Unavailability and Admissibility: Are a Child's Out-of-Court Statements About Sexual Abuse Admissible if the Child Does Not Testify at Trial?

JoEllen S. McComb
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Evidence Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol76/iss2/8

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Unavailability and Admissibility: Are a Child’s Out-of-Court Statements About Sexual Abuse Admissible if the Child Does Not Testify at Trial?

INTRODUCTION

The critical evidence against those accused of sexually abusing children is supplied most often by the victims. Yet, very young victims may not testify against the defendant at trial for a variety of reasons. A child may be found incompetent as a

1 The only eyewitness is usually a child of tender years, therefore the child's testimony is usually critical to the state's case against the alleged abuser. As one commentator observed, "[i]n abuse cases, the eyewitness testimony of the youngsters involved may be the only direct link between the child and the offender; any other evidence is generally circumstantial physical evidence that indicates only that abuse was committed." Note, The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?, 40 U. MIAMI L. REV. 245, 245 (1985-86) [hereinafter Note, Competency Requirement]; see Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Issues (no. 2) 125, 129 (1984) ("There seldom are other witnesses or corroborating physical evidence."); Note, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 COLUM. L. REV 1745, 1749-50 (1983) ("Physical corroboration is rare, for the crimes committed are predominantly nonviolent in nature.") [hereinafter Note, Comprehensive Approach]; Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations, 98 HARV. L. REV. 806, 806-07 (1984-85) ("The child is usually the only witness to the crime.") [hereinafter Note, Two Legislative Innovations]; Note, Can You Hear What I Hear? Direction and Limitation on Allowable Hearsay Testimony in Child Sexual Abuse Cases: State v. Campbell, 22 WILLAMETTE L. REV. 421, 422 (1986) ("[N]o one else witnessed the act.") [hereinafter Note, Can You Hear]; Note, Minnesota’s Hearsay Exception for Child Victims of Sexual Abuse, 11 WM. MITCHELL L. REV 799, 802 (1985) ("[C]hild victims are usually the only witnesses to sexual abuse.") [hereinafter Note, Minnesota’s Hearsay Exception]; Comment, An Overview of the Competency of Child Testimony, 13 N. KY. L. REV. 187, 187 (1986) ("[T]he child victim is usually the only witness, and often there is no physical evidence for the court to rely upon.") [hereinafter Comment, Overview].
witness because of lack of memory² or lack of testimonial capacity due to age.³ Children may also be unavailable as witnesses because they refuse to testify,⁴ have retracted⁵ an original report,⁶ suffer "from a mental illness or infirmity,"⁷ or because there is

³ See State v. Gitchel, 706 P.2d 1091, 1094 (Wash. Ct. App. 1985), in which a three year old was found incompetent to testify because:

- at the pretrial hearing, R was "squirming, looking around, hiding her face, closing her eyes, making grumaces and really nothing of substance could be obtained from her by way of testimony."
- Although R was able to receive just impressions and relate them truly when she made the statements, she was not able to do so in the atmosphere of a courtroom several months after the event.

See also Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050, 1052 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984) (finding four year old incompetent to testify because "the child continuously stated that she would not tell the truth"); State v. Superior Court, 719 P.2d 283, 285 (Ariz. Ct. App. 1986) (the court noted the trial court's conclusion that a three year old "is not competent to testify in this matter as she appears unable to receive just impressions of the facts and to relate them truly. It appears also that she cannot appreciate the oath taken by a witness."); Oldsen v. People, 732 P.2d 1132, 1133 (Colo. 1986) (noting that trial court found the five year old "is incapable of understanding the nature of an oath and receiving accurate cognitive impressions; and that she is too young to communicate and relate circumstances of her life factually"); W.C.L. v. People, 685 P.2d 176, 178 n.1 (Colo. 1984) (determining that three year old was incompetent to testify because she "did not know what 'to tell the truth' meant"); Lancaster v. People, 615 P.2d 720, 723 (Colo. 1980) (stating that child of two years and ten months was incompetent and thus "unavailable as a witness due to her age"); People v. Lewis, 498 N.E.2d 1169 (Ill. App. Ct. 1986), appeal denied, 505 N.E.2d 358 (Ill. 1987), cert. denied, 107 S. Ct. 2487 (1987) (finding six year old unqualified to testify because she could not take the oath, said she did not know her last name, and refused to speak up in answering questions); State v. Taylor, 704 P.2d 443, 447 (N.M. App. Ct. 1985) (ruling three year old incompetent to testify "because his communication skills were nil"); Goldade v. State, 674 P.2d 721, 723 (Wyo. 1983), cert. denied, 467 U.S. 1253 (1984) (A four year old child was found incompetent because "[s]he could not respond to questions, presumably because of shyness and awe."). But see State v. Frey, 718 P.2d 846, 848 (Wash. Ct. App. 1986) (finding six year old "should not be permitted to testify because she was unable to understand the significance of the oath," but she was not incompetent).

