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National Center for the  
Prosecution of Child Abuse

# Monograph

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SPECIAL ISSUES RELATED TO CHILD ABUSE PROSECUTION

## Special Hearsay Exceptions

Many states have enacted special statutory hearsay exceptions authorizing admission at trial of a child victim's out-of-court statement about abuse as substantive evidence.<sup>1</sup> Some of these statutes apply only to criminal prosecutions for child sexual abuse, while others also apply to criminal prosecution for physical abuse of children and specified civil proceedings.

Both practical and legal considerations necessitated the creation of a special statutory hearsay exception for young child abuse victims. There seldom are eyewitnesses to acts of abuse, and other evidence corroborating a child victim's allegation is often absent. In child sexual abuse cases, for example, conclusive medical evidence is often lacking, and the child's out-of-court statements, which may capture details and spontaneity missing in later accounts, may provide the prosecution with critical evidence. This is especially true when the child is unavailable to testify at trial, since the hearsay statement then provides the victim's only account of the abuse.

The hearsay rule ordinarily bars admission into evidence of a declarant's out-of-court statement if that statement is offered to prove the truth of the matter asserted in the statement. A child victim's out-of-court statement, of course, may be admitted if it is offered for a non-hearsay purpose such as to impeach another witness, or to support the child's credibility (rehabilitation) once it has been attacked.<sup>2</sup> A child's statement about

By Ross Eatman

abuse may also be admitted under the "prompt complaint" or similar doctrine to support her\* in-court testimony and rebut an inference of silence that the jury might view as inconsistent with abuse.<sup>3</sup> Certain of the child victim's communications may be non-assertive in nature and hence not hearsay, thus admissible as substantive evidence. A Louisiana appellate court, for example, held that an investigator's description of a child victim's play with anatomical dolls during an interview with a psychologist described the child's non-assertive conduct not subject to the hearsay rule.<sup>4</sup> A victim's out-of-court statement about abuse is ordinarily admissible as substantive evidence of abuse only if it falls within the hearsay exception. The new special hearsay exception statutes facilitate the admission of child victim statements which do not fall within other hearsay exceptions.

Prosecutors often successfully offer child victims' out-of-court statements as substantive evidence under a variety of hearsay exceptions. These are commonly: (1) spontaneous exclamations, excited

utterances or *res gestae*; (2) statements made to physicians for purposes of diagnosis or treatment; (3) statements of present sense impressions or bodily symptoms; and, (4) residual or catch-all hearsay exceptions.<sup>5</sup> Some state courts, recognizing the special needs of children of tender years and child abuse victims, have liberally construed the normally strict requirements of traditional hearsay exceptions, facilitating the admission of such statements as substantive evidence.<sup>6</sup> Other courts, however, have adhered to strict construction of the traditional hearsay exceptions.<sup>7</sup> Since child victim statements do not always fulfill the criteria of existing hearsay exceptions, special statutory hearsay exceptions are necessary.

### Confrontation Rights

Although the special hearsay exception for a child victim's statement creates a statutory vehicle for admitting a statement at trial, admission of the statement must not violate the criminal defendant's Sixth Amendment confrontation rights. Even if the statement satisfies the elements of a special statutory hearsay exception, the confrontation clause could preclude admission of a child victim's out-of-court statement.<sup>8</sup> U.S. Supreme Court hearsay/confrontation clause

### APRI

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\* 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.

decisions distinguish between situations in which the hearsay declarant is available and those in which the declarant is unavailable to testify. The primary confrontation concerns—testimony under oath, cross-examination of the declarant about his or her statements, and the jury's opportunity to assess the declarant/witness' demeanor—are all satisfied when the hearsay declarant testifies at trial. Thus, the confrontation clause does not bar the admission of a child victim's hearsay statement if the statement is admissible under a hearsay exception, and if the child testifies at trial and is subject to cross-examination about the statement.

