition be videotaped in accordance with division (A)(3) of this section. The judge shall notify the child victim whose deposition is to be taken, the prosecution, and the attorney for the child who is charged with

the violation or act of the date, time, and place for taking the deposition. The notice shall identify the child victim who is to be examined and shall indicate whether a request that the deposition be videotaped has been made. The child who is charged with the violation or act shall have the right to attend the deposition and the right to be represented by counsel. Depositions shall be taken in the manner provided in civil cases, except that the judge in the proceeding shall preside at the taking of the child charged with the violation or act. The prosecution and the attorney for the child charged with the violation or act shall have the right, as at an adjudication hearing, to full examination and cross-examination of the child victim whose deposition is to be taken. If a deposition taken under this division is intended to be offered as evidence in the proceeding, it shall be filed in the juvenile court in which the action is pending and is admissible in the manner described in division (B) of this section. If a deposition of a child victim taken under this division is admitted as evidence at the proceeding under division (B) of this section, the child victim shall not be required to testify in person at the proceeding. However, at any time before the conclusion of the proceeding, the attorney for the child charged with the violation or act may file a motion with the judge requesting that another deposition of the child victim be taken because new evidence material to the defense of the child charged has been discovered that the attorney for the child charged could not with reasonable diligence have discovered prior to the taking of the admitted deposition. Any motion requesting another deposition shall be accompanied by supporting affidavits. Upon the filing of the motion and affidavits, the court may order that additional testimony of the child victim relative to the new evidence be taken by another deposition. If the court orders the taking of another deposition under this provision, the deposition shall be taken in accordance with this division; if the admitted deposition was a videotaped deposition taken in accordance with division (A)(3) of this section, the new deposition also shall be videotaped in accordance with that division, and, in other cases, the new deposition may be videotaped in accordance with that division.

(3) If the prosecution requests that a deposition to be taken under division (A)(2) of this section be videotaped, the juvenile judge shall order that the deposition be videotaped in accordance with this division. If a juvenile judge issues an order to video tape the deposition, the judge shall exclude from the room in which the deposition is to be taken every person except the child victim giving the testimony, the judge, one or more interpreters if needed, the attorneys for the prosecution and the child who is charged with the violation or act, any person needed to operate the equipment to be used, one person chosen by the child victim giving the deposition, and any person whose presence the judge determines would contribute to the welfare and well-being of the child victim giving the deposition. The person chosen by the child victim shall not be a witness in the proceeding and, both before and during the deposition, shall not discuss the testimony of the child victim with any other witness in the proceeding. To the extent feasible, any person operating the recording equipment shall be restricted to a room adjacent to the room in which the deposition is being taken, or to a location in the room in which the deposition is being taken that is behind a screen or mirror so that the person operating the recording equipment can see and hear, but cannot be seen or heard by, the child victim giving the deposition during the deposition. The child who is charged with the violation or act shall be permitted to observe and hear the testimony of the child victim giving the deposition on a monitor, shall be provided with an

electronic means of immediate communication with the attorney of the child who is charged with the violation or act during the testimony, and shall be restricted to a location from which the child who is charged with the violation or act cannot be seen or heard by the child victim giving the deposition, except on a monitor provided for that purpose. The child victim giving the deposition shall be provided with a monitor on which the child victim can observe, while giving testimony, the child who is charged with the violation or act. The judge, at the judge's discretion, may preside at the deposition by electronic means from outside the room in which the deposition is to be taken; if the judge presides by electronic means, the judge shall be provided with monitors on which the judge can see each person in the room in which the deposition is to be taken and with an electronic means of communication with each person in that room, and each person in the room shall be provided with a monitor on which that person can see the judge and with an electronic means of communication with the judge. A deposition that is videotaped under this division shall be taken and filed in the manner described in division (A)(2) of this section and is admissible in the manner described in this division and division (B) of this section, and, if a deposition that is videotaped under this division is admitted as evidence at the proceeding, the child victim shall not be required to testify in person at the proceeding. No deposition videotaped under this division shall be admitted as evidence at any proceeding unless division (B) of this section is satisfied relative to the deposition and all of the following apply relative to the recording:

- (a)** The recording is both aural and visual and is recorded on film or videotape, or by other electronic means.
- (b)** The recording is authenticated under the Rules of Evidence and the Rules of Criminal Procedure as a fair and accurate representation of what occurred, and the recording is not altered other than at the direction and under the supervision of the judge in the proceeding.
- (c)** Each voice on the recording that is material to the testimony on the recording or the making of the recording, as determined by the judge, is identified.
- (d)** Both the prosecution and the child who is charged with the violation or act are afforded an opportunity to view the recording before it is shown in the proceeding.

(B)

(1) At any proceeding in relation to which a deposition was taken under division (A) of this section, the deposition or a part of it is admissible in evidence upon motion of the prosecution if the testimony in the deposition or the part to be admitted is not excluded by the hearsay rule and if the deposition or the part to be admitted otherwise is admissible under the Rules of Evidence. For purposes of this division, testimony is not excluded by the hearsay rule if the testimony is not hearsay under Evidence Rule 801; if the testimony is within an exception to the hearsay rule set forth in Evidence Rule 803; if the child victim who gave the testimony is unavailable as a witness, as defined in Evidence Rule 804, and the testimony is admissible under that rule; or if both of the following apply:

(a) The child who is charged with the violation or act had an opportunity and similar motive at the time of the taking of the deposition to develop the testimony by direct, cross, or redirect examination.

(b) The judge determines that there is reasonable cause to believe that, if the child victim who gave the testimony in the deposition were to testify in person at the proceeding, the child victim would experience serious emotional trauma as a result of the child victim's participation at the proceeding.

(2) Objections to receiving in evidence a deposition or a part of it under division (B) of this section shall be made as provided in civil actions.

(3) The provisions of divisions (A) and (B) of this section are in addition to any other provisions of the Revised Code, the Rules of Juvenile Procedure, the Rules of Criminal Procedure, or the Rules of Evidence that pertain to the taking or admission of depositions in a juvenile court proceeding and do not limit the admissibility under any of those other provisions of any deposition taken under division (A) of this section or otherwise taken.

(C) In any proceeding in juvenile court involving a complaint, indictment, or information in which a child is charged with a violation listed in division (A)(2) of this section or an act that would be an offense of violence if committed by an adult and in which an alleged victim of the violation or offense was a child who was less than thirteen years of age when the complaint or information was filed or indictment was returned, the prosecution may file a motion with the juvenile judge requesting the judge to order the testimony of the child victim to be taken in a room other than the room in which the proceeding is being conducted and be televised, by closed circuit equipment, into the room in which the proceeding is being conducted to be viewed by the child who is charged with the violation or act and any other persons who are not permitted in the room in which the testimony is to be taken but who would have been present during the testimony of the child victim had it been given in the room in which the proceeding is being conducted. Except for good cause shown, the prosecution shall file a motion under this division at least seven days before the date of the proceeding. The juvenile judge may issue the order upon the motion of the prosecution filed under this division, if the judge determines that the child victim is unavailable to testify in the room in which the proceeding is being conducted in the physical presence of the child charged with the violation or act, due to one or more of the reasons set forth in division (E) of this section. If a juvenile judge issues an order of that nature, the judge shall exclude from the room in which the testimony is to be taken every person except a person described in division (A)(3) of this section. The judge, at the judge's discretion, may preside during the giving of the testimony by electronic means from outside the room in which it is being given, subject to the limitations set forth in division (A)(3) of this section. To the extent feasible, any person operating the televising equipment shall be hidden from the sight and hearing of the child victim giving the testimony, in a manner similar to that described in division (A)(3) of this section. The child who is charged with the violation or act shall be permitted to observe and hear the testimony of the child victim giving the testimony on a monitor, shall be provided with an electronic means of immediate communication with the attorney of the child who is charged with the violation or act during the testimony, and shall be restricted to a location from which the child who is charged with the violation or act cannot be seen or heard by the child victim giving the testimony, except on a monitor provided for that purpose. The child victim giving the testimony shall be provided with a

monitor on which the child victim can observe, while giving testimony, the child who is charged with the violation or act.

(D) In any proceeding in juvenile court involving a complaint, indictment, or information in which a child is charged with a violation listed in division (A)(2) of this section or an act that would be an offense of violence if committed by an adult and in which an alleged victim of the violation or offense was a child who was less than thirteen years of age when the complaint or information was filed or the indictment was returned, the prosecution may file a motion with the juvenile judge requesting the judge to order the testimony of the child victim to be taken outside of the room in which the proceeding is being conducted and be recorded for showing in the room in which the proceeding is being conducted before the judge, the child who is charged with the violation or act, and any other persons who would have been present during the testimony of the child victim had it been given in the room in which the proceeding is being conducted. Except for good cause shown, the prosecution shall file a motion under this division at least seven days before the date of the proceeding. The juvenile judge may issue the order upon the motion of the prosecution filed under this division, if the judge determines that the child victim is unavailable to testify in the room in which the proceeding is being conducted in the physical presence of the child charged with the violation or act, due to one or more of the reasons set forth in division (E) of this section. If a juvenile judge issues an order of that nature, the judge shall exclude from the room in which the testimony is to be taken every person except a person described in division (A)(3) of this section. To the extent feasible, any person operating the recording equipment shall be hidden from the sight and hearing of the child victim giving the testimony, in a manner similar to that described in division (A)(3) of this section. The child who is charged with the violation or act shall be permitted to observe and hear the testimony of the child victim giving the testimony on a monitor, shall be provided with an electronic means of immediate communication with the attorney of the child who is charged with the violation or act during the testimony, and shall be restricted to a location from which the child who is charged with the violation or act cannot be seen or heard by the child victim giving the testimony, except on a monitor provided for that purpose. The child victim giving the testimony shall be provided with a monitor on which the child victim can observe, while giving testimony, the child who is charged with the violation or act. No order for the taking of testimony by recording shall be issued under this division unless the provisions set forth in divisions (A)(3)(a), (b), (c), and (d) of this section apply to the recording of the testimony.

(E) For purposes of divisions (C) and (D) of this section, a juvenile judge may order the testimony of a child victim to be taken outside of the room in which a proceeding is being conducted if the judge determines that the child victim is unavailable to testify in the room in the physical presence of the child charged with the violation or act due to one or more of the following circumstances:

- (1)** The persistent refusal of the child victim to testify despite judicial requests to do so;
- (2)** The inability of the child victim to communicate about the alleged violation or offense because of extreme fear, failure of memory, or another similar reason;
- (3)** The substantial likelihood that the child victim will suffer serious emotional trauma from so testifying.

(F)

(1) If a juvenile judge issues an order pursuant to division (C) or (D) of this section that requires the testimony of a child victim in a juvenile court proceeding to be taken outside of the room in which the proceeding is being conducted, the order shall specifically identify the child victim to whose testimony it applies, the order applies only during the testimony of the specified child victim, and the child victim giving the testimony shall not be required to testify at the proceeding other than in accordance with the order. The authority of a judge to close the taking of a deposition under division (A)(3) of this section or a proceeding under division (C) or (D) of this section is in addition to the authority of a judge to close a hearing pursuant to section 2151.35 of the Revised Code.

(2) A juvenile judge who makes any determination regarding the admissibility of a deposition under divisions (A) and (B) of this section, the videotaping of a deposition under division (A)(3) of this section, or the taking of testimony outside of the room in which a proceeding is being conducted under division (C) or (D) of this section, shall enter the determination and findings on the record in the proceeding.

Ohio Rev. Code Ann. § 2945.481 Deposition of child victim; videotaping; testimony taken outside courtroom and televised into it or replayed in courtroom.

(A)

(1) As used in this section, "victim" includes any person who was a victim of a violation identified in division (A)(2) of this section or an offense of violence or against whom was directed any conduct that constitutes, or that is an element of, a violation identified in division (A)(2) of this section or an offense of violence.

(2) In any proceeding in the prosecution of a charge of a violation of section 2905.03, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.09, 2907.21, 2907.23, 2907.24, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, or 2919.22 of the Revised Code or an offense of violence and in which an alleged victim of the violation or offense was a child who was less than thirteen years of age when the complaint, indictment, or information was filed, whichever occurred earlier, the judge of the court in which the prosecution is being conducted, upon motion of an attorney for the prosecution, shall order that the testimony of the child victim be taken by deposition. The prosecution also may request that the deposition be videotaped in accordance with division (A)(3) of this section. The judge shall notify the child victim whose deposition is to be taken, the prosecution, and the defense of the date, time, and place for taking the deposition. The notice shall identify the child victim who is to be examined and shall indicate whether a request that the deposition be videotaped has been made. The defendant shall have the right to attend the deposition and the right to be represented by counsel. Depositions shall be taken in the manner provided in civil cases, except that the judge shall preside at the taking of the deposition and shall rule at that time on any objections of the prosecution or the attorney for the defense. The prosecution and the attorney for the defense shall have the right, as at trial, to full examination and cross-examination of the child victim whose deposition is to be taken. If a deposition taken under this division is intended to be offered as evidence in the proceeding, it shall be filed in the

court in which the action is pending and is admissible in the manner described in division (B) of this section. If a deposition of a child victim taken under this division is admitted as evidence at the proceeding under division (B) of this section, the child victim shall not be required to testify in person at the proceeding. However, at any time before the conclusion of the proceeding, the attorney for the defense may file a motion with the judge requesting that another deposition of the child victim be taken because new evidence material to the defense has been discovered that the attorney for the defense could not with reasonable diligence have discovered prior to the taking of the admitted deposition. A motion for another deposition shall be accompanied by supporting affidavits. Upon the filing of a motion for another deposition and affidavits, the court may order that additional testimony of the child victim relative to the new evidence be taken by another deposition. If the court orders the taking of another deposition under this provision, the deposition shall be taken in accordance with this division; if the admitted deposition was a videotaped deposition taken in accordance with division (A)(3) of this section, the new deposition also shall be videotaped in accordance with that division and in other cases, the new deposition may be videotaped in accordance with that division.

(3) If the prosecution requests that a deposition to be taken under division (A)(2) of this section be videotaped, the judge shall order that the deposition be videotaped in accordance with this division. If a judge issues an order that the deposition be videotaped, the judge shall exclude from the room in which the deposition is to be taken every person except the child victim giving the testimony, the judge, one or more interpreters if needed, the attorneys for the prosecution and the defense, any person needed to operate the equipment to be used, one person chosen by the child victim giving the deposition, and any person whose presence the judge determines would contribute to the welfare and well-being of the child victim giving the deposition. The person chosen by the child victim shall not be a witness in the proceeding and, both before and during the deposition, shall not discuss the testimony of the child victim with any other witness in the proceeding. To the extent feasible, any person operating the recording equipment shall be restricted to a room adjacent to the room in which the deposition is being taken, or to a location in the room in which the deposition is being taken that is behind a screen or mirror, so that the person operating the recording equipment can see and hear, but cannot be seen or heard by, the child victim giving the deposition during the deposition. The defendant shall be permitted to observe and hear the testimony of the child victim giving the deposition on a monitor, shall be provided with an electronic means of immediate communication with the defendant's attorney during the testimony, and shall be restricted to a location from which the defendant cannot be seen or heard by the child victim giving the deposition, except on a monitor provided for that purpose. The child victim giving the deposition shall be provided with a monitor on which the child victim can observe, during the testimony, the defendant. The judge, at the judge's discretion, may preside at the deposition by electronic means from outside the room in which the deposition is to be taken; if the judge presides by electronic means, the judge shall be provided with monitors on which the judge can see each person in the room in which the deposition is to be taken and with an electronic means of communication with each person, and each person in the room shall be provided with a monitor on which that person can see the judge and with an electronic means of communication with the judge. A deposition that is

videotaped under this division shall be taken and filed in the manner described in division (A)(2) of this section and is admissible in the manner described in this division and division (B) of this section, and, if a deposition that is videotaped under this division is admitted as evidence at the proceeding, the child victim shall not be required to testify in person at the proceeding. No deposition videotaped under this division shall be admitted as evidence at any proceeding unless division (B) of this section is satisfied relative to the deposition and all of the following apply relative to the recording:

- (a)** The recording is both aural and visual and is recorded on film or videotape, or by other electronic means.
- (b)** The recording is authenticated under the Rules of Evidence and the Rules of Criminal Procedure as a fair and accurate representation of what occurred, and the recording is not altered other than at the direction and under the supervision of the judge in the proceeding.
- (c)** Each voice on the recording that is material to the testimony on the recording or the making of the recording, as determined by the judge, is identified.
- (d)** Both the prosecution and the defendant are afforded an opportunity to view the recording before it is shown in the proceeding.

(B)

(1) At any proceeding in a prosecution in relation to which a deposition was taken under division (A) of this section, the deposition or a part of it is admissible in evidence upon motion of the prosecution if the testimony in the deposition or the part to be admitted is not excluded by the hearsay rule and if the deposition or the part to be admitted otherwise is admissible under the Rules of Evidence. For purposes of this division, testimony is not excluded by the hearsay rule if the testimony is not hearsay under Evid.R. 801; if the testimony is within an exception to the hearsay rule set forth in Evid.R. 803; if the child victim who gave the testimony is unavailable as a witness, as defined in Evid.R. 804, and the testimony is admissible under that rule; or if both of the following apply:

- (a)** The defendant had an opportunity and similar motive at the time of the taking of the deposition to develop the testimony by direct, cross, or redirect examination.
- (b)** The judge determines that there is reasonable cause to believe that, if the child victim who gave the testimony in the deposition were to testify in person at the proceeding, the child victim would experience serious emotional trauma as a result of the child victim's participation at the proceeding.

(2) Objections to receiving in evidence a deposition or a part of it under division (B) of this section shall be made as provided in civil actions.

(3) The provisions of divisions (A) and (B) of this section are in addition to any other provisions of the Revised Code, the Rules of Criminal Procedure, or the Rules of Evidence that pertain to the taking or admission of depositions in a criminal proceeding and do not limit the

admissibility under any of those other provisions of any deposition taken under division (A) of this section or otherwise taken.

(C) In any proceeding in the prosecution of any charge of a violation listed in division (A)(2) of this section or an offense of violence and in which an alleged victim of the violation or offense was a child who was less than thirteen years of age when the complaint, indictment, or information was filed, whichever occurred earlier, the prosecution may file a motion with the judge requesting the judge to order the testimony of the child victim to be taken in a room other than the room in which the proceeding is being conducted and be televised, by closed circuit equipment, into the room in which the proceeding is being conducted to be viewed by the jury, if applicable, the defendant, and any other persons who are not permitted in the room in which the testimony is to be taken but who would have been present during the testimony of the child victim had it been given in the room in which the proceeding is being conducted. Except for good cause shown, the prosecution shall file a motion under this division at least seven days before the date of the proceeding. The judge may issue the order upon the motion of the prosecution filed under this section, if the judge determines that the child victim is unavailable to testify in the room in which the proceeding is being conducted in the physical presence of the defendant, for one or more of the reasons set forth in division (E) of this section. If a judge issues an order of that nature, the judge shall exclude from the room in which the testimony is to be taken every person except a person described in division (A)(3) of this section. The judge, at the judge's discretion, may preside during the giving of the testimony by electronic means from outside the room in which it is being given, subject to the limitations set forth in division (A)(3) of this section. To the extent feasible, any person operating the televising equipment shall be hidden from the sight and hearing of the child victim giving the testimony, in a manner similar to that described in division (A)(3) of this section. The defendant shall be permitted to observe and hear the testimony of the child victim giving the testimony on a monitor, shall be provided with an electronic means of immediate communication with the defendant's attorney during the testimony, and shall be restricted to a location from which the defendant cannot be seen or heard by the child victim giving the testimony, except on a monitor provided for that purpose. The child victim giving the testimony shall be provided with a monitor on which the child victim can observe, during the testimony, the defendant.

(D) In any proceeding in the prosecution of any charge of a violation listed in division (A)(2) of this section or an offense of violence and in which an alleged victim of the violation or offense was a child who was less than thirteen years of age when the complaint, indictment, or information was filed, whichever occurred earlier, the prosecution may file a motion with the judge requesting the judge to order the testimony of the child victim to be taken outside of the room in which the proceeding is being conducted and be recorded for showing in the room in which the proceeding is being conducted before the judge, the jury, if applicable, the defendant, and any other persons who would have been present during the testimony of the child victim had it been given in the room in which the proceeding is being conducted. Except for good cause shown, the prosecution shall file a motion under this division at least seven days before the date of the proceeding. The judge may issue the order upon the motion of the prosecution filed under this division, if the judge determines that the child victim is unavailable to testify in the room in which the proceeding is being conducted in the physical presence of the defendant, for one or more of the reasons set forth in division (E) of this section. If a judge issues an order of that nature, the judge shall exclude from the room in which the testimony is to be taken every person except a person described in division (A)(3) of this section. To

the extent feasible, any person operating the recording equipment shall be hidden from the sight and hearing of the child victim giving the testimony, in a manner similar to that described in division (A)(3) of this section. The defendant shall be permitted to observe and hear the testimony of the child victim who is giving the testimony on a monitor, shall be provided with an electronic means of immediate communication with the defendant's attorney during the testimony, and shall be restricted to a location from which the defendant cannot be seen or heard by the child victim giving the testimony, except on a monitor provided for that purpose. The child victim giving the testimony shall be provided with a monitor on which the child victim can observe, during the testimony, the defendant. No order for the taking of testimony by recording shall be issued under this division unless the provisions set forth in divisions (A)(3)(a), (b), (c), and (d) of this section apply to the recording of the testimony.

(E) For purposes of divisions (C) and (D) of this section, a judge may order the testimony of a child victim to be taken outside the room in which the proceeding is being conducted if the judge determines that the child victim is unavailable to testify in the room in the physical presence of the defendant due to one or more of the following:

- (1)** The persistent refusal of the child victim to testify despite judicial requests to do so;
- (2)** The inability of the child victim to communicate about the alleged violation or offense because of extreme fear, failure of memory, or another similar reason;
- (3)** The substantial likelihood that the child victim will suffer serious emotional trauma from so testifying.

(F)

(1) If a judge issues an order pursuant to division (C) or (D) of this section that requires the testimony of a child victim in a criminal proceeding to be taken outside of the room in which the proceeding is being conducted, the order shall specifically identify the child victim to whose testimony it applies, the order applies only during the testimony of the specified child victim, and the child victim giving the testimony shall not be required to testify at the proceeding other than in accordance with the order.

(2) A judge who makes any determination regarding the admissibility of a deposition under divisions (A) and (B) of this section, the videotaping of a deposition under division (A)(3) of this section, or the taking of testimony outside of the room in which a proceeding is being conducted under division (C) or (D) of this section, shall enter the determination and findings on the record in the proceeding.

Ohio Rev. Code Ann. § 2945.49 Testimony of deceased or absent witness; videotaped preliminary hearing testimony of child victim.

(A)

(1) As used in this section, "victim" includes any person who was a victim of a felony violation identified in division (B)(1) of this section or a felony offense of violence or against whom was

directed any conduct that constitutes, or that is an element of, a felony violation identified in division (B)(1) of this section or a felony offense of violence.

(2) Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving the testimony dies or cannot for any reason be produced at the trial or whenever the witness has, since giving that testimony, become incapacitated to testify. If the former testimony is contained within an authenticated transcript of the testimony, it shall be proven by the transcript, otherwise by other testimony.

(B)

(1) At a trial on a charge of a felony violation of section 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.21, 2907.24, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, or 2919.22 of the Revised Code or a felony offense of violence and in which an alleged victim of the alleged violation or offense was less than thirteen years of age when the complaint or information was filed, whichever occurred earlier, the court, upon motion of the prosecutor in the case, may admit videotaped preliminary hearing testimony of the child victim as evidence at the trial, in lieu of the child victim appearing as a witness and testifying at the trial, if all of the following apply:

(a) The videotape of the testimony was made at the preliminary hearing at which probable cause of the violation charged was found;

(b) The videotape of the testimony was made in accordance with division (C) of section 2937.11 of the Revised Code;

(c) The testimony in the videotape is not excluded by the hearsay rule and otherwise is admissible under the Rules of Evidence. For purposes of this division, testimony is not excluded by the hearsay rule if the testimony is not hearsay under Evid.R. 801, if the testimony is within an exception to the hearsay rule set forth in Evid.R. 803, if the child victim who gave the testimony is unavailable as a witness, as defined in Evid.R. 804, and the testimony is admissible under that rule, or if both of the following apply:

(i) The accused had an opportunity and similar motive at the preliminary hearing to develop the testimony of the child victim by direct, cross, or redirect examination;

(ii) The court determines that there is reasonable cause to believe that if the child victim who gave the testimony at the preliminary hearing were to testify in person at the trial, the child victim would experience serious emotional trauma as a result of the child victim's participation at the trial.

(2) If a child victim of an alleged felony violation of section 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.21, 2907.24, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, or 2919.22 of the Revised Code or an alleged felony offense of violence testifies at the preliminary hearing in the case, if the testimony of the child victim at the preliminary

hearing was videotaped pursuant to division (C) of section 2937.11 of the Revised Code, and if the defendant in the case files a written objection to the use, pursuant to division (B)(1) of this section, of the videotaped testimony at the trial, the court, immediately after the filing of the objection, shall hold a hearing to determine whether the videotaped testimony of the child victim should be admissible at trial under division (B)(1) of this section and, if it is admissible, whether the child victim should be required to provide limited additional testimony of the type described in this division. At the hearing held pursuant to this division, the defendant and the prosecutor in the case may present any evidence that is relevant to the issues to be determined at the hearing, but the child victim shall not be required to testify at the hearing. After the hearing, the court shall not require the child victim to testify at the trial, unless it determines that both of the following apply:

(a) That the testimony of the child victim at trial is necessary for one or more of the following reasons:

(i) Evidence that was not available at the time of the testimony of the child victim at the preliminary hearing has been discovered;

(ii) The circumstances surrounding the case have changed sufficiently to necessitate that the child victim testify at the trial.

(b) That the testimony of the child victim at the trial is necessary to protect the right of the defendant to a fair trial. The court shall enter its finding and the reasons for it in the journal. If the court requires the child victim to testify at the trial, the testimony of the victim shall be limited to the new evidence and changed circumstances, and the child victim shall not otherwise be required to testify at the trial. The required testimony of the child victim may be given in person or, upon motion of the prosecution, may be taken by deposition in accordance with division (A) of section 2945.481 of the Revised Code provided the deposition is admitted as evidence under division (B) of that section, may be taken outside of the courtroom and televised into the courtroom in accordance with division (C) of that section, or may be taken outside of the courtroom and recorded for showing in the courtroom in accordance with division (D) of that section.

(3) If videotaped testimony of a child victim is admitted at trial in accordance with division (B)(1) of this section, the child victim shall not be compelled in any way to appear as a witness at the trial, except as provided in division (B)(2) of this section.

(C) An order issued pursuant to division (B) of this section shall specifically identify the child victim concerning whose testimony it pertains. The order shall apply only during the testimony of the child victim it specifically identifies.

(D) As used in this section, "prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

Cases

Key Points:

- Even very young children (such as four-year-olds) may be considered competent to testify, if the requisite factors are met.
- A child victim's out-of-court statements given to a medical professional, when evidence shows they were made in pursuit of treatment and/or diagnosis, are nontestimonial and admissible.
- A child victim may be allowed to testify via closed-circuit television when evidence shows delivering in-person testimony would traumatize them further.

"Defendant appealed his convictions of murder and attempted murder that were based on the testimony of his four-year-old child who had survived being shot. The trial court conducted a thorough competency evaluation considering the factors laid out in *Frazier*, and determined that **the victim was competent to testify despite being unable to recall her birthday or her brother's age because she answered many other questions correctly like the names of her siblings and mother, television characters, and what she received for Christmas.** *Id.* at 1166. Additionally, the trial court determined the child's active imagination and belief in Santa Claus and the boogeyman did not indicate she was incompetent to testify. *Id.* In upholding the trial court's decision, the Court of Appeals of Ohio noted that **"[the child's] responses did not indicate that she was unable to perceive or relate facts or that she did not understand her responsibility to be truthful."** *Id.* at 1167." *State v. Anderson*, 798 N.E.2d 1155 (Ohio Ct. App. 2003) (emphasis added).

"In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful." *State v. Frazier*, 574 N.E.2d 483, 487 (Ohio 1991) (emphasis added).

In *State v. Muttart*, the Supreme Court of Ohio held that the trial court properly found the child victim's statements to be admissible under the medical exception to hearsay, and that the statements were non-testimonial in nature, thus not violating defendant's right to confrontation. *State v. Muttart*, 875 N.E.2d 944 (Ohio 2007). The Court noted that during the interview, the child knew she was in a medical facility, was not asked leading questions, and the treating doctor relied heavily upon her statements. *Id.* Thus, the trial court properly admitted them under the medical exception. *Id.* The Court was not persuaded in regard to the defendant's second argument: that the statements were testimonial and thus violated his right to confrontation. *Id.* The Court pointed to the absence of any intent to preserve the child's statements for trial, and the overwhelming evidence that all interviews and statements were received in an effort to medically diagnose the child and provide treatment. *Id.*

In *State v. Remy*, the Court of Appeals of Ohio held that the trial court properly allowed the child victim to testify via closed-circuit television. *State v. Remy*, 117 N.E.3d 916 (Ohio Ct. App. 2018). The Court noted that the child victim exhibited intense trauma, evidenced in her severe behavioral issues and suicidal ideation. *Id.* Furthermore, the Court took into account the child victim's therapist who testified in regard to the severity of abuse the child suffered -- specifically, the therapist spoke about the child being gagged and having developed a trauma response of being unable to speak in front of defendants. *Id.* Thus, the Court found that the State had sufficiently set a foundation in order to request the child be able to testify via closed-circuit television. *Id.*

Ohio Hearsay Exceptions

OH. STAT. REV. Evid. R. Rule 803. Exceptions to the rule against hearsay -- regardless of whether the declarant is available as a witness.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.
- (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.
- (3) ***Then Existing, Mental, Emotional, or Physical Condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) ***Recorded Recollection.*** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of Entry in Record Kept in Accordance with the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law

(10) **Absence of Public Record.** Testimony -- or a certification under Evid.R. 901(B) (10) -- that a diligent search failed to disclose a public record or statement if:

(a) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(b) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice -- unless the court sets a different time for the notice or the objection.

(11) **Records of Religious Organizations.** 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.** 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.** Statements of fact concerning 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** 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 twenty years or more the authenticity of which 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** Reputation of a person's character among the person's associates or in the community.

(22) **Judgment of Previous Conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

OH. STAT. REV. Evid. R. Rule 804. Hearsay exceptions; declarant unavailable.

(A) **Definition of Unavailability.** "Unavailability as a witness" includes any of the following situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- (3) testifies to a lack of memory of the subject matter of the declarant's statement;
- (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;
- (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) *Statement Under Belief of Impending Death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) *Statement Against Interest.* A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.*

(a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or

(b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Statement by a Deceased or Incompetent Person.* The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

(6) *Forfeiture by Wrongdoing.* A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

OH. STAT. REV. Evid. R. Rule 807. Hearsay exceptions; child statements in abuse cases.

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual activity performed, or attempted to be performed, by, with, or on the child or describing any act or attempted act of physical harm directed against the child's person is not excluded as hearsay under Evid.R. 802 if all of the following apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual activity or attempted sexual activity, or of the act or attempted act of physical harm directed against the child's person;

(2) The child's testimony is not reasonably obtainable by the proponent of the statement;

(3) There is independent proof of the sexual activity or attempted sexual activity, or of the act or attempted act of physical harm directed against the child's person;

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:

(a) the child is absent from the trial or hearing;

(b) the proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;

(c) it is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:

(a) the child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;

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

The proponent of the statement has not established that the child's testimony or attendance is not reasonably obtainable if the child's refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

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

OH ST REV Evid. Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- Admission of a child victim's statement that counts as a hearsay exception does not violate a defendant's right to confrontation, and the state need not demonstrate the victim's unavailability.
- When statements are subject to a hearsay exception, a trial court can admit them without need to find the child competent to testify.
- A child victim's out-of-court statements regarding abuse may be admissible as an excited utterance exception to hearsay, though a later statement made to a police officer (and resulting testimony) may not count under this exception.

The Ohio Supreme Court has held that in cases involving children's hearsay statements introduced in prosecution of the children's alleged abusers, if the statement at issue falls within firmly rooted hearsay exception, its admission does not violate a defendant's right to confrontation, and the

prosecution is not required to demonstrate the unavailability of the child. *State v. Dever*, 64 Ohio St. 3d 401, 596 N.E.2d 436 (Ohio 1992).

Additionally, when statements are subject to an exception to the hearsay rule, such as the excited utterance exception, a trial court does not need to find the child competent to testify prior to the admission of such statements. *State v. Rice*, 2005 WL 1541007 (Ohio Ct. App. 2005).

In *State v. F.R.*, the Ohio Court of Appeals held that the admission of a child's out-of-court statements to her mother and friend regarding the abuse by the defendant was permissible under the excited utterance exception to hearsay. However, the police officer's testimony regarding the child's interview with him was not admissible (although its admission was a harmless error). *State v. F.R.*, 34 N.E.3d 498 (Ohio Ct. App. 2015).

Oklahoma

Oklahoma Admissibility

10A Okla. Stat. Ann. § 1-4-505. Applicability of Section—Admissibility of Child Statement Recorded before Proceedings Begin

A. This section shall apply only to a proceeding brought within the purview of the Oklahoma Children's Code in which a child twelve (12) years of age or younger is alleged to be deprived, and shall apply only to the statement of that child or another child witness.