⁵ See generally Summit, The Child Sexual Abuse Accommodation Syndrome, 7 CHILD ABUSE & NEGLECT 177, 188 (1983) (identifying retraction as the last stage of a syndrome believed to be typically suffered by child victims of sexual abuse).
⁷ People v. Stritzinger, 194 Cal. Rptr. 431, 434, 668 P.2d 738, 741 (Cal. 1983). The court reversed the defendant's conviction in this case because of inadequate proof that the 14 year old victim's "mental, emotional and physical condition rendered her ability to testify" relatively impossible and not merely inconvenient. Id. at 440, 668.
a "substantial likelihood of severe mental harm to the child if [he is] required to testify in open trial proceedings." 

When the child is found either incompetent or unavailable as a witness, his or her out-of-court statements made to a parent, custodian, police officer, social worker, doctor, or others are offered by the prosecution to prove both that the crime occurred, and that the defendant was the perpetrator. These statements may be challenged under the rule prohibiting the admission of hearsay evidence. Such challenges are often

P.2d at 747 (citation omitted); see Quinn, Competency to Be a Witness: A Major Child Forensic Issue, 14 BULL. AM. ACAD. PSYCHIATRY L. 311, 319 (1986) (discussing post-traumatic symptoms or disorganizing anxiety interfering with a child's competency as a witness).

An earlier decision recited open sympathy for an unavailable child witness: "Certainly a five year old girl should be spared the necessity of testifying against her father in a rape case if at all possible." State v. Boodry, 394 P.2d 196, 199 (Ariz. 1964), cert. dened, 379 U.S. 949 (1964).


See, e.g., Frey, 718 P.2d at 846.


See, e.g., Jones v. United States, 231 F.2d 244 (D.C. Cir. 1956); Mendeth, 503 N.E.2d at 1132.


The Federal Rules of Evidence define hearsay as follows: "'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." Fed. R. Evid. 801(c). "Hearsay is not admissible except as provided by these rules." Id. at 802.

About half of the states have adopted the Federal Rules, or a substantially similar version, regarding hearsay. See 4 J. WEnSTEIn & M. BERGER, WEnSTEIn'S EbIDEnCE ¶¶ 801(a)-(c)(02), 802(03) (1985). Wigmore referred to the widely-accepted rule against
unsuccessful, resulting in the statements' admission into evidence. The statements are admitted in one of three ways: 1) under one of the traditional exceptions to the rule;\(^{18}\) 2) under the residual rule;\(^{19}\) or 3) under a special statutory exception for statements made by child victims of sexual abuse.\(^{20}\)

When state and federal courts address the admissibility of the hearsay on appeal, they are confronted with a variety of issues: 1) whether incompetency or psychological unavailability provides a sufficient basis for meeting the unavailability requirement\(^{21}\) of \textit{Ohio v Roberts};\(^{22}\) 2) whether established hearsay exceptions should be expanded to apply to the unique characteristics of statements made by children;\(^{23}\) 3) what are the "equivalent circumstantial guarantees of trustworthiness"\(^{24}\) under state versions of Rule 803(24)\(^{25}\)

hear says as "that most characteristic rule of the Anglo-American law of evidence."

5 J. Wigmore, \textit{Evidence in Trials at Common Law} § 1364 (Chadbourn rev. 1974).

Two well known definitions of "hearsay" should be noted. One is that "by 'hearsay' is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness has received his information."