The primary confrontation problem posed by hearsay evidence is raised when the hearsay declarant *does not* testify at trial. Courts and commentators have generally viewed the 1980 U.S. Supreme Court decision in *Ohio v. Roberts*<sup>9</sup> as imposing additional confrontation clause requirements on the admission of a non-testifying witness' hearsay statement. *Roberts* stated that first, the hearsay proponent (here, prosecutor) must demonstrate that the hearsay declarant is unavailable to testify at trial; and second, that the proffered statements bear "indicia of reliability" sufficient to justify their admission.<sup>10</sup>

Special statutory hearsay exceptions for the statements of child victims have so far survived constitutional challenges in state courts. Appellate courts in Minnesota, Kansas and Washington, observing that the respective statutory exceptions incorporated the *Ohio v. Roberts* confrontation clause requirements, have held that such statutes do not violate the defendant's confrontation rights.<sup>11</sup> The cases show, however, that the reviewing court will carefully scrutinize hearsay offered pursuant to these exceptions to ensure that the defendant's confrontation rights were not compromised in the particular application of the statutory

exception.<sup>12</sup>

The recent Supreme Court decision in *United States v. Inadi*,<sup>13</sup> however, has limited the applicability of *Ohio v. Roberts*. Whereas some had interpreted *Roberts* to require a showing of unavailability any time the hearsay statement of a non-testifying witness was proffered, the *Inadi* Court expressly stated that this requirement governs only hearsay statements offered under the "prior" or "former" testimony hearsay exception.<sup>14</sup> *Inadi* held that the confrontation clause does not require a showing of unavailability before a non-testifying co-conspirator's out-of-court statements are admitted, when the statements otherwise satisfy the requirements of Federal Rule 801(d)(2)(E) characterizing such statements as non-hearsay.

After *Inadi*, it is not clear whether the confrontation clause requires a showing of unavailability as a condition of admissibility for hearsay offered under the other numerous hearsay exceptions.<sup>15</sup> It is possible, for example, that no such showing is required when the prosecutor seeks to offer an excited utterance or statement made to a physician by a non-testifying child witness. Similarly, there is no guarantee that a showing of unavailability is constitutionally required to admit hearsay statements offered pursuant to the new special hearsay exceptions for child victims.

Many of the statutory special hearsay exceptions, enacted before *Inadi*, incorporate the *Ohio v. Roberts* standards, and require as a prerequisite to admissibility a showing that a non-testifying child hearsay declarant is an unavailable witness. Thus, even if unavailability may not be constitutionally required, it is often a statutory requisite. The safe course, even in those few states that do not require an unavailability showing,<sup>16</sup> is to establish on the record both the child's unavailability<sup>17</sup> and the trustworthiness of her statements.

The unavailability and reliability showings are discussed in more detail below.

### Unavailability

The Federal Rules of Evidence,<sup>18</sup> and parallel state statutes, court rules, and decisions, generally recognize similar grounds of witness unavailability, such as death, physical or mental disability, privilege, absence from the jurisdiction, failure of memory, and persistent refusal to testify. There may be additional grounds of unavailability applicable in cases in which the hearsay declarant is a child. A child victim or witness may be found, for instance, to lack testimonial competence to testify at trial. Her lack of competency at the time of trial should not preclude admission of the child's hearsay statements, provided that the statements otherwise satisfy the requirements of the special hearsay exception and the confrontation clause.<sup>19</sup> The child's statement may be sufficiently reliable or trustworthy to merit admission nonetheless.<sup>20</sup>

A trial court's finding that the child is incompetent should satisfy the prosecutor's burden of showing the child victim's unavailability— "[A] determination of incompetency constitutes unavailability within the meaning of the hearsay exceptions and the confrontation clause."<sup>21</sup> It is important to note, however, that a *stipulation* between the parties (as opposed to a trial court finding) as to the child's incompetency<sup>22</sup> or unavailability, or the prosecutor's assertion of the child's testimonial incompetence,<sup>23</sup> may be an inadequate demonstration of the child victim's unavailability.<sup>24</sup>

There are two situations in which a prosecutor might seek to offer the hearsay statements of a child who is otherwise available but not competent to testify at trial. One is when a prosecutor seeking to use the child victim as a witness at trial is prevented from doing so by a court's ruling (usual-

ly after a defense challenge and a *voir dire* or evidentiary hearing before the judge) that the child is not competent. In such a situation, the child victim's hearsay statements might offer the child's only admissible account of the abuse.