B. The recording of an oral statement of the child made before the proceedings begin is admissible into evidence if:

1. The court determines in a hearing conducted outside the presence of the jury that the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy. In determining trustworthiness, the court may consider, among other things, the following factors: the spontaneity and consistent repetition of the statement, the mental state of the declarant, whether the terminology used is unexpected of a child of similar age or of an incapacitated person, and whether a lack of motive to fabricate exists; and the child either:

a. testifies or is available to testify at the proceedings in open court or through an alternative method pursuant to the provisions of the Uniform Child Witness Testimony by Alternative Methods Actor Section 2611.2 of Title 12 of the Oklahoma Statutes, or

b. is unavailable as a witness as defined in Section 2804 of Title 12 of the Oklahoma Statutes. When the child is unavailable, such statement may be admitted only if there is corroborative evidence of the act;

2. No attorney for any party is present when the statement is made. However, if appropriate facilities are utilized that allow observation of the child without the child's knowledge or awareness in any way, any such attorney may be present as an observer, but not as a participant, and no such attorney shall have any right to intervene, object, or otherwise make his or her presence known to the child before, after, or during the making of the statement of the child;

3. The recording is both visual and aural and is recorded on film or videotape or by other electronic means;

4. The recording equipment is capable of making an accurate recording, the operator of the equipment is competent, and the recording is accurate and has not been altered;

5. The statement is not made in response to questioning calculated to lead the child to make a particular statement or is otherwise clearly shown to be the child's statement and not made solely as a result of a leading or suggestive question;
6. Every voice on the recording is identified;
7. The person conducting the interview of the child in the recording is present at the proceeding and is available to testify or be cross-examined by any party;
8. Each party to the proceeding is afforded an opportunity to view the recording before the recording is offered into evidence; and
9. A copy of a written transcript of the recording transcribed by a licensed or certified court reporter is available to the parties. A statement may not be admitted under this subsection unless the proponent of the statement makes known to the parties an intention to offer the statement and the particulars of the statement at least ten (10) days in advance of the proceedings to provide the parties with an opportunity to prepare to answer the statement.

10A Okla. Stat. Ann. § 1-4-506. Testimony of Child Taken in Room Other than Courtroom—Court Order

A. This section shall apply only to a proceeding brought under the Oklahoma Children" Code in which a child at the time of the testimony is alleged to be deprived, and shall apply only to the testimony of that child or other child witness.

B.

1. When appropriate facilities are reasonably available, the court shall, on the motion of a party to the proceeding, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom for review by:

- a. the court,
- b. the finder of fact, and
- c. the parties to the proceeding.

2. Only an attorney for each party, an attorney ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child, and persons necessary to operate the equipment may be present in the room with the child during the testimony of the child.

3. Only the attorneys for the parties may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during the testimony of the child, but does not permit the child to see or hear them.

C.

1. The court shall, on the motion of a party to the proceeding, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before:

- a. the court,
- b. the finder of fact, and
- c. the parties to the proceeding.

2. Only those persons permitted to be present at the taking of testimony under subsection B of this section may be present during the taking of the child's testimony.

3. Only the attorneys for the parties may question the child, and the persons operating the equipment shall be confined from the child's sight and hearing. The court shall ensure that:

- a. the recording is both visual and aural and is recorded on film or videotape or by other electronic means,
- b. the recording equipment is capable of making an accurate recording, the operator of the equipment is competent, and the recording is accurate and has not been altered,
- c. every voice on the recording is identified, and
- d. each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom, and a copy of a written transcript transcribed by a licensed or certified court reporter is provided to the parties.

D. If the testimony of a child is taken as provided by subsection B or C of this section, the child shall not be compelled to testify in court during the proceeding.

E. If the testimony of a child is taken as provided in subsection B or C of this section, the attorney for any parent shall, on request, be permitted a recess of sufficient length to allow the attorney to consult with his or her client prior to conclusion of the testimony.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors to evaluate its trustworthiness.
- Indicia of unreliability can render an out-of-court statement inadmissible.

In *In re K.U.*, the Court of Civil Appeals of Oklahoma held that the trial court properly admitted the child victim's out-of-court statements after finding sufficient indicia of reliability. *In re K.U.*, 140 P.3d 568 (Okla. Civ. App. 2006). The child's statements were made spontaneously during a forensic interview at her elementary school with a social worker and school counselor. *Id.* Trustworthiness

may be evaluated through the following factors: "the spontaneity and consistent repetition of the statement, the mental state of the declarant, whether the terminology used is unexpected of a child of similar age or of an incapacitated person, and whether a lack of motive to fabricate exists." *Id.* The Court denied the defendant's argument that trustworthiness must be determined solely through the victim's testimony. *Id.* Rather, the Court noted that "enumerated factors clearly anticipate the trial court's reliance on witnesses other than the minor child in gleaning information about the time, content, and circumstances surrounding the taking of the out-of-court statements." *Id.*

In *In re P.F.*, the Court of Civil Appeals of Oklahoma held that the trial court erred in admitting the child victim's video recorded forensic interview that had been conducted by two different interviewers. *In re P.F.*, 118 P.3d 224 (Okla. Civ. App. 2005). Prior to the child's interview, the scheduled forensic interviewer was absent, so a substitute interviewer conducted the interview. *Id.* This interviewer did not discuss their credentials, nor did they testify. *Id.* The interviewer, despite asking leading questions over an extended period of time, was unable to elicit incriminating details from the child. *Id.* Additionally, the interviewer left the room twice, leaving the child alone. During this time, a child welfare worker entered twice, encouraging the child to disclose. *Id.* After the second time the substitute forensic interviewer left, the child welfare worker took over and was able to elicit incriminating statements from the child. *Id.* The Court noted that the video recorded interview should not have been admitted because: 1) the child welfare worker testified that she was present for the entirety of the interview, but was not identified during the interview, 2) the child welfare worker was not qualified to conduct a forensic interview, 3) the substitute interviewer did not testify, and 4) the substitute interviewer did not demonstrate their qualifications during the interview. *Id.* Thus, the Court found that the video recorded interview was not reliable and consequently inadmissible. *Id.*

Oklahoma Hearsay Exceptions

12 Okla. Stat. Ann. § 2803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- 1. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter;**
- 2. 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;**
- 3. A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and 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 made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, if reasonably pertinent to diagnosis or treatment;

5. A record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. The record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party;

6. A record of acts, events, conditions, opinions or diagnosis, made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with paragraph 11 or 12 of Section 2902 of this title, or with a statute providing for certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit. A public record inadmissible under paragraph 8 of this section is inadmissible under this exception;

7. Evidence that a matter is not included in records kept in accordance with the provisions of paragraph 6 of this section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a record was regularly made and preserved, or by certification that complies with paragraph 11 or 12 of Section 2902 of this title, or with a statute providing for certification, unless the sources of information or other circumstances indicate lack of trustworthiness;

8. To the extent not otherwise provided in this paragraph, a record of a public office or agency setting forth its regularly conducted and regularly recorded activities or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual finding resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

- a.** investigative reports by police and other law enforcement personnel,
- b.** investigative reports prepared by or for a government, a public office or agency when offered by it in a case in which it is a party,
- c.** factual findings offered by the government in criminal cases,
- d.** factual findings resulting from special investigation of a particular complaint, case or incident, or
- e.** any matter as to which the sources of information or other circumstances indicate lack of trustworthiness;

9. Records of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to statutory requirements;

- 10.** To prove the absence of a record or the nonoccurrence or nonexistence of a matter of which a record was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Section 2903 of this title, or testimony, that diligent search failed to disclose the record or entry;
- 11.** 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.** Statements of fact contained in a certified record that the maker performed a marriage or other ceremony or administered a sacrament, made by a cleric, 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.** Statements of fact concerning personal or family history including those contained in family Bibles, genealogy, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, or the like;
- 14.** A public record 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 and delivered;
- 15.** A statement contained in a record purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the record unless dealings with the property since the record was made have been inconsistent with the truth of the statement or the purport of the record;
- 16.** Statements in a record in existence twenty (20) years or more, the authenticity of which is established;
- 17.** Market quotations, tabulations, lists, directories or other published or publicly recorded compilations generally used and relied upon by the public or by persons in particular occupations;
- 18.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits;
- 19.** Reputation among members of an individual's family by blood, adoption or marriage, or among the individual's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry or other similar fact of the individual's personal or family history;
- 20.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community or state or nation in which located;
- 21.** Reputation of a person's character among the person's associates or in the community;

22. Evidence of a final judgment, but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility;

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

24. A verified or declared written medical report signed by a physician, provided:

a. the report is used in an action not arising out of contract in which the claim of the plaintiff is not in excess of Twenty-five Thousand Dollars (\$25,000.00),

b. the report contains a history of the plaintiff, the complaints of the plaintiff, the physician's findings on examination, and any diagnostic tests, description and cause of the injury, and the nature and extent of any permanent impairment. All opinions expressed in the report must be based upon a reasonable degree of medical probability, and

c. the medical report must be verified or contain a written declaration, made under the penalty of perjury, that the report is true.

12 Okla. Stat. Ann. § 2803.1. Statements of children not having attained 13 years or incapacitated persons describing acts of physical abuse or sexual contact -- admissibility in criminal and juvenile proceedings.

A. A statement made by a child who has not attained thirteen (13) years of age, a child thirteen (13) years of age or older who has a disability or a person who is an incapacitated person as such term is defined by the provisions of Section 10-103 of Title 43A of the Oklahoma Statutes, which describes any act of physical abuse against the child or incapacitated person or any act of sexual contact performed with or on the child or incapacitated person by another, is admissible in criminal and juvenile proceedings in the courts in this state if:

1. The court finds, in a hearing conducted outside the presence of the jury, that the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy. In determining such trustworthiness, the court may consider, among other things, the following factors: the spontaneity and consistent repetition of the statement, the mental state of the declarant, whether the terminology used is unexpected of a child of similar age or of an incapacitated person, and whether a lack of motive to fabricate exists; and

2. The child or incapacitated person either:

a. testifies or is available to testify at the proceedings in open court or through an alternative method pursuant to the provisions of the Uniform Child Witness Testimony by Alternative Methods Act or Section 2611.2 of this title, or

b. is unavailable as defined in Section 2804 of this title as a witness. When the child or incapacitated person is unavailable, such statement may be admitted only if there is corroborative evidence of the act.

B. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at least ten (10) days in advance of the proceedings to provide the adverse party with an opportunity to prepare to answer the statement.

C. As used in this section, "disability" means a physical or mental impairment which substantially limits one or more of the major life activities of the child or the child is regarded as having such an impairment by a competent medical professional.

12 Okla. Stat. Ann. § 2804. Hearsay exception; declarant unavailable.

A. "Unavailability as a witness," as used in this section, includes the situation in which the declarant:

- 1.** Is exempt by ruling of the court on the ground of privilege from testifying concerning the subject matter or of the declarant's statement;
- 2.** Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- 3.** Testifies to a lack of memory of the subject matter of the declarant's statement;
- 4.** Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- 5.** Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or, in the case of a hearsay exception under paragraphs 2, 3 or 4 of subsection B of this section, the declarant's attendance or testimony, by process or other reasonable means. A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability or absence is due to an act by the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

B. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- 1.** Testimony given as a witness at another hearing of the same or another proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered or, in a civil action or proceeding, a predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination;
- 2.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death;

3. A statement which was at the time of its making contrary to the declarant's pecuniary or proprietary interest, or which tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, and which a reasonable person in the declarant's position would not have made unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other individual implicating both the codefendant or other individual and the accused, is not within this exception;

4. A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, ancestry, relationship to another person or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or statement concerning the foregoing matters or death of another person, if the declarant was related to that person by blood, adoption or marriage or was so intimately associated with the person's family as to be likely to have accurate information concerning the matter declared; and

5. A statement offered against a party that wrongfully caused or acquiesced in wrongfully causing the declarant's unavailability as a witness, and did so intending that result.

12 Okla. Stat. Ann. § 2804.1. Hearsay exception--exceptional circumstances.

A. In exceptional circumstances a statement not covered by Section 2803, 2804, 2805, or 2806 of this title but possessing equivalent, though not identical, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that:

- 1. The statement is offered as evidence of a fact of consequence;**
- 2. The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and**
- 3. The general purposes of this Code and the interests of justice will best be served by admission of the statement into evidence.**

B. The court shall state on the record the circumstances that support its determination of the admissibility of the statement offered pursuant to subsection A of this section.

C. A statement is not admissible under this exception unless its proponent gives to all parties' reasonable notice in advance of trial, or during trial if the court excuses pretrial notice for good cause shown, of the substance of the statement and the identity of the declarant.

12 Okl. St. Ann. § 2107. Remainder of record.

When a record or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other record that should in fairness be considered contemporaneously with it.

Cases

Key Points:

- A child victim's out-of-court video recorded statement depicting their use of anatomical dolls to describe a perpetrator's abuse can be admissible under the state of mind exception to the hearsay rule.
- A medical exception to hearsay can include a child's statements of identification or fault because an abuser's identity can be key to diagnosis and treatment of mental as well as physical health.
- An excited utterance statement is admissible when the victim made the statement immediately after the incident.
- Even if the child is deemed incompetent to testify due to age, the out-of-court hearsay exception is still admissible.

In *Huskey v. State*, the Oklahoma Court of Criminal Appeals permitted the inclusion of a video recording showing the young child playing with anatomical dolls under the state of mind exception to the hearsay rule and as a statement of a child victim describing sexual conduct with a child. *Huskey v. State*, 989 P.2d 1, 1999 Okla. Crim. 3 (Okla. Crim. App. 1999).

The same Court held in *Kennedy v. State* that statements by a three-year-old child to a physician, indicating that she had been sexually abused and identifying the defendant as the perpetrator, were such as the physician would reasonably rely on for diagnosis or treatment. The statements were therefore admissible under the medical diagnosis or treatment exception to the hearsay rule. *Kennedy v. State*, 1992 Okla. Crim. 67, 839 P.2d 667 (Okla. Crim. App. 1992).

Additionally, the court held in *Bishop v. State* that an excited utterance statement is properly admitted as testimony when the victim makes the statement immediately after the incident, and even if the child is deemed incompetent to testify due to age, the out-of-court statement is still admissible. *Bishop v. State*, 581 P.2d 45 (Okla. Crim. App., 1978).

Oregon

Oregon Admissibility

ORS § 44.547. Notice to court; accommodations.

(1) In any case in which a child under 12 years of age or a person with a developmental disability described in subsection (2) of this section is called to give testimony, the attorney or party who plans to call the witness must notify the court at least seven days before the trial or proceeding of any special accommodations needed by the witness. Upon receiving the notice, the court shall order such accommodations as are appropriate under the circumstances considering the age or disability of the witness. Accommodations ordered by the court may include:

- (a)** Break periods during the proceedings for the benefit of the witness.
- (b)** Designation of a waiting area appropriate to the special needs of the witness.
- (c)** Conducting proceedings in clothing other than judicial robes.
- (d)** Relaxing the formalities of the proceedings.
- (e)** Adjusting the layout of the courtroom for the comfort of the witness.
- (f)** Conducting the proceedings outside of the normal courtroom.

(2) For the purposes of this section, "developmental disability" means a disability attributable to mental retardation, autism, cerebral palsy, epilepsy or other disabling neurological condition that requires training or support similar to that required by persons with mental retardation, if either of the following apply:

- (a)** The disability originates before the person attains 22 years of age, or if the disability is attributable to mental retardation the condition is manifested before the person attains 18 years of age, the disability can be expected to continue indefinitely, and the disability constitutes a substantial handicap to the ability of the person to function in society.
- (b)** The disability results in a significant subaverage general intellectual functioning with concurrent deficits in adaptive behavior that are manifested during the developmental period.

Cases

Key Points:

- Dual-purpose medical and forensic interviews are admissible when evidence shows that details offered during the interviews are used for medical diagnosis and treatment.

- A child victim's self-recording of a conversation with a defendant is admissible under the "homeowners' exception" to the two-party consent rule.

In *Dep't of Hum. Serv. v. J.G.*, the Court of Appeals of Oregon denied the defendant's claim that the child victims' out-of-court statements were improperly admitted under the medical examination hearsay exception. *Dep't of Hum. Serv. v. J.G.*, 308 P.3d 296 (Or. Ct. App. 2013). The Court noted that during each interview, the Child Abuse Response and Evaluation Services (CARES) doctor told each victim that "we do the examination *and* the interview for the purposes of medical diagnoses and treatment of any medical problems that we find." *Id.* Each interview and examination was done at a medical center. *Id.* Furthermore, the interviewer and doctor worked together, were both present during all interactions with the children, and introduced themselves to each child with a description of the process and their roles. *Id.* Thus, the Court held that all statements obtained during the interviews were for medical diagnosis and treatment, making them admissible under the hearsay exception. *Id.*

In *State v. Evensen*, the Court of Appeals of Oregon held that the trial court properly admitted the child victim's self-recording of a conversation between her and the defendant on her iPhone. *State v. Evensen*, 447 P.3d 23 (Or. Ct. App. 2019). The Court noted that while normally, recorded conversations without both parties' consent are inadmissible, Oregon allows an exception entitled the "homeowners' exception." *Id.* The defendant provided the phone service for the victim, and both used the service within the home. *Id.* Furthermore, the victim was a relative to the defendant and recorded the conversation within the home. *Id.* Thus, the victim's recording of her statements and the defendant's statements were admissible under the homeowners' exception. *Id.*

Oregon Hearsay Exceptions

O.R.S. § 40.460. Rule 803. Hearsay exception; availability of declarant immaterial

The following are not excluded by ORS 40.455, even though the declarant is available as a witness:

- (1) (Reserved.)
- (2) 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.**
- (3) A statement 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 the declarant's will.**
- (4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.**

(5) A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the memory of the witness and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Evidence that a matter is not included in the memoranda, reports, records, or data compilations, and in any form, kept in accordance with the provisions of subsection (6) of this section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Records, reports, statements or data compilations, in any form, of public offices or agencies, including federally recognized American Indian tribal governments, setting forth:

(a) The activities of the office or agency;

(b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, in criminal cases, matters observed by police officers and other law enforcement personnel;

(c) In civil actions and proceedings and against the government in criminal cases, factual findings, resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness; or

(d) In civil actions and criminal proceedings, a sheriff's return of service.

(9) Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office, including a federally recognized American Indian tribal government, pursuant to requirements of law.

(10) To prove the absence of a record, report, statement or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, including a federally recognized American Indian tribal government, evidence in the form of a certification in accordance with ORS 40.510, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

(11) 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) A statement of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, a public official, an official of a federally recognized American Indian tribal government or any 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) Statements of facts concerning 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) The record of a document purporting to establish or affect an interest in property, as proof of 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, including a federally recognized American Indian tribal government, and an applicable statute authorizes the recording of documents of that kind in that office.

(15) 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 a document in existence 20 years or more the authenticity of which is established.

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

(18) (Reserved.)

(18a)

(a) A complaint of sexual misconduct, complaint of abuse as defined in ORS 107.705 or 419B.005, complaint of abuse of an elderly person, as those terms are defined in ORS 124.050, or a complaint relating to a violation of ORS 163.205 or 164.015 in which a person 65 years of age or older is the victim, made by the witness after the commission of the alleged misconduct or abuse at issue. Except as provided in paragraph (b) of this subsection, such evidence must be confined to the fact that the complaint was made.

(b) A statement made by a person concerning an act of abuse as defined in ORS 107.705 or 419B.005, a statement made by a person concerning an act of abuse of an elderly person, as those terms are defined in ORS 124.050, or a statement made by a person concerning a violation of ORS 163.205 or 164.015 in which a person 65 years of age or older is the victim, is not excluded by ORS 40.455 if the declarant either testifies at the proceeding and is subject to cross-examination, or is unavailable as a witness but was chronologically or mentally under 12 years of age when the statement was made or was 65 years of age or

older when the statement was made. However, if a declarant is unavailable, the statement may be admitted in evidence only if the proponent establishes that the time, content and circumstances of the statement provide indicia of reliability, and in a criminal trial that there is corroborative evidence of the act of abuse and of the alleged perpetrator's opportunity to participate in the conduct and that the statement possesses indicia of reliability as is constitutionally required to be admitted. No statement may be admitted under this paragraph unless the proponent of the statement makes known to the adverse party the proponent's intention to offer the statement and the particulars of the statement no later than 15 days before trial, except for good cause shown. For purposes of this paragraph, in addition to those situations described in ORS 40.465 (1), the declarant shall be considered "unavailable" if the declarant has a substantial lack of memory of the subject matter of the statement, is presently incompetent to testify, is unable to communicate about the abuse or sexual conduct because of fear or other similar reason or is substantially likely, as established by expert testimony, to suffer lasting severe emotional trauma from testifying. Unless otherwise agreed by the parties, the court shall examine the declarant in chambers and on the record or outside the presence of the jury and on the record. The examination shall be conducted immediately prior to the commencement of the trial in the presence of the attorney and the legal guardian or other suitable person as designated by the court. If the declarant is found to be unavailable, the court shall then determine the admissibility of the evidence. The determinations shall be appealable under ORS 138.045 (1)(d). The purpose of the examination shall be to aid the court in making its findings regarding the availability of the declarant as a witness and the reliability of the statement of the declarant. In determining whether a statement possesses indicia of reliability under this paragraph, the court may consider, but is not limited to, the following factors:

- (A) The personal knowledge of the declarant of the event;
- (B) The age and maturity of the declarant or extent of disability if the declarant is a person with a developmental disability;
- (C) Certainty that the statement was made, including the credibility of the person testifying about the statement and any motive the person may have to falsify or distort the statement;
- (D) Any apparent motive the declarant may have to falsify or distort the event, including bias, corruption or coercion;
- (E) The timing of the statement of the declarant;
- (F) Whether more than one person heard the statement;
- (G) Whether the declarant was suffering pain or distress when making the statement;

(H) Whether the declarant's young age or disability makes it unlikely that the declarant fabricated a statement that represents a graphic, detailed account beyond the knowledge and experience of the declarant;

(I) Whether the statement has internal consistency or coherence and uses terminology appropriate to the declarant's age or to the extent of the declarant's disability if the declarant is a person with a developmental disability;

(J) Whether the statement is spontaneous or directly responsive to questions; and

(K) Whether the statement was elicited by leading questions.

(c) This subsection applies to all civil, criminal and juvenile proceedings.

(d) This subsection applies to a child declarant, a declarant who is an elderly person as defined in ORS 124.050 or an adult declarant with a developmental disability. For the purposes of this subsection, "developmental disability" means any disability attributable to mental retardation, autism, cerebral palsy, epilepsy or other disabling neurological condition that requires training or support similar to that required by persons with mental retardation, if either of the following apply:

(A) The disability originates before the person attains 22 years of age, or if the disability is attributable to mental retardation the condition is manifested before the person attains 18 years of age, the disability can be expected to continue indefinitely, and the disability constitutes a substantial handicap to the ability of the person to function in society.

(B) The disability results in a significant subaverage general intellectual functioning with concurrent deficits in adaptive behavior that are manifested during the developmental period.

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

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

(21) Reputation of a person's character among associates of the person or in the community.

(22) Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a crime other than a traffic offense, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

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

(24) Notwithstanding the limits contained in subsection (18a) of this section, in any proceeding in which a child under 12 years of age at the time of trial, or a person with a developmental disability as described in subsection (18a)(d) of this section, may be called as a witness to testify concerning an act of abuse, as defined in ORS 419B.005, or sexual conduct performed with or on the child or person with a developmental disability by another, the testimony of the child or person with a developmental disability taken by contemporaneous examination and cross-examination in another place under the supervision of the trial judge and communicated to the courtroom by closed-circuit television or other audiovisual means. Testimony will be allowed as provided in this subsection only if the court finds that there is a substantial likelihood, established by expert testimony, that the child or person with a developmental disability will suffer severe emotional or psychological harm if required to testify in open court. If the court makes such a finding, the court, on motion of a party, the child, the person with a developmental disability or the court in a civil proceeding, or on motion of the district attorney, the child or the person with a developmental disability in a criminal or juvenile proceeding, may order that the testimony of the child or the person with a developmental disability be taken as described in this subsection. Only the judge, the attorneys for the parties, the parties, individuals necessary to operate the equipment and any individual the court finds would contribute to the welfare and well-being of the child or person with a developmental disability may be present during the testimony of the child or person with a developmental disability.

(25)

(a) Any document containing data prepared or recorded by the Oregon State Police pursuant to ORS 813.160 (1)(b)(C) or (E), or pursuant to ORS 475.235 (4), if the document is produced by data retrieval from the Law Enforcement Data System or other computer system maintained and operated by the Oregon State Police, and the person retrieving the data attests that the information was retrieved directly from the system and that the document accurately reflects the data retrieved.

(b) Any document containing data prepared or recorded by the Oregon State Police that is produced by data retrieval from the Law Enforcement Data System or other computer system maintained and operated by the Oregon State Police and that is electronically transmitted through public or private computer networks under an electronic signature adopted by the Oregon State Police if the person receiving the data attests that the document accurately reflects the data received.

(c) Notwithstanding any statute or rule to the contrary, in any criminal case in which documents are introduced under the provisions of this subsection, the defendant may subpoena the analyst, as defined in ORS 475.235 (6), or other person that generated or keeps the original document for the purpose of testifying at the preliminary hearing and trial of the issue. Except as provided in ORS 44.550 to 44.566, no charge shall be made to the defendant for the appearance of the analyst or other person.

(26)

(a) A statement that purports to narrate, describe, report or explain an incident of domestic violence, as defined in ORS 135.230, made by a victim of the domestic violence within 24 hours after the incident occurred, if the statement:

(A) Was recorded, either electronically or in writing, or was made to a peace officer as defined in ORS 161.015, corrections officer, youth correction officer, parole and probation officer, emergency medical services provider or firefighter; and

(B) Has sufficient indicia of reliability.

(b) In determining whether a statement has sufficient indicia of reliability under paragraph (a) of this subsection, the court shall consider all circumstances surrounding the statement. The court may consider, but is not limited to, the following factors in determining whether a statement has sufficient indicia of reliability:

(A) The personal knowledge of the declarant.

(B) Whether the statement is corroborated by evidence other than statements that are subject to admission only pursuant to this subsection.

(C) The timing of the statement.

(D) Whether the statement was elicited by leading questions.

(E) Subsequent statements made by the declarant. Recantation by a declarant is not sufficient reason for denying admission of a statement under this subsection in the absence of other factors indicating unreliability.

(27) A report prepared by a forensic scientist that contains the results of a presumptive test conducted by the forensic scientist as described in ORS 475.235, if the forensic scientist attests that the report accurately reflects the results of the presumptive test.

(28)

(a) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:

(A) The statement is relevant;

(B) The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and

(C) The general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this subsection unless the proponent of it makes known to the adverse party the intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial

or hearing, or as soon as practicable after it becomes apparent that such statement is probative of the issues at hand, to provide the adverse party with a fair opportunity to prepare to meet it.

O.R.S. § 40.465. Rule 804. Hearsay exceptions when the declarant is unavailable.

(1) "Unavailability as a witness" includes situations in which the declarant:

(a) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of a statement;

(b) Persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so;

(c) Testifies to a lack of memory of the subject matter of a statement;

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under subsection (3)(b), (c) or (d) of this section, the declarant's attendance or testimony) by process or other reasonable means.

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(3) The following are not excluded by ORS 40.455 if the declarant is unavailable as a witness:

(a) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(b) A statement made by a declarant while believing that death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(d)

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood or adoption or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(e) A statement made at or near the time of the transaction by a person in a position to know the facts stated therein, acting in the person's professional capacity and in the ordinary course of professional conduct.

(f) A statement offered against a party who intentionally or knowingly engaged in criminal conduct that directly caused the death of the declarant, or directly caused the declarant to become unavailable as a witness because of incapacity or incompetence.

(g) A statement offered against a party who engaged in, directed or otherwise participated in wrongful conduct that was intended to cause the declarant to be unavailable as a witness, and did cause the declarant to be unavailable.

(h) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this paragraph unless the proponent of it makes known to the adverse party the intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that the statement is probative of the issues at hand, to provide the adverse party with a fair opportunity to prepare to meet it.

(4) For purposes of subsection (3)(f) and (g) of this section, the proponent of a statement is not required to issue a material witness order, as defined in ORS 136.608, or seek sanctions for contempt in order to show the unavailability of the declarant under subsection (1)(e) of this section.

SECTION 2. This 2021 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2021 Act takes effect on its passage.

O.R.S. § 40.040. Rule 106. When part of transaction proved, whole admissible.

When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, where otherwise admissible, may at that time be inquired into by the other; when a letter is read, the answer may at that time be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may at that time also be given in evidence.

Cases

Key Points:

- The hearsay statements of a child victim under 18 years of age regarding sexual abuse are admissible if the victim testifies and is available for cross-examination at trial.
- Even if a child victim's statement is not an excited utterance, if probative and found to be trustworthy, it can be admissible as a residual hearsay exception.
- A child victim's video recorded, out-of-court interview may be admissible under a medical exception to hearsay when the statements are used for medical diagnosis or treatment.

In *State v. Lamb*, the Court of Appeals of Oregon noted that the hearsay statements of a child victim under 18 years of age regarding sexual abuse are admissible [OEC 803(18a) (b)], so long as the child testifies and is available for cross-examination at trial proceedings. *State v. Lamb*, 161 Or. App. 66, 983 P.2d 1058 (Or. Ct. App. 1999).

The same Court, in *State v. Hollywood*, also held that a four-year-old victim's out-of-court statements were properly admitted. *State v. Hollywood*, 67 Or. App. 546, 680 P.2d 655 (Or. Ct. App. 1984). There, the child disclosed abuse to her grandmother, and while the court determined the statement was not an excited utterance, it was admissible under the residual exception of OEC 803(24)(a) because it was probative and had the requisite "equivalent circumstantial guarantees of trustworthiness." *Id.* at 550-51.

The Supreme Court of Oregon additionally held, in *State v. Barkley*, that a victim's statements in a video recorded interview may be admissible under an exception to hearsay. *State v. Barkley*, 315 Or. 420, 846 P.2d 390 (Or. 1993). In *Barkley*, the 10-year-old victim was interviewed by hospital personnel regarding the abuse, and the interview was video recorded and admitted into evidence at trial. *Id.* The court found that the video recording was admissible because the interview consisted of out-of-court statements made for purposes of medical diagnosis or treatment. *Id.*

Pennsylvania

Pennsylvania Admissibility

42 PA. Cons. Stat. § 5985.1. Admissibility of certain statements.

(a) *General rule.*

(1) An out-of-court statement made by a child victim or witness, who at the time the statement was made was 16 years of age or younger, describing any of the offenses enumerated in paragraph (2), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

(i) 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

(ii) the child either:

(A) testifies at the proceeding; or

(B) is unavailable as a witness.

(2) The following offenses under 18 Pa.C.S. (relating to crimes and offenses) shall apply to paragraph (1):

Chapter 25 (relating to criminal homicide).

Chapter 27 (relating to assault).

Chapter 29 (relating to kidnapping).

Chapter 30 (relating to human trafficking).

Chapter 31 (relating to sexual offenses).

Chapter 35 (relating to burglary and other criminal intrusion).

Chapter 37 (relating to robbery).

Section 4302 (relating to incest).

Section 4304 (relating to endangering welfare of children), if the offense involved sexual contact with the victim.

Section 6301(a)(1)(ii) (relating to corruption of minors).

Section 6312(b) (relating to sexual abuse of children).

Section 6318 (relating to unlawful contact with minor).

Section 6320 (relating to sexual exploitation of children).

(a.1) Emotional distress. — In order to make a finding under subsection (a)(1)(ii)(B) that the child is unavailable as a witness, 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 that would substantially impair the child's ability to reasonably communicate. In making this determination, the court may do all of the following:

- (1) Observe and question the child, 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 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)(1)(ii)(B), 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.

Cases

Key Points:

- A child victim can testify via closed-circuit television when doing so would spare them further trauma.
- A child victim's video recorded out-of-court forensic interview is inadmissible when the victim is either physically or effectively unavailable to testify to their testimonial statements.

In *Com. v. Charlton*, the Superior Court of Pennsylvania held that the trial court properly allowed the child victim to testify via closed-circuit television. *Com. v. Charlton*, 902 A.2d 554 (Pa. Super. Ct. 2006).

The Court noted that the trial court held a hearing to determine the child's ability and need to testify in a separate room, and a psychotherapist who specialized in adolescent trauma provided expert testimony regarding the child's depression, suicidal ideation, PTSD, and emotional regression. *Id.* Thus, the trial court properly found the child would avoid much emotional trauma if allowed to testify via closed-circuit television, and properly granted the accommodation. *Id.*

In *In re N.C.*, the Superior Court of Pennsylvania held that the trial court violated the defendant's right to confrontation by admitting the child victim's video recorded, testimonial out-of-court forensic interview. *In re N.C.*, 74 A.3d 271 (Pa. Super. Ct. 2013). The Court noted that although the child victim was present at trial to testify, she was so disengaged that she was effectively unavailable. *Id.* The child provided no testimony regarding the incident, rarely gave verbal responses, and repeatedly shook her head in denial when asked if the defendant had touched her. *Id.* Given the child's unavailability, the Court noted that the admission of her video would only have been proper if her statements were nontestimonial. *Id.* However, the Court found the video to be testimonial because the interview took place almost three weeks after the incident, there was no ongoing emergency, the statements were not used for treatment purposes, and the interviewer stepped out of the interview to consult with law enforcement. *Id.*

In *Com. v. Rabion*, the Superior Court of Pennsylvania held that the near-blanket admission of the forensic interview during rebuttal under Rule 106 was improper and remanded the matter to the Superior Court to address its admissibility under Rule 613(c). *Com. v. Rabion*, 9 WAP 2020 (Pa. Super. Ct. 2021). The Court noted that the trial court permitted the Commonwealth to introduce the victim's forensic interview during rebuttal on the basis that it constituted a prior consistent statement under Rule 613(c). *Id.* In its Rule 1925(a) opinion, the trial court later concluded that this was improper and instead found the statement admissible as a remainder of a writing or recording under Rule 106. *Id.* Appellant preserved a challenge to the admissibility under Rule 613(c) in his appeal to the Superior Court. *Id.* The Superior Court, however, declined to address the admissibility of the statement under Rule 613(c), and instead relied on *Bond* to conclude it was admissible under Rule 106 irrespective of whether it was a prior consistent statement. *Id.* Although the court has found the forensic interview to be inadmissible under Rule 106, the question of its admissibility under Rule 613(c) remains unanswered. Because of this, it was held appropriate in this instance to remand this matter to the Superior Court to address the admissibility of the forensic interview under Rule 613(c).