The other asserts that the hearsay rule "is that rule which prohibits the use of a person's assertion, as equivalent to testimony of the fact asserted, unless the asserer is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it."


\(^{18}\) See infra notes 124-53 and accompanying text.

\(^{19}\) See infra notes 25-26, 154-67 and accompanying text.

\(^{20}\) See infra notes 168-82 and accompanying text.

\(^{21}\) See infra notes 84-95 and accompanying text.

\(^{22}\) 448 U.S. 56 (1980).

\(^{23}\) See infra notes 133-36, 146-47 and accompanying text.

\(^{24}\) See infra notes 156-67 and accompanying text.

\(^{25}\) The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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
and 804(b)(5) of the Federal Rules of Evidence; and 4) how reliability is determined for admission under recently enacted or promulgated hearsay exceptions.

A review of these cases shows that one thing is clear: courts and commentators have given inadequate scrutiny to the relationship between the reasons for the child's absence at trial and the reliability required of his out-of-court statements to admit them into evidence. This oversight is compounded when judges presume that statements alleged to have been made by children are inherently reliable. While the state has a strong interest in convicting sexual abuse offenders, courts must strike a balance between the welfare of the child and the preservation of the accused's right to a fair trial.

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.

FED. R. EVID. 803(24); see 4 J. Weinstein & M. Berger, supra note 17, at ¶ 803(24)(02) for state adaptations.

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

(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, his intention to offer the statement and particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b). See 4 J. Weinstein & M. Berger, supra note 17, at ¶ 804(b)(5)(02) for state adaptations.

See infra notes 174-81 and accompanying text.

See infra notes 93-95 and accompanying text.

See infra note 115 and accompanying text.

"The function of the court must be to pursue the transcendent goal of addressing the most pernicious social ailment which afflicts our society, family abuse, and more specifically, child abuse." Goldade, 674 P.2d at 725.

Note, Competency Requirement, supra note 1, at 245-46.
This Comment focuses on the manner in which the courts have addressed questions of the admissibility of hearsay statements by child victims of sexual abuse when the child has not testified.\textsuperscript{32} Cases decided after the 1980 decision of \textit{Ohio v. Roberts}\textsuperscript{33} receive particular attention because this case set the prevailing standard\textsuperscript{34} that courts use to determine whether the admission of a particular out-of-court statement violates the defendant's right to confrontation.\textsuperscript{35} This Comment concludes by recommending an approach that judges can use to determine whether to admit the extra-judicial declarations of unavailable child witnesses.\textsuperscript{36}

\textbf{I. COMPETENCY AND CHILD WITNESSES}

To determine what bearing a child's competency may have on the reliability of his or her hearsay statements, the criteria from the jurisdiction's competency requirements which the child failed to meet must be identified. Like any other potential witness, a child must possess the capacity to perceive, recollect, narrate, and tell the truth.\textsuperscript{37}

The Supreme Court has held that "there is no precise age which determines the question of competency."\textsuperscript{38} About half the

\begin{itemize}
\item The admission of out-of-court statements by declarants who do not testify at trial is beyond the scope of this Comment. "When the declarant is available to testify at trial, the [Supreme] Court has consistently found hearsay evidence admissible, reasoning that the opportunity to cross-examine the declarant about the content of out-of-court statements sufficiently tests their reliability." Note, \textit{Two Legislative Innovations, supra} note 1, at 810 (citing \textit{Chambers v. Mississippi}, 410 U.S. 284, 301 (1973); \textit{Nelson v. O'Neil}, 402 U.S. 622, 626-27 (1971); \textit{California v. Green}, 399 U.S. 149, 158-61 (1970)).
\item 448 U.S. at 56.
\item See supra notes 82-83 and accompanying text.
\item "In all criminal prosecutions, the accused shall have the right to be confronted with the witnesses against him." U.S. Const. amend. VI. The right of confrontation is "a fundamental right and is made obligatory on the States by the Fourteenth Amendment." \textit{Pointer v. Texas}, 380 U.S. 400, 403 (1965).
\item See infra notes 183-91 and accompanying text.
\item The competency of a witness to testify regarding a particular matter requires a minimum capacity to observe, record, recollect, and recount, an understanding of the duty to tell the truth, combined with evidence sufficient to support a finding of actual personal knowledge of the matter." M. \textit{Graham, Evidence Text, Rules, Illustrations and Problems} 31 (1983); see 2 J. \textit{Wigmore, supra} note 17, at § 505.
\item Wheeler v. United States, 159 U.S. 523, 524 (1895); see \textit{State v. R.W.}, 514 A.2d 1287, 1290 (N.J. 1986) ("age per se cannot render a proposed witness incompetent"); 2 J. \textit{Wigmore, supra} note 17, at § 505 ("no rule defines any particular age as conclusive of incapacity") (emphasis in original).
\end{itemize}
states still statutorily define the age above which a presumption of competency to testify operates. Below that age, courts will consider:

