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Monograph

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Competency of Child Witnesses

By Ross Eatman

Challenges to a child victim's testimonial competency are raised frequently in child abuse cases. Since a judicial finding of incompetency prevents the child from testifying at trial, the threshold determination of competency can have a decisive impact on child abuse prosecution. If there is no definitive evidence of abuse other than the child victim's account, which is often the case, the child's trial testimony is not only probative and relevant but indispensable.

Traditional Competency Standards and Practice

Because of a variety of legal and psychological assumptions about children,[1] traditional competency requirements have worked to the special disadvantage of children. Early common law deemed children incompetent witnesses (hence, excluded from testifying) based on their supposed inability to understand the nature of an oath. In recent years, however, competency rules for children have adhered to the standards set forth in the 1895 United States Supreme Court case *Wheeler v. United States*:

> [T]here is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision on this question rests primarily with the trial judge who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.[2]

Although the *Wheeler* standard states that age itself is not a ground of incompetence, age has remained an important factor in state competency standards.[3] Some state laws consider children above a certain age presumptively competent, requiring the judge to inquire into the competency of a child only under a specified age.[4] Other states designate a child below a prescribed age an incompetent witness unless the child is shown to understand the nature and obligation of an oath. Even with competency standards that do not require special qualification of child witnesses, it is unlikely competency hearings will be readily abandoned since children have paternalistically been viewed as unreliable witnesses.[5]

Traditionally, a *voir dire* or hearing to assess the child's competency takes place outside the presence of the jury.[6] The competency determination is based on: appreciation of the obligation to tell the truth, understanding of the difference between truth and falsehood, mental capacity to perceive impressions and recollect observations, and ability to narrate or communicate the memory of these observations in words.[7] The trial judge generally has the discretion to determine the necessity for and scope of a competency examination,[8] and preliminary examinations can range from a simple *voir dire* by the judge to a full-scale adversarial hearings with opposing attorneys questioning the child.[9] Since a reviewing court will reverse the trial judge's competency determination only for abuse of discretion, these rulings are seldom overturned on appeal.

Commentators have been uniformly critical of traditional competency procedures and agree that juries should, in most cases, be allowed to hear a child's testimony and assess its weight and credibility.[10] Even those commentators who accept traditional assumptions about children's capacities have viewed factors ordinarily listed as competency requirements as more relevant to credibility.[11] Recent psychological research also indicates many traditional assumptions about children's capacities are insupportable or oversimplified.[12] Although further study is needed to compare adults' to children's abilities, [13] children probably possess the basic skills required to observe, remember and communicate information about events they witness.[14] Developmen-

APRI

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tal trends in suggestibility, for example, "are not nearly as pronounced as is commonly assumed,"[15] and there appears to be little correlation between age and honesty.[16] Young children may lack vocabulary to describe their experiences fully and may need direct, simple questions to stimulate recall, but they are often able to give concrete descriptions of abusive acts.

Competency Reform

Many states have moved to eliminate procedures requiring special qualification of child witnesses. A number have adopted the approach of Federal Rule of Evidence 601, which states that "[e]very person is competent to be a witness except as otherwise provided in these rules." Aimed at eliminating status-based grounds of incompetency—i.e., religious belief, conviction of crime and mental incapacity—Rule 601 allows matters pertaining to perception, memory and narration to be considered in assessing the witness' credibility.[17] Under Rule 601 children are accorded the same presumptive competency as other witnesses. Other new competency standards specifically deem children competent witnesses,[18] while a few eliminate the need for prior qualification specifically in child sexual abuse cases.[19]

While commentators and courts agree that the Rule 601 approach and other competency reforms have liberalized the competency standard, little attention has been paid to their practical impact.[20] Even in a Rule 601 jurisdiction, the trial judge retains discretionary power to exclude witnesses from testifying.[21] Since Federal Rules 602, 603 and parallel state provisions require a witness to testify under oath (Rule 603) and with personal knowledge of the events to which she* testifies (Rule 602), a witness' testimony is still conditioned upon some type of minimal showing, even if the need for prior qualification has been eliminated.[22]

Furthermore, the trial judge has broad discretion to admit or exclude evidence and to control the course of a trial (e.g., Federal Rules 410[23] and 403[24]). Since a variety of objections are likely to be raised in cases involving child victims—lack of personal knowledge, insufficiency of oath, lack of even minimal competency to justify proffered testimony, prosecutors must be prepared to ensure that the policy of Rule 601 and similar reforms—presumptive competency—are carried out.