Pennsylvania Hearsay Exceptions

PA ST REV Rule 803: Exceptions to the Rule Against Hearsay -- Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. When the declarant is unidentified, the proponent shall show by independent corroborating evidence that the declarant actually perceived the event or condition.

(2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. When the declarant is unidentified, the proponent shall show by independent corroborating evidence that the declarant actually perceived the startling event or condition.

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.

(4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:

(A) is made for -- and is reasonably pertinent to -- medical treatment or diagnosis in contemplation of treatment; and

(B) describes medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

(5) **Recorded Recollection (Not Adopted)**

(6) **Records of a Regularly Conducted Activity.** A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if:

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity (Not Adopted)**

(8) **Public Records.** A record of a public office if:

- (A) the record describes the facts of the action taken or matter observed;
- (B) the recording of this action or matter observed was an official public duty; and
- (C) the opponent does not show that the source of the information or other circumstances indicate a lack of trustworthiness.

(g) **Public Records of Vital Statistics (Not Adopted)**

(10) **Non-Existence of a Public Record.** Testimony -- or a certification -- that a diligent search failed to disclose a public record if:

- (A) the testimony or certification is admitted to prove that
 - (i) the record does not exist; or
 - (ii) a matter did not occur or exist, if a public office regularly kept a record for a matter of that kind.
- (B) in a criminal case:
 - (i) the attorney for the Commonwealth who intends to offer a certification files and serves written notice of that intent upon the defendant's attorney or, if unrepresented, the defendant, at least 20 days before trial; and
 - (ii) defendant's attorney or, if unrepresented, the defendant, does not file and serve a written demand for testimony in lieu of the certification within 10 days of service of the notice.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

- (A) made by a person who is authorized by a religious organization or by law to perform the act certified;
- (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
- (C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document, other than a will, that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least 30 years old and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets (Not Adopted)**

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction (Not Adopted)**

(23) **Judgments Involving Personal, Family, or General History or a Boundary (Not Adopted)**

(24) **Other Exceptions (Not Adopted)**

(25) **An Opposing Party's Statement.** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement may be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

PA ST REV Rule 803.1: Exceptions to the Rule Against Hearsay—Testimony of Declarant Necessary

The following statements are not excluded by the rule against hearsay if the declarant testifies and is subject to cross-examination about the prior statement:

(1) **Prior Inconsistent Statement of Declarant-Witness.** A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:

(A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;

(B) is a writing signed and adopted by the declarant; or

(C) is a verbatim contemporaneous electronic recording of an oral statement.

(2) **Prior Statement of Identification by Declarant-Witness.** A prior statement by a declarant-witness identifying a person or thing, made after perceiving the person or thing, provided that the declarant-witness testifies to the making of the prior statement.

(3) **Recorded Recollection of Declarant-Witness.** A memorandum or record made or adopted by a declarant-witness that:

(A) is on a matter the declarant-witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the declarant-witness when the matter was fresh in his or her memory; and

(C) the declarant-witness testifies accurately reflects his or her knowledge at the time when made.

If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

(4) **Prior Statement by a Declarant-Witness Who Claims an Inability to Remember the Subject Matter of the Statement.** A prior statement by a declarant-witness who testifies to an inability to remember the subject matter of the statement, unless the court finds the claimed inability to remember to be credible, and the statement:

(A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;

(B) is a writing signed and adopted by the declarant; or

(C) is a verbatim contemporaneous electronic recording of an oral statement.

PA ST REV Rule 804: Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter, except as provided in Rule 803.1(4);

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this paragraph (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under Belief of Imminent Death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement made before the controversy arose about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Other exceptions (Not Adopted)*

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

PA ST REV Rule 106: Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

Cases

Key Points:

- For a child victim's out-of-court statement to qualify for the medical treatment exception, it must meet two requirements:
 - The declarant must make the statement for the purpose of receiving medical treatment.

- The statement must be necessary and proper for diagnosis and treatment.
- A statement of fault or identification must also meet both criteria.

In *Commonwealth v. D.J.A.*, the Superior Court of Pennsylvania addressed the medical treatment exception to hearsay. *Commonwealth v. D.J.A.*, 800 A.2d 965, 2002 Pa. Super. 176 (Pa. Super. Ct. 2002). The court noted that for the medical treatment exception to apply, a statement must meet two requirements: "[f]irst, the declarant must make the statement for the purpose of receiving medical treatment, *Lichtenwallner v. Laubach*, 105 Pa. 366 (1884), and second, the statement must be necessary and proper for diagnosis and treatment, *Cody v. S.K.F.*" *Id.* at 976 (quoting *Commonwealth v. Smith*, 545 Pa. 487, 493, 681 A.2d 1288, 1291 (1996) (other citations omitted)). In *D.J.A.*, the child identified her father as the abuser to her doctor, and while the abuse carried with it the risk of contracting a sexually transmitted disease, the statement standing alone could not determine whether the child should be tested or treated and therefore did not fall within the medical treatment exception to hearsay. *Id.* at 977.

In *Commonwealth v. McClelland*, 233 A.3d 717, 736 (2020), the Supreme Court of Pennsylvania reversed *Commonwealth v. Ricker*, 120 A.3d 349, 351 (2015), holding that hearsay evidence alone does not establish a prima facie case at a defendant's preliminary hearing and characterizing this as a due process violation. Since the Commonwealth relied exclusively on hearsay evidence at the preliminary hearing [*Editor's Note: This is a common practice in many jurisdictions.*], the defendant's due process was not protected at the preliminary hearing stage, resulting in the release of McClelland, who was charged with indecent assault, indecent exposure, and corruption of minors against an eight-year-old child.

Puerto Rico

Puerto Rico Admissibility

34A L.P.R.A. App. II, Rule 131.2. RECORDING OF DEPOSITION ON VIDEO TAPE.

In every procedure involving a crime committed against a minor or in which the minor is a witness, the Prosecutor, the guardian *ad litem* of the minor, parents, legal tutor or custodian of the minor may request the court, before the trial, to order that the testimony of the minor be given through a deposition and that the same is recorded and preserved in any reliable recording system according to the following rules:

(1) The court shall evaluate the petition and shall make a preliminary determination regarding the availability of the minor to testify in open court and in the presence of the defendant, the judge and the jury, taking into consideration the following circumstances:

(a) That the minor feels fearful or intimidated.

(b) That through an expert testimony, it has been established that his/her testimony in open court would cause an emotional trauma to the minor.

(c) That the minor suffers a mental disability or disease or impairment. In the case of persons over eighteen (18) years of age, the disability or impairment must be previously determined judicially, or shall be established through expert testimony or by stipulation between the parties.

(d) That it has been proven that the defendant or his/her lawyer have incurred in a conduct that prevents the minor from continuing his testimony. When the court finds that it is impossible for the minor to continue testifying in open court for any of the circumstances listed, it shall order that the deposition of the testimony of the minor be taken and recorded on a video tape. If the preliminary determination of the inability to testify is based on the provisions of clause (a) of this subsection and the evidence shows that the minor is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant who has assumed his own defense (*pro se*), shall be removed from the place where the deposition is being taken. In this case, provisions shall be made for the installation of a one or two-way closed-circuit television system, which allows the defendant to observe the minor and communicate with his/her legal representative in private and while the deposition is being taken.

(2) The judge shall preside over the deposition of the minor, who shall declare under oath or affirmation after due admonishments, and shall adjudicate any questions set forth or objections raised during the taking thereof. Only the following persons shall be present during the deposition:

- (a) The prosecutor.
- (b) The defense attorney.
- (c) The minor's attorney or his/her legal guardian.
- (d) The operators of the recording equipment.
- (e) The defendant, except when disqualified under the provisions of subsection (1)(d) of this rule.
- (f) Any other support personnel, as the term is defined in Rule 131.3 of this appendix, whose presence contributes to the welfare of the minor, as determined by the court.
- (g) Officers of the court responsible for security. The constitutional rights of the defendant shall be guaranteed, including the right to legal counsel, to cross examine the witnesses for the prosecution and the right to cross examine the minor.

(3) A complete record of the examination of the minor shall be kept, including the images and voices of all persons who participated in the examination, which shall be preserved on any reliable recording system, in addition to being reproduced on a double video tape sound recorder or other digital recording means. The recording shall be delivered to the Clerk of the Court in which the case is being seen and shall be available for examination by the parties during working hours.

(4) If when the trial begins, the court determines that the minor is unable to testify for any of the circumstances established in this rule, the court shall admit as evidence the recording of the deposition of the minor, in substitution of his/her testimony in open court. The court shall base its determination on this rule and on the findings that it establishes for the record.

(5) Any of the parties, when notified of the discovery of new evidence once the deposition has been recorded, and before or during the trial, may request the court, upon determination of just cause, to take an additional deposition to be recorded by any reliable recording system. The testimony of the minor shall be limited to the matters authorized by the Judge in the order.

(6) In everything that is related to the taking of a deposition recorded on video tape or other digital recording means under this rule, the court may issue a protecting order that guarantees the right to privacy of the minor.

(7) The video tape or other digital recording means used for the taking of the deposition under this rule shall be destroyed five (5) years after the sentence in the case has been issued, unless an appeal of the sentence is pending. The tape shall be part of the record and shall remain in the custody of the court until the time of its destruction.

Puerto Rico Hearsay Exceptions

32A L.P.R.A. App. I, Rule 62: Admissions

As an exception to the hearsay evidence rule, the statement offered against a party is admissible if:

- (A) It is made by said party, in either his individual or representative capacity, or
- (B) It is one of which the party, having knowledge of the contents thereof, has manifested his adoption or belief in its truth, or
- (C) It is made by a person authorized by said party to make a statement concerning the subject, or
- (D) It is made by his agent or servant concerning a matter within the scope of his agency or employment, during the existence of the relationship, or
- (E) It is made by a coconspirator of said party during the course and in furtherance of the conspiracy.

32A L.P.R.A. App. I, Rule 63: Prior statement by witness

As an exception to the hearsay rule, a prior statement made by a witness who appears at a trial or hearing and who is subject to cross-examination as to the prior statement is admissible, provided that such statement is admissible if made by the declarant appearing as witness.

32A L.P.R.A. App. I, Rule 64: Unavailability of witness

- (A) Definition. - 'Unavailability as a witness' includes situations in which the declarant:
- (1) Is exempted or unable to testify because of a privilege acknowledged by this rule concerning the subject matter of his statement; or
 - (2) persists in refusing to testify despite an order of the court to do so; or
 - (3) testifies to a lack of memory; or
 - (4) has died or is unable to be present and testify because of a physical or mental illness or infirmity; or
 - (5) is absent from the hearing and the proponent of his statement has exercised reasonable diligence to procure his attendance by a summons of the court.

A declarant is not unavailable as a witness if the reason alleged for the unavailability is that the procurement or conduct of the proponent of his statement has been such as to prevent the witness from appearing or testifying.

(B) When the declarant is unavailable as a witness, the following exceptions to the hearsay rule are admissible:

(1) *Former testimony.* -- Testimony given as a witness at another hearing, or a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony was given offered it for his own benefit or had the opportunity to cross-examine the declarant with an interest or motive similar to that had in the hearing.

(2) *Statement under belief of impending death.* -- A statement made by a person according to his personal knowledge and while believing that his death is imminent.

(3) *Statement against interest.* -- A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interests, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, or to create a risk of turning him into the object of hatred, ridicule or social misfortune, that a reasonable man in his position would not have made the statement unless he believed it to be true.

(4) *Statement of personal or family history.* --

(i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood or marriage, race, ancestry or other similar fact of his personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated.

(ii) A statement concerning the matters set forth in subdivision (i) above, and death also, of another person, if the declarant was related to the other by blood, marriage or adoption, or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. -- **A statement having circumstantial guarantees of trustworthiness, if it is determined that:**

(i) the statement is more probative on the point for which it is offered than any other evidence which the proponent may procure through reasonable efforts, and

(ii) the proponent notified the adverse party sufficiently in advance his intention to offer the statement, and the particulars of it, including the name and address of the declarant.

32A L.P.R.A. App. I, Rule 65: Exceptions to the hearsay rule even though the declarant is available as witness

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(A) ***Present sense impression.*** -- A statement relating, describing or explaining an act, condition or event perceived by the declarant and made while the declarant was perceiving the act, condition or event, or immediately thereafter.

(B) ***Spontaneous excited utterance.*** -- A statement made by the declarant while under the stress of excitement caused by the perception of an act, event or condition, and the statement refers to said act, event or condition.

(C) ***Mental, physical or emotional condition.*** -- A statement of the declarant's then existing state of mind, emotion, sensation or physical condition including a statement on the intent, plan, motive, design, mental or emotional feeling, pain and 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 the declarant's will.

(D) ***Diagnosis or medical treatment.*** -- A statement made for purposes of medical diagnosis or treatment, describing medical history or past or present symptoms, pain or sensations, insofar as reasonably pertinent to diagnosis or treatment.

(E) **Recorded recollection.** -- A statement contained in a writing or recording concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable him to testify accurately, if the writing or recording was made or adopted by the witness when the matter was fresh in his memory. If admitted, the writing or recording shall be read, but shall not be received as an exhibit unless offered by the adverse party.

(F) **Records of business or activity.** -- A writing made as a record of an act, condition or event, if made during the course of a regularly conducted business activity, at or near the time of the act, condition or event, and the custodian of said writing, or another witness, testifies as to the identity and mode of its preparation, if the sources of information, method and time of preparation are such as to indicate its trustworthiness. The term 'business' includes business, a government activity, profession, occupation, calling or operation of institutions, whether or not conducted for profit.

(G) **Absence of entry in business records.** -- Evidence of the absence from the records of a business of an entry of an alleged act, condition or event, when it is offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if it was the regular course of the business to make records of all such acts, conditions or events at or near the time of the act, condition or event and to preserve them, if the sources of information and the method and time of preparation of the business records were such that the absence from the record is a trustworthy indication that the act or event did not occur or the condition did not exist.

(H) **Public records and reports.** -- Evidence of a writing made as a record or report of an act, condition or event, when it is offered to prove the act, condition or event, if the writing was made at

or near the time of the act, condition or event, by and within the scope of duty of a public officer, if the sources of information and the method and time of preparation were such as to indicate its trustworthiness.

(I) **Records of vital statistics.** -- A writing made as a record of a birth, fetal death, death or marriage, if the maker was required by law to file it in a specific public office, and the writing was made and filed pursuant to requirements of law.

(J) **Absence of public record.** -- A writing made by the official custodian of the records of a public office, stating that diligent search failed to disclose a specific record, if offered to prove the absence of said record in that office.

(K) **Records of religious organizations.** -- Statements of births, marriages, divorces, deaths, legitimacy, ancestry, race, relationship by blood or marriage or other similar facts of personal or family history contained in a regularly kept record of a church or other religious organization.

(L) **Marriage, baptismal and similar certificates.** -- A statement concerning the birth, marriage, death, race, ancestry, relationship by blood or marriage or other similar fact of the family history of a person, if the statement is contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, if the person who performed the ceremony was a person authorized by law or by the rules and regulations of a religious organization to perform the acts certified, and purporting to have been issued by the maker at the time and place of the ceremony or sacrament, or within a reasonable time thereafter.

(M) **Family records.** -- Evidence of entries in family Bibles, or other books or charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, or the like, when offered to establish the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage or other similar fact of the family history of a member of a family.

(N) **Official records affecting an interest in property.** -- Evidence of the official record of a document affecting a right or interest in real or personal property as proof of the content of the original document and its execution, including the delivery by each person by whom its purports to have been executed, if the record is an official record of a public office and the recording of that document in said office is authorized by law.

(O) **Statements in documents affecting an interest in property.** -- A statement contained in a document affecting a right or interest in real or personal property, if the matter stated was relevant to the purpose of the document, provided that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

(P) **Statements in ancient documents.** -- Statements contained in a writing more than twenty (20) years old if the authenticity of the writing has been established.

(Q) **Market lists and other compilations.** -- A statement contained in a tabulation, list, directory, register or other compilation, if generally such compilation is used and relied upon as exact in the course of the pertinent activity or occupation.

(R) **Learned treatises.** -- Statements contained in a treaty, periodical, pamphlet or other similar publication, on the subject of history, medicine or other science or art, if it is established, through judicial notice or expert testimony, that the publication is a reliable authority on the matter.

(S) **Reputation among the family concerning personal or family History.** -- Evidence of reputation among members of a family if such reputation concerns the birth, marriage, adoption, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage or other similar fact of the family or personal history of a member of the family by blood or marriage.

(T) **Reputation concerning boundaries; general history, or personal or family History.** -- Evidence of reputation in the community if the reputation concerns:

(1) Boundaries of lands or customs affecting lands in the community, if the reputation arose before the controversy;

(2) an event of general history of the community, if the event was notorious or important to the community;

(3) the birth, marriage, divorce, death, legitimacy, race, ancestry or relationship by blood or marriage, or other similar fact of the personal or family history of a person who resided in the community at the time the reputation arose.

(U) **Reputation as to character.** -- Evidence of a person's reputation in the community in which he resides, or in a group with which he associates, regarding the character or a specific character trait of such person.

(V) **Judgment of previous conviction.** -- Evidence of a final judgment, entered after a trial or a plea of guilty, adjudging a person guilty of a felony, offered to prove any fact essential to sustain the judgment of conviction. The pendency of an appeal shall not affect admissibility under this rule, although the fact that the judgment of conviction is not yet final may be brought before the court's consideration. This rule does not permit the Government in a criminal prosecution to offer as evidence the judgment of conviction of a person other than the accused, except for the purpose of impeaching a witness.

(W) **Other exceptions.** -- A statement having sufficient circumstantial guarantees of trustworthiness, if it is determined that:

(1) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.

(2) The proponent notified the adverse party sufficiently in advance his intention to offer the statement in evidence, notifying the latter on the statement's particulars, including the name and address of the declarant.

32A L.P.R.A. App. I, Rule 8: Related Evidence

When a writ, video or tape recording or part thereof is introduced as evidence by a party, the other party may require the introduction at that moment, of the rest of the writ, video or tape recording which was partially introduced, or of any other writ, video or tape recording which must be introduced at the same time, for a full understanding of the matter.

Rhode Island

Rhode Island Admissibility

R.I. Gen. Laws § 11-37-13.1. Recording -- Grand jury testimony -- Child assault.

(a) In any grand jury proceeding investigating a sexual assault alleged to have been committed against a child, a recording of a statement from the alleged victim who is fourteen (14) years of age or younger at the time of the proceeding shall be admissible into evidence at the proceeding if:

- (1)** The statement is sworn to under oath by the child, and the significance of the oath is explained to the child;
- (2)** The recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- (3)** The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;
- (4)** Every voice on the recording is identified;
- (5)** The statement was not made in response to questioning calculated to lead the child to make a particular statement;
- (6)** The person conducting the interview is an attorney in the department of the attorney general or another person chosen by the attorney general to make the proceeding less intimidating to the child, and the interviewer is available to testify at the proceeding;
- (7)** The child is available to testify if requested by the grand jurors; and
- (8)** The recording is made a part of the record of the grand jury.

(b) In any grand jury proceeding investigating a sexual assault alleged to have been committed against a child, a recording of a statement from the alleged victim who is more than fourteen (14) years of age and less than eighteen (18) years of age at the time of the proceeding shall be admissible into evidence at the proceeding if:

- (1)** The attorney general petitions the court for permission to introduce the recording at the proceeding; and
- (2)** The court grants the petition upon a finding that the child would suffer unreasonable and unnecessary mental or emotional harm if required to appear personally before the grand jury in order to testify; and
- (3)** All of the conditions as set forth in subsection (a) of this section are followed.

R.I. Gen. Laws § 11-37-13.2. Alternative methods of victim testimony -- Child victim.

(a) In any judicial proceeding in which a person has been charged with sexual assault of a child who at the time of trial is seventeen (17) years of age or less, the court may order, upon a showing that the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm, that the testimony of the child be taken in a room other than the courtroom and either be recorded for later showing before the court and/or the finder of fact in the proceeding or be broadcast simultaneously by closed circuit television to the court and/or finder of fact in the proceeding. When the child is fourteen (14) years of age or younger at the time of trial, there shall be a rebuttable presumption that the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm. Only the judge, attorneys for the parties, persons necessary to operate the recording or broadcasting equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his or her testimony. Examination and cross-examination shall proceed in the same manner as permitted at the trial or hearing.

(b) The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror which permits them to see and hear the child during his or her testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but ensure that the child cannot hear or see the person alleged to have committed the assault. The defendant shall be afforded a means of communicating with his or her attorney throughout the proceedings, and, upon request of the defendant or his or her attorney, recesses shall be permitted to allow them to confer. The court shall ensure that:

- (1)** The recording or broadcast is both visual and aural and is recorded on film or videotape or by other electronic means;
- (2)** The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;
- (3)** Each voice on the recording is identified;
- (4)** Each party is afforded an opportunity to view any recording made prior to trial before it is shown in the courtroom; and
- (5)** The statement is sworn to under oath by the child.

(c) If the court orders the testimony of a child to be so recorded or broadcast, the child shall not be required to testify at the proceeding for which the testimony was taken, and the testimony shall be used in lieu of the live testimony of the child.

R.I. Gen. Laws § 14-1-68. Child witness.

(a) A videotape recording made by the department of children, youth, and families, a law enforcement officer, or a hospital, of an interview of or statement made by a child who is the

subject of any petition filed by the department pursuant to §§ 40-11-7, 14-1-11, and/or 15-7-7, is admissible in any court proceeding under those sections notwithstanding any objection to hearsay statements contained in the videotape, provided it is relevant and material, and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian, or other person responsible for the child's welfare. The circumstances of the making of the videotape recording, including the maker's lack of personal knowledge, may be proved to affect its weight.

(b) Prior to the videotaped recording being introduced into evidence the court shall first determine that:

- (1) The statement is sworn to under oath by the child and the significance of the oath is explained to the child;**
- (2) The recording is both visual and aural, and is recorded on film or videotaped or by other electronic means;**
- (3) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;**
- (4) Every voice on the recording is identified;**
- (5) The statement was not made in response to questioning calculated to lead the child to make a particular statement;**
- (6) The person conducting the interview of the child is available to testify at any court proceeding pursuant to this chapter; and**
- (7) The child shall be available to testify at any court proceeding pursuant to this chapter.**

Cases

Key Points:

- Admitting video testimony of a child victim is not a violation of the defendant's right to confrontation if evidence shows that testifying in person will result in further trauma to the child.

In *State v. Taylor*, the Supreme Court of Rhode Island held that admitting the child victim's video testimony did not violate the defendant's right to confrontation. *State v. Taylor*, 562 A.2d 445, 452 (R.I. 1989). In determining whether the exclusion of the child from testifying in court was permissible, the Court noted that a child's testimony may be taken by alternate means if the child would suffer "unreasonable and unnecessary mental or emotional harm." *Id.* If the child is unable to testify in court, they may testify live by closed circuit television or prerecorded video, but only after the prosecution shows by clear and convincing evidence that the child will be subject to unreasonable harm. *Id.* Because the child in *Taylor* froze while testifying during a pretrial hearing, and a medical expert

testified that she would suffer emotional and mental harm as a result of testifying in the defendant's presence, the trial court did not err in finding her to be unavailable and admitting her prerecorded video testimony. *Id.*

Rhode Island Hearsay Exceptions

RI R REV Rule 803: Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.
- (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.
- (3) ***Then Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, but not including statements made to a physician consulted solely for the purposes of preparing for litigation or obtaining testimony for trial.
- (5) ***Recorded Recollection.*** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence and received as an exhibit.
- (6) ***Records of Regularly Conducted Activity.*** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, another person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes

business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth

(A) the activities of the office or agency, or

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or

(C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** 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.** 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.** Statements of fact concerning 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** 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 twenty years or more the authenticity of which 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his or her personal or family history.

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to Character.** Reputation of a person's character among his associates or in the community.

(22) **Judgment of Previous Conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty or of nolo contendere which constitutes a conviction by the terms of G.L.R.I. § 12-18-3, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

(24) **Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his or her intention to offer the statement and the particulars of it, including the name and address of the declarant.

RI R REV Rule 804: Hearsay Exceptions; Declarant Unavailable

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant

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(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his or her statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his or her statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Recorded testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a party with similar motive and interest had an opportunity to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(c) **Declaration of Decedent Made in Good Faith.** A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.

RI R REV Rule 106: Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- Statements that a child victim makes to an investigator can be admissible as excited utterances, even if they don't immediately follow the incident, when they can be shown not to be the product of reflection.
- A child victim's statements to a treating physician can be admissible under an exception to the hearsay rule permitted in some custody proceedings.
- Out-of-court statements made by a child victim's non-offending caregiver can be admissible under the excited utterance exception to the hearsay rule.

In *In re Ne-kia S.*, the Supreme Court of Rhode Island found that the statements made by the child victims to the investigator were admissible as excited utterances. Likewise, the statements the victims made to the treating physician were admissible as hearsay evidence specially permitted in custody proceedings under certain circumstances. *In re Ne-kia S.*, 566 A.2d 392 (RI 1989). While the abuse described to the investigator had not immediately occurred, the statements were still permissible as excited utterances because they were "excited and impulsive" rather than "the product of reflection and deliberation." *Id.* at 394-95.

Additionally, in *State v. Bergevine*, the court held that both the tape recording of statements the victim's father made to the 911 operator while calling for emergency assistance, and the father's statements to a police detective, were admissible under the excited utterance exception to the hearsay rule. *State v. Bergevine*, 942 A.2d 974 (RI 2008).

South Carolina

South Carolina Admissibility

S.C. Code Ann. § 17-23-175. Admissibility of out-of-court statement of child under twelve; determination of trustworthiness; notice to adverse party.

(A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:

- (1) the statement was given in response to questioning conducted during an investigative interview of the child;**
- (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);**
- (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and**
- (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.**

(B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:

- (1) whether the statement was elicited by leading questions;**
- (2) whether the interviewer has been trained in conducting investigative interviews of children;**
- (3) whether the statement represents a detailed account of the alleged offense;**
- (4) whether the statement has internal coherence; and**
- (5) sworn testimony of any participant which may be determined as necessary by the court.**

(C) For purposes of this section, a child is:

- (1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of making the statement; and**

(2) a person who is the alleged victim of, or witness to, a criminal act for which the defendant, upon conviction, would be required to register pursuant to the provisions of Article 7, Chapter 3, Title 23.

(D) For purposes of this section an investigative interview is the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of one of these agencies, or in response to a suspected case of child abuse.

(E)

(1) The contents of a statement offered pursuant to this section are subject to discovery pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure.

(2) If the child is twelve years of age or older, an adverse party may challenge the finding that the child functions cognitively, adaptively, or developmentally under the age of twelve.

(F) Out-of-court statements made by a child in response to questioning during an investigative interview that is visually and auditorily recorded will always be given preference. If, however, an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider the statement in a hearing outside the presence of the jury to determine:

(1) the necessary visual and audio recording equipment was unavailable;

(2) the circumstances surrounding the making of the statement;

(3) the relationship of the professional and the child; and

(4) if the statement possesses particularized guarantees of trustworthiness. After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.

Cases

Key Points:

- A forensic interviewer's testimony should lay the foundation for a child victim's video recorded out-of-court statement, without comment on the reliability of the child's testimony.
- Video recorded out-of-court statements are admissible when the child victim is available for cross-examination at trial.

In *State v. Whitner*, the South Carolina Supreme Court addressed the admissibility of a video recording of the child victim's forensic interview. *State v. Whitner*, 732 S.E.2d 861, 867-68 (S.C. 2012). The Court noted that while out-of-court statements are typically only admissible when the witness is charged with fabrication or bias, the South Carolina legislature has allowed specific exceptions for

hearsay statements by victims in cases involving minors. *Id.* The Court notes that while it is improper for a forensic interviewer to comment on the reliability of the child's testimony, in this instance, the forensic interviewer's testimony was to lay the foundation for the videotape, exactly as the legislature intended. *Id.* Because the forensic interviewer did not lead the child in any questions, and the interview included no improper or bolstering testimony, the trial court did not err in allowing the jury to view the video. *Id.*

In *State v. Adams*, the South Carolina Court of Appeals reiterated the admissibility of video recorded interviews between a child victim, a professional counselor, and a police officer as evidence. *State v. Adams*, 845 S.E.2d 217, 220-21 (S.C. Ct. App. 2020). Here, the court particularly emphasized the child's testimony at the trial and the defense's ability to cross-examine his testimony, consistent with SCCA § 17-23-175(A)(3). *Id.* Furthermore, although the court noted that the police officer used questionable methods when interviewing the child, the child's disclosures were not in response to leading questions, and at eight years old, the child was sufficiently competent to testify. *Id.*

South Carolina Hearsay Exceptions

SC R REV Rule 803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.
- (5) ***Recorded Recollection.*** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and

accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however*, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of Entry in Records Kept in Accordance with the Provisions of Subsection (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subsection (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; *provided, however*, that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** 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.** 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.** Statements of fact concerning 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** 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 twenty years or more the authenticity of which 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. This rule is in addition to any statutory provisions on this subject.

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

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to Character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of Previous Conviction.** Evidence of a final judgment (to include final judgments in juvenile delinquency matters), entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in

excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

SC R REV Rule 804: HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant

--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

SC R REV Rule 106: REMAINDER OF OR RELATED WRITINGS OR STATEMENTS

When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- An out-of-court hearsay statement about abuse does not qualify for the excited utterance exception when a child victim has interacted with other people between the times of the incident and the statement, and/or when enough time has passed for the child to be under less stress caused by the incident.

In *State v. Whisonant*, the Court of Appeals articulated what constitutes an excited utterance, allowing admission of "[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." *State v. Whisonant*, 515 S.E.2d 768, 772 (S.C. 1999) (quoting S.C.R.E. 803(2)). In this instance, the stepmother of the child testified that the child disclosed the abuse; however, because the statement was made nine hours after the incident took place, and the child had interacted with a friend and friend's mother during that time, the court held it did not fit into the excited utterance category of exceptions. *Id.*

South Dakota

South Dakota Admissibility

S.D. Codified Laws § 23A-12-9. Videotape of young sex crime victim's testimony at preliminary hearing or deposition — Use at trial.

If a defendant has been charged with a violation of subdivision 22-22-1(1), (5), or (6) or § 22-22-7, where the victim is less than sixteen years of age, the prosecuting attorney or defense attorney may apply for an order that the victim's testimony at the preliminary hearing or at a deposition, in addition to being stenographically recorded, be recorded and preserved on videotape. The scope and manner of the examination and cross-examination shall be such as would be allowed at the trial. Notice of any such deposition pursuant to this section shall conform in all respects to the notice requirements contained in § 23A-12-2.

The application for the order shall be in writing and made at least three days before the preliminary hearing or deposition.

Upon timely receipt of the application, the court may order that the testimony of the victim given at the preliminary hearing or deposition be taken and preserved on videotape. The videotape shall be transmitted to the clerk of the court in which the action is pending.

If at the time of trial, the court finds that the victim is otherwise unavailable within the meaning of § 19-16-29, or that such testimony would in the opinion of the court be substantially detrimental to the well-being of the victim, the court may admit the videotape of the victim's testimony at the preliminary hearing or deposition as former testimony under § 19-16-30.

S.D. Codified Laws § 26-8A-16. Photographs, videotapes, and images of trauma — Collection, maintenance, and destruction.

Any person who receives a report under § 26-8A-3 may take or cause to be taken color photographs, videotapes, or other images of the areas of trauma visible on a child who is the subject of the report and may require a radiological or other medical examination or testing of the child without the consent of the child's parents, guardian, or custodian. All photographs, videotapes, or other images taken pursuant to this section shall be taken by a law enforcement official, the Department of Social Services, or a person authorized by a law enforcement official or the department. All photographs, videotapes, other images, X rays, and test results, or copies of them, shall be sent to the appropriate law enforcement agency or state's attorney or to the Department of Social Services. These photographs, videotapes, and other images need not be made a part of the child's medical or hospital records. Any photograph, videotapes, or other image in the possession of the Department of Social Services shall be destroyed by the Department of Social Services if no criminal prosecution or

civil action is initiated within three years of the date that such material was received by the Department of Social Services.

Cases

Key Points:

- A video recorded out-of-court statement is admissible when a trial court finds the video to be reliable based on multiple factors.