The second is when a prosecutor, on his or her own initiative, contends that the child is incompetent to testify as a witness. A child victim might be so young or so limited in communication skills that she will be ineffective or incompetent as a witness. The same child nonetheless may have made an out-of-court statement that is communicative, reliable, and of great evidentiary value. A prosecutor might offer the hearsay statement without the child's in-court testimony, claiming that the child is incompetent and is therefore an unavailable witness. The prosecutor, however, would have to establish to the trial court's satisfaction the child's lack of competence (and hence, the child's unavailability) at a hearing on the issue.<sup>25</sup> Such a course of action should be used only in unusual circumstances.

A prosecutor who wishes to introduce the child victim's hearsay statements without offering the child as a witness may also seek to establish that the child is "psychologically" unavailable as a witness.<sup>26</sup> The contention that a child victim will be seriously traumatized by testifying in court, or that the child will be completely unable to testify because of fear or emotional trauma, may be sufficient grounds for establishing the child's unavailability for confrontation clause purposes. Courts and commentators addressing this issue, however, have maintained that the test for establishing a witness' psychological unavailability is a demanding one.<sup>27</sup> According to this view, there must be a substantial showing that the child witness' prospective trauma or fear renders it a "relative impossibility" for the child to testify.<sup>28</sup>

A showing of prospective trauma is also required in many of the recent videotaped deposition and closed-circuit television provisions for child victims. There is a marked difference, however, between the special hearsay and video technology circumstances. In the former, there is no cross-examination of the child and the jury is unable to observe the child's demeanor. In the latter, the basic confrontation elements of an oath, cross-examination, and ability to observe demeanor are preserved, albeit under conditions departing from the typical courtroom arrangement. Thus, it is reasonable to expect that courts will examine a claim of psychological unavailability with particular scrutiny before admitting the child's hearsay statements without the protection of cross-examination.

Unavailability, for either hearsay or confrontation clause purposes, pertains to that witness' unavailability at the time of trial. Since this determination is often reached in advance of trial after an evidentiary hearing, the prosecutor should protect the record by ensuring that the judge's finding of unavailability pertains to the witness' unavailability at the time of trial.

In establishing the child's unavailability, prosecutors could offer as witnesses the child's relatives, teachers, acquaintances, and possibly experts such as licensed psychologists, social workers, therapists, physicians, or psychiatrists. Expert testimony may be of particular import when psychological trauma is the basis for the child's unavailability.<sup>29</sup> Some courts may, however, require that the prosecutor call the child victim as a witness at an evidentiary hearing addressing her availability to testify, and a prosecutor may consider this course the most persuasive demonstration of the child's inability to testify. The prosecution should consider all ramifications

carefully before proceeding.

### Indicia of Reliability

In addition to demonstrating the child victim's unavailability, the prosecutor offering the hearsay statements of a non-testifying child victim must also satisfy the court that the particular statements bear "indicia of reliability" sufficient to warrant their admission as evidence. For statements that fall under a firmly rooted hearsay exception (e.g., excited utterances or statements made for purposes of medical diagnosis), such reliability may be presumed. Any other statement, however, must be shown to bear "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56 (1980). If a special hearsay statute for child victims is used when the statements do not fulfill the requirements of a traditional exception, the "particularized guarantees" requirement is applicable.

In a recent publication describing victim/witness protections for child abuse victims, the National Legal Resource Center for Child Advocacy and Protection (a program of the American Bar Association's Young Lawyer's Division) compiled a list of factors which can be considered to determine whether a statement possesses such guarantees of trustworthiness. They include the following:

1. Child's personal knowledge of the event.
2. 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. 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. 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 defendant's opportunity to commit the act complained of in the child's statement.<sup>31</sup>

The circumstances under which a particular statement was made may also provide the prosecutor with further guarantees of the statement's trustworthiness.

The purpose of the "particularized guarantees" test is to ensure that a hearsay statement bears indicia of reliability equivalent to those which underlie the traditional hearsay exceptions.<sup>32</sup> An expert who testifies to the child victim's unavailability may also be able to comment on some of the reliability factors. The expert, for example, may provide useful information to the court by showing that the language, timing, and circumstances of the child victim's statement are consistent with the dynamics of abuse, hence, underscoring its reliability.