Suggestions for Practice

Some courts continue to hold routine preliminary competency examinations for children, even when competency reforms have been instituted.[25] Preliminary competency examinations or hearings should rarely, if ever, be required in jurisdictions which have liberalized their standards, since the primary objective of these reforms is to allow the jury to weigh the witness' testimony.[26]

However, there may be some situations in which the child is so young or uncommunicative that a serious question of the child's testimonial capacity exists.[27] If a child's competency is challenged, the defense should have the burden of convincing the trial court of the child's incapacity;[28] and since there is a presumption of competency, this burden should be significant. The defense, therefore, should not be entitled to a competency hearing simply by pointing out that the witness is a child. It seems consistent with Rule 601 and other more liberal standards for a court to require a child to go through a competency hearing or examination *only* after the defense has made a preliminary and substantial offer of proof that a particular child is incompetent by some means other than bringing the child to court. The court could, for instance, require a written motion with accompanying affidavits setting forth substantive facts that provide a legitimate basis for questioning the child's competence.

In the few cases in which a preliminary examination is merited, the child's competency should be established upon a showing of "minimal credibility" so that the objective of these liberalized rules is not frustrated.[29] The proffered witness, that is, is competent if she "is capable of testifying in any meaningful fashion whatsoever."[30] The Rule 601 standard has also been described as one of minimal relevancy. The prosecutor or a sensitive trial judge (rather than opposing counsel) should conduct the inquiry into the child's competence since the examination, held out of the presence of the jury, could be used by the defense to intimidate the child. If the judge conducts the examination, he or she may incorporate questions submitted by counsel if appropriate.

The prosecutor should ensure the scope of the hearing is appropriately limited to establishing the child's "minimal credibility" and object if the defense attempts to harass or confuse the child during the hearing. Further, if the child appears at all intimidated by the judge, the prosecutor should suggest that the judge allow questioning by the prosecutor since this might make the child more comfortable and thus more responsive. Cross examination by the defense should be unnecessary (or else severely limited) once minimal requirements of competency have been established.

Judges have sometimes conducted informal competency examinations, or have held such hearings *in camera*, in the absence of the defendent.[31] Recent state court decisions regarding the right of the defendent to attend a competency

*To simplify references to the child victim, "she" or "her" will be used. There may be as many (or more) male victims as female victims but female victims are more frequently reported.

hearing[32] have reached different results. The United States Supreme Court recently accepted a case for review, *Kentucky v. Stincer*, which will address this issue. A proper approach to Rule 601 would render a competency hearing an infrequent event. Moreover, it should be possible to conduct the limited inquiry required at such a hearing in the defendant's presence without overly intimidating the child.

Special Instructions

In some jurisdictions, judges have instructed juries to subject a child witness' testimony to special scrutiny. Such instructions may suggest to the jury that a child's testimony is inherently suspect and may unduly influence the jury's ability to assess the child's credibility.[33] Other courts have instructed juries to judge a child witness' testimony according to the same standards as that of any other witness, or to consider a child's testimony in light of the child's age, intelligence and experience. These instructions reflect a more neutral view of children than the "special scrutiny" instruction, and thus preserve the jury's role in assessing credibility. Still, to the extent that any such instructions direct the jury's attention to the child's testimonial capacity or credibility, they may have a negative influence and should be avoided if possible. Prosecutors should always weigh the potential impact of special child witness instructions carefully before requesting them.

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Footnotes

[1] Eatman, *Minor Victims of Sexual Assault*, 26 N.H.B.J. 199 (1985).

[2] 159 U.S. 523, 524 (1895).

[3] Melton, Bulkley, & Wulkan, *Competency of Children as Witnesses*, in CHILD SEXUAL ABUSE AND THE LAW (J. Bulkley, ed., ABA 1981); *see also* D. Whitcomb, E. Shapiro, & L. Stellwagen, WHEN THE VICTIM IS A CHILD (Government Printing Office 1985).

[4] *See, e.g., State v. Schossou*, 703 P.2d 448 (Ariz. 1985). For recent analysis of existing state competency standards see generally R. Eatman & J. Bulkley, PROTECTING CHILD VICTIM/WITNESSES (ABA 1986); Comment, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?* 40 U. MIAMI L. REV. 245 (1985) (authored by Robin W. Morey).

[5] Eatman, *supra* note 1 at 201, 205.

[6] J.H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW 509 (1979); Melton, Bulkley, & Wulkan, *supra* note 3 at 131.