In *State v. Schoenwetter*, the South Dakota Supreme Court considered whether the trial court appropriately admitted the child's interview with a social services investigator where the child gave a detailed recount of the abuse. *State v. Schoenwetter*, 452 N.W.2d 549, 550 (S.D. 1990). The child testified at trial, and after her testimony, the jury was permitted to view the video. *Id.* Away from the jury and prior to showing the video, the trial court conducted a hearing to determine whether the "time, content, and circumstances of the statement provide sufficient indicia of reliability." *Id.* Because the child was relatively mature for her age and the testimony she had provided in court was substantially the same as the video, the trial court found the video to be reliable. *Id.* at 551. The state supreme court held that because the trial court had carefully addressed the reliability of the video, they did not abuse their discretion in admitting the videotaped testimony under SDLC § 23A-12-9. *Id.*

South Dakota Hearsay Exceptions

SD ST § 19-19-803: Exceptions to the rule against hearsay -- Regardless of whether the declarant is available as a witness

The statements described in this section are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then-existing mental, emotional, or physical condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.

(4) **Statement made for medical diagnosis or treatment.** A statement that:

(A) Is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and

(B) Describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) **Recorded recollection.** A record that:

(A) Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) Was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) Accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of regularly conducted business activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) The record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) Making the record was a regular practice of that activity;

(D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule or a statute permitting certification; and

(E) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a record of a regularly conducted activity.** Evidence that a matter is not included in a record as described in subdivision (6) if:

(A) The evidence is admitted to prove that the matter did not occur or exist;

(B) A record was regularly kept for a matter of that kind; and

(C) The opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public records.** A record or statement of a public office if:

(A) It sets out:

(i) The office's activities;

(ii) A matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) In a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) The opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) **Public records of vital statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of public record.** Testimony -- or a certification under § 19-19-902 -- that a diligent search failed to disclose a public record or statement if:

(A) The testimony or certification is admitted to prove that

(i) The record or statement does not exist; or

(ii) A matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) In a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice -- unless the court sets a different time for the notice or the objection.

(11) **Records of religious organizations concerning personal or family history.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of marriage, baptism, and similar ceremonies.** A statement of fact contained in a certificate:

(A) Made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) Attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) Purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of documents that affect an interest in property.** The record of a document that purports to establish or affect an interest in property if:

(A) The record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) The record is kept in a public office; and

(C) A statute authorizes recording documents of that kind in that office.

(15) **Statements in documents that affect an interest in property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) **Market reports and similar commercial publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in learned treatises, periodicals, or pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) The statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation concerning personal or family history.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation concerning boundaries or general history.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation concerning character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a previous conviction.** Evidence of a final judgment of conviction if:

(A) The judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) The conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) The evidence is admitted to prove any fact essential to the judgment; and

(D) When offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments involving personal, family, or general history, or a boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) Was essential to the judgment; and

(B) Could be proved by evidence of reputation

SD ST § 19-19-804: Exceptions to the rule against hearsay -- When declarant unavailable as witness

(a) **Criteria for being unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

(1) Is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) Refuses to testify about the subject matter despite a court order to do so;

(3) Testifies to not remembering the subject matter;

(4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) The declarant's attendance, in the case of a hearsay exception under subdivision (b)(1); or

(B) The declarant's attendance or testimony, in the case of a hearsay exception under subdivision (b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony that:

(A) Was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) Is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement under the belief of imminent death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement against interest.* A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) Is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of personal or family history.* A statement about:

(A) The declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) Another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Decedent's statements.* In actions, suits, or proceedings by or against the representatives of deceased persons including proceedings for the probate of wills, any statement of the deceased whether oral or written shall not be excluded as hearsay, provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.

(6) *Statement offered against a party that wrongfully caused the declarant's unavailability.* A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

SD ST § 19-19-806.1: Statement by child under age thirteen or child with developmental disability regarding sex crime, physical abuse, or neglect

A statement made by a child under the age of thirteen, or by a child thirteen years of age or older who is developmentally disabled as defined in § 27B-1-18, describing any act of sexual contact or rape performed with or on the child by another, or describing any act of physical abuse or neglect of the child by another, or any act of physical abuse or neglect of another child observed by the child making the statement, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant or in any proceeding under chapters 26-7A, 26-8A, 26-8B, and 26-8C in the courts of this state if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness.

However, if the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

No statement may be admitted under this section unless the proponent of the statement makes known the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

SD ST § 19-19-806.2: Statements alleging child abuse or neglect

An out-of-court statement not otherwise admissible by statute or rule of evidence is admissible in evidence in any civil proceeding alleging child abuse or neglect or any proceeding for termination of parental rights if:

(1) The statement was made by a child under the age of thirteen years or by a child thirteen years of age or older who is developmentally disabled, as defined in § 27B-1-18;

(2) The statement alleges, explains, denies, or describes:

(a) Any act of sexual penetration or contact performed with or on the child;

(b) Any act of sexual penetration or contact with or on another child observed by the child making the statement;

(c) Any act of physical abuse or neglect of the child by another; or

(d) Any act of physical abuse or neglect of another child observed by the child making the statement;

(3) The court finds that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(4) The proponent of the statement notifies other parties of an intent 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 parties with a fair opportunity to meet the statement.

For purposes of this section, an out-of-court statement includes a video, audio, or other recorded statement.

SD ST § 19-19-807: Residual exception

(a) *In general.* Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in § 19-19-803 or 19-19-804.

(1) The statement has equivalent circumstantial guarantees of trustworthiness;

(2) It is offered as evidence of a material fact;

(3) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts, and

(4) Admitting it will best serve the purposes of these rules and the interests of justice.

(b) *Notice.* The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

SD ST § 19-19-106: Remainder of or related writings or recorded statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors to evaluate its trustworthiness.
- Indicia of reliability likewise apply to hearsay testimony admitted under the residual exception to the hearsay rule.

In *State v. Anderson*, the Supreme Court of South Dakota noted that "[t]here are several factors courts may consider in evaluating the reliability of a child's hearsay statement, including spontaneity, consistent repetition, the mental state of the child at the time the statements were made, use of terminology unexpected of a child of similar age, and lack of motive to fabricate." *State v. Anderson*, 608 N.W.2d 644, 660 (S.D. 2000) (internal quotation omitted). The Court then found that the child's statements regarding the kidnapping of another child were reliable, despite her young age, because they were consistent, childish, and she had no reason to fabricate. *Id.*

Additionally, in *People in re M.W.*, the Court held that testimony of a caseworker and a sheriff's employee regarding the child's statements about abuse was admissible under the residual exception to the hearsay rule. The testimony was found trustworthy considering the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the defendant, the reliability of the assertions, and the reliability of the child. *People in re M.W.*, 374 N.W.2d 88g (S.D. 1985).

Tennessee

Tennessee Admissibility

Tenn. Code Ann. § 24-7-117. Audiovisually recorded testimony in child sexual abuse proceedings.

(a) This section shall apply to proceedings in the prosecution of offenses defined in § 37-1-602 as "child sexual abuse" and to any civil proceeding in which child sexual abuse as defined in § 37-1-602 is an issue, and it shall apply only to the statements of a child or children under the age of thirteen (13) years of age who are victims of such abuse.

(b) The court may, on the motion of any party, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact. Only the court, the attorneys for the parties, the defendant, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during the child's testimony. Only the attorneys or the court may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits such persons to see and hear the child during the child's testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person. The court shall also ensure that:

- (1)** The recording is both visual and oral and is recorded on film or videotape or by other similar audiovisual means;
- (2)** The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;
- (3)** Each voice on the recording is identified; and
- (4)** The attorney for the defendant is afforded an opportunity to view the recording before it is shown in the courtroom.

(c) The court may, on the motion of either party upon showing of good cause, order that additional testimony of the child be taken, if time and circumstances permit, outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding in accordance with subsection (b). If time and circumstances do not permit such additional out of court recording, the court may order the child to testify in court. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting such order.

(d) If the court orders the testimony of a child to be taken under subsection (b) or (c), the child shall not be required to testify in court at the proceeding for which the testimony was taken, unless so ordered pursuant to subsection (c).

Tenn. Code Ann. § 24-7-123. Admission of video recording of interview of child describing sexual conduct.

(a) Notwithstanding any of this part to the contrary, a video recording of an interview of a child by a forensic interviewer containing a statement made by the child under thirteen (13) years of age describing any act of sexual contact performed with or on the child by another is admissible and may be considered for its bearing on any matter to which it is relevant in evidence at the trial of the person for any offense arising from the sexual contact if the requirements of this section are met.

(b) A video recording may be admitted as provided in subsection (a) if:

(1) The child testifies, under oath, that the offered video recording is a true and correct recording of the events contained in the video recording and the child is available for cross examination;

(2) The video recording is shown to the reasonable satisfaction of the court, in a hearing conducted pretrial, to possess particularized guarantees of trustworthiness. In determining whether a statement possesses particularized guarantees of trustworthiness, the court shall consider the following factors:

(A) The mental and physical age and maturity of the child;

(B) Any apparent motive the child may have to falsify or distort the event, including, but not limited to, bias or coercion;

(C) The timing of the child's statement;

(D) The nature and duration of the alleged abuse;

(E) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(F) Whether the statement is spontaneous or directly responsive to questions;

(G) Whether the manner in which the interview was conducted was reliable, including, but not limited to, the absence of any leading questions;

(H) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;

(I) The relationship of the child to the offender;

(J) Whether the equipment that was used to make the video recording was capable of making an accurate recording; and

(K) Any other factor deemed appropriate by the court;

(3) The interview was conducted by a forensic interviewer who met the following qualifications at the time the video recording was made, as determined by the court:

(A) Was employed by a child advocacy center that meets the requirements of § 9-4-213(a) or (b); provided, however, that an interview shall not be inadmissible solely because the interviewer is employed by a child advocacy center that:

(i) Is not a nonprofit corporation, if the child advocacy center is accredited by a nationally recognized accrediting agency; or

(ii) Employs an executive director who does not meet the criteria of § 9-4-213(a)(2), if the executive director is supervised by a publicly elected official;

(B) Had graduated from an accredited college or university with a bachelor's degree in a field related to social service, education, criminal justice, nursing, psychology or other similar profession;

(C) Had experience equivalent to three (3) years of full-time professional work in one (1) or a combination of the following areas:

(i) Child protective services;

(ii) Criminal justice;

(iii) Clinical evaluation;

(iv) Counseling; or

(v) Forensic interviewing or other comparable work with children;

(D) Had completed a minimum of forty (40) hours of forensic training in interviewing traumatized children and fifteen (15) hours of continuing education annually;

(E) Had completed a minimum of eight (8) hours of interviewing under the supervision of a qualified forensic interviewer of children;

(F) Had knowledge of child development through coursework, professional training or experience;

(G) Had no criminal history as determined through a criminal records background check; and

(H) Had actively participated in peer review;

(4) The recording is both visual and oral and is recorded on film or videotape or by other similar audiovisual means;

(5) The entire interview of the child was recorded on the video recording and the video recording is unaltered and accurately reflects the interview of the child; and

(6) Every voice heard on the video recording is properly identified as determined by the court.

(c) The video recording admitted pursuant to this section shall be discoverable pursuant to the Tennessee Rules of Criminal Procedure.

(d) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

(e) The court shall enter a protective order to restrict the video recording used pursuant to this section from further disclosure or dissemination. The video recording shall not become a public record in any legal proceeding. The court shall order the video recording be sealed and preserved following the conclusion of the criminal proceeding.

Tenn. Code Ann. § 37-1-609. Photographs and examinations of suspected abuse — Video recordings.

(a) Any person required to investigate cases of suspected child sexual abuse may take or cause to be taken photographs of the areas of trauma visible on a child who is the subject of a report and, if the condition of the child indicates a need for a medical examination, may cause the child to be referred for diagnosis to a licensed physician or an emergency department in a hospital without the consent of the child's parents, legal guardian or legal custodian. Any licensed physician who, based on information furnished by the investigator, the parents or other persons having knowledge of the situation, or the child, or on personal observation of the child, suspects that a child has been sexually abused may authorize appropriate examinations to be performed on the child without the consent of the child's parents, legal guardian or legal custodian.

(b) Any photograph or report on examinations made or x-rays taken pursuant to this section, or copies thereof, shall be sent to the department as soon as possible, at which point such records shall be available to the members of the team. All state, county and local agencies shall give the team or the department access to records in their custody and shall otherwise cooperate fully with the investigation.

(c) At the initial investigation of child sexual abuse by the child protection team, and at any subsequent investigations as deemed appropriate by the team, when a justifiable suspicion of sexual abuse exists, a videotape recording that meets the standards as established by § 24-7-117 may be taken of the traumatized victim. The video recording shall be taken for the purpose of indicating the child's physical or mental condition at the time the report is investigated and shall be made available for future reference and for utilization as provided in this part.

Cases

Key Points:

- A child victim's statements made to a physician for treatment or diagnostic purposes can be admissible hearsay under the medical diagnosis exception, even if they contain little information.
- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors to evaluate its trustworthiness.

In *State v. Stinnett*, the Supreme Court of Tennessee held that any statements made by the child to physicians were admissible hearsay under the medical diagnosis exception. *State v. Stinnett*, 958 S.W.2d 329, 331 (Tenn. 1997). Additionally, in rejecting the defendant's assertion that the statement was unreliable merely because little information was given, the court considered the statement's totality and whether it was given for diagnostic or treatment purposes. *Id.* at 332.

In *State v. Franklin*, the Court of Criminal Appeals of Tennessee held that the forensic interview of the child victim was admissible because the trial court conducted a lengthy analysis into the trustworthiness of the video. *State v. Franklin*, 585 S.W.3d 431, 454-55 (Tenn. Crim. App. 2019). The Court discussed the interviewer's credentials, the method of questioning, the child's age and maturity, the duration of the recording, and other factors that helped determine that the video was trustworthy and therefore not improperly admitted, consistent with T.C.A. § 24-7-123. *Id.*

Tennessee Hearsay Exceptions

TN R REV Rule 803: Hearsay Exceptions

The following are not excluded by the hearsay rule:

(1) [Reserved.]

(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.

(3) ***Then Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 and Treatment.*** Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or

sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

(5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) [Reserved.]

(8) **Public Records and Reports.** Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel.

(9) **Records of Vital Statistics.** Records or data compilations in any form of births, fetal deaths, deaths, marriages, or divorces, if the report was made to a public office pursuant to requirements of law.

(10) [Reserved.]

(11) [Reserved.]

(12) **Marriage, Baptismal, and Similar Certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament made by a member of the clergy, a public official, or another 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.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, engravings on rings, inscriptions on family portraits, engravings on burial urns, crypts, tombstones, or the like.

(14) **Records of Documents Affecting an Interest in Property.** The record of a document purporting to establish or affect an interest in property as proof of the contents 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 authorizes the recording of documents of that kind in that office.

(15) [Reserved.]

(16) **Statements in Ancient Documents Affecting an Interest in Property.** Statements in a document in existence thirty years or more purporting to establish or affect an interest in property, the authenticity of which is established.

(17) **Market Reports and 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) [Reserved.]

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

(20) **Reputation Concerning Ancient Boundaries.** Reputation in a community, arising before the controversy and existing thirty years, as to the boundaries of or customs affecting lands in the community.

(21) **Reputation as to Character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of Previous Conviction.** Evidence of a final judgment adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to Personal or Family History or Boundaries.** Judgments as proof of matters of personal or family history or boundaries, which matters were essential to the judgment.

(24) [Reserved.]

(25) **Children's Statements.** Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological

abuse offered in a civil trial relating to custody, shared parenting, or visitation. Declarants of age thirteen or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

(26) **Prior Inconsistent Statements of a Testifying Witness.** A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:

- (A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.
- (B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.
- (C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

TN R REV Rule 804: Hearsay Exceptions; Declarant Unavailable

(a) **Definition of Unavailability.** "Unavailability of a witness" includes situations in which the declarant:

- (1) is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) demonstrates a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity;
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process; or
- (6) for depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

TN R REV Rule 106: Writing or Recorded Statements -- Completeness

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors to evaluate whether it qualifies under an exception to hearsay.
- A nontestimonial statement should not be excluded as hearsay if it isn't introduced as evidence to prove the truth of the asserted matter.

In *State v. Flood*, the Supreme Court of Tennessee held that the victim's statement to her father regarding the extent of the abuse was inadmissible hearsay because it did not fall under any of the hearsay exceptions under Tennessee Rule of Evidence 803. *State v. Flood*, 219 S.W.3d 307 (Tenn. 2007). Additionally, the court ruled that the father's testimony -- that the child asked him if the defendant would go to jail -- was not a "statement" for the purposes of hearsay" as it was not "offered in evidence to prove the truth of the matter asserted" and was improperly excluded as hearsay. *Id.* at 314-15 (quoting Tenn. R. Evid. 801(c)).

In *State v. McCoy*, the court also noted that "an out-of-court statement does not qualify as hearsay evidence if it "was offered not to prove the truth of its content ... but ... to show its effect on the hearer ... without regard to its truth or falsity." *State v. McCoy*, 459 S.W.3d 1, 11 (Tenn. 2014) (quoting *State v. Furlough*, 797 S.W.2d 631, 647 (Tenn.Crim.App.1990)). However, the court found that the video-recorded interview of the child in this instance qualified as hearsay, and while hearsay is generally inadmissible, there are numerous existing exceptions, and the provision that other exceptions may be "provided otherwise by law." *Id.*

Texas

Texas Admissibility

Tex. Fam. Code § 104.002. Prerecorded Statement of Child.

If a child 12 years of age or younger is alleged in a suit under this title to have been abused, the recording of an oral statement of the child recorded prior to the proceeding is admissible into evidence if:

- (1) no attorney for a party was present when the statement was made;
- (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- (3) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
- (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
- (5) each voice on the recording is identified;
- (6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and
- (7) each party is afforded an opportunity to view the recording before it is offered into evidence.

Tex. Fam. Code § 104.003. Prerecorded Videotaped Testimony of Child.

(a) The court may, on the motion of a party to the proceeding, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court, the finder of fact, and the parties to the proceeding.

(b) Only an attorney for each party, an attorney ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child, and persons necessary to operate the equipment may be present in the room with the child during the child's testimony.

(c) Only the attorneys for the parties may question the child.

(d) The persons operating the equipment shall be placed in a manner that prevents the child from seeing or hearing them.

(e) The court shall ensure that:

- (1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- (2) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;
- (3) each voice on the recording is identified; and
- (4) each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom.

Tex. Fam. Code § 104.005. Substitution for In-Court Testimony of Child.

(a) If the testimony of a child is taken as provided by this chapter, the child may not be compelled to testify in court during the proceeding.

(b) The court may allow the testimony of a child of any age to be taken in any manner provided by this chapter if the child, because of a medical condition, is incapable of testifying in open court.

Tex. Fam. Code § 261.302. Conduct of Investigation.

(a) The investigation may include:

- (1) a visit to the child's home, unless the alleged abuse or neglect can be confirmed or clearly ruled out without a home visit; and
- (2) an interview with and examination of the subject child, which may include a medical, psychological, or psychiatric examination.

(b) The interview with and examination of the child may:

- (1) be conducted at any reasonable time and place, including the child's home or the child's school;
- (2) include the presence of persons the department determines are necessary; and
- (3) include transporting the child for purposes relating to the interview or investigation.

(b-1) Before the department may transport a child as provided by Subsection (b)(3), the department shall attempt to notify the parent or other person having custody of the child of the transport.

(c) The investigation may include an interview with the child's parents and an interview with and medical, psychological, or psychiatric examination of any child in the home.

(d) If, before an investigation is completed, the investigating agency believes that the immediate removal of a child from the child's home is necessary to protect the child from further abuse or neglect, the investigating agency shall file a petition or take other action under Chapter 262 to provide for the temporary care and protection of the child.

(e) An interview with a child in which the allegations of the current investigation are discussed and that is conducted by the department during the investigation stage shall be audiotaped or videotaped unless:

(1) the recording equipment malfunctions and the malfunction is not the result of a failure to maintain the equipment or bring adequate supplies for the equipment;

(2) the child is unwilling to allow the interview to be recorded after the department makes a reasonable effort consistent with the child's age and development and the circumstances of the case to convince the child to allow the recording; or

(3) due to circumstances that could not have been reasonably foreseen or prevented by the department, the department does not have the necessary recording equipment because the department employee conducting the interview does not ordinarily conduct interviews.

(e-1) An interview with a child alleged to be a victim of physical abuse or sexual abuse conducted by an investigating agency other than the department shall be audiotaped or videotaped unless the investigating agency determines that good cause exists for not audiotaping or videotaping the interview in accordance with rules of the agency. Good cause may include, but is not limited to, such considerations as the age of the child and the nature and seriousness of the allegations under investigation. Nothing in this subsection shall be construed as prohibiting the investigating agency from audiotaping or videotaping an interview of a child on any case for which such audiotaping or videotaping is not required under this subsection. The fact that the investigating agency failed to audiotape or videotape an interview is admissible at the trial of the offense that is the subject of the interview.

(f) A person commits an offense if the person is notified of the time of the transport of a child by the department and the location from which the transport is initiated and the person is present at the location when the transport is initiated and attempts to interfere with the department's investigation. An offense under this subsection is a Class B misdemeanor. It is an exception to the application of this subsection that the department requested the person to be present at the site of the transport.

Tex. Code Crim. Proc. Ann. Art. 38.071. Testimony of Child Who Is Victim of Offense.

Sec. 1. This article applies only to a hearing or proceeding in which the court determines that a child younger than 13 years of age would be unavailable to testify in the presence of the defendant about an offense defined by any of the following sections of the Penal Code:

(1) Section 19.02 (Murder);

(2) Section 19.03 (Capital Murder);

- (3) Section 19.04 (Manslaughter);
- (4) Section 20.04 (Aggravated Kidnapping);
- (5) Section 21.11 (Indecency with a Child);
- (6) Section 22.011 (Sexual Assault);
- (7) Section 22.02 (Aggravated Assault);
- (8) Section 22.021 (Aggravated Sexual Assault);
- (9) Section 22.04(e) (Injury to a Child, Elderly Individual, or Disabled Individual);
- (10) Section 22.04(f) (Injury to a Child, Elderly Individual, or Disabled Individual), if the conduct is committed intentionally or knowingly;
- (11) Section 25.02 (Prohibited Sexual Conduct);
- (12) Section 29.03 (Aggravated Robbery);
- (13) Section 43.25 (Sexual Performance by a Child);
- (14) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
- (15) Section 43.05(a)(2) (Compelling Prostitution); or
- (16) Section 20A.02(a)(7) or (8) (Trafficking of Persons).

Sec. 2.

(a) The recording of an oral statement of the child made before the indictment is returned or the complaint has been filed is admissible into evidence if the court makes a determination that the factual issues of identity or actual occurrence were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter.

(b) If a recording is made under Subsection (a) of this section and after an indictment is returned or a complaint has been filed, by motion of the attorney representing the state or the attorney representing the defendant and on the approval of the court, both attorneys may propound written interrogatories that shall be presented by the same neutral individual who made the initial inquiries, if possible, and recorded under the same or similar circumstances of the original recording with the time and date of the inquiry clearly indicated in the recording.

(c) A recording made under Subsection (a) of this section is not admissible into evidence unless a recording made under Subsection (b) is admitted at the same time if a recording under Subsection (b) was requested prior to the time of the hearing or proceeding.

Sec. 3.

(a) On its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact. To the extent practicable, only the judge, the court reporter, the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. To the extent practicable, the persons necessary to operate the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but the court shall attempt to ensure that the child cannot hear or see the defendant. The court shall permit the attorney for the defendant adequate opportunity to confer with the defendant during cross-examination of the child. On application of the attorney for the defendant, the court may recess the proceeding before or during cross-examination of the child for a reasonable time to allow the attorney for the defendant to confer with defendant.

(b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.

Sec. 4.

(a) After an indictment has been returned or a complaint filed, on its own motion or on the motion of the attorney representing the state or the attorney representing the defendant, the court may order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact. To the extent practicable, only those persons permitted to be present at the taking of testimony under Section 3 of this article may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact but shall attempt to ensure that the child cannot hear or see the defendant.

(b) The court may set any other conditions and limitations on the taking of the testimony that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors. The court shall also ensure that:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the interviewer, and the recording is accurate and is not altered;

- (3) each voice on the recording is identified;
- (4) the defendant, the attorneys for each party, and the expert witnesses for each party are afforded an opportunity to view the recording before it is shown in the courtroom;
- (5) before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully;
- (6) the court finds from the recording or through an in-camera examination of the child that the child was competent to testify at the time the recording was made; and
- (7) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings is established at the hearing or proceeding.

(c) After a complaint has been filed or an indictment returned charging the defendant, on the motion of the attorney representing the state, the court may order that the deposition of the child be taken outside of the courtroom in the same manner as a deposition may be taken in a civil matter. A deposition taken under this subsection is admissible into evidence.

Sec. 5.

(a) On the motion of the attorney representing the state or the attorney representing the defendant and on a finding by the court that the following requirements have been substantially satisfied, the recording of an oral statement of the child made before a complaint has been filed or an indictment returned is admissible into evidence if:

- (1) no attorney or peace officer was present when the statement was made;
- (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- (3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the interviewer, and the recording is accurate and has not been altered;
- (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
- (5) every voice on the recording is identified;
- (6) the person conducting the interview of the child in the recording is expert in the handling, treatment, and investigation of child abuse cases, present at the hearing or proceeding, called by the state, and subject to cross-examination;
- (7) immediately after a complaint was filed or an indictment returned, the attorney representing the state notified the court, the defendant, and the attorney representing the defendant of the existence of the recording;

(8) the defendant, the attorney for the defendant, and the expert witnesses for the defendant were afforded an opportunity to view the recording before it is offered into evidence and, if a proceeding was requested as provided by Subsection (b) of this section, in a proceeding conducted before a district court judge but outside the presence of the jury were afforded an opportunity to cross-examine the child as provided by Subsection (b) of this section from any time immediately following the filing of the complaint or the returning of an indictment charging the defendant until the date the hearing or proceeding begins;

(9) the recording of the cross-examination, if there is one, is admissible under Subsection (b) of this section;

(10) before giving his testimony, the child was placed under oath or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully;

(11) the court finds from the recording or through an in-camera examination of the child that the child was competent to testify at the time that the recording was made; and

(12) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings has been established at the hearing or proceeding.

(b) On the motion of the attorney representing the defendant, a district court may order that the cross-examination of the child be taken and be recorded before the judge of that court at any time until a recording made in accordance with Subsection (a) of this section has been introduced into evidence at the hearing or proceeding. On a finding by the court that the following requirements were satisfied, the recording of the cross-examination of the child is admissible into evidence and shall be viewed by the finder of fact only after the finder of fact has viewed the recording authorized by Subsection (a) of this section if:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, the quality of the recording is sufficient to allow the court and the finder of fact to assess the demeanor of the child and the attorney representing the defendant, and the recording is accurate and has not been altered;

(3) every voice on the recording is identified;

(4) the defendant, the attorney representing the defendant, the attorney representing the state, and the expert witnesses for the defendant and the state were afforded an opportunity to view the recording before the hearing or proceeding began;

(5) the child was placed under oath before the cross-examination began or was otherwise admonished in a manner appropriate to the child's age and maturity to testify truthfully; and

(6) only one continuous recording of the child was made or the necessity for pauses in the recordings or for multiple recordings was established at the hearing or proceeding.

(c) During cross-examination under Subsection (b) of this section, to the extent practicable, only a district court judge, the attorney representing the defendant, the attorney representing the state, persons necessary to operate the equipment, and any other person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys and the judge may question the child. To the extent practicable, the persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child and to communicate contemporaneously with his attorney during periods of recess or by audio contact, but shall attempt to ensure that the child cannot hear or see the defendant.

(d) Under Subsection (b) of this section the district court may set any other conditions and limitations on the taking of the cross-examination of a child that it finds just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.

Sec. 6. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article or if the court finds the testimony of the child taken under Section 2 or 5 of this article is admissible into evidence, the child may not be required to testify in court at the proceeding for which the testimony was taken, unless the court finds there is good cause.

Sec. 7. In making any determination of good cause under this article, the court shall consider the rights of the defendant, the interests of the child, the relationship of the defendant to the child, the character and duration of the alleged offense, any court finding related to the availability of the child to testify, the age, maturity, and emotional stability of the child, the time elapsed since the alleged offense, and any other relevant factors.

Sec. 8.

(a) In making a determination of unavailability under this article, the court shall consider relevant factors including the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because:

(1) of emotional or physical causes, including the confrontation with the defendant; or

(2) the child would suffer undue psychological or physical harm through his involvement at the hearing or proceeding.

(b) A determination of unavailability under this article can be made after an earlier determination of availability. A determination of availability under this article can be made after an earlier determination of unavailability.

Sec. 9. If the court finds the testimony taken under Section 2 or 5 of this article is admissible into evidence or if the court orders the testimony to be taken under Section 3 or 4 of this article and if the identity of the perpetrator is a contested issue, the child additionally must make an in-person identification of the defendant either at or before the hearing or proceeding.

Sec. 10. In ordering a child to testify under this article, the court shall take all reasonable steps necessary and available to minimize undue psychological trauma to the child and to minimize the emotional and physical stress to the child caused by relevant factors, including the confrontation with the defendant and the ordinary participation of the witness in the courtroom.

Sec. 11. In a proceeding under Section 2, 3, or 4 or Subsection (b) of Section 5 of this article, if the defendant is not represented by counsel and the court finds that the defendant is not able to obtain counsel for the purposes of the proceeding, the court shall appoint counsel to represent the defendant at the proceeding.

Sec. 12. In this article, "cross-examination" has the same meaning as in other legal proceedings in the state.

Sec. 13. The attorney representing the state shall determine whether to use the procedure provided in Section 2 of this article or the procedure provided in Section 5 of this article.

Cases

Key Points:

- For a video recorded out-of-court statement to be admitted into evidence, a child victim must be present to testify at trial, *or* the defendant must have had a previous opportunity to cross-examine for both testimony and credibility.
- An outcry witness may only testify to the abuse through their own testimony. An out-of-court statement, even if video recorded, may not serve as a substitute for testimony, though it can be used in pretrial hearings to establish an interviewer's reliability as an outcry witness.

In *Coronado v. State*, the Texas Court of Criminal Appeals held that for a video recorded forensic interview to be admitted into evidence, the child victim must be present to testify at trial, or the defendant must have had a previous opportunity for meaningful and effective cross-examination. *Coronado v. State*, 351 S.W.3d 315, 324-25 (Tex. Crim. App. 2011). In defining prior cross-examination, the court noted that to be meaningful, the defendant must be able to attack the witness's credibility contemporaneously with their testimony. *Id.* at 326-28.

In *Bays v. State*, the Texas Court of Criminal Appeals held that an outcry witness may only testify to the abuse through their own testimony, and it was impermissible to play the jury a video of the child victim describing the abuse to an investigator. *Bays v. State*, 396 S.W.3d 580, 588-90 (Tex. Crim. App. 2013). The video testimony may not serve as a substitute for the testimony of the outcry witness. *Rodriguez v. State*, No. 04-20-00036-CR, 2021 WL 799895, at *2 (Tex. App. 2021) (citing *Bays*, 396 S.W.3d at 584, 592). Conversely, recorded interviews may be used in pretrial hearings to establish the reliability of the interviewers as outcry witnesses, though not used at trial or presented to a jury in any way. *Id.* at *1.

Texas Hearsay Exceptions

Tex. Code Crim. Proc. Ann. Art. 38.072. Hearsay Statement of Certain Abuse Victims.

Sec. 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child younger than 14 years of age or a person with a disability:

- (1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);
- (2) Section 25.02 (Prohibited Sexual Conduct);
- (3) Section 43.25 (Sexual Performance by a Child);
- (4) Section 43.05(a)(2) (Compelling Prostitution);
- (5) Section 20A.02(a)(7) or (8) (Trafficking of Persons); or
- (6) Section 15.01 (Criminal Attempt), if the offense attempted is described by Subdivision (1), (2), (3), (4), or (5) of this section.

Sec. 2.

(a) This article applies only to statements that:

(1) describe:

(A) the alleged offense; or

(B) if the statement is offered during the punishment phase of the proceeding, a crime, wrong, or act other than the alleged offense that is:

(i) described by Section 1;

(ii) allegedly committed by the defendant against the child who is the victim of the offense or another child younger than 14 years of age; and

(iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405, Texas Rules of Evidence, or another law or rule of evidence of this state;

(2) were made by the child or person with a disability against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and

(3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense or extraneous crime, wrong, or act.

(b) A statement that meets the requirements of Subsection (a) is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) notifies the adverse party of its intention to do so;

(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and

(C) provides the adverse party with a written summary of the statement;

(2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child or person with a disability testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Sec. 3. In this article, "person with a disability" means a person 13 years of age or older who because of age or physical or mental disease, disability, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self.

TX R EVID Rule 803: Exceptions to the Rule Against Hearsay -- Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.

(4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:

(A) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) ***Recorded Recollection.*** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge, unless the circumstances of the record's preparation cast doubt on its trustworthiness.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularly conducted business activity;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and

(E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. "Business" as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent fails to show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness.

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant

to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

(A) it is offered in a civil case and:

(i) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(ii) the conviction was for a felony;

(iii) the evidence is admitted to prove any fact essential to the judgment; and

(iv) an appeal of the conviction is not pending; or

(B) it is offered in a criminal case and:

(i) the judgment was entered after a trial or a guilty or nolo contendere plea;

(ii) the conviction was for a criminal offense;

(iii) the evidence is admitted to prove any fact essential to the judgment;

(iv) when offered by the prosecutor for a purpose other than impeachment, the judgment was against the defendant; and

(v) an appeal of the conviction is not pending.