### Corroboration

A number of the new special hearsay exception statutes for child victims require corroborative evidence of the alleged act or the statement as a prerequisite to the admission of the statement of an unavailable witness.<sup>33</sup> Such requirements reflect a legislative judgment that a criminal defendant should not be convicted solely on

evidence consisting of a child victim's out-of-court statement about abuse. Corroboration is probably not required under the confrontation clause since it relates to the criminal defendant's fair trial rights protecting him against a conviction based on insufficient evidence, rather than to *admissibility* of a hearsay statement.<sup>34</sup>

Nonetheless, some of the factors listed above as indicators of the trustworthiness of the child's statement could possibly be used to satisfy the corroboration requirement in states having such a requirement in their statutes. However, those that do are most likely to call for corroboration independent of the child's statement, such as admissions or a confession by the accused; medical findings or evidence consistent with (though not necessarily conclusive of) the alleged abuse; a witness who can provide corroborating evidence; physical or scientific evidence consistent with the child's account (e.g., presence of semen on bedding or clothing); excited utterances; photographs supporting the child's account; or even expert testimony characterizing specific behavior changes of the child as consistent with the alleged abuse.

When the victim is unavailable as a witness and the prosecutor needs corroboration in order to gain admission of the child's statements under the special hearsay exception, he should offer any evidence that could be deemed corroborative. Not only will this increase the chances of having statements admitted into evidence, it will as a practical matter increase the likelihood of obtaining a conviction.

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### Footnotes

<sup>1</sup> As of December 1986, twenty-five states had enacted such statutes which apply to criminal proceedings: Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Missouri, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, and Washington.

<sup>2</sup> McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 601 (1972).

<sup>3</sup> Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Abuse Cases*, 89 DICK. L. REV. 645, 650 (1985).

<sup>4</sup> *State v. Fezell*, 486 So. 2d 327 (La. Ct. App. 1986). See also *In re Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984); *In Re Penelope B.*, 104 Wash. 2d 643, 709 P.2d 1185 (1985); but see *State v. Messier*, 499 A. 2d 32 (Vt. 1985).

<sup>5</sup> See generally Bulkley, *Evidentiary and Procedural Trends*, *supra* note 3 at 650; see also Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983) (authored by Judy Yun).

<sup>6</sup> E.g., *Lancaster v. People*, 61 P.2d 720 (Colo. 1980) (child victim's statement long after event deemed sufficient for excited utterances exception); *State v. Poehmel*, 722 P.2d 304 (Ariz. Ct. App. 1985) (victim's statements deemed admissible as excited utterance even when police officer said victim only made sense after she had time to calm down); *People v. Wilkins*, 134 Mich. App. 39, 349 N.W.2d 815 (1984) (testimony as to identity of perpetrator admissible as part of medical diagnosis and treatment hearsay exception).

<sup>7</sup> E.g., *State v. Thompson*, 379 N.W.2d 295 (S.D. 1985); *State v. Taylor*, 704 P.2d 443 (N.M. Ct. App. 1985).

<sup>8</sup> *California v. Green*, 399 U.S. 149 (1970).

<sup>9</sup> 448 U.S. 56 (1980).

<sup>10</sup> *Id.* at 64-65.

<sup>11</sup> *State v. Belloti*, 383 N.W.2d 308 (Minn. Ct. App. 1986); *State v. Myatt*, 237 Kan. 17, 697 P.2d 838 (1985); *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984). See also *State v. Pendelton*, 10 Kan. App. 2d 26, 690 P.2d 959 (1984); *State v. Slider*, 38 Wash. App. 689, 688 P.2d 538 (1984), *rev. denied* (1985).

<sup>12</sup> E.g., *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984).

<sup>13</sup> 106 S. Ct. 1121 (1986).

<sup>14</sup> *Id.* at 398.

<sup>15</sup> See also the discussion about *hindi's* impact in "Videotaping Child Victim Interviews or Statements," another article by Ross Eatman, also available from the National Center.

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<sup>16</sup> See e.g., *State v. Gollon*, 115 Wis. 2d 592, 340 N.W.2d 912 (Ct. App. 1983) (if the child is physically unavailable to testify, court must make finding of unavailability before admitting excited utterances of the non-testifying child victim).