[7] J. Bulkley, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES (ABA 1982); Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAV. 73 (1981); Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*, to be published in ADVANCES IN DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS, eds. M. Wolraich & D.K. Routh.

[8] *E.g., People v. Garcia*, 97 Ill. 2d 58, 454 N.E. 2d 274 (1983), *cert. denied*, 461 U.S. 1260 (1984).

[9] RECOMMENDATIONS, *supra* note 7.

[10] J.H. Wigmore, *supra* note 6 at 501, 509; McCormick, HANDBOOK OF THE LAW OF EVIDENCE 62 (1971) (describing it as a "primitive remedy" to exclude one who may be only effective witness); 3 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE 601[01] to 601[05] (1985).

[11] J.H. Wigmore, *supra* note 6 at 509.

[12] *See generally* Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125 (1984); Goodman & Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181 (1985); Goodman, *Children's Testimony in Historical Perspective*, 40 J. SOC. ISSUES 9 (1984); Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 J. SOC. ISSUES 33 (1984); Loftus & Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51 (1984); Marin, Holmes, Guth & Kova, *The Potential of Children as Eyewitnesses: A Comparison of Children and Adults on Eyewitness Tasks*, 3 LAW AND HUM. BEHAV. 295 (1975); Melton, *Children's Competency to Testify*, 5 LAW AND HUM. BEHAV. 73 (1981).

[13] Johnson & Foley, *id. at* 45.

[14] *See generally* Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*, *supra* note 7 at 22-25.

[15] *Id.* at 23.

[16] Burton, *Honesty and Dishonesty*, in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES (T. Lickona, ed., 1976).

[17] R. Eatman & J. Bulkley, PROTECTING CHILD VICTIM/WITNESSES (ABA 1986).

[18] *See id.* at 43 for a survey of the various state competency standards.

[19] *E.g.*, UTAH CODE ANN. 76-5-410 (1985).

[20] Several states incorporate competency procedures into the statutory or evidentiary standards. *E.g.*, IOWA R. EVID. 601 (1985).

[21] M. Graham, HANDBOOK OF FEDERAL EVIDENCE (1981); Weinstein, *supra* note 10 at 601[9-10].

[22] Professor Graham states that Rules 601, 602, & 603, taken together, still impose these requirements on witnesses:

1) the witness must have the capacity to perceive, record, and recollect impressions of facts;
2) the witness must in fact have perceived, recorded, and must be able to recollect impressions of fact having any tendency to establish a fact of consequence in the litigation (personal knowledge);
3) the witness must declare that he or she will tell the truth and the witness must be capable of understanding the duty to tell the truth (oath or affirmation), which requires that the witness be capable of distinguishing between the truth and a lie (or fantasy); and
4) the witness must be able to express himself clearly.

M. Graham, HANDBOOK, *id.*

[23] *J. Weinstein, supra* note 10, at 601[9-10].

[24] *E.g., Huff v. White Motor Corp.*, 609 F.2d 286, 294 n.12 (7th Cir. 1979) ("In the extreme case in which the witness' incompetency is clear, the judge could exercise his balancing authority under Rule 403 to exclude the evidence.")

[25] M. Graham, HANDBOOK, *supra* note 21, at 601.2.

[26] *United States v. Roach*, 590 F.2d 181, 186 (5th Cir. 1979): "[T]here seems no longer to be any occasion for judicially-ordered psychiatric examinations or competency hearings of witnesses - none, at least, on the theory that a preliminary determination of competency must be made by the [trial] court."

[27] *E.g., United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980); *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979).

[28] *United States v. Haro*, 573 F.2d 661, 667 (10th Cir. 1978); J. Weinstein, *supra* note 10.

[29] J. Weinstein, *supra* note 10, at 601-29; M. Graham, *supra* note 21, at 601.2.

[30] *United States v. Banks*, 520 F.2d 627, 630 (7th Cir. 1975).

[31] *E.g., State v. Taylor*, 704 P.2d 443 (N.M. Ct. App. 1985); *Moll v. State*, 351 N.W.2d 639 (Minn. Ct. App. 1984).

[32] For an analysis of the criminal defendant's rights in competency assessments, see Comment, *Minnesota Developments: Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedure for Sexual Abuse Cases*, 69 MINN. L. REV. 1377 (1985). (Authored by Julie Oseid.) *See also* Comment, *supra* note 4.

[33] *See* Annotation, *Instructions to Jury as to the Credibility of a Child's Testimony in a Criminal Case*, 32 A.L.R.4th 1196 (1984).

(continued on page 6)

ANNOUNCING

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