(23) **Judgments Involving Personal, Family, or General History or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) **Statement Against Interest.** A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability or to make the declarant an object of hatred, ridicule, or disgrace; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

TX R EVID Rule 803: Exceptions to the Rule Against Hearsay -- When the Declarant is Unavailable as a Witness

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance or testimony.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) when offered in a civil case:

(i) was given as a witness at a trial or hearing of the current or a different proceeding or in a deposition in a different proceeding; and

(ii) is now offered against a party and the party -- or a person with similar interest -- had an opportunity and similar motive to develop the testimony by direct, cross-, or redirect examination.

(B) when offered in a criminal case:

(i) was given as a witness at a trial or hearing of the current or a different proceeding; and

(ii) is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination; or

(iii) was taken in a deposition under -- and is now offered in accordance with -- chapter 39 of the Code of Criminal Procedure.

(2) **Statement Under the Belief of Imminent Death.** A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) **Statement of Personal or Family History.** A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

TX R EVID Rule 106: Remainder of or Related Writings or Recorded Statement

If a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time. "Writing or recorded statement" includes depositions.

TX R EVID Rule 107: Optional Completeness

If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. "Writing or recorded statement" includes a deposition.

Cases

Key Points:

- A child victim's out-of-court statement regarding abuse to a friend or family member of similar age can be admissible as an excited utterance.
- However, to qualify as an excited utterance, the statement must be evidenced by strong emotion.
- A medical exception to hearsay can include a child's statements of identification or fault because an abuser's identity can be key to diagnosis and treatment of mental as well as physical health.

The Court of Appeals of Texas has heard a number of cases regarding the admission of hearsay evidence. See, e.g., *Snellen v. State*, 923 S.W.2d 238 (Tex. App. 1999) (holding the child victim's statement to a cousin regarding abuse was admissible as an excited utterance and, even so, admission of such evidence was harmless); *Horner v. State*, 129 S.W.3d 210 (Tex. App. 2004) (upholding the conviction based on the medical social worker's testimony about the victim's statements identifying her abuser, which was admissible under the medical diagnosis or treatment exception to the hearsay rule).

Additionally, in *Tienda v. State*, the court ruled that the trial court impermissibly admitted testimony of the school nurse and detective regarding statements the child victim made to each of them. *Tienda v. State*, 479 S.W.3d 863 (Tex. App. 2015). Because the statement made to the school nurse was made with only "a few tears" with no evidence the statement was dominated by emotion, and there was no evidence the nurse intended to treat the child, it was neither an excited utterance nor a statement made for the purposes of medical diagnosis or treatment. *Id.* at 879. Additionally, the statement made to the detective was recorded and admitted, and the court found that none of the statements made by the child amounted to an excited utterance, as the child remained calm and did not elicit an "immediate, impulsive, or spontaneous response." *Id.* at 877. (*Editor's Note:* In most jurisdictions, statements describing abuse made by a child during an active display of emotion (i.e., crying) will be covered by the excited utterance exception.)

Utah

Utah Admissibility

Utah Code Ann. § 62A-4a-414. Interviews of children — Recording required — Exceptions.

(1)

(a) Except as provided in Subsection (4), interviews of children during an investigation in accordance with Section 62A-4a-409, and involving allegations of sexual abuse, sexual exploitation, severe abuse, or severe neglect of a child, shall be conducted only under the following conditions:

(i) the interview shall be recorded visually and aurally on film, videotape, or by other electronic means;

(ii) both the interviewer and the child shall be simultaneously recorded and visible on the final product;

(iii) the time and date of the interview shall be continuously and clearly visible to any subsequent viewer of the recording; and

(iv) the recording equipment shall run continuously for the duration of the interview.

(b) This Subsection (1) does not apply to initial or minimal interviews conducted in accordance with Subsection 62A-4a-409(8)(b) or (c).

(2) Interviews conducted in accordance with Subsection (1) shall be carried out in an existing Children's Justice Center or in a soft interview room, when available.

(a) If the Children's Justice Center or a soft interview room is not available, the interviewer shall use the best setting available under the circumstances.

(b) Except as provided in Subsection (4), if the equipment required under Subsection (1) is not available, the interview shall be audiotaped, provided that the interviewer shall clearly state at the beginning of the tape:

(i) the time, date, and place of the interview;

(ii) the full name and age of the child being interviewed; and

(iii) that the equipment required under Subsection (1) is not available and why.

(3) Except as provided in Subsection (4), all other investigative interviews shall be audiotaped using electronic means. At the beginning of the tape, the worker shall state clearly the time, date, and place of the meeting, and the full name and age of the child in attendance.

(4)

(a) Subject to Subsection (4)(b), an interview described in this section may be conducted without being taped if the child:

- (i)** is at least nine years old;
- (ii)** refuses to have the interview audio taped; and
- (iii)** refuses to have the interview videotaped.

(b) If, pursuant to Subsection (4)(a), an interview is conducted without being taped, the child's refusal shall be documented as follows:

- (i)** the interviewer shall attempt to get the child's refusal on tape, including the reasons for the refusal; or
- (ii)** if the child does not allow the refusal, or the reasons for the refusal, to be taped, the interviewer shall:

(A) state on the tape that the child is present, but has refused to have the interview, refusal, or the reasons for the refusal taped; or

(B) if complying with Subsection (4)(b)(ii)(A) will result in the child, who would otherwise consent to be interviewed, to refuse to be interviewed, the interviewer shall document, in writing, that the child refused to allow the interview to be taped and the reasons for that refusal.

(c) The division shall track the number of interviews under this section that are not taped, and the number of refusals that are not taped, for each interviewer, in order to determine whether a particular interviewer has a higher incidence of refusals, or taped refusals, than other interviewers.

Cases

Key Points:

- A trial court's discretion in determining a child victim's unavailability is broad as long as it takes reasonable steps to make the determination.

In *State v. Thomas*, the Utah Supreme Court considered the defendant's appeal that the trial court erred in deeming the child victim unavailable to testify and instead admitting a prerecorded video recorded interview. *State v. Thomas*, 974 P.2d 269, 270 (Utah 1999). At trial, the six-year-old child struggled to provide verbal responses to even leading questions, and the trial court determined that she was unavailable and admitted a previously recorded interview detailing the abuse. *Id.* at 271. The defendant had the opportunity to cross-examine the child, but chose not to. *Id.* The Court disagreed with the defendant that unavailability should be determined by "medical or psychological evidence

or expert testimony," and emphasized that the trial court had broad discretion over the matter. *Id.* at 273. Ultimately the Court held that because the trial court's interpretation of "unavailability" was not hastily or uninformedly made, and was a reasonable conclusion after considerable deliberation, the trial court did not abuse its discretion in determining the child was unavailable to testify. *Id.* at 274-275.

Utah Hearsay Exceptions

UT R REV Rule 803: Exceptions to the Rule Against Hearsay - Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.
- (4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:
 - (A) is made for -- and is reasonably pertinent to--medical diagnosis or treatment; and
 - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
- (5) **Recorded Recollection.** A record that:
 - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments Involving Personal, Family, or General History or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [Other Exceptions.] [Transferred to Rule 807.]

UT R REV Rule 804: Exceptions to the Rule Against Hearsay - When the Declarant is Unavailable as a Witness

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

- (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a civil or criminal case, a statement made by the declarant while believing the declarant's death to be imminent, if the judge finds it was made in good faith.

(3) *Statement Against Interest.* A statement that:

- (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
- (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

- (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

UT R REV Rule 807: Residual Exception

(a) *In General.* Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) *Notice.* The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

UT R REV Rule 106: Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- or any other writing or recorded statement -- that in fairness ought to be considered at the same time.

Cases

Key Points:

- A child victim's out-of-court statements made to a parent, therapist, or social worker are permissible hearsay exceptions as excited utterances or statements for medical diagnosis or treatment, or when indicia of reliability are met.

The Utah Court of Appeals has repeatedly held that admission of out-of-court statements made by a child victim to a parent, therapist, and social worker are all permissible hearsay exceptions as excited utterances or statements for medical diagnosis or treatment. See e.g., *State v. Kinross*, 906 P.2d 320

(Utah Ct. App. 1995) (holding that a young child's statement to their mother immediately after abuse was admissible as an excited utterance); *State v. Sloan*, 72 P.3d 138 (Utah Ct. App. 2003) (holding the trial court properly admitted out-of-court statements by the child recounting their abuse to their therapist as medical diagnosis hearsay, even though the therapist had talked to the mother about the abuse and the child met with the therapist seven months after the abuse); and *State ex. rel L.N.*, 91 P.3d 836, 840 (Utah Ct. App. 2004) (holding that the child's statement about abuse to their shelter mother was admissible because they were in a "trust relationship" and substantial indicia of reliability were present).

Virgin Islands of the United States

Virgin Islands of the U.S. Admissibility

V.I. Code Ann. tit. 5, § 3510. Videotaped testimony of minors who are the victims of sexual and child abuse.

(a) It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a minor victim, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant against the need to protect a minor witness and to preserve the integrity of the court's fact-finding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.

(b) Notwithstanding any other provision of law to the contrary, the court in an adjudicatory or disposition hearing pursuant to section 2548 or 2549 of this title or, in a criminal proceeding involving sexual and child abuse, or in a criminal case involving a crime of violence, as defined in Title 23, section 451(e), Virgin Islands Code, or a violation of the controlled substances law as codified in Title 19, chapter 29 of this code, and where a minor is to testify as a witness, upon written notice of the prosecutor made at least three days prior to the date of the hearing or trial on which the testimony of the minor is scheduled, or during the course of the proceeding on the court's own motion, may order that the testimony of a minor, who is 16 years of age or younger, be taken by contemporaneous examination and cross-examination in a room near the courtroom and out of the presence of the jury, defendant and public, and communicated contemporaneously to the courtroom by means of two-way closed-circuit television, if the court makes any of the following findings:

(1) The minor's testimony will involve a recitation of the facts of an alleged sexual or physical offense committed on, with, or in the presence of the minor.

(2) The impact on the minor of one or more factors enumerated in subparagraphs (A) to (D) of this paragraph, inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit television is used:

(A) Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding or to prevent the minor from reporting the alleged sexual or physical offense or from assisting in criminal prosecution;

(B) Use of a firearm or any other deadly weapon during the commission of the crime;

(C) Infliction of great bodily injury upon the victim during the commission of the crime;

(D) Conduct on the part of the defendant or defense counsel during the hearings or trial which causes the minor to be unable to continue his or her testimony. In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary in order to obtain the minor's testimony.

(c) The conditions imposed on the use of the closed-circuit video-taped presentation shall be as follows:

(1) In addition to the minor, the persons present in the room from which the minor will testify, (hereinafter referred to as the "testimonial room") shall consist of the prosecutor, the defense attorney, the guardian ad litem as provided by section 2542 of this title, the therapist, counselor, or other professional who has worked most closely with the minor concerning the alleged sexual or child abuse, and the judge if he determines that his presence is necessary.

(2) The video camera and cameraman shall be separated from the testimonial room by means of a one-way mirror which would allow the videotaping of the minor's testimony.

(3) The courtroom shall be equipped with monitors having the capacity to present images and sound with clarity, in order that the jury, defendant, and judge shall be able to see and hear the testimony of the minor.

(4) No bright lights shall be employed in the testimonial room.

(5) Color images may be projected to the courtroom by the video camera.

(6) The video camera may be equipped with zoom lens to be used only on notice to counsel who may have an opportunity to object.

(7) The video camera, the witness and counsel shall be so arranged that the witness and counsel in the testimonial room can be seen on the courtroom monitors simultaneously. The face of the witness shall be visible on the monitors at all times, except on agreement by counsel or direction by the court for some other arrangement. The placement of counsel in the testimonial room shall be at the discretion of each counsel.

(8) The defendant and his attorney shall be provided by the Government with a video system which will permit constant private communication between them during the testimony of the minor.

(9) If the judge determines that his presence is not necessary in the testimonial room, an audio system may be provided connecting the judge with the testimonial room in order that he may be able to rule on objections and otherwise control the proceedings from the bench.

(10) The testimony of the minor may be interrupted at reasonable intervals to provide the defendant with an opportunity for consultation with his counsel.

(d)

(1) The hearing on a motion to videotape the minor witness, pursuant to this section, shall be conducted out of the presence of the jury.

(2) Notwithstanding any other provision of law to the contrary, the court, in determining the merits of the motion, shall not compel the minor to testify at the hearing nor shall the court deny the motion on the ground that the minor has not testified.

(3) In determining whether the impact on an individual child of one or more of the four factors enumerated in subsection (b)(2) of this section, is so substantial that the minor is unavailable as a witness unless closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the guardian ad litem, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the minor. The prosecutor and the defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

(e) When the court orders the testimony of a minor to be taken in the testimonial room, the court shall:

(1) Make a brief statement on the record, outside of the presence of the jury, of the reasons in support of its order and the reasons in support of the exclusion of the defendant from the testimonial room. While the statement need not include traditional findings of fact, the reasons shall be set forth with sufficient specificity to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner.

(2) Instruct the members of the jury that they are to draw no inferences from the use of two-way closed-circuit television as a means of facilitating the testimony of the minor.

(3) Instruct respective counsel, outside of the presence of the jury, that they are to make no comment during the course of the hearing or trial on the use of two-way closed-circuit television procedures.

(4) Instruct the guardian ad litem, outside of the presence of the jury, that he is not to coach, cue, or in any way, influence or attempt to influence the testimony of the minor.

(5) Order that a complete record of the examination of the minor, including the images and voices of all persons who in any way participated in the examination, be made and preserved on videotape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and his attorney during

ordinary business hours. The videotape shall be destroyed after five years have elapsed from the date of entry of judgment. If an appeal is filed, the videotape shall not be destroyed until a final judgment on appeal has been ordered. Any videotape which is taken pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the witness.

(f) When the court orders the testimony of a minor to be taken in a room near the courtroom, the minor shall be brought into the judge's chambers prior to the taking of his testimony to meet for a reasonable period of time with the judge, the prosecutor, defense counsel and the guardian ad litem. The purpose of the meeting shall be to explain the court process to the child and to allow the attorneys an opportunity to establish a rapport with the minor to facilitate later questioning by closed-circuit television. No participant shall discuss the defendant or any of the facts of the case with the minor during the meeting.

(g) When the court orders that the testimony of a minor may be taken in the testimonial room, nothing in this section shall prohibit the court from ordering the minor to be brought into the courtroom for a limited purpose, including the identification of the defendant or defendants, as the court deems necessary.

(h) The examination of the minor shall be under oath.

(i) Nothing in this section shall affect the requirements of section 831 of this title.

Cases

In *Government of the Virgin Islands v. Morris*, the court upheld the defendant's conviction that was based largely on out-of-court statements the child victim had made to their aunt and examining doctor, noting that the statements were admissible under the medical treatment and residual hearsay exceptions. *Government of the Virgin Islands v. Morris*, 42 V.I. 135, 138-142 (1999).

Virgin Islands of the U.S. Hearsay Exceptions

VI ST R EVID Rule 803: EXCEPTIONS TO THE RULE AGAINST HEARSAY - REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) **Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.

(4) **Statement Made for Medical Diagnosis or Treatment.** A statement that:

(A) is made for - and is reasonably pertinent to - medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) **Recorded Recollection.** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

- (A) the evidence is admitted to prove that the matter did not occur or exist;
- (B) a record was regularly kept for a matter of that kind; and
- (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

- (A) it sets out:
 - (i) the office's activities;
 - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
 - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
- (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if:

- (A) the testimony or certification is admitted to prove that
 - (i) the record or statement does not exist; or
 - (ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and
- (B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice - unless the court sets a different time for the notice or the objection.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

- (A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose - unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage - or among a person's associates or in the community - concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community - arising before the controversy - concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments Involving Personal, Family, or General History, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) was essential to the judgment; and
- (B) could be proved by evidence of reputation.

(24) [Other Exceptions.] [Reserved.]

VI ST R EVID Rule 803: EXCEPTIONS TO THE RULE AGAINST HEARSAY - WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS

(a) **Criteria for Being Found Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had - or, in a civil case, whose predecessor in interest had - an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Other Exceptions.] [Reserved.]

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused - or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did so intending that result.

VI ST R EVID Rule 807: RESIDUAL EXCEPTION

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;**
- (2) it is offered as evidence of a material fact;**
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and**
- (4) admitting it will best serve the purposes of these rules and the interests of justice.**

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

VI ST R EVID Rule 106: REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time.

Cases

Key Points:

- A medical exception to hearsay exists when the child victim's statements are in pursuit of treatment or diagnosis, and the treating physician can reasonably rely on the statement's content for said treatment or diagnosis.
- A statement that isn't an excited utterance because of the passage of time, but is still spontaneous, with no reason or ability for a child victim to fabricate, can still be admissible as a residual exception to the hearsay rule.

In *Government of the Virgin Islands v. Morris*, the Territorial Court of the Virgin Islands upheld the admission of hearsay statements by the child victim's examining doctor and the child's aunt under the medical treatment exception and residual exception, respectively. *Government of the Virgin Islands v. Morris*, 191 F.R.D. 82, 42 V.I. 135 (V.I. 1999). In admitting the doctor's hearsay testimony, a court must consider (1) the declarant's motive in making the statement and whether it is consistent with the purposes of promoting treatment, and (2) whether the content of the statement is such as could be reasonably relied upon by a physician in treatment or diagnosis. *Id.* at 139 (citing *United States v. Renville*, 779 F.2d 430, 436 (8th Cir.1985)). Because the child understood her hospital visit was for the purpose of securing treatment, and the testimony provided by the physician was relevant and routinely obtained and relied upon in child sexual abuse cases, there was no abuse of discretion in admitting the physician's testimony. *Id.* at 140. Additionally, the aunt's testimony was admissible because the child spontaneously gave the information when the aunt arrived from Atlanta, and there was no indication the child had a reason or ability to fabricate the story. *Id.* at 141-42.

Vermont

Vermont Admissibility

V.R.E. Rule 804a. Hearsay exception; putative victim age 12 or under; person with a mental illness or an intellectual or developmental disability.

(a) Statements by a person who is a child 12 years of age or under or who is a person with a mental illness as defined in 18 V.S.A. § 7101(14) or intellectual or developmental disability as defined in 1 V.S.A. §§ 146, 148 at the time the statements were made are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:

(1) the statements are offered in a civil, criminal, or administrative proceeding in which the child or person with a mental illness or intellectual or developmental disability is a putative victim of sexual assault under 13 V.S.A. § 3252, aggravated sexual assault under 13 V.S.A. § 3253, aggravated sexual assault of a child under 13 V.S.A. § 3253a, lewd or lascivious conduct under 13 V.S.A. § 2601, lewd or lascivious conduct with a child under 13 V.S.A. § 2602, incest under 13 V.S.A. § 205, abuse, neglect, or exploitation under 33 V.S.A. § 6913, sexual abuse of a vulnerable adult under 13 V.S.A. § 1379, or wrongful sexual activity and the statements concern the alleged crime or the wrongful sexual activity; or the statements are offered in a juvenile proceeding under chapter 52 of Title 33 involving a delinquent act alleged to have been committed against a child 13 years of age or under or a person with a mental illness or intellectual or developmental disability if the delinquent act would be an offense listed herein if committed by an adult and the statements concern the alleged delinquent act; or the child is the subject of a petition alleging that the child is in need of care or supervision under chapter 53 of Title 33, and the statement relates to the sexual abuse of the child;

(2) the statements were not taken in preparation for a legal proceeding and, if a criminal or delinquency proceeding has been initiated, the statements were made prior to the defendant's initial appearance before a judicial officer under Rule 5 of the Vermont Rules of Criminal Procedure;

(3) the child or person with a mental illness or intellectual or developmental disability is available to testify in court or under Rule 807; and

(4) the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

(b) Upon motion of either party in a criminal or delinquency proceeding, the court shall require the child or person with a mental illness or intellectual or developmental disability to testify for the state.

V.R.E. Rule 807. Testimony where victim is a minor or a person with a psychiatric, intellectual, or developmental disability.

(a) **Application.** -- This rule applies only to the testimony of a child age 12 or under or a person with a psychiatric, intellectual, or developmental disability as defined in 1 V.S.A. §§ 146-148 in a proceeding:

(1) in a prosecution for sexual assault under 13 V.S.A. § 3252 or aggravated sexual assault under 13 V.S.A. § 3253 alleged to have been committed against that child or person with a psychiatric, intellectual, or developmental disability;

(2) in a prosecution for lewd and lascivious conduct with a child under 13 V.S.A. § 2602 or incest under 13 V.S.A. § 205 alleged to have been committed against that child;

(3) in a prosecution for abuse, neglect or exploitation under 33 V.S.A. § 6913 or lewd and lascivious conduct under 13 V.S.A. § 2601 alleged to have been committed against that person with a psychiatric, intellectual, or developmental disability;

(4) under chapter 55 of Title 33 involving a delinquent act alleged to have been committed against that child or person with a psychiatric, intellectual, or developmental disability, if that delinquent act would be an offense listed in this subsection if committed by an adult;

(5) in a civil action in which one of the parties or witnesses has been an alleged victim of causes of action alleging sexual assault, lewd and lascivious conduct or sexual activity as defined in 33 V.S.A. § 6902;

(6) in a prosecution for domestic assault under 13 V.S.A. § 1042 or aggravated domestic assault under 13 V.S.A. § 1043 or § 1044 alleged to have been committed against that child or person with a psychiatric, intellectual, or developmental disability.

(b) **Who may move.** -- The court may, on motion of any party, on its own motion or on motion of the attorney or guardian ad litem for the child or person with a psychiatric, intellectual, or developmental disability order that the testimony of the child or person with a psychiatric, intellectual, or developmental disability be taken by two-way closed-circuit television or by recorded testimony under this rule.

(c) **Finding a trauma.** -- The court shall make an order for two-way closed-circuit television or recorded testimony under this rule only upon a finding that requiring the child or person with a psychiatric, intellectual, or developmental disability to testify in court will present a substantial risk of trauma to the child or person with a psychiatric, intellectual, or developmental disability which would substantially impair the ability of the child or person with a psychiatric, intellectual, or developmental disability to testify.

(d) **Recorded testimony.** -- The testimony of the child or person with a psychiatric, intellectual, or developmental disability may be taken outside the courtroom and recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only the court and the attorneys may question the child or person with a psychiatric, intellectual, or developmental disability. In pro se proceedings, the court may modify the provisions of this subsection relating to the role of a pro se party. The court shall permit the person against whom the child, or person with a psychiatric,

intellectual, or developmental disability is testifying to observe and hear the testimony of the child or person with a psychiatric, intellectual, or developmental disability in person and to confer personally with his or her attorney. Only the person against whom the testimony is directed, the attorneys, the court, persons necessary to operate the equipment and any person who is not a potential witness and whose presence the court finds would contribute to the welfare and well-being of the child or person with a psychiatric, intellectual, or developmental disability may be present in the room with the child or person with a psychiatric, intellectual, or developmental disability during the testimony. The persons operating the equipment shall be situated whenever possible in such a way that they can see and hear the child or person with a psychiatric, intellectual, or developmental disability during the testimony, but the child or person with a psychiatric, intellectual, or developmental disability cannot see or hear them. If the testimony is taken under this subsection, the court shall also ensure that:

- (1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- (2) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and is not altered except as ordered by the court;
- (3) each voice on the recording is identified; and
- (4) each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(e) **Two-way closed-circuit television.** -- The testimony of the child or person with a psychiatric, intellectual, or developmental disability may be taken in a room other than the courtroom and be televised by two-way closed-circuit equipment to be viewed by the finder of fact and others present in the courtroom. Only the persons necessary to operate the equipment and a person who is not a potential witness and whose presence the court finds would contribute to the welfare and well-being of the child or person with a psychiatric, intellectual, or developmental disability may be present in the room with the child or person with a psychiatric, intellectual, or developmental disability during the testimony.

(f) **Placing of the party against whom the testimony is directed.** --During the recording of testimony under subsection (d) of this rule the party shall be situated in such a way that the child or person with a psychiatric, intellectual, or developmental disability can hear and see the party unless the court finds that requiring the child or person with a psychiatric, intellectual, or developmental disability to hear and see the party presents a substantial risk of trauma to the child or person with a psychiatric, intellectual, or developmental disability which would substantially impair the ability of the child or person with a psychiatric, intellectual, or developmental disability to testify, in which case the court may order that the party be situated in such a way that the child or person with a psychiatric, intellectual, or developmental disability cannot hear or see the party. During the taking of testimony by two-way closed-circuit equipment under subsection (e) the party's image shall be transmitted to the witness unless the court finds that requiring the witness to hear and see the party presents a substantial risk of trauma to the witness which would substantially impair the ability of the witness to testify, in which case the image of the party shall not be transmitted to the witness.

(g) **In-court testimony not required.** -- If the court orders the testimony of a child or person with a psychiatric, intellectual, or developmental disability to be taken under this rule, the child or person with a psychiatric, intellectual, or developmental disability may not be required to testify in court at the proceeding for which the testimony was taken, unless otherwise ordered by the court for good cause shown.

Cases

Key Points:

- A child victim's availability to testify is defined as contemporaneous to trial; however, a contemporaneous audio or visual recording, or live testimony closed-circuit television, can fulfill this requirement.
- A child victim's written testimony is admissible when it supports the victim's testimony, and when the defendant is present and able to cross-examine the victim.

In *State v. Oscarson*, the Supreme Court of Vermont held that in order for a child's testimony to be admitted in court, the child must be "available to testify," and interpreted this to mean the testimony must occur contemporaneously with the trial. *State v. Oscarson*, 845 A.2d 337, 343-346 (Vt. 2004). Because one child's testimony had been pre-recorded only and he was unavailable for day-of testimony, the Court vacated the defendant's conviction in that regard. *Id.* However, the Court did note that it would have been permissible for the child to testify contemporaneously via audio or visual recording, or closed-circuit television. *Id.*

In *State v. Brink*, the Supreme Court of Vermont held that a child's written testimony is admissible. *State v. Brink*, 949 A.2d 1069, 1071-72 (2008). The child had written a statement about her experience of abuse, which she intended to read aloud in court. When she was unable to read particular sections, the prosecutor asked her specific questions regarding what she had written. *Id.* Because the defendant was still present and retained the right to cross-examine the victim, the Court found that his Sixth Amendment rights were not violated. *Id.*

In *State v. Bergquist*, the Supreme Court of Vermont held that the language of VRE 807 is not sufficiently protective of defendant's rights to pass constitutional muster and requires instead a finding of trauma, at least by a preponderance, rather than a substantial risk of trauma. (*State v. Bergquist*, 032219 VTSC, 2017-281 (2019).

Vermont Hearsay Exceptions

VT R REV Rule 803: HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations.
- (5) ***Recorded Recollection.*** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- (6) ***Records of Regularly Conducted Business Activity.*** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12) or a statute or rule permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
- (7) ***Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6).*** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public Records and Reports.**

(A) To the extent not otherwise provided in (B), records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

(B) The following are not within this exception to the hearsay rule:

(i) investigative reports by police and other law enforcement personnel;

(ii) investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party;

(iii) factual findings offered by the government in criminal cases;

(iv) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, of the fact 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of Religious Organizations.** 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.** 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.** Statements of fact concerning 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.** 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.** 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 20 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 him 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation Concerning Personal or Family History.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to Character.** Reputation of a person's character among his associates or in the community.

(22) **Judgment of Previous Conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. A judgment is not admissible under this rule during the pendency of an appeal therefrom.

(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 the same would be provable by evidence of reputation.

(24) **Statements of a Putative Victim Who Is a Minor.** [Repealed.]

VT R REV Rule 804: HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of his statement; or
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) *Statement Under Belief of Impending Death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.
- (3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement of confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused, is not within this exception.
- (4) *Statement of Personal or Family History or Concerning Boundaries.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; or

(C) a statement as to boundaries of land.

(5) [Reserved]

(6) *Forfeiture by wrongdoing.* A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

VT R REV Rule 804A: HEARSAY EXCEPTION; PUTATIVE VICTIM AGE 12 OR UNDER; PERSON WITH A MENTAL ILLNESS OR AN INTELLECTUAL OR DEVELOPMENTAL DISABILITY

(a) Statements by a person who is a child 12 years of age or under or who is a person with a mental illness as defined in 18 V.S.A. § 7101(14) or intellectual or developmental disability as defined in 1 V.S.A. §§ 146, 148 at the time the statements were made are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:

(1) the statements are offered in a civil, criminal, or administrative proceeding in which the child or person with a mental illness or intellectual or developmental disability is a putative victim of sexual assault under 13 V.S.A. § 3252, aggravated sexual assault under 13 V.S.A. § 3253, aggravated sexual assault of a child under 13 V.S.A. § 3253a, lewd or lascivious conduct under 13 V.S.A. § 2601, lewd or lascivious conduct with a child under 13 V.S.A. § 2602, incest under 13 V.S.A. § 205, abuse, neglect, or exploitation under 33 V.S.A. § 6913, sexual abuse of a vulnerable adult under 13 V.S.A. § 1379, or wrongful sexual activity and the statements concern the alleged crime or the wrongful sexual activity; or the statements are offered in a juvenile proceeding under chapter 52 of Title 33 involving a delinquent act alleged to have been committed against a child 13 years of age or under or a person with a mental illness or intellectual or developmental disability if the delinquent act would be an offense listed herein if committed by an adult and the statements concern the alleged delinquent act; or the child is the subject of a petition alleging that the child is in need of care or supervision under chapter 53 of Title 33, and the statement relates to the sexual abuse of the child;

(2) the statements were not taken in preparation for a legal proceeding and, if a criminal or delinquency proceeding has been initiated, the statements were made prior to the defendant's initial appearance before a judicial officer under Rule 5 of the Vermont Rules of Criminal Procedure;

(3) the child or person with a mental illness or intellectual or developmental disability is available to testify in court or under Rule 807; and

(4) the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

(b) Upon motion of either party in a criminal or delinquency proceeding, the court shall require the child or person with a mental illness or intellectual or developmental disability to testify for the state.

VT R REV Rule 106: REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- Hearsay testimony is admissible when the child victim who made the out-of-court statements is available for cross-examination.
- However, while Vermont allows for statements made for purposes of medical diagnosis or treatment, statements of the inception and cause of a condition or symptoms are not permissible, even if they are pertinent to diagnosis or treatment. (*Editor's Note:* Most jurisdictions would reject this narrow interpretation of the medical treatment exception.)

In *State v. Gallagher*, the defendant appealed his conviction of sexual assault, arguing that the trial court erred in allowing hearsay testimony to be presented by the child's teacher, social worker, and treating physician. *State v. Gallagher*, 150 Vt. 341, 554 A.2d 221 (Vt. 1988). The Supreme Court of Vermont held that admission of the teacher and social worker's statements was permissible, as they were admitted under V.R.E 804a(a)(3), which requires the declarant to be available for cross-examination at trial. *Id.* at 344. Here, the child served as a witness for the prosecution, was cross-examined by the defense, and was therefore available within the meaning of the hearsay exception. *Id.* However, the court held that the physician's testimony was improperly admitted because the child's identification of the defendant was a statement of cause rather than a statement of a symptom for medical diagnosis or treatment. *Id.* at 349. However, because the child was available for cross-examination, the error was harmless. *Id.*

In *State v. Babson*, the Supreme Court of Vermont held that statements made by the child to the examining physician and read aloud to the jury were impermissible hearsay. However, because the statements did not "substantially affect" the jury, there was no reversible error. *State v. Babson*, 180 Vt. 602, 603-04, 908 A.2d 500 (Vt. 2006). While Vermont allows for statements made for purposes of

medical diagnosis or treatment, statements of the inception and cause of a condition or symptoms are not permissible, even if they are pertinent to diagnosis or treatment. *Id.*

Virginia

Virginia Admissibility

Va. Code Ann. § 63.2-1522. Admission of evidence of sexual acts with children.

A. In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to § 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-283, or 20-107.2, an out-of-court statement made by a child 14 years of age or younger at the time the statement is offered into evidence, describing any act of a sexual nature performed with or on the child by another, not otherwise admissible by statute or rule, may be admissible in evidence if the requirements of subsection B are met.

B. An out-of-court statement may be admitted into evidence as provided in subsection A if:

1. The child testifies at the proceeding, or testifies by means of a videotaped deposition or closed-circuit television, and at the time of such testimony is subject to cross-examination concerning the out-of-court statement or the child is found by the court to be unavailable to testify on any of these grounds:

- a. The child's death;
- b. The child's absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;
- c. The child's total failure of memory;
- d. The child's physical or mental disability;
- e. The existence of a privilege involving the child;
- f. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; and
- g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.

2. The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness and reliability.

C. A statement may not be admitted under this section unless the proponent of the statement notifies the adverse party of his intention to offer the statement and the substance of the statement sufficiently in advance of the proceedings to provide the adverse party with a reasonable opportunity to prepare to meet the statement, including the opportunity to subpoena witnesses.

D. In determining whether a statement possesses particularized guarantees of trustworthiness and reliability under subdivision B 2, the court shall consider, but is not limited to, the following factors:

- 1. The child's personal knowledge of the event;**
- 2. The age and maturity of the child;**
- 3. Certainty that the statement was made, including the credibility of the person testifying about the statement and any apparent motive such person may have to falsify or distort the event including bias, corruption, or coercion;**
- 4. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;**
- 5. The timing of the child's statement;**
- 6. Whether more than one person heard the statement;**
- 7. Whether the child was suffering pain or distress when making the statement;**
- 8. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;**
- 9. Whether the statement has internal consistency or coherence, and uses terminology appropriate to the child's age;**
- 10. Whether the statement is spontaneous or directly responsive to questions;**
- 11. Whether the statement is responsive to suggestive or leading questions; and**
- 12. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.**

E. The court shall support with findings on the record, or with written findings in a court not of record, any rulings pertaining to the child's unavailability and the trustworthiness and reliability of the out-of-court statement.