<sup>17</sup> See, e.g., *State v. Thompson*, 379 N.W.2d 275 (S.D. 1985) (admission of child victim's statements pursuant to tender years hearsay exception held improper in absence of finding of trustworthiness); *Ellison v. Sachs*, 769 F.2d 955 (4th Cir. 1985) (incompetent child's hearsay statements inadmissible because there were no adequate indicia of reliability).

<sup>18</sup> FED. R. EVID. 804(a).

<sup>19</sup> Cases holding the hearsay statements of an incompetent child witness admissible under various hearsay exceptions are collected in Note, *Minnesota's Hearsay Exceptions for Child Victims of Sexual Abuse*, 11 WM. MITCHELL L. REV. 799, 815 (1985).

<sup>20</sup> E.g., *State v. Bellotti*, 383 N.W.2d 308 (Minn. Ct. App. 1986); *State v. Skala*, 719 P.2d 283 (Ariz. Ct. App. 1986); *State v. Rodriguez*, 8 Kan. App. 2d 353, 657 P.2d 79 (1983).

<sup>21</sup> Note, *supra* note 19 at 815, fn.101 citing *Haggins v. Warden*, 715 F.2d 1050, 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984).

<sup>22</sup> *State v. Campbell*, 299 Or. 633, 705 P.2d 694 (1985).

<sup>23</sup> *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984).

<sup>24</sup> See also *State v. Gollon*, 115 Wis. 2d 592, 340 N.W.2d 912 (Ct. App. 1983).

<sup>25</sup> In several child victim cases, courts have stated that the child is so young that while able to take the stand to testify, the child is not amenable to a meaningful cross-examination. These courts have viewed that situation as presenting a special type of unavailability rather than strict testimonial incompetency. *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979); *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980).

<sup>26</sup> See generally *Graham, Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 20 (1985) for a thorough discussion of psychological unavailability as a grounds for excusing a child victim's live testimony in court.

<sup>27</sup> See *Graham, id.* at 83; R. Eatman & J. Bulkley, PROTECTING CHILD VICTIM/WITNESSES at 22-23 (ABA 1986); *People v. Stritzinger*, 34 Cal. 3d 505, 194 Cal. Rptr. 431, 668 P.2d 738 (1983); *Warren v. United States*, 436 A.2d 821 (D.C. 1981).

<sup>28</sup> *People v. Stritzinger*, 34 Cal. 3d 505, 194 Cal. Rptr. 431, 668 P.2d 738 (1983).

<sup>29</sup> For further discussion of unavailability see "Videotaped Depositions and Closed-Circuit Testimony," another article by Ross Eatman, also available from the National Center.

<sup>30</sup> *Ohio v. Roberts*, 448 U.S. 56, 64-65 (1980).

<sup>31</sup> R. Eatman & J. Bulkley, PROTECTING THE CHILD VICTIM/WITNESSES at 6 (ABA 1986); *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985); see *State v. Taylor*, 704 P.2d 443 (N.M. Ct. App. 1985); *State v. Bellotti*, 383 N.W.2d 308 (Minn. Ct. App. 1986). The "catch-all" or "residual" hearsay exceptions, contained in Fed. R. Evid. 803(24) and 804(b) (5), allow for the admission of hearsay statements if (along with several other requirements) the statements possess "circumstantial guarantees of trustworthiness." Thus, cases addressing the propriety of hearsay statements admitted under the residual exceptions contain discussions of trustworthiness which are pertinent to the analogous issue in special statutory hearsay exceptions for child victims.

<sup>32</sup> *Graham, Indicia of Reliability, supra* note 26.

<sup>33</sup> See, e.g., ARIZ. REV. STAT. ANN. 13-1416 (1986); OKLA. STAT. ANN. tit. 12, 2803.1 (1984).

<sup>34</sup> Bulkley, *Evidentiary and Procedural Trends, supra* note 3, at 650.

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## National Center for the Prosecution of Child Abuse

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The National Center for the Prosecution of Child Abuse provides training and technical assistance on investigating and prosecuting child abuse, child victim advocacy, court reforms, case law and state statute developments, and alternative approaches to child abuse prosecution. For further information, write or call National Center for the Prosecution of Child Abuse, 1033 N. Fairfax Street, Suite 200, Alexandria, VA 22314. 703/739-0321.

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