Va. Code Ann. § 63.2-1523. Use of videotaped statements of complaining witnesses as evidence.

A. In any civil proceeding involving alleged abuse or neglect of a child pursuant to this chapter or pursuant to § 16.1-241, 16.1-251, 16.1-252, 16.1-253, 16.1-283, or 20-107.2, a recording of a statement of the alleged victim of the offense, made prior to the proceeding, may be admissible as evidence if the requirements of subsection B are met and the court determines that:

- 1.** The alleged victim is 14 years of age or younger at the time the statement is offered into evidence;

2. The recording is both visual and oral, and every person appearing in, and every voice recorded on, the tape is identified;
3. The recording is on videotape or was recorded by other electronic means capable of making an accurate recording;
4. The recording has not been altered;
5. No attorney for any party to the proceeding was present when the statement was made;
6. The person conducting the interview of the alleged victim was authorized to do so by the child-protective services coordinator of the local department;
7. All persons present at the time the statement was taken, including the alleged victim, are present and available to testify or be cross examined at the proceeding when the recording is offered; and
8. The parties or their attorneys were provided with a list of all persons present at the recording and were afforded an opportunity to view the recording at least 10 days prior to the scheduled proceedings.

B. A recorded statement may be admitted into evidence as provided in subsection A if:

1. The child testifies at the proceeding, or testifies by means of closed-circuit television, and at the time of such testimony is subject to cross-examination concerning the recorded statement or the child is found by the court to be unavailable to testify on any of these grounds:
 - a. The child's death;
 - b. The child's absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;
 - c. The child's total failure of memory;
 - d. The child's physical or mental disability;
 - e. The existence of a privilege involving the child;
 - f. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason;
 - g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of closed-circuit television; and
2. The child's recorded statement is shown to possess particularized guarantees of trustworthiness and reliability.

C. A recorded statement may not be admitted under this section unless the proponent of the statement notifies the adverse party of his intention to offer the statement and the substance of the statement sufficiently in advance of the proceedings to provide the adverse party with a reasonable opportunity to prepare to meet the statement, including the opportunity to subpoena witnesses.

D. In determining whether a recorded statement possesses particularized guarantees of trustworthiness and reliability under subdivision B 2, the court shall consider, but is not limited to, the following factors:

- 1. The child's personal knowledge of the event;**
- 2. The age and maturity of the child;**
- 3. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;**
- 4. The timing of the child's statement;**
- 5. Whether the child was suffering pain or distress when making the statement;**
- 6. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;**
- 7. Whether the statement has a "ring of verity," has internal consistency or coherence, and uses terminology appropriate to the child's age;**
- 8. Whether the statement is spontaneous or directly responsive to questions;**
- 9. Whether the statement is responsive to suggestive or leading questions; and**
- 10. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.**

E. The court shall support with findings on the record, or with written findings in a court not of record, any rulings pertaining to the child's unavailability and the trustworthiness and reliability of the recorded statement.

Cases

Key Points:

- A child victim's testimony can be provided via closed-circuit television when they are unavailable due to the likelihood that testifying would further traumatize them.
- A child victim's written testimony is admissible when the child is available for oral testimony, including cross-examination.

Virginia's appellate court has consistently, across multiple cases, held that child testimony presented via closed-circuit television is admissible when a child is sufficiently "unavailable" within the meaning of the statute. See *Parrish v. Commonwealth*, 567 S.E.2d 576, 579-580 (Va. Ct. App. 2002) (noting the child was unavailable because testifying in court would cause "severe emotional trauma" and could instead testify by closed-circuit television) and *Johnson v. Commonwealth*, 580 S.E.2d 486 (Va. Ct. App. 2003) (determining the child was unavailable because a psychologist testified it would be very traumatic for the girl to testify and she might run away or refuse to be present in the courtroom).

In *Turner v. Commonwealth*, the Virginia Court of Appeals, Chesapeake, upheld a trial court's determination that the written testimony of a child victim is admissible. *Turner v. Commonwealth*, 758 S.E.2d 81, 85 (Va. Ct. App. 2014). Because the child provided oral testimony alongside her written allegations, was present in the courtroom, and the defendant had the opportunity to cross-examine her written and oral testimony, the Court found his rights under the Confrontation Clause were not violated. *Id.*

Virginia Hearsay Exceptions

VA R S CT Rule 2:803: HEARSAY EXCEPTIONS APPLICABLE REGARDLESS OF AVAILABILITY OF THE DECLARANT (Rule 2:803(10)(a) derived from Code § 8.01-390(C); Rule 2:803(10)(b) derived from Code § 19.2-188.3; Rule 2:803(17) derived from Code § 8.2-724; and Rule 2:803(23) is derived from Code § 19.2-268.2)

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (o) **Admission by Party-Opponent.** A statement offered against a party that is
 - (A) the party's own statement, in either an individual or a representative capacity, or
 - (B) a statement of which the party has manifested adoption or belief in its truth, or
 - (C) a statement by a person authorized by the party to make a statement concerning the subject, or
 - (D) a statement by the party's agent or employee, made during the term of the agency or employment, concerning a matter within the scope of such agency or employment, or
 - (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

- (1) **Present Sense Impression.** A spontaneous statement describing or explaining an event or condition made contemporaneously with, or while, the declarant was perceiving the event or condition.

(2) **Excited Utterance.** A spontaneous or impulsive statement prompted by a startling event or condition and made by a declarant with firsthand knowledge at a time and under circumstances negating deliberation.

(3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 the declarant's will.

(4) **Statements for Purposes of Medical Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded Recollection.** Except as provided by statute, a memorandum or record concerning a matter about which a witness once had firsthand knowledge made or adopted by the witness at or near the time of the event and while the witness had a clear and accurate memory of it, if the witness lacks a present recollection of the event, and the witness vouches for the accuracy of the written memorandum. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of acts, events, calculations, or conditions if:

(A) the record was made at or near the time of the acts, events, calculations, or conditions by -- or from information transmitted by -- someone with knowledge;

(B) the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making and keeping the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Reserved.

(8) **Public Records and Reports.** In addition to categories of government records made admissible by statute, records, reports, statements, or data compilations, in any form, prepared by public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed within the scope of the office or agency's duties, as to which the source of the recorded information could testify if called as a witness; generally excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel when offered against a criminal defendant.

(9) **Records of Vital Statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report was made to a public office pursuant to requirements of law.

(10) **Absence of Entries in Public Records and Reports.**

(a) *Civil Cases.* An affidavit signed by an officer, or the deputy thereof, deemed to have custody of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court, stating that after a diligent search, no record or entry of such record is found to exist among the records in such office is admissible as evidence that the office has no such record or entry.

(b) *Criminal Cases.* In any criminal hearing or trial, an affidavit signed by a government official who is competent to testify, deemed to have custody of an official record, or signed by such official's designee, stating that after a diligent search, no record or entry of such record is found to exist among the records in such official's custody, is admissible as evidence that the office has no such record or entry, provided that if the hearing or trial is a proceeding other than a preliminary hearing the procedures set forth in subsection G of § 18.2-472.1 for admission of an affidavit have been satisfied, mutatis mutandis, and the accused has not objected to the admission of the affidavit pursuant to the procedures set forth in subsection H of § 18.2-472.1, mutatis mutandis. Nothing in this subsection (b) shall be construed to affect the admissibility of affidavits in civil cases under subsection (a) of this Rule.

(11) **Records of Religious Organizations.** 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.** 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.** Statements of fact concerning 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.** 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 authorizes the recording of documents of that kind in that office.

(15) **Statements in Documents Affecting an Interest in Property.** 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 generally acted upon as true by persons having an interest in the matter, and contained in a document in existence 30 years or more, the authenticity of which is established.

(17) **Market Quotations.** Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown.

(18) **Learned Treatises.** See Rule 2:706.

(19) **Reputation Concerning Boundaries.** Reputation in a community, arising before the controversy, as to boundaries of lands in the community, where the reputation refers to monuments or other delineations on the ground and some evidence of title exists.

(20) **Reputation as to a Character Trait.** Reputation of a person's character trait among his or her associates or in the community.

(21) **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 the same would be provable by evidence of reputation.

(22) **Statement of Identification by Witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person.

(23) **Recent Complaint of Sexual Assault.** In any prosecution for criminal sexual assault under Article 7 (§ 18.2-61 *et seq.*) of Chapter 4 of Title 18.2, a violation of §§ 18.2-361, 18.2-366, 18.2-370 or § 18.2-370.1, the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness.

(24) **Price of Goods.** In shoplifting cases, price tags regularly affixed to items of personalty offered for sale, or testimony concerning the amounts shown on such tags.

VA R S CT RULE 2:803.1: STATEMENTS BY CHILD DESCRIBING ACTS RELATING TO OFFENSE AGAINST CHILDREN (DERIVED FROM CODE § 19.2-268.3)

(a) Proof of an out-of-court statement made by a child who is under 13 years of age at the time of trial or hearing, and who is the alleged victim of an offense against children as provided in Code § 19.2-268.3(A), which statement describes any act directed against the child relating to such alleged offense, shall not be excluded as hearsay under Rule 2:802 if both of the following apply:

(1) The court finds, in a hearing conducted prior to a trial, that the time, content, and totality of circumstances surrounding the statement provide sufficient indicia of reliability

so as to render it inherently trustworthy. In determining such trustworthiness, the court may consider, among other things, the following factors:

- (i) The child's personal knowledge of the event;
- (ii) The age, maturity, and mental state of the child;
- (iii) The credibility of the person testifying about the statement;
- (iv) Any apparent motive the child may have to falsify or distort the event, including bias or coercion;
- (v) Whether the child was suffering pain or distress when making the statement; and
- (vi) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act; and

(2) The child:

- (i) Testifies; or
- (ii) Is declared by the court to be unavailable as a witness; provided, however, that if the child has been declared unavailable, such statement may be admitted pursuant to this section only if there is corroborative evidence of the act relating to an alleged offense against children.

(b) At least 14 days prior to the commencement of the proceeding in which a statement will be offered as evidence, the party intending to offer the statement shall notify the opposing party, in writing, of the intent to offer the statement and shall provide or make available copies of the statement to be introduced.

(c) This provision shall not be construed to limit the admission of any statement offered under any other hearsay exception or applicable rule of evidence.

VA R S CT RULE 2:804: HEARSAY EXCEPTIONS APPLICABLE WHERE THE DECLARANT IS UNAVAILABLE (Rule 2:804(b)(5) derived from Code § 8.01-397)

(a) **Applicability.** The hearsay exceptions set forth in subpart (b) hereof are applicable where the declarant is dead or otherwise unavailable as a witness.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule:

(1) *Former Testimony.* Testimony given under oath or otherwise subject to penalties for perjury at a prior hearing, or in a deposition, if it is offered in reasonably accurate form and, if given in a different proceeding, the party against whom the evidence is now offered, or in a civil case a privy, was a party in that proceeding who examined the witness by direct examination or

had the opportunity to cross-examine the witness, and the issue on which the testimony is offered is substantially the same in the two cases.

(2) *Statement Under Belief of Impending Death.* In a prosecution for homicide, a statement made by a declarant who believed when the statement was made that death was imminent and who had given up all hope of survival, concerning the cause or circumstances of declarant's impending death.

(3) *Statement Against Interest.*

(A) A statement which the declarant knew at the time of its making to be contrary to the declarant's pecuniary or proprietary interest, or to tend to subject the declarant to civil liability.

(B) A statement which the declarant knew at the time of its making would tend to subject the declarant to criminal liability, if the statement is shown to be reliable.

(4) *Statement of Personal or Family History.* If no better evidence is available, a statement made before the existence of the controversy, concerning family relationships or pedigree of a person, made by a member of the family or relative.

(5) *Statement by Party Incapable of Testifying.* Code § 8.01-397, entitled "Corroboration required and evidence receivable when one party incapable of testifying," presently provides:

In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party. The phrase "from any cause" as used in this section shall not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury.

For the purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party. If authentication of the business record is not admitted in a request for admission, such business record shall be authenticated by a person other than the author of the entry who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint.

**VA R S CT RULE 2:106: REMAINDER OF A WRITING OR RECORDED STATEMENT (Rule 2:106(b)
derived from Code § 8.01-417.1)**

(a) **Related Portions of a Writing in Civil and Criminal Cases.** When part of a writing or recorded statement is introduced by a party, upon motion by another party the court may require the offering party to introduce any other part of the writing or recorded statement which ought in fairness to be considered contemporaneously with it, unless such additional portions are inadmissible under the Rules of Evidence.

(b) **Lengthy Documents in Civil Cases.** To expedite trials in civil cases, upon timely motion, the court may permit the reading to the jury, or the introduction into evidence, of relevant portions of lengthy and complex documents without the necessity of having the jury hear or receive the entire document. The court, in its discretion, may permit the entire document to be received by the jury, or may order the parties to edit from any such document admitted into evidence information that is irrelevant to the proceedings.

Cases

Key Points:

- A child victim's hearsay statement is admissible as circumstantial evidence when it demonstrates the victim's attitude, versus being offered to show the truth of a matter.

In *Church v. Commonwealth*, the Supreme Court of Virginia allowed a child's hearsay statement to be admitted as circumstantial evidence, because the statement was offered to show the child's attitude towards sex, rather than to show the truth of the matter. *Church v. Commonwealth*, 230 Va. 208, 335 S.E.2d 823, 825 (Va. 1985). Although the child did not disclose the abuse for some time, the mother testified that she observed changes in behavior and comments that sex was "dirty, nasty and it hurt." *Id.* at 211. While hearsay statements offered as "assertions to evidence of the truth of the matter asserted" are impermissible, because the mother's testimony was offered to demonstrate the child's attitude -- likely as the result of a traumatic experience -- the testimony was admissible. *Id.* at 212.

Washington

Washington Admissibility

Rev. Code Wash. (ARCW) § 9A.44.120. Admissibility of child's statement -- conditions.

(1) A statement not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(a)

(i) It is made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110; or

(ii) It is made by a child when under the age of sixteen describing any of the following acts or attempted acts performed with or on the child: Trafficking under RCW 9A.40.100; commercial sexual abuse of a minor under RCW 9.68A.100; promoting commercial sexual abuse of a minor under RCW 9.68A.101; or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102;

(b) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(c) The child either:

(i) Testifies at the proceedings; or

(ii) Is unavailable as a witness, except that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

(2) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

Rev. Code Wash. (ARCW) § 9A.44.150. Testimony of child by closed-circuit television.

(1) On motion of the prosecuting attorney in a criminal proceeding, the court may order that a child under the age of fourteen may testify in a room outside the presence of the defendant and the jury

while one-way closed-circuit television equipment simultaneously projects the child's testimony into another room so the defendant and the jury can watch and hear the child testify if:

(a) The testimony will:

(i) Describe an act or attempted act of sexual contact performed with or on the child witness by another person or with or on a child other than the child witness by another person;

(ii) Describe an act or attempted act of physical abuse against the child witness by another person or against a child other than the child witness by another person;

(iii) Describe a violation of RCW 9A.40.100 (trafficking) or any offense identified in chapter 9.68A RCW (sexual exploitation of children); or

(iv) Describe a violent offense as defined by RCW 9.94A.030 committed against a person known by or familiar to the child witness or by a person known by or familiar to the child witness;

(b) The testimony is taken during the criminal proceeding;

(c) The court finds by substantial evidence, in a hearing conducted outside the presence of the jury, that requiring the child witness to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at the trial. If the defendant is excluded from the presence of the child, the jury must also be excluded;

(d) As provided in (a) and (b) of this subsection, the court may allow a child witness to testify in the presence of the defendant but outside the presence of the jury, via closed-circuit television, if the court finds, upon motion and hearing outside the presence of the jury, that the child will suffer serious emotional distress that will prevent the child from reasonably communicating at the trial in front of the jury, or, that although the child may be able to reasonably communicate at trial in front of the jury, the child will suffer serious emotional or mental distress from testifying in front of the jury. If the child is able to communicate in front of the defendant but not the jury the defendant will remain in the room with the child while the jury is excluded from the room;

(e) The court finds that the prosecutor has made all reasonable efforts to prepare the child witness for testifying, including informing the child or the child's parent or guardian about community counseling services, giving court tours, and explaining the trial process. If the prosecutor fails to demonstrate that preparations were implemented or the prosecutor in good faith attempted to implement them, the court shall deny the motion;

(f) The court balances the strength of the state's case without the testimony of the child witness against the defendant's constitutional rights and the degree of infringement of the closed-circuit television procedure on those rights;

- (g)** The court finds that no less restrictive method of obtaining the testimony exists that can adequately protect the child witness from the serious emotional or mental distress;
- (h)** When the court allows the child witness to testify outside the presence of the defendant, the defendant can communicate constantly with the defense attorney by electronic transmission and be granted reasonable court recesses during the child's testimony for person-to-person consultation with the defense attorney;
- (i)** The court can communicate with the attorneys by an audio system so that the court can rule on objections and otherwise control the proceedings;
- (j)** All parties in the room with the child witness are on camera and can be viewed by all other parties. If viewing all participants is not possible, the court shall describe for the viewers the location of the prosecutor, defense attorney, and other participants in relation to the child;
- (k)** The court finds that the television equipment is capable of making an accurate reproduction and the operator of the equipment is competent to operate the equipment; and
- (l)** The court imposes reasonable guidelines upon the parties for conducting the filming to avoid trauma to the child witness or abuse of the procedure for tactical advantage.

The prosecutor, defense attorney, and a neutral and trained victim's advocate, if any, shall always be in the room where the child witness is testifying. The court in the court's discretion depending on the circumstances and whether the jury or defendant or both are excluded from the room where the child is testifying, may remain or may not remain in the room with the child.

(2) During the hearing conducted under subsection (1) of this section to determine whether the child witness may testify outside the presence of the defendant and/or the jury, the court may conduct the observation and examination of the child outside the presence of the defendant if:

- (a)** The prosecutor alleges and the court concurs that the child witness will be unable to testify in front of the defendant or will suffer severe emotional or mental distress if forced to testify in front of the defendant;
- (b)** The defendant can observe and hear the child witness by closed-circuit television;
- (c)** The defendant can communicate constantly with the defense attorney during the examination of the child witness by electronic transmission and be granted reasonable court recesses during the child's examination for person-to-person consultation with the defense attorney; and
- (d)** The court finds the closed-circuit television is capable of making an accurate reproduction and the operator of the equipment is competent to operate the equipment. Whenever possible, all the parties in the room with the child witness shall be on camera so that the viewers can see all the parties. If viewing all participants is not possible, then the court shall describe for the viewers the location of the prosecutor, defense attorney, and other participants in relation to the child.

(3) The court shall make particularized findings on the record articulating the factors upon which the court based its decision to allow the child witness to testify via closed-circuit television pursuant to this section. The factors the court may consider include, but are not limited to, a consideration of the child's age, physical health, emotional stability, expressions by the child of fear of testifying in open court or in front of the defendant, the relationship of the defendant to the child, and the court's observations of the child's inability to reasonably communicate in front of the defendant or in open court. The court's findings shall identify the impact the factors have upon the child's ability to testify in front of the jury or the defendant or both and the specific nature of the emotional or mental trauma the child would suffer. The court shall determine whether the source of the trauma is the presence of the defendant, the jury, or both, and shall limit the use of the closed-circuit television accordingly.

(4) This section does not apply if the defendant is an attorney pro se unless the defendant has a court-appointed attorney assisting the defendant in the defense.

(5) This section may not preclude the presence of both the child witness and the defendant in the courtroom together for purposes of establishing or challenging the identification of the defendant when identification is a legitimate issue in the proceeding.

(6) The Washington supreme court may adopt rules of procedure regarding closed-circuit television procedures.

(7) All recorded tapes of testimony produced by closed-circuit television equipment shall be subject to any protective order of the court for the purpose of protecting the privacy of the child witness.

(8) Nothing in this section creates a right of the child witness to a closed-circuit television procedure in lieu of testifying in open court.

(9) The state shall bear the costs of the closed-circuit television procedure.

(10) A child witness may or may not be a victim in the proceeding.

(11) Nothing in this section precludes the court, under other circumstances arising under subsection (1)(a) of this section, from allowing a child to testify outside the presence of the defendant and the jury so long as the testimony is presented in accordance with the standards and procedures required in this section.

Cases

Key Points:

- A child victim may not be required to testify in court, but the trial court cannot admit their hearsay statements without determining whether the child is able or unable to testify via closed-circuit television.
- Age alone is not determinative of competency; multiple factors are necessary for a court to determine a child victim's competency.

In *State v. Smith*, the Washington Supreme Court held that while a child may not be required to testify in court, the trial court must then determine whether the child is unable to testify via closed-circuit television. *State v. Smith*, 59 P.3d 74 (Wash. 2002). After a social worker and therapist testified that the victim would be uncomfortable testifying with the defendant in the courtroom, the trial court determined the child to be unavailable and admitted the hearsay statements. *Id.* at 76-77. Because the trial court did not consider using a closed-circuit television pursuant to RCW 9A.44.150, the supreme court vacated the defendant's conviction as it was wholly based on the victim's improperly admitted hearsay statements. *Id.* at 82.

In *State v. Woods*, the Washington Supreme Court upheld the defendant's conviction after affirming the trial court's determination of competency of the then 4 and 6-year-old victims. *State v. Woods* 114 P.3d 1174, 1177 (Wash. 2005). Noting that age alone is not determinative of competency, the Court held that the competency standard is met if the child: 1) understands the obligation to speak the truth on the witness stand; 2) has the mental capacity, at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it; 3) has a memory sufficient to retain an independent recollection of the occurrence; 4) has the capacity to express in words her memory of the occurrence; and 5) has the capacity to understand simple questions about the occurrence. *Id.* (citing *State v. Allen*, 424 P.2d 1021 (Wash. 1967)). Although the defendant challenged the second factor regarding mental capacity, the supreme court found the trial court did not abuse its discretion, as the victims were able to recall specific instances of abuse including time and location where it took place. *Id.* at 1178-79.

Washington Hearsay Exceptions

WA R REV ER Rule 803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(a) **Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of Regularly Conducted Activity.* [Reserved. See RCW 5.45.]

(7) *Absence of Entry in Records Kept in Accordance with RCW 5.45.* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public Records and Reports.* [Reserved. See RCW 5.44.040.]

(9) *Records of Vital Statistics.* Records or data compilations, in any form, 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.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of Religious Organizations.* 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.* 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.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, tattoos, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of Documents Affecting an Interest in Property.* 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.* 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 20 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 witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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

(20) *Reputation Concerning Boundaries or General History.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) *Reputation as to Character.* Reputation of a person's character among his associates or in the community.

(22) *Judgment of Previous Conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

(b) **Other Exceptions.** [Reserved.]

WA R REV ER Rule 804: HEARSAY EXCEPTION: DECLARANT UNAVAILABLE

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

(6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* In a trial for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a

reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History.

(i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other Exceptions. [Reserved.]

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged directly or indirectly in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

WA R REV ER Rule 106: REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- A child victim's out-of-court statements to a therapist are admissible under the medical treatment exception to the hearsay rule, even if the child's cross-examination doesn't support the statements.
- A child victim's out-of-court statements meant to support a criminal investigation rather than response to an ongoing emergency are not admissible.
- Nontestimonial out-of-court statements made by a child victim to adults not involved in a criminal investigation may be admissible when a trial court has determined the victim is unavailable to testify.

In *In re Personal Restraint of Grasso*, the Supreme Court of Washington held that although statements made by the child to a therapist were impermissible hearsay because the child's cross-examination did not support the statements, they were admissible under the medical treatment exception to the hearsay rule. *In re Personal Restraint of Grasso*, 151 Wash.2d 1, 84 P.3d 859, 868 (Wash. 2004) (en banc).

In *State v. Beadle*, the Supreme Court of Washington evaluated whether the admission of testimonial hearsay to a detective and therapist made during an interrogation was in error. *State v. Beadle*, 173 Wash.2d 97, 265 P.3d 863 (Wash. 2011) (en banc). The court determined that the primary purpose of the interrogation was to "establish or prove past events potentially relevant to later criminal prosecution," rather than to respond to an "ongoing emergency." *Id.* at 870 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). While the testimonial statements made to the therapist and detective were inadmissible, the trial court properly admitted nontestimonial statements made by the child to a number of other adults because the child, having been appropriately found to be unavailable as a witness, did not testify. *Id.* at 871.

See *State v. Price*, 158 Wn.2d 630, 146 P.3d 1183 (Wash. 2006) (holding that admission of child victim's prior statements did not violate the Confrontation Clause even where the victim was unable to remember the charged events or the prior statements, where victim testified at trial, was subject to cross-examination and was asked about the events and the hearsay statements) (cited by *State v. Howell*, 226 S.W.3d 892, 897 (2007)).

West Virginia

West Virginia Admissibility

W. Va. Child Abuse and Neglect Proceedings, Rule 8. Testimony of children; inclusion of children in hearings and multidisciplinary treatment team meetings.

(a) Restrictions on the testimony of children.

Notwithstanding any limitation on the ability to testify imposed by this rule, all children remain competent to testify in any proceeding before the court as determined by the Rules of Evidence and the Rules of Civil Procedure. **However, there shall be a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony and the court shall exclude this testimony if the potential psychological harm to the child outweighs the necessity of the child's testimony. Further, the court may exclude the child's testimony if (A) the equivalent evidence can be procured through other reasonable efforts; (B) the child's testimony is not more probative on the issue than the other forms of evidence presented; and (C) the general purposes of these rules and the interest of justice will best be served by the exclusion of the child's testimony.**

(b) Procedure for taking testimony from children.

The court may conduct in camera interviews of a minor child, outside the presence of the parent(s). The parties' attorneys shall be allowed to attend such interviews, except when the court determines that the presence of attorneys will be especially intimidating to the child witness. When attorneys are not allowed to be present for in camera interviews of a child, the court shall, unless otherwise agreed by the parties, have the interview electronically or stenographically recorded and make the recording available to the attorneys before the evidentiary hearing resumes. Under exceptional circumstances, the court may elect not to make the recording available to the attorneys but must place the basis for a finding of exceptional circumstances on the record. Under these exceptional circumstances, the recording only will be available for review by the Supreme Court of Appeals. When attorneys are present for an in-camera interview of a child, the court may, before the interview, require the attorneys to submit questions for the court to ask the child witness rather than allow the attorneys to question the child directly, and the court may require the attorney to sit in an unobtrusive manner during the in-camera interview. Whether or not the parties' attorneys are permitted to attend the in-camera interview, they may submit interview questions and/or topics for consideration by the court.

(c) Sealing of child's testimony.

If an interview was recorded and disclosed to the attorneys, the record of the child's testimony thereafter shall be sealed and shall not be opened unless:

- (1) Ordered by the court for good cause shown; or
- (2) For purposes of appeal.

(d) A child subject to a case may attend all or portions of hearings, unless the court deems such attendance inappropriate, and may attend all or portions of multidisciplinary treatment team meetings, unless the multidisciplinary treatment team deems such participation inappropriate. Consideration shall be given to the child's preferences and developmental maturity.

W. Va. Child Abuse and Neglect Proceedings, Rule 9. Use of closed-circuit television testimony.

(a) In any case governed by these rules in which a child eleven (11) years old or less is to be a witness, the court, upon order of its own or upon motion of a party, may permit the child witness to testify through live, one-way, closed-circuit television whereby there shall be no transmission into the room from which the child witness is testifying.

(b) In any case in which a child over the age of eleven (11) years is to be a witness, the court, upon order of its own or upon motion of a party, and upon a finding of good cause, shall permit the child witness to testify through live, one-way, closed-circuit television whereby there shall be no transmission into the room from which the child witness is testifying.

(c) The testimony of the child witness shall be taken in any room, separate and apart from the courtroom, from which testimony of the child witness can be transmitted to the courtroom by means of live, one-way, closed-circuit television. The testimony shall be deemed as given in open court.

(d) The judge, the attorneys for the parties, and any other person the court permits for the purpose of providing support for the child in order to promote the ability of the child to testify shall be present in the testimonial room at all times during the testimony of the child witness. The judge may permit liberal consultation between counsel and the parties by adjournment, electronic means, or otherwise.

(e) The image and voice of the child witness, as well as the image of all other persons present in the testimony room, other than the operator, shall be transmitted live by means of live, one-way, closed-circuit television in the courtroom. The courtroom shall be equipped with monitors sufficient to permit the parties to observe the demeanor of the child witness during his or her testimony.

(f) The operator shall place herself or himself and the closed-circuit television equipment in a position that permits the entire testimony of the child witness to be transmitted to the courtroom.

(g) The child witness shall testify under oath, and the examination and cross-examination of the child witness shall, in all other respects, be conducted in the same manner as if the child witness testified in the courtroom.

(h) When the testimony of the child witness is transmitted from the testimonial room into the courtroom, the court stenographer shall record the testimony in the same manner as if the child witness testified in the courtroom.

(i) Under all circumstances, the image of the child witness transmitted shall include the entirety of his or her person ordinarily subject to observation by the human eye, subject to such limitations as may be unavoidable by reason of standard courtroom furnishings.

(j) Should it be required, for the purposes of identification that the person to be identified and the child witness be present in the courtroom at the same time, the court shall ensure that this meeting takes place after the child witness has completed his or her testimony; and this confrontation shall, to the extent possible, be accomplished in a manner that is nonthreatening to the child witness.

W. Va. Code § 62-6B-3. Findings of fact required for taking testimony of child witness by closed-circuit television; considerations for court.

(a) Upon a written motion filed by the prosecuting attorney, the child's attorney or the child's guardian ad litem, and upon findings of fact determined pursuant to subsection (b) of this section, a circuit court may order that the testimony of a child witness may be taken at a pretrial proceeding or at trial through the use of live, closed-circuit television.

(b) Prior to ordering that the testimony of a child witness may be taken through the use of live, closed-circuit television, the circuit court must find by clear and convincing evidence, after conducting an evidentiary hearing on this issue, that:

- (1) The child is an otherwise competent witness;
- (2) That, absent the use of live, closed-circuit television the child witness will be unable to testify due solely to being required to be in the physical presence of the defendant while testifying;
- (3) The child witness can only testify if live, two-way closed-circuit television is used in the trial; and
- (4) That the state's ability to proceed against the defendant without the child witness' live testimony would be substantially impaired or precluded.

(c) The court shall consider the following factors in determining the necessity of allowing a child witness to testify by the use of live, closed-circuit television:

- (1) The age and maturity of the child witness;
- (2) The facts and circumstances of the alleged offense;
- (3) The necessity of the child's live testimony to the prosecution's ability to proceed as well as any prejudice to the defendant by allowing testimony through closed-circuit television;
- (4) Whether or not the facts of the case involve the alleged infliction of bodily injury to the child witness or the threat of bodily injury to the child or another; and
- (5) Any mental or physical handicap of the child witness.

(d) In determining whether to allow a child witness to testify through live, closed-circuit television the court shall appoint a psychiatrist or a licensed psychologist with at least five years clinical experience who shall serve as an advisor or friend of the court to provide the court with an expert opinion as to

whether, to a reasonable degree of professional certainty, the child witness will suffer severe emotional harm, be unable to testify based solely on being in the physical presence of the defendant while testifying and that the child witness does not evidence signs of being subjected to undue influence or coercion. The opinion of the psychiatrist or licensed psychologist shall be filed with the circuit court at least thirty days prior to the final hearing on the use of live, closed-circuit television and the defendant shall be allowed to review the opinion and present evidence on the issue by the use of an expert or experts or otherwise.

W. Va. Code § 62-6B-4. Procedures required for taking testimony of child witness by closed-circuit television; election of defendant; jury instruction; sanction for failure to follow procedures; additional accommodation options; recordings and confidentiality.

(a) If the court determines that the use of live, two-way closed-circuit testimony is necessary and orders its use the defendant may, at any time prior to the child witness being called, elect to absent himself from the courtroom during the child witness' testimony. If the defendant so elects the child shall be required to testify in the courtroom.

(b)

(1) If live, closed-circuit television is used in the testimony of the child witness, he or she shall be taken into the testimonial room and be televised live, by closed-circuit equipment to the view of the defendant, counsel, the court and, if applicable, the jury. The projected image of the defendant shall be visible for child witness to view if he or she chooses to do so and the view of the child witness available to those persons in the courtroom shall include a full body view. Only the prosecuting attorney, the attorney for the defendant, and the operator of the equipment may be present in the room with the child witness during testimony. Only the court, the prosecuting attorney and the attorney for the defendant may question the child. In pro se proceedings, the court may modify the provisions of this subdivision relating to the role of the attorney for the defendant to allow the pro se defendant to question the child witness in such a manner as to cause as little psychological trauma as possible under the circumstances. The court shall permit the defendant to observe and hear the testimony of the child witness contemporaneous with the taking of the testimony. The court shall provide electronic means for the defendant and the attorney for the defendant to confer confidentially during the taking of the testimony.

(2) If the defendant elects to not be physically present in the courtroom during the testimony of the child witness, the defendant shall be taken into the testimonial room and be televised live, by two-way closed-circuit equipment to the view of the finder of fact and others present in the courtroom. The defendant shall be taken to the testimonial room prior to the appearance of the child witness in the courtroom. There shall be made and maintained a recording of the images and sounds of all proceedings which were televised pursuant to this article. While the defendant is in the testimonial room, the defendant shall be permitted to view the live, televised image of the child witness and the image of those other persons in the courtroom whom the court determines the defendant is entitled to view. Only the court, the prosecuting attorney and the attorney for the defendant may question the child. In pro se

proceedings, the court may modify the provisions of this subdivision relating to the role of the attorney for the defendant to allow the pro se defendant to question the child witness in such a manner as to cause as little emotional distress as possible under the circumstances. The transmission from the courtroom to the testimonial room shall be sufficient to permit the defendant to observe and hear the testimony of the child witness contemporaneous with the taking of the testimony. No proceedings other than the taking of the testimony of the child witness shall occur while the defendant is outside the courtroom. In the event that the defendant elects that the attorney for the defendant remain in the courtroom while the defendant is in the testimonial room, the court shall provide electronic means for the defendant and the attorney for the defendant to confer confidentially during the taking of the testimony.

(c) In every case where the provisions of the article are used, the jury, at a minimum, shall be instructed, unless such instruction is waived by the defendant, that the use of live, closed-circuit television is being used solely for the child's convenience, that the use of the medium cannot as a matter of law and fact be considered as anything other than being for the convenience of the child witness and that to infer anything else would constitute a violation of the oath taken by the jurors.

W. Va. Code § 62-6B-5. Memorialization of statements of certain child witnesses; admissibility; hearing.

(a) After the effective date of this section, whenever any law-enforcement officer, physician, psychologist, social worker, or investigator, in the course of his or her employment or profession or while engaged in an active criminal investigation as a law-enforcement officer or an agent of a prosecuting attorney, obtains a statement from a child 13 years of age or younger who is an alleged victim in an investigation or prosecution alleging a violation of the provisions of §61-8B-3, §61-8B-4, §61-8B-5, or §61-8B-7 of this code, he or she shall immediately make a contemporaneous written notation and recitation of the statement received or obtained. An audio recording or video recording with sound capability of the statement may be used in lieu of the written recitation required by the provisions of this section. Failure to comply with the provisions of this section creates a presumption that the statement is inadmissible. The statement may be admitted if, after a hearing on the matter, the court finds by clear and convincing evidence that the failure to comply with the provisions of this section was a good faith omission and that the content of the proffered statement is an accurate recital of the information provided by the child and is otherwise admissible.

(b) The provisions of this section shall not apply to:

- (1)** Medical personnel and other persons performing a forensic medical examination of a child who is an alleged victim; and
- (2)** Prosecuting attorneys when counseling with a child in preparation for eliciting the child's testimony in court.

W. Va. Code § 62-6B-6. Confidentiality of recorded interviews of children.

(a) Except as provided by the provisions of this article, recorded interviews of an interviewed child in any judicial or administrative proceeding shall not be published or duplicated except pursuant to the terms of an order of a court of competent jurisdiction. All written documentation in any form that is related to the recorded interview shall also be deemed confidential.

(b) Prior to the commencement of formal proceedings as contemplated in subsection (a) of this section, the persons or agencies listed in subdivision (6), section two [§ 62-6B-2] of this article shall be entitled to access to or copies of the recorded interview of an interviewed child: Provided, That such persons or agencies may provide access to the recorded interview of a child to a legal parent, guardian or custodian of such child when: (1) Such parent, guardian or custodian is not alleged to have been involved or engaged in conduct that may give rise to a judicial or administrative proceeding; and (2) it would not undermine or frustrate an ongoing investigation: Provided, however, That prior to the commencement of formal proceedings only psychologists, psychiatrists, physicians, nurses and social workers who are providing services to the interviewed child may be afforded reasonable access to the recorded interview.

(c) The Supreme Court of Appeals is requested to promulgate a rule or rules regulating in the courts of this state the publication and duplication of recorded interviews, including use, duplication and publication by counsel, and to include in any such rule limitations upon the publication, duplication, distribution or use of the recorded statements of a child.

(d) Any person who knowingly and willfully duplicates or publishes a recorded interview in violation of the terms of an order entered by a court of competent jurisdiction or in violation of the provisions of subsection (b) of this section shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail for not less than ten days nor more than one year or fined not less than \$2,000 nor more than \$10,000, or both fined and confined.

West Virginia Trial Court Rule 18. Recorded Interviews of Children.

Rule 18.01. Application Generally.

This Rule applies to all types of proceedings in circuit court, family court, and magistrate court.

Rule 18.02. Definitions.

For the purpose of this Rule, the following definitions shall apply:

(a) "Interviewed child" shall mean any person under the age of eighteen who has been interviewed by means of any type of recording equipment in connection with alleged criminal behavior or allegations of abuse or neglect of any child under the age of eighteen.

(b) "Recorded interview" means any electronic recording of the interview, any transcript thereof, and any written documentation in any form related to the recorded interview, of an interviewed child conducted by:

(1) An employee or representative of a child advocacy center as that term is defined in W. Va. Code § 49-3-101;

(2) any psychologist, psychiatrist, physician, nurse, social worker or other person appointed by the court to interview the interviewed child as provided in W. Va. Code § 62-6B-3(d); or

(3) a child protective services worker, law-enforcement officer, prosecuting attorney or any representative of his or her office, or any other person investigating allegations of criminal behavior or behavior alleged to constitute abuse or neglect of a child. Criminal complaints, police reports, and other routine law enforcement documentation do not constitute a recorded interview.

Rule 18.03. Access and Use.

(a) Any recorded interview that is subject to access or disclosure pursuant to court rules regarding discovery or production in a proceeding shall be kept strictly confidential as provided by this Rule.

(b) There shall be no access to, or publication, duplication, or use of any such recorded interview, transcript, or related documentation except in accordance with a protective order issued by the judicial officer presiding over the proceeding, which order shall include the following terms and conditions:

(1) All recordings, transcripts, and related documentation shall have the words "CONFIDENTIAL — PENALTIES FOR UNAUTHORIZED DISCLOSURE OR DUPLICATION," conspicuously affixed thereto;

(2) Access to and use of recordings, transcripts, and related documentation shall be authorized for counsel for parties, guardians ad litem, and their employees who have responsibility to assist in the proceeding, limited to use in that proceeding only, and only to the extent expressly permitted by the protective order;

(3) Parties to the proceeding shall be authorized to review recordings, transcripts, and related documentation only under the supervision of their counsel or guardian ad litem, or their staff, or if unrepresented, by designated court staff, but not be provided duplicates unless authorized by separate order for good cause shown; Provided, that the protective order shall prohibit display or disclosure of recordings, transcripts, and related documentation to non-party family members of the defendant, respondent, petitioner, victim, or to any other individual, unless the judicial officer presiding over the proceeding makes a finding that such display or disclosure is necessary for the protection of a party's rights or is in the best interests of the interviewed child.

(4) Access and duplication of recordings, transcripts, and related documentation shall be authorized for consultants, investigators, and experts employed or contracted to assist in the proceeding, but only after such persons have executed and filed with the court an agreement to be bound by the protective order;

(5) Counsel and guardians ad litem shall be required to take reasonable and appropriate measures to prevent unauthorized access to, or use of recordings, transcripts, and related documentation;

(6) Specific confidentiality protections shall be provided for any recording, transcript, or related documentation that is filed as an exhibit to a pleading or memorandum, or discussed in a pleading or memorandum;

(7) Use of recordings, transcripts, and related documentation at depositions shall be permitted, provided that parties and attorneys shall have the right and obligation to designate the recordings, transcripts, related documentation, and testimony related thereto as confidential and subject to the terms of the protective order required by this Rule;

(8) Notice to the court shall be required prior to any use of a recording, transcript, or related documentation during a hearing or trial in the proceeding;

(9) The statutory criminal penalties for knowing and willful duplication or publication of a recorded interview in violation of the terms of the protective order shall be stated, and further that violation of the protective order can result in contempt sanctions imposed by the court; and

(10) Any other protective measure deemed appropriate by the court shall be provided.

(c) Although protective orders are generally required under paragraph (b), a judicial officer presiding over a proceeding retains discretion to permit guardians ad litem and counsel temporary or expedited access to recorded interviews by so permitting through a provisional order; but any such access shall occur while the recorded interview is in the custody of an authorized individual, such as the prosecuting attorney, and the recorded interview shall remain in the custody of the authorized individual for the duration of the access.

Rule 18.04. Production by Non-Parties.

A person or entity not a party to a proceeding may only be required to produce a recorded interview, any transcript thereof, and any related documentation pursuant to the following procedure and conditions:

(a) The party seeking the production of such recorded interview, transcript, and related documentation must first file a motion with the court in which the proceeding is pending putting forth the grounds for production, along with a copy of the subpoena to be served on the non-party.

(b) A copy of the motion and subpoena, together with a notice of hearing, shall be served on:

(i) all counsel for parties and unrepresented parties;

(ii) the prosecuting attorney of the county where the proceeding is pending;

(iii) the prosecuting attorney in any other county where the recorded interview was conducted or used in relation to an investigation or prosecution of criminal activity or suspected child abuse or neglect; and

(iv) the person or entity to whom the subpoena is directed.

(c) A hearing shall be held on the motion, which may include, in the court's discretion, an in-camera inspection of the subject records, and upon good cause found and stated in the written order, the court may direct that all or part of the records be produced.

(d) If the court grants the motion for production of such records, the court shall include in the written order the protective order provisions required under paragraph (b) of this Rule.

Cases

In *State v. Edward Charles L.*, the court declined to discuss the competency of the four-year-old victims who testified at trial, noting that "the trial court properly examined the truth-telling abilities of the children at trial and determined that they were competent to testify. ... Absent a clear abuse of discretion, a trial court's decision regarding competency will not be overturned on appeal." *State v. Edward Charles L.*, 398 S.E.2d 123, 141 n. 26 (W.Va. 1990).

The defense cannot seek reversal due to improper jury instructions regarding the defendant's absence from the courtroom during victim testimony, when defense counsel advised the trial court on how the jury should be instructed. *State v. Gary A.*, 237 W. Va. 762, 791 S.E.2d 392 (W. Va. 2016).

West Virginia Hearsay Exceptions

WV R REV Rule 803: Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as 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 validity or terms of the declarant's will.
- (4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:

(A) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) **Recorded Recollection.** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(g) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) a person who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the opposing party does not object in writing within 7 days of receiving the notice -- unless the court sets a different time for the notice or the objection, or the court otherwise permits for good cause shown.

(11) **Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that is at least 20 years old and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage -- or among a person's associates or in the community -- concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgments Involving Personal, Family, or General History, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [Other Exceptions.] [Transferred to Rule 807.]

WV R REV Rule 804: Hearsay Exceptions; Declarant Unavailable

(a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of Personal or Family History.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Statement of a Deceased Person.* In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased -- whether oral or written -- shall not be excluded as hearsay provided the trial judge shall first find as a fact that the statement:

(A) was made by the decedent; and

(B) was made in good faith and on decedent's personal knowledge; and

(C) was made under circumstances that indicate it was trustworthy.

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused -- or acquiesced in wrongfully causing -- the declarant's unavailability as a witness, and did so intending that result.

(7) [Other Exceptions.] [Transferred to Rule 807.]

WV R REV Rule 807: Residual Exception

(a) *In General.* Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;**
- (2) it is offered as evidence of a material fact;**
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and**
- (4) admitting it will best serve the purposes of these rules and the interests of justice.**

(b) *Notice.* The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

WV R REV Rule 106: Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may request the introduction, at that time, of any other part -- or any other writing or recorded statement-- that in fairness ought to be considered at the same time.

Cases

Medical Treatment Exception. "In *In re B.M.*, 2017 W. Va. LEXIS 563, 2017 WL 2628569 (W. Va. June 19, 2017) (memorandum decision), we considered an argument similar to that advanced by petitioner. The petitioner in *B.M.* asserted that his child victim's statements to the same forensic interviewer, Ms. Runyon, were inadmissible because the child's statements were made 'for purposes of proceeding against him in the abuse and neglect matter, not for purposes of medical treatment.' 2017 W. Va. LEXIS 563. Relying, in part, on *Pettrey*, we found that the child's statements were admissible under Rule 803(4) of the West Virginia Rules of Evidence. *Id.* First, the child had been referred to the CAC at Women and Children's due to her disclosures of sexual abuse, thereby satisfying the first part of the test requiring that the statement be made for medical diagnosis or treatment. *Id.* Additionally, we observed that Ms. Runyon's forensic interview 'was the first step in a two-step process, whereby she collected information regarding possible abuse so that a medical professional could thereafter conduct an examination based on the child's disclosures.' 2017 W. Va. LEXIS 563, [WL] at *4. Further, because the circuit court ordered continued therapy for the child, it was clear 'that the ultimate goal

of the child's interview was continued treatment for the effects of her abuse.' *Id.*" *State v. Edward C.*, 2020 W. Va. LEXIS 692, *6-7 (2020).

"Just as occurred in *B.M.*, S.C. was referred to the CAC at Women and Children's following her disclosures of sexual abuse, and Ms. Runyon's interview was the first step in a process designed to determine the most appropriate course of action for S.C. from the 'array of services' offered by the CAC. S.C.'s motive in submitting to an interview by Ms. Runyon was clearly consistent with the purposes of promoting treatment, thereby satisfying the first prong of the test. In this case, Ms. Runyon determined that the appropriate treatment should include an examination by a pediatrician. In satisfaction of the second prong of the test, Ms. Runyon detailed that her interviews are used for treatment purposes and that pediatricians rely on her interviews in conducting their own examinations. Accordingly, we cannot say that the circuit court erred by admitting S.C.'s interview because it was not taken for a strictly investigatory or forensic purpose." *State v. Edward C.*, 2020 W. Va. LEXIS 692, *7-8 (2020).

In *State v. Payne*, the West Virginia Supreme Court of Appeals upheld the admission of hearsay testimony offered by a forensic nurse under the medical treatment exception. *State v. Payne*, 225 W.Va. 602, 694 S.E.2d 935, 940 (W. Va. 2010). The Court determined that hearsay testimony from a forensic nurse is admissible "if the declarant's motive for making the statement was consistent with the purposes of promoting treatment and the content of the statement was reasonably relied upon by the nurse for treatment." *Id.* at 942.

The West Virginia Supreme Court of Appeals first decided that statements made by children to psychologists during treatment were admissible in *State v. Edward Charles L.*, when the child was examined by the psychologist prior to the contemplation of any criminal action against the perpetrator. *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (W. Va. 1990). The Court later clarified, in *Misty D.G. v. Rodney L.F.*, that to admit a statement made to a therapist or counselor, it is important the trial court conduct an examination into the child's motive in making the statement. *Misty D.G. v. Rodney L.F.*, 221 W.Va. 144, 650 S.E.2d 243, 249-50 (W. Va. 2007).

Excited Utterance Exception. "The theory on which the excited utterance exception rests is that 'a guarantee of reliability surrounds statements made by one who participates in or observes a startling event, provided they are made while under the stress of excitement.' *State v. Smith*, __ W. Va. ____, 358 S.E.2d 188, 193 (1987). ... 'An alleged spontaneous declaration [the former term for excited utterance] must be evaluated in light of the following factors: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation; and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the

declaration or statement was made." *State v. Murray*, 375 S.E.2d 405, 409 (1988) (quoting *State v. Young*, 166 W. Va. 309, 273 S.E.2d 592 (1980)).

Present Sense Impression. "[I]t is within a trial court's discretion to admit an out-of-court statement under the present sense impression exception if: (1) The statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant's personal knowledge. Additionally, it is appropriate for a trial court to weigh the corroboration of an event (or the absence thereof) by an independent witness in evaluating the trustworthiness of the statement." *State v. Phillips*, 194 W. Va. 569, 577 (1995) (overruled on other grounds).

Residual Exception. See *Tex S. v. Pszczolkowski*, 236 W. Va. 245, 248, n. 6 (2015) ("The victim, who was seven years old at the time of trial, testified. She, however, stated that she could not recall the events in question and the trial court determined that she was unavailable under Rule 804(a)(3) of the West Virginia Rules of Evidence. The trial court then determined that statements made by the child to her mother and Ms. Leahy, a nurse, were admissible under the medical treatment and present sense impression exceptions, West Virginia Rule of Evidence 803(1) and (4), or the general catch-all exception pursuant to the former West Virginia Rule of Evidence 804(b)(5), which is now Rule 807 of the West Virginia Rules of Evidence ('Residual exception')."). See also *State v. Tex S.*, 2011 W. Va. LEXIS 186 (W. Va. Supreme Court, February 11, 2011) (memorandum decision).

Prior Consistent Statement. "West Virginia Rule of Evidence 801(d)(1)(B) [1994] permits what would ordinarily be treated as hearsay evidence to be considered without regard to its hearsay nature. Under this Rule, a prior consistent statement of a declarant who can be cross-examined on the statement is 'not hearsay' if there has been an express or implied charge against the declarant of recent fabrication or improper influence or motive [. . .] and the statement is offered to rebut the charge. *Id.*" *State v. Quinn*, 200 W. Va. 432, 441 (1997). The statement "must have been made before the alleged fabrication, influence, or motive came into being." *Id.* at 443.

Prior Inconsistent Statement. Forensic interviews may be admissible as a witness's prior inconsistent statement, where the interview is not offered for the truth of the matter asserted, and appropriate jury instructions are given. "Accordingly, the extrinsic evidence in this case, the videotaped interview, was admissible because it assisted the jury in deciding the issue of B.K.'s credibility. Moreover, the jury, on two occasions, was instructed that the videotaped interview was admitted solely on the issue of credibility. These instructions were key to the jury's understanding that the evidence contained on the videotape was not to be considered as substantive evidence, but, rather, for credibility purposes only. ...In this case, the videotaped interview which was admitted into evidence was not introduced for the purpose of showing the appellant's improper or lustful disposition toward S.J.K., the victim in this case. Rather, as stated above, it was introduced to assist the jury in deciding the credibility of a material witness who was not the victim in this case, namely, B.K." *State v. King*, 183 W. Va. 440, 448 (1990).

"Three requirements must be satisfied before admission at trial of a prior inconsistent statement allegedly made by a witness: (1) The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) if the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of

impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence -- notice and an opportunity to explain or deny -- must be met; and, finally, (3) the jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact." *State v. Rodoussakis*, 204 W. Va. 58, 73-74 (1998).

Prompt Complaint Exception. "This Court has held that a prompt complaint made by the victim of a sexual offense is admissible independently of its qualifications as an excited utterance, but that the details of the event or the name of the perpetrator are ordinarily not admissible. Syllabus Point 4, *State v. Murray*, 180 W.Va. 41, 375 S.E.2d 405 (W.Va. 1988). The prompt complaint rule "...evolved from an expectation that a rape victim would make immediate outcry. Even though the validity of this expectation is flawed, the expectation persists. . . . We would certainly prefer to abolish the doctrine in its entirety, given its genesis in the profoundly sexist expectation that female victims of sexual crimes should respond in a prescribed manner or risk losing credibility. Even though psychologists have proved that victims respond to sexual attacks in no prescribed way, abolition of the doctrine would strip the victim of one of the few methods to rebut the expectation of outcry, now deeply rooted in our culture." *State v. Quinn*, 200 W. Va. 432, 441, n. 18, 490 S.E.2d 34, 43 (1997) (quoting *State v. Livingston*, 907 S.W.2d 392, 394 (Tenn. 1995)).

Wisconsin

Wisconsin Admissibility

Wis. Stat. Ann. § 967.04. Depositions in criminal proceedings.

(1) If it appears that a prospective witness may be unable to attend or prevented from attending a criminal trial or hearing, that the prospective witness's testimony is material and that it is necessary to take the prospective witness's deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion and notice to the parties order that the prospective witness's testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed pursuant to s. 969.01 (3), the court shall direct that the witness's deposition be taken upon notice to the parties. After the deposition has been subscribed, the court shall discharge the witness.

(2) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time. Upon request of all defendants, unless good cause to the contrary is shown, the court may order that a deposition under this section be taken on the record by telephone or live audiovisual means.

(3) A deposition shall be taken as provided in civil actions. At the request of a party, the court may direct that a deposition be taken on written interrogatories as provided in civil actions.

(4)

(a) If the state or a witness procures such an order, the notice shall inform the defendant that the defendant is required to personally attend at the taking of the deposition and that the defendant's failure so to do is a waiver of the defendant's right to face the witness whose deposition is to be taken. Failure to attend shall constitute a waiver unless the defendant was physically unable to attend.

(b) If the defendant is not in custody, the defendant shall be paid witness fees for travel and attendance. If the defendant is in custody, the defendant's custodian shall, at county expense, produce the defendant at the taking of the deposition. If the defendant is in custody, leave to take a deposition on motion of the state shall not be granted unless all states which the custodian will enter with the defendant in going to the place the deposition is to be taken have conferred upon the officers of this state the right to convey prisoners in and through them.

(5)

(a) At the trial or upon any hearing, a part or all of a deposition, so far as it is otherwise admissible under the rules of evidence, may be used if any of the following conditions appears to have been met:

- 1.** The witness is dead.
- 2.** The witness is out of state, unless it appears that the absence of the witness was procured by the party offering the deposition.
- 3.** The witness is unable to attend or testify because of sickness or infirmity.
- 4.** The party offering the deposition has been unable to procure the attendance of the witness by subpoena.

(b) Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to offer all of it which is relevant to the part offered and any party may offer other parts.

(6) Objections to receiving in evidence a deposition may be made as in civil actions.

(7)

(a) In any criminal prosecution or any proceeding under ch. 48 or 938, any party may move the court to order that a deposition of a child who has been or is likely to be called as a witness be taken by audiovisual means. Upon notice and hearing, the court may issue an order for such a deposition if the trial or hearing in which the child may be called will commence:

- 1.** Prior to the child's 12th birthday; or
- 2.** Prior to the child's 16th birthday and the court finds that the interests of justice warrant that the child's testimony be prerecorded for use at the trial or hearing under par. (b).

(b) Among the factors which the court may consider in determining the interests of justice are any of the following:

- 1.** The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.
- 2.** The child's general physical and mental health.
- 3.** Whether the events about which the child will testify constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

4. The child's custodial situation and the attitude of other household members to the events about which the child will testify and to the underlying proceeding.
5. The child's familial or emotional relationship to those involved in the underlying proceeding.
6. The child's behavior at or reaction to previous interviews concerning the events involved.
7. Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.
8. Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.
9. The number of separate investigative, administrative and judicial proceedings at which the child's testimony may be required, the likely length of time until the last such proceeding, and the mental or emotional strain associated with keeping the child's recollection of the events witnessed fresh for that period of time.
10. Whether the use of a recorded deposition would reduce the mental or emotional strain of testifying and whether the deposition could be used to reduce the number of times the child will be required to testify.

(8)

(a) If the court orders a deposition under sub. (7), the judge shall preside at the taking of the deposition and enforce compliance with the applicable provisions of ss. 885.44 to 885.47. Notwithstanding s. 885.44 (5), counsel may make objections and the judge shall make rulings thereon as at trial. The clerk of court shall keep the certified original recording of a deposition taken under sub. (7) in a secure place. No person may inspect or copy the deposition except by order of the court upon a showing that inspection or copying is required for editing under s. 885.44 (12) or for the investigation, prosecution or defense of the action in which it was authorized or the provision of services to the child.

(b) If the court orders that a deposition be taken by audiovisual means under sub. (7), the court shall do all of the following:

- 1.** Schedule the deposition on a date when the child's recollection is likely to be fresh and at a time of day when the child's energy and attention span are likely to be greatest.
- 2.** Schedule the deposition in a room which provides adequate privacy, freedom from distractions, informality and comfort appropriate to the child's developmental level.
- 3.** Order a recess whenever the energy, comfort or attention span of the child or other circumstances so warrant.
- 4.** Determine that the child understands that it is wrong to tell a lie and will testify truthfully if the child's developmental level or verbal skills are such that administration of an oath or affirmation in the usual form would be inappropriate.
- 5.** Before questioning by the parties begins, attempt to place the child at ease, explain to the child the purpose of the deposition and identify all persons attending.
- 6.** Allow any questioner to have an adviser to assist the questioner, and upon permission of the judge, to conduct the questioning.
- 7.** Supervise the spatial arrangements of the room and the location, movement, and deportment of all persons in attendance.
- 8.** Allow the child to testify while sitting on the floor, on a platform, on an appropriately sized chair, or on the lap of a trusted adult, or while moving about the room within range of the visual and audio recording equipment.
- 9.** Permit the defendant to be in a position from which the defendant can communicate privately and conveniently with counsel.
- 10.** Upon request, make appropriate orders for the discovery and examination by the defendant of documents and other evidence in the possession of the state which are relevant to the issues to be covered at the deposition at a reasonable time prior thereto.
- 11.** Bar or terminate the attendance of any person whose presence is not necessary to the taking of the deposition, or whose behavior is disruptive of the deposition or unduly stressful to the child. A reasonable number of persons deemed by the court supportive of the child or any defendant may be considered necessary to the taking of the deposition under this paragraph.

(9) In any criminal prosecution or juvenile fact-finding hearing under s. 48.31 or 938.31, the court may admit into evidence a recorded deposition taken under subs. (7) and (8) without an additional hearing under s. 908.08. In any proceeding under s. 302.113 (9) (am), 302.114 (9) (am), 304.06 (3), or 973.10 (2), the hearing examiner may order that a deposition be taken by audiovisual means and preside at the taking of the deposition using the procedure provided in subs. (7) and (8) and may admit the recorded deposition into evidence without an additional hearing under s. 908.08.

(10) If a court or hearing examiner admits a recorded deposition into evidence under sub. (9), the child may not be called as a witness at the proceeding in which it was admitted unless the court or hearing examiner so orders upon a showing that additional testimony by the child is required in the interest of fairness for reasons neither known nor with reasonable diligence discoverable at the time of the deposition by the party seeking to call the child. The testimony of a child who is required to testify under this subsection may be taken in accordance with s. 972.11 (2m), if applicable.

Wis. Stat. Ann. § 908.08. Audiovisual recordings of statements of children.

(1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or 938.31 or revocation hearing under s. 302.113 (9) (am), 302.114 (9) (am), 304.06 (3), or 973.10 (2), the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section.

(2)

(a) Not less than 10 days before the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the statement before the hearing under par. (b).

(b) Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or before the hearing, the court shall view the statement. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44 (12).

(3) The court or hearing examiner shall admit the recording upon finding all of the following:

(a) That the trial or hearing in which the recording is offered will commence:

1. Before the child's 12th birthday; or
2. Before the child's 16th birthday and the interests of justice warrant its admission under sub. (4).

(b) That the recording is accurate and free from excision, alteration and visual or audio distortion.

(c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

(d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.

(e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(4) In determining whether the interests of justice warrant the admission of an audiovisual recording of a statement of a child who is at least 12 years of age but younger than 16 years of age, among the factors which the court or hearing examiner may consider are any of the following:

(a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

(b) The child's general physical and mental health.

(c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

(d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.

(e) The child's familial or emotional relationship to those involved in the underlying proceeding.

(f) The child's behavior at or reaction to previous interviews concerning the events involved.

(g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

(h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

(i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

(5)

(a) If the court or hearing examiner admits a recorded statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court or hearing examiner, upon request by any other

party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.

(am) The testimony of a child under par. (a) may be taken in accordance with s. 972.11 (2m), if applicable.

(b) If a recorded statement under this section is shown at a preliminary examination under s. 970.03 and the party who offers the statement does not call the child to testify, the court may not order under par. (a) that the child be produced for cross-examination at the preliminary examination.

(6) Recorded oral statements of children under this section in the possession, custody or control of the state are discoverable under ss. 48.293 (3), 304.06 (3d), 971.23 (1) (e) and 973.10 (2g).

(7) At a trial or hearing under sub. (1), a court or a hearing examiner may also admit into evidence an audiovisual recording of an oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.

Cases

Key Points:

- A trial court's decision to admit a child's hearsay or out-of-court statement necessarily relies on a multitude of factors to evaluate its trustworthiness.
- Courts need only watch as much of a video recorded out-of-court statement as is factually necessary to determine its reliability and admissibility.
- An out-of-court statement can be admitted when the child victim's testimony about it meets circumstantial guarantees of trustworthiness.

In *State v. Mercado*, the Wisconsin Supreme Court overturned the appellate court's reversal of the circuit court's conviction of the defendant. *State v. Mercado*, 953 N.W.2d 337, 339 (Wis. 2021). Initially, the circuit court admitted the video recordings of forensic interviews conducted with the three victims, ages 4-7 at the time of the abuse, and permitted each child to testify afterward. *Id.* at 340-342. The appellate court found error in the circuit court's admission of the youngest child's testimony, as she did not demonstrate sufficient understanding of truthfulness. *Id.* at 343-344. Additionally, the appellate court found the forensic interviews needed to be viewed in their entirety before being admitted and ultimately that they were inadmissible hearsay. *Id.* The Wisconsin Supreme Court reversed and held that the youngest girl was sufficiently trustworthy after considering five factors: 1) the characteristics of the child, including age, ability to communicate verbally, understand true and false, and whether they have any fear of punishment; 2) the person to whom the statement was made; 3) the circumstances under which the statement was made; 4) the content of the statement itself; and 5) any corroborating evidence. *Id.* at 350 (citing *State v. Sorenson*, 421 N.W.2d 77, 84-85 (Wis. 1988)). Further, the Supreme Court of Wisconsin refused to interpret § 908.08 to create a bright-line rule that courts must view video recordings in their entirety prior to admitting them, and granted

deference to circuit courts to watch as much as is factually necessary. *Id.* at 348. Finally, because the youngest girl's testimony was found to have "circumstantial guarantees of trustworthiness" necessary under § 908.03(24), it was permissible to admit her forensic interview under the residual hearsay exception. *Id.* at 349.

Wisconsin Hearsay Exceptions

Wis. Stat. 908.03: Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) ***Present sense impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (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.
- (3) ***Then existing mental, emotional, or physical condition.*** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.
- (6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (6m) **Patient health care records.**

(a) *Definition.* In this subsection:

1. "Health care provider" has the meanings given in ss. 146.81(1) and 655.001(8).

2. "Patient health care records" has the meaning given in s. 146.81(4)

(b) *Authentication witness unnecessary.* A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer patient health care records into evidence at a trial or hearing does one of the following at least 40 days before the trial or hearing:

1. Serves upon all appearing parties an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian.

2. Notifies all appearing parties that an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

(bm) *Presumption.* Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

(c) *Subpoena limitations.* Patient health care records are subject to subpoena only if one of the following conditions exists:

1. The health care provider is a party to the action.

2. The subpoena is authorized by an ex parte order of a judge for cause shown and upon terms.

3. If upon a properly authorized request of an attorney, the health care provider refuses, fails, or neglects to supply within 2 business days a legible certified duplicate of its records for the fees under s. 146.83(1f) or (3f), whichever is applicable.

(7) **Absence of entry in records of regularly conducted activity.** Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with s. 909.02, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, whether a child is marital or nonmarital, ancestry, relationship by blood, marriage or adoption, 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.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, 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.** Statements of fact concerning 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.** 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.** 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 20 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.** A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.

(a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

(19) **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of this personal or family history.

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

(21) **Reputation as to character.** Reputation of a person's character among the person's associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a felony as defined in ss. 939.60 and 939.62(3)(b), to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(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 the same would be provable by evidence of reputation.

(24) **Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.**

Wis. Stat. 908.04: Hearsay exceptions; declarant unavailable; definition of unavailability

(1) "Unavailability as a witness" includes situations in which the declarant:

- (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or
- (c) Testifies to a lack of memory of the subject matter of the declarant's statement; or
- (d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

Wis. Stat. 908.045: Hearsay exceptions; declarant unavailable;

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.
- (2) **Statement of recent perception.** A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.
- (3) **Statement under belief of impending death.** A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.
- (4) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose

the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

(5) **Statement of personal or family history of declarant.** A statement concerning the declarant's own birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated.

(5m) **Statement of personal or family history of person other than the declarant.** A statement concerning the birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history and death of a person other than the declarant, if the declarant was related to the other person by blood, adoption or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

(6) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Wis. Stat. 901.07: Remainder of or Related Writings or Statements

When any part of a writing or statement, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion.

Cases

In *State v. Dwyer*, the Wisconsin Supreme Court noted that a child's out-of-court statements to her mother and social worker made during the days immediately following the alleged abuse would be admissible under the excited utterance hearsay exception, although it was unnecessary because the trial court had erred in excluding the child from testifying. *State v. Dwyer*, 149 Wis.2d 850, 440 N.W.2d 344, 346 (Wis. 1989).

In *State v. Huntington*, the Wisconsin Supreme Court held that statements made by the 13-year-old victim to her mother, sister, and a police officer were all admissible under the excited utterance exception to the hearsay rule. *State v. Huntington*, 216 Wis.2d 671, 575 N.W.2d 268 (Wis. 1998). Because there was 1) a startling event or condition, 2) an out-of-court statement made by the child relating to the startling event or condition, and 3) the child was still "under the stress of excitement caused by the event or condition," the excited utterance was admissible. *Id.* at 682 (citing *Muller v. State*, 94 Wis.2d 450, 466, 289 N.W.2d 570 (1980)).

Wyoming

Wyoming Admissibility

Wyo. Stat. Ann. § 7-11-408. Videotape depositions.

(a) In any case in which the defendant is charged with incest as defined in W.S. 6-4-402(a) or sexual assault as defined in W.S. 6-2-302 through 6-2-304 and 6-2-314 through 6-2-317 and a child less than twelve (12) years of age is the victim, the judge may order the taking of a videotape deposition of the child. The videotaping shall be done under the supervision of the court.

(b) Persons allowed to be present at the videotaping of the deposition are the child, the judge, prosecutor, defendant and defense counsel, a family member who was not a witness to the offense or a support person for the child and any technicians required to operate the equipment.

(c) Before ordering the deposition, the judge shall find that:

- (i)** The child's testimony would be relevant and material;
- (ii)** The best interests of the child would be served by permitting the videotape deposition;
- (iii)** A potential physical or psychological harm to the child is likely to occur if the child is required to testify which would effectively render the child incapable to testify at the trial; and
- (iv)** The defendant or his legal counsel has the opportunity to be present and to cross-examine the child at the videotape deposition.

(d) The judge may deny the defendant's face-to-face confrontation of the child at the videotape deposition if:

- (i)** The defendant is alleged to have inflicted physical harm or is alleged to have threatened to inflict physical harm upon the child, and physical or psychological harm to the child is likely to occur if there is a face-to-face confrontation of the child by defendant;
- (ii)** The defendant's legal counsel will have reasonable opportunity to confer with his client before and at any time during the videotape deposition; and
- (iii)** The defendant will have opportunity to view and hear the proceedings while being taken.

(e) A videotape deposition may be admitted at trial in lieu of the direct testimony of the child, if the judge finds, after hearing, that:

- (i)** The visual and sound qualities of the videotape are satisfactory;
- (ii)** The videotape is not misleading;

(iii) All portions of the videotape that have been ruled inadmissible have been deleted; and

(iv) A potential physical or psychological harm to the child is likely to occur if the child is required to testify which would effectively render the child incapable to testify at the trial.

(f) Children unable to articulate what was done to them will be permitted to demonstrate the sexual act or acts committed against them with the aid of anatomically correct dolls. Such demonstrations will be under the supervision of the court and shall be videotaped to be viewed at trial, and shall be received into evidence as demonstrative evidence.

(g) Videotapes which are part of the court record are subject to a protective order to preserve the privacy of the child.

(h) If the prosecutor elects to utilize a videotaped deposition pursuant to this section and the videotape has been taken and is admissible, the child may not testify in court without the consent of the defendant.

Cases

Key Points:

- A trial court's determination of a child victim's competence to testify necessarily relies on evidence to support five criteria.

In *Billingsley v. State*, the Wyoming Supreme Court upheld the trial court's decision to allow the children to testify, as "[r]ulings on the admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of a clear abuse of discretion." *Billingsley v. State*, 69 P.3d 390, 395 (Wyo. 2003). The trial court had allowed the defendant's three daughters, ages 10, 11, and 12, to testify against their father after disclosing to their aunt that he had been sexually abusing all three daughters for years. *Id.* at 394. The defendant challenged this testimony on appeal, claiming the trial court erred in deeming the children competent to testify, and that they had been coached through the "interview" conducted by their aunt after their disclosure. *Id.* The Supreme Court reiterated a five-part test used for determining the competency of a child witness: 1) an understanding of the obligation to speak the truth on the witness stand; 2) the mental capacity at the time of the occurrence which the testimony is about, to provide an accurate impression; 3) a memory sufficient to retain an independent recollection of the occurrence; 4) the capacity to verbally express memory of the occurrence; and 5) the capacity to understand simple questions about it. *Id.* at 395; *Larsen v. State*, 686 P.2d 583 (Wyo. 1984). Because of the district court's extensive reasoning into each competency factor, the Supreme Court of Wyoming found sufficient support by the record and upheld the determination of competency.

In *Griggs v. State*, the Wyoming Supreme Court again considered a challenge to several children's competency to testify. *Griggs v. State*, 367 P.3d 1108, 1118 (Wyo. 2016). The defendant appealed his conviction on the grounds that the children were incorrectly deemed competent to testify at trial. *Id.* Again citing *Larsen*, the court found that the two girls who testified, ages 6 and 7, had sufficient

understanding of truth, and ability to retain and recall memory to be deemed competent. *Id.* at 1120-1122. Absent a severe abuse of discretion in admitting the girls' testimony, the Supreme Court of Wyoming determined the district court did not err in allowing the girls to testify to the abuse.

Wyoming Hearsay Exceptions

WY R REV Rule 803: Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) ***Present Sense Impression.*** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter:

(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:

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and 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 for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment:

(5) ***Recorded Recollection.*** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party:

(6) ***Records of Regularly Conducted Activity.*** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by a certification that complies with Rule 902(a)(11) through (14) or with a statute or other court rule permitting certification; or the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The

term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit:

(7) **Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

(8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth

(A) the activities of the office or agency, or

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or

(C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;

(9) **Records of Vital Statistics.** Records or data compilations, in any form, 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.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry;

(11) **Records of Religious Organizations.** 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.** 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.** Statements of fact concerning 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.** 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 public office and an applicable statute authorizes the recording of documents of that kind in that office;

(15) **Statements in Documents Affecting an Interest in Property.** 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 twenty (20) years or more the authenticity of which 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 him 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 the testimony on admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits;

(19) **Reputation Concerning Personal or Family History.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history;

(20) **Reputation Concerning Boundaries or General History.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located;

(21) **Reputation as to Character.** Reputation of a person's character among his associates or in the community;

(22) **Judgment of Previous Conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility;

(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 the same would be provable by evidence of reputation;

(24) **Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

WY R REV Rule 804: Hearsay Exceptions; Witness Unavailable

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

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

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination;

(2) *Statement Under Belief of Impending Death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death;

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement;

(4) *Statement of Personal or Family History.*

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared;

(5) *Statement of Recent Perception.* In a civil action or proceeding, a statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear;

(6) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(7) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. The proponent shall give pretrial notice of intent to use such evidence, similar to notice required by W.R.E. 404(b).

WY R REV Rule 106: Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Cases

Key Points:

- A child victim's out-of-court statement made to a school nurse is admissible as a medical exception to hearsay when it's made for the purpose of obtaining medical treatment and/or diagnosis.
- Likewise, statements made to a non-medical professional serving as a proxy can still be admissible if the foundation for the medical professional's testimony is established.

In *Schmidt v. State*, the Supreme Court of Wyoming addressed whether the trial court abused its discretion in allowing a school nurse to testify about a child's report of abuse. *Schmidt v. State*, 401 P.3d 868 (2017). The defendant argued that because the school nurse did not conduct a physical examination and asked questions through the child's paraprofessional (in accordance with her individualized education plan, or IEP), the trial court erred in determining this was permissible hearsay under the medical diagnosis exception of W.R.E. 803(4). *Id.* at 879. However, the supreme court noted that "apply[ing] the definition of diagnosis and treatment required by our precedent, it is clear that [the school nurse] was engaged in the diagnosis and treatment of child abuse," and met the foundation required by Rule 803(4). *Id.* The foundation is met if "the child's statements were consistent with the purposes for which the witness became involved with the child, and the witness relied on the statements in connection with diagnosis and treatment of the child." *Bush v. State*, 2008 WY 108, 193 P.3d 203, 209 (Wyo. 2008) (citing *Simmers v. State*, 943 P.2d 1189, 1197-1198 (Wyo. 1997)). Additionally, the Court held that statements made to a non-medical professional were still admissible if the foundation conditions were met, and because the foundation for the school nurse's testimony was established, it was immaterial that the victim was questioned by the school nurse through her paraprofessional. *Id.* at 881.

Federal Legislation

18 U.S.C.S. § 3509. Child victims' and child witnesses' rights

(a) Definitions. For purposes of this section—

- (1)** the term “adult attendant” means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;
- (2)** the term “child” means a person who is under the age of 18, who is or is alleged to be—
 - (A)** a victim of a crime of physical abuse, sexual abuse, or exploitation; or
 - (B)** a witness to a crime committed against another person;
- (3)** the term “child abuse” means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;
- (4)** the term “physical injury” includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;
- (5)** the term “mental injury” means harm to a child’s psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;
- (6)** the term “exploitation” means child pornography or child prostitution;
- (7)** the term “multidisciplinary child abuse team” means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;
- (8)** the term “sexual abuse” includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;
- (9)** the term “sexually explicit conduct” means actual or simulated—
 - (A)** sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;
 - (B)** bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

(10) the term "sex crime" means an act of sexual abuse that is a criminal act;

(11) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

(12) the term "child abuse" does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

(b) Alternatives to live in-court testimony.

(1) Child's live testimony by 2-way closed circuit television.

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 7 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

(i) The child is unable to testify because of fear.

(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

(iii) The child suffers a mental or other infirmity.

(iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of

time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are—

(i) the child's attorney or guardian ad litem appointed under subsection (h);

(ii) persons necessary to operate the closed-circuit television equipment;

(iii) a judicial officer, appointed by the court; and

(iv) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant. The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed-circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child.

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B)

(i) Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

(I) The child will be unable to testify because of fear.

(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(III) The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are—

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child. The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding, and that the defendant be provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition.

(v) Handling of videotape. The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on video tape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours.

(C) If at the time of trial, the court finds that the child is unable to testify as for a reason described in subparagraph (B)(i), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.

(D) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

(E) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a protective order for the purpose of protecting the privacy of the child.

(F) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

(c) Competency examinations.

(1) *Effect of Federal Rules of Evidence.* Nothing in this subsection shall be construed to abrogate rule 601 of the Federal Rules of Evidence.

(2) *Presumption.* A child is presumed to be competent.

(3) *Requirement of written motion.* A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party.

(4) *Requirement of compelling reasons.* A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.

(5) *Persons permitted to be present.* The only persons who may be permitted to be present at a competency examination are—

(A) the judge;

(B) the attorney for the Government;

(C) the attorney for the defendant;

(D) a court reporter; and

(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) *Not before jury.* A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) *Direct examination of child.* Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(8) *Appropriate questions.* The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

(9) *Psychological and psychiatric examinations.* Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

(d) Privacy protection.

(1) *Confidentiality of information.*

(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall—

(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to—

(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;

(ii) employees of the court;

(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

(iv) members of the jury.

(2) Filing under seal. All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court—

(A) the complete paper to be kept under seal; and

(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record.

(3) Protective orders.

(A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

(B) A protective order issued under subparagraph (A) may—

(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

(ii) provide for any other measures that may be necessary to protect the privacy of the child.

(4) Disclosure of information. This subsection does not prohibit disclosure of the name of or other information concerning a child to the defendant, the attorney for the defendant, a multidisciplinary child abuse team, a guardian ad litem, or an adult attendant, or to anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child.

(e) Closing the courtroom. When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order shall be narrowly tailored to serve the Government's specific compelling interest.

(f) Victim impact statement. In preparing the presentence report pursuant to rule 32(c) of the Federal Rules of Criminal Procedure, the probation officer shall request information from the multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected. A guardian ad litem appointed under subsection (h) shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization. A guardian ad litem shall use forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.

(g) Use of multidisciplinary child abuse teams.

(1) *In general.* A multidisciplinary child abuse team shall be used when it is feasible to do so. The court shall work with State and local governments that have established multidisciplinary child abuse teams designed to assist child victims and child witnesses, and the court and the attorney for the Government shall consult with the multidisciplinary child abuse team as appropriate.

(2) *Role of multidisciplinary child abuse teams.* The role of the multidisciplinary child abuse team shall be to provide for a child services that the members of the team in their professional roles are capable of providing, including—

(A) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings;

(B) telephone consultation services in emergencies and in other situations;

(C) medical evaluations related to abuse or neglect;

(D) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or child witness case;

(E) expert medical, psychological, and related professional testimony;

(F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and

(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

(h) Guardian ad litem.

(1) *In general.* The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) *Duties of guardian ad litem.* A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem

shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) Immunities. A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

(i) Adult attendant. A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

(j) Speedy trial. In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

(k) Stay of civil action. If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(l) Testimonial aids. The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.

(m) Prohibition on reproduction of child pornography.

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title [18 USCS § 2256]) shall remain in the care, custody, and control of either the Government or the court.

(2)

(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title [18 USCS § 2256]), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

(3) In any criminal proceeding, a victim, as defined under section 2259(c)(4), shall have reasonable access to any property or material that constitutes child pornography, as defined under section 2256(8), depicting the victim, for inspection, viewing, and examination at a Government facility or court, by the victim, his or her attorney, and any individual the victim may seek to qualify to furnish expert testimony, but under no circumstances may such child pornography be copied, photographed, duplicated, or otherwise reproduced. Such property or material may be redacted to protect the privacy of third parties.

Appendix A

Motion in Limine to Determine Admissibility of Forensic Interview and Memorandum in Support

Comes now the State of Minnesota by _____, _____ County Attorney, and moves this Honorable Court to determine the admissibility of the forensic interview conducted with _____ [initials], the victim in the above captioned matter, for the reasons set forth below. First, the forensic interview is admissible under Minnesota's residual hearsay exception. Second, the forensic interview will likely constitute a prior consistent statement at trial. Finally, both Minnesota law and federal jurisprudence recognize that child abuse disclosures are specially situated and implicate significant admissibility considerations.

I. The forensic interview is admissible under Minnesota's residual hearsay exception, as contained in Rule 807 of the Minnesota Rules of Evidence.

Rule 807 of the Minnesota Rules of Evidence provides that statements having "circumstantial guarantees of trustworthiness" are not excluded by the general hearsay rule if a court determines the following:

- "(A) the statement is offered as evidence of a material fact;
- (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

In *Kihanya*, the prosecution "relied heavily" on forensic interviews "as substantive evidence to establish the state's version of events." *State v. Kihanya*, 2015 Minn. App. Unpub. LEXIS 745, at 5. Following conviction, the defendant argued that the forensic interviews constituted inadmissible hearsay. *Id.* at 7. Hearsay is not admissible as substantive evidence, unless it falls into an exception

under the Minnesota Rules of Evidence. Minn. R. Evid. 802; *State v. Ashby*, 567 N.W.2d 21, 26 (Minn. 1997). The *Kihanya* Court began its analysis of the defendant's claims by noting "recognized factors relevant to admission of forensic interviews", including "reliability considerations 'spontaneity, consistent repetition, [the child's] mental state ..., use of terminology unexpected of a child of similar age,' and whether the interviewer 'had a preconceived idea of what the child would say' or asked leading or suggestive questions." *Kihanya* at 8-9; *In re Welfare of L.E.P.*, 594 N.W.2d 163, 170 (Minn. 1999).

The court's admissibility analysis in *Kihanya* is directly applicable to the above captioned matter; there, as here, "the interview... was videotaped"; "there is no question about what [the victim] said or how [the victim] said it"; "[t]he videotape... shows that the interviewer was extremely sensitive to eliciting truthful answers and avoided planting ideas in [the victim's] mind"; "there is no evidence that anyone had prepared [the victim] for the interview or that [the victim] had any motive to lie"; "the interview statements... do not contradict other evidence." *Id.* at 9. The Court further noted that, as in the immediate case, the defendant had the opportunity to cross-examine the victim at trial. Based on the above, the *Kihanya* Court concluded that "the circumstances of the forensic interview" constituted sufficient indicia of reliability, within the meaning of Rule 807, to justify the admissibility of the forensic interview.

II. The forensic interview will likely constitute a prior consistent statement at trial, admissible under Rule 801(d)(1)(B) of the Minnesota Rules of Evidence.

Rule 801(d)(1)(B) of the Minnesota Rules of Evidence provides that a statement is not hearsay if the declarant testifies subject to cross-examination, and the statement is "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." The prior statement "need not be identical to the trial testimony but rather 'reasonably consistent' to be admissible." *State v. Cochran*, 2017 Minn. App. Unpub. LEXIS 448, *13; *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (citing *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000); *In re Welfare of K.A.S.*, 585 N.W.2d 71, 75 (Minn. App. 1998)). The

State anticipates that the victim's credibility will be challenged in this matter, which enables the prosecution to "bolster the witness'[s] credibility." *In re Welfare of K.A.S.*, 585 N.W.2d 71, 75 (Minn. App. 1998) (quoting *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997)). The State further anticipates that the victim's testimony will be "reasonably consistent" with the forensic interview.

In *Cochran*, the defense argued on appeal that inconsistencies between the victim's trial testimony and the forensic interview barred the interview from being admitted pursuant to Rule 801(d)(1)(B). *Cochran, supra* at 14-15. The court noted that the victim provided more detail in the forensic interview than the trial, which was conducted over a year later, and the victim was understandably hesitant to discuss graphic information in the courtroom. Ultimately, the differences between the forensic interview and the victim's trial testimony did "not directly affect the elements" of the charged offenses, and the Court of Appeals of Minnesota has repeatedly "rejected similar arguments regarding the admission of a child-victim's prior statement where the prior statement was much more detailed than the child's trial testimony." *Id.* at 15.

Another defendant argued for exclusion of a recorded child-victim's statement on identical grounds in *In re Welfare of K.A.S.*, 585 N.W.2d 71, 75 (Minn. App. 1998). The defendant noted that the recording "was much more detailed than [the victim's] trial testimony, took over an hour to complete, and contained significant facts that she did not testify to at trial." *Id.* The court held that despite the disparity in detail, the recorded statement "was reasonably consistent with [the victim's] trial testimony. It may have assisted the jury in judging her credibility." *Id.* at 76. Therefore, the recording was admissible as a prior consistent statement. *Id.* at 75-76.

The Court of Appeals of Minnesota has rendered similar holdings as recently as March of 2020. In *Murphy*, the court approvingly cited language from prior decisions noting that "videotaped statements of children who allegedly have suffered sexual abuse... are not hearsay if the child testifies at trial and is subject to cross-examination and if the statement is both consistent with the child's trial testimony and would be helpful in evaluating credibility." *State v. Murphy*, 2020 Minn. App. Unpub. LEXIS 169, *5. Since the victim's trial testimony "was at least 'reasonably consistent' with the

statements she made during the interview," and the defendant "had an opportunity to cross-examine [the victim] before the interview was played for the jury," the court found no error in "admitting the video-recorded interview of [the victim] into evidence and allowing it to be played for the jury." *Id.* at 6.

III. Minnesota and federal jurisprudence recognize that child abuse disclosures are specially situated and implicate significant admissibility considerations.

Minnesota statutes and case law recognize the unique admissibility considerations surrounding child abuse disclosures. For example, Minn. Stat. § 595.02, subd. 3 (2012), provides that out-of-court statements made by children under 10 which involve sexual or physical abuse are admissible under many circumstances. "In essence, the reliability of a child's out-of-court statement is determined based on the totality of the circumstances." *State v. Angotti*, 2014 Minn. App. Unpub. LEXIS 1161, 5 (citing *State v. Edwards*, 485 N.W.2d 911, 915 (Minn. 1992)). The exclusion of forensic interviews is a consequential decision; as the Supreme Court of Minnesota has noted, prohibiting out-of-court statements by children "significantly reduces the likelihood of a successful prosecution." *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992); *State v. Joon Kyu Kim*, 398 N.W.2d 544, 551 (Minn. 1987). See also *In re Welfare of L.E.P.*, 594 N.W.2d 163, 173 (1999) ("...the state has met its burden of demonstrating that the suppression of the videotape will have a critical impact on its case and that the videotape is admissible...").

In the immediate case, the State does not rely on Minn. Stat. § 595.02, subd. 3 as a distinct ground for admissibility, due to the age of the victim. However, it should be noted that several pertinent factors relating to evaluating the reliability of out-of-court statements by child victims, are met by the facts of this case. For example, "relevant factors include whether the person talking with the child had a preconceived idea of what the child would say and the lack of leading or suggestive questions." *In re Welfare of L.E.P.*, 594 N.W.2d 163, 170 (1999); *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990). Here, the victim was interviewed in a neutral, child-friendly setting at the _____ Child Advocacy Center, by _____, a trained forensic interviewer who followed the ChildFirst

forensic interviewing protocol, an evidence-based approach designed to prevent suggestibility, inappropriate leading questions, or other improper influences on a child's statements and which is one of the models specifically approved by the National Children's Alliance. _____ had no "preconceived idea of what the child would say," and conducted the forensic interview within the dictates of the _____ forensic interviewing protocol. As in *L.E.P.*, _____ did not ask leading or suggestive questions; "employed techniques appropriate for gaining information from [the victim] without putting words in the child's mouth"; "repeated what [the victim said] as if to validate it"; "and asked follow-up questions about the information [the victim] had already given her – usually open-ended questions." *L.E.P.*, 594 N.W.2d at 172. As in *L.E.P.*, the forensic interview "was not at all the product of leading questions or [the forensic interviewer's] own preconception of what [the victim] would say."

The Supreme Court of Minnesota has also considered whether statements are "of a type which a child of that age would be expected to fabricate." *L.E.P.*, 594 N.W.2d at 171. In assessing reliability, Minnesota courts have looked at the emotional state of the child when the statement is given, which also weighs in favor of admissibility in this case. *Id.* Lastly, courts look to the existence of "corroborative evidence of the statement's reliability," *id.* at 172, which is certainly the case in this matter. Courts have "considerable leeway in their consideration of appropriate factors." *Id.* at 170; *State v. Angotti*, 2014 Minn. App. Unpub. LEXIS 1161, at 8-9.

It should be noted that due to the unique circumstances and legal considerations surrounding child abuse disclosures, it is debatable whether the Confrontation Clause is even implicated in the context of most forensic interviews. For example, the United States Supreme Court held in *Ohio v. Clark* that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." *Ohio v. Clark*, 135 S.Ct. 2173, 2182 (2015). The Supreme Court recognized that youth "would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all." *Id.* This rationale has been applied by other jurisdictions to teenage victims of abuse. See *State v. McLaughlin*, 786 S.E.2d 269, 276-83 (N.C. Ct. App. 2016) (applying the holding of

Ohio v. Clark to support the admissibility of a videotaped statement of the 15-year-old child abuse victim to a nurse at a Child Advocacy Center). While the Supreme Court declined to hold that child victim statements to non-law enforcement officers are categorically outside the Sixth Amendment, the Court noted that "the questioner's identity" is highly significant, and contextually may be "significantly less likely to be testimonial than statements given to law enforcement officers." *Id.*

Even if Sixth Amendment protections did apply, this is irrelevant since the victim will testify at trial. In *Crawford*, the U.S. Supreme Court specifically stated that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004). As one scholar noted, "in any criminal child abuse case in which the child testifies, the child's hearsay statements may be admitted under firmly rooted or residual exceptions even if the prior statements are 'testimonial.'" Victor Vieth, Keeping the Balance True: Admitting Child Hearsay in the Wake of *Crawford v. Washington*, Nat'l Center for Prosecution of Child Abuse Update (NDAA, Alexandria, V.A.) 2004.

Accordingly, the State moves the Court for a hearing on this Motion and an Order that the forensic interview shall be admissible at trial, for the reasons set forth above.

Respectfully submitted,

STATE OF MINNESOTA

By Counsel

/s/ _____

Appendix B

Sample Motion for Courtroom Accommodation with Supporting Memorandum

STATE'S MOTION FOR SPECIAL PROCEDURES DURING THE PRESENTATION OF CHILD VICTIM TESTIMONY AND MEMORANDUM IN SUPPORT

Comes now the State of _____, by and through its Assistant District Attorney _____, and hereby requests that the following procedures and modifications in the courtroom be used during the child victim's testimony:

1. That _____ and _____ be permitted to bring a transitional object to the witness stand, such as a small comfort item or toy;
2. That _____'s therapist, _____, be permitted to be present in the courtroom during _____'s testimony, standing next to _____, Ms. _____ having provided trauma therapy to _____;
3. That the Victim Advocate, _____, be permitted to sit at Counsel for the State's table during child victim testimony;
4. That supportive adults, familiar to _____ and _____, be permitted to stand next to _____ and _____ during their respective testimony;
5. That representatives of Bikers Against Child Abuse (BACA) be permitted to be present in the courtroom at the time of testimony;
6. That objections by Counsel for the Defendant be made by raising a hand and stating in a quiet tone of voice the general nature of the objection (i.e. hearsay, relevancy, prejudicial, etc.) using fewer than 10 words; if a lengthy discussion is necessary for the court to rule on the objection,

the State would request that a break be taken to allow the child to leave the room during the discussion;

7. That, to the extent necessary to develop the child's testimony, leading questions be permitted during direct examination;

8. That during _____ and _____'s testimony, the Defendant be prohibited from approaching the witness stand or bench, and that if such a conference with the Court becomes necessary, that _____ and _____ be permitted to leave the courtroom before the Defendant approaches.

MEMORANDUM IN SUPPORT OF STATE'S MOTION

I. INTRODUCTION

This case involves two vulnerable, male child victims of sexual abuse, who are understandably reluctant and afraid to discuss the Defendant's perpetration in private, let alone in a large, public courtroom with their abuser present.

Because of the special needs of young children, the adult, formal, adversarial environment of a courtroom may be the very worst environment in which to elicit reliable information from child witnesses. The special procedures and protections requested above are designed to provide for the special needs of child witnesses and obtain the most reliable information possible. As one judge has noted:

"To assure a fair trial, judges have special responsibility for child witnesses... Judges must remember that a child may be alert and communicative at 9:00 a.m., but sleepy and anxious a few hours later. Judges should appreciate that, for a child, even 15 or 20 minutes on a witness stand may be unmanageable.

"Some lawyers carelessly argue that such courtroom techniques take the side of the child. They fail to acknowledge that **such techniques help a child communicate, but do not tell a child what to say**. The techniques are analogous to

providing a Spanish-speaking or hearing-impaired person with a translator, or allowing a disabled veteran to testify from a wheelchair. In fact, many lawyers enthusiastically endorse these evolving laws and techniques, realizing their potential value for child witnesses for the defense, or for plaintiffs in civil lawsuits. None of these techniques supports the substance of the child's testimony. All of these techniques, however, reduce discrimination that has denied judges and juries the chance to hear a child's testimony." Judge Charles B. Schudson, *Making Courts Safe for Children*, 2 JOURNAL OF INTERPERSONAL VIOLENCE 120, 121 (1987).

The procedures above are in keeping with Rule _____ of the _____ Rules of Evidence and the purpose of evidentiary law, "to the end of ascertaining the truth and securing a just determination."

II. THE USE OF SUPPORT PERSONS

Numerous courts have repeatedly allowed support persons to be present during child victim testimony, and have even permitted the child witnesses to sit in their laps, as long as the support person is carefully admonished not to do anything that might influence the child's answer to a particular question. These courts have recognized that support persons can reassure a child who is thrust into a difficult and strange situation and thereby enable them to better relate events to the court.

The nature of the testimony coupled with the presence of the defendant may cause extreme anxiety on the part of the child witness resulting in confused testimony. The use of a support person may keep the child from being distracted.

The _____ Rules of Evidence addressing witness sequestration are found in Rule _____. Rule _____ provides that the rule does not authorize excluding "a person whose presence a party shows to be essential to presenting the party's claim". The traumatic context and setting of child sexual abuse victim testimony, and the interests of evidentiary law and the Court in ensuring the most reliable information is elicited at trial, suggest the importance of permitting a support person's presence.

Pennsylvania, citing a court's broad discretion to conduct the trial, also allows the use of support persons. *Commonwealth v. Pankraz*, 554 A.2d 974 (Pa. Super. Ct. 1989). In allowing a four-year-old child to sit on her grandmother's lap during testimony, the court observed that the child's

testimony did not appear to be in any way influenced by her grandmother. *Id.* at 979. Neither the child nor the grandmother spoke to each other during the testimony.

An Ohio appellate court found no constitutional violation, nor an abuse of discretion by the trial court, in allowing an eight-year-old witness to sit on the lap of a relative during the presentation of testimony. *State v. Johnson*, 528 N.E.2d 567, 569 (Ohio Ct. App. 1986), *cert. denied*, 111 S. Ct. 81 (1990).

In *State v. Dompier*, 764 P.2d 979 (Or. Ct. App. 1988), the court allowed the victim to sit on her foster mother's lap after repeatedly being unable to testify as to the specific details of the sexual abuse. While on her foster mother's lap, the victim answered both the prosecutor's and defense attorney's questions and gave detailed testimony on the claimed sexual abuse. *Id.* at 980; see also, *Mosby v. State*, 703 S.W.2d 714 (Tex. Ct. App. 1985) (support person permitted to sit with child); Cal. Penal Code § 868.5 (1985).

The emotional difficulties children experience when asked to recall certain events are severe, particularly where, as here, the perpetrator of those offenses is only a few feet away in the courtroom. Having a trusted adult available for general comfort and support and to provide the child with a basic sense of safety may be necessary if the child is expected to be able to answer any questions at all. As long as the support person(s) is carefully admonished not to attempt to influence the child's testimony in any way, the presence of such a trusted adult can only enhance the ability of the child to communicate and for the trier of fact to determine the truth— which should be in keeping with the interest of both parties in this matter.

III. THE USE OF LEADING QUESTIONS ON DIRECT EXAMINATION OF THE CHILD WITNESSES

Rule _____ of the _____ Rules of Evidence states "Leading questions should not be used on direct examination except as necessary to develop the witness's testimony."

Accordingly, the decision to allow leading questions on direct examination is within the sound discretion of the trial court. Traditionally, leading questions have been allowed on direct examination of embarrassed, reluctant, fearful, or forgetful witnesses.

Leading questions may also be permitted, in the discretion of the court, where the witness is ignorant or forgetful. Youthful witnesses fall in this class, and leading questions find a special

usefulness in the trials of sex offenders when young children must testify, the courts sometimes saying that leading questions are justified because of the embarrassing nature of the testimony, or because of the demands of modesty. Underhill, H.C., *Criminal Evidence*, 1207–1208 (5th ed).

Numerous appellate courts have upheld trial judges' decisions allowing the use of leading questions of child witnesses in sexual abuse cases because of the sensitive nature of the subject and the understandable hesitancy, embarrassment, anxiety, and shame of the witnesses. See, e.g., *Rotolo v. United States*, 404 F.2d 316 (5th Cir. 1968) (15-year-old-child); *People v. Kosters*, 438 N.W.2d 651 (Mich. Ct. App. 1989) (five-year-old-child); *State v. Chandler*, 376 S.E.2d 728 (N.C. 1989) (two to five-year-old children); *Altmeyer v. State*, 519 N.E.2d 138 (Ind. 1988) (10- and 14-year-old children); *Nash v. State*, 519 A.2d 769 (Md. 1987) (13-year-old child); *People v. Server*, 499 N.E.2d 1019 (Ill. App. Ct. 1986), cert. denied, 484 U.S. 842 (1987) (nine-year-old child); *Commonwealth v. Baran*, 490 N.E.2d 479 (Mass. App. Ct. 1986); *State v. Hawthorne*, 523 S.W.332 (Mo. Ct. App. 1975) (eight-year-old witness); *Wright v. Blakeslee*, 128 A. 113 (1925).

IV. THE MANNER AND SCOPE OF QUESTIONING

The ability of children to provide meaningful testimony that is helpful to the ascertainment of the truth can be significantly affected and diminished unless this Court takes a proactive role in limiting the manner and scope of the questioning. The State has asked the court to assure that objections be made in a quiet, non-threatening manner, and that the scope of questioning be limited to areas which are essential.

In *In re Pamela A.G.*, 134 P.3d 746 (N.M. 2006), the New Mexico Supreme Court noted that "protecting the child's emotional state" was of the utmost importance. For that reason it is necessary to assure the child a modicum of protection. See generally, Parker J., "The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?" 17 *New Eng. L.J.* 3 (1982)."

----- Rule of Evidence ----- empowers the court to control the mode and manner in which witnesses will be questioned to (1) assure that such questioning is "effective for determining the truth, (2) avoid wasting time, and (3) protect witnesses from harassment or undue embarrassment." This includes regulation of the manner in which objections are made,

Commonwealth v. Amirault, 535 N.E.2d 193, 207 (Mass. 1989), the method and duration of cross-examination, *People v. Conyers*, 382 N.Y.S.2d 437, 441 (1976), and the length of questioning, *Commonwealth v. Brusqulis*, 496 N.E.2d 652, 656 (Mass. 1986). As one Court has noted:

"[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *State v. Catsam*, 534 A.2d 184, 378 (Vt. 1987), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Thus, there is ample authority to support the State's request that the Court regulate the mode and manner of examination of these child witnesses.

STATE OF _____

By Counsel

Appendix C

Sample Motion to Quash Subpoena for Victim Records

NOW COME THE PEOPLE OF THE STATE OF _____, by their attorney, _____, District Attorney of _____ County, (State), _____ Judicial Circuit, by Assistant District Attorney _____, hereby request this Court to enter an Order with quashing a subpoena duces tecum, and in support thereof states as follows:

1. That the Defendant issued a subpoena on the custodian of records for Victim's Middle School/Victim's therapist/Victim's medical doctor/Children Youth and Family Services, located at _____ (State) and the subpoena was served on _____ and filed with the Court on _____. The subpoena has a return date of _____.
2. The subpoena requests school records for J.P. for the school years of 2014-2016 including any attendance records, behavioral reports, grades and progress reports. The subpoena was issued to the school citing the criminal case number and name of the Defendant. (sample language, adjust to make case specific)
3. J.P. is entitled to privacy as a victim of a violent crime and the issuance of this subpoena to the school for records is an invasion of that privacy. Pursuant to the (State) Victims Rights Law _____, a victim shall have the right to: be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;
4. The date range on the Bill of Indictment is June 27, 2015 through February 1, 2016.

5. None of the records requested by the subpoena would be relevant or admissible in a criminal trial against the Defendant. Therefore, the subpoena should be quashed.

6. In the alternative, the People request an in camera review of these records to determine any relevant or admissible records. However, the return date of the subpoena is the morning of trial and this raises concerns about the Court's ability to review them prior to trial and the State's ability to prepare for any rebuttal.

WHEREFORE the People pray the Court enter an order quashing the subpoena or in the alternative review the records in camera.

Respectfully Submitted,

Assistant District Attorney