1. Present understanding of the difference between truth and falsity and an appreciation of the obligation or responsibility to speak the truth (sometimes phrased as an understanding of the nature and obligation of an oath);
2. Mental capacity at the time of the occurrence in question to observe or receive accurate impressions of the occurrence;
3. Memory sufficient to retain an independent recollection of the observation; and
4. Capacity to communicate or translate into words the memory of such observation and the capacity to understand simple questions about the occurrence.

As the rest of the states have adopted a variation of Rule 601 of the Federal Rules of Evidence, they have been considered by some to have abolished the common law competency

---

Melton, *Competency of Children as Witness in Sexual Abuse Cases* [sic], in *Protection of Abused Victims: State Laws & Decisions* 115 (J. Sloan ed. 1982) (noting that most states use the age of 10 or 14).

See 2 J. Wimore, *supra* note 17, at § 488 for the text of state competency statutes.

The question of a child's competency as a witness may be determined either from a preliminary examination or from his testimony before the jury or from both. Usually the child's competency is determined preliminarily by the court.

The competency of a child of tender years as a witness is left to the discretion of the trial judge, and will be sustained if the appropriate standard has been satisfied.


*NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, YOUNG LAWYERS DIVISION, AMERICAN BAR ASSOCIATION, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES* 30 (J. Bulkley Rptr. 1982) [hereinafter NAT'L LEGAL RESOURCES CENTER, RECOMMENDATIONS]; see, e.g., *State v. Singh*, 586 S.W.2d 410, 415-16 (Mo. App. 1979).


"Every person is competent to be a witness except as otherwise provided in these rules." *Fed. R. Evid.* 601.
requirement. In fact, when read with Rule 602 and Rule 603, Rule 601 requires at least that a witness have personal knowledge of the matter about which he testifies, and the capacity to understand the duty to tell the truth.

A few courts appear to be easing the competency requirement for children, and commentators support this trend. The better
view, however, recognizes that "[t]here are dangers inherent in allowing a truly incompetent child to testify". But, as Wigmore noted, generalizations about all children's capacity to testify are questionable. Current research challenges old notions about the untrustworthiness of children as witnesses. While young children are found to have problems with certain aspects of

---

LEGAL RESOURCE CENTER, RECOMMENDATIONS, supra note 42 ("Child victims of sexual abuse should be considered competent witnesses and should be allowed to testify without prior qualification in any judicial proceeding."); D. WHITCOMB, E. SHAPIRO, & L. STELLWAGEN, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 115 (1985) (recommending "establishing a presumption that every witness is competent and leaving the determination of credibility to the trier of fact"); Bulkley, Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases, 89 DICK. L. REV. 645, 648 (1985) ("[A]lthough efforts should be made to protect children, efforts also should be directed to treating them equally as adults, where appropriate. Reform laws abolishing competency requirements for children often reflect such an attitude.").

Note, Competency Requirement, supra note 1 at 283-84.

It is hardly fair to the defendant to have some unknown individual, so to speak, pulling the strings of an incompetent witness. It is not necessary to totally abandon competency requirements. It would be preferable for the courts to properly apply the relevant competency criteria to each and every witness, no matter how young, carefully distinguishing between testimony that reflects on credibility and testimony that reflects on competency. Children today are much brighter and receive education much earlier than children did when competency statutes were first used. If the child is truly incompetent, we should not sanction admission of the child's testimony; because that would be the same as putting a puppet on the stand.

Id., see Cross v. Commonwealth, 77 S.E.2d 447, 452 (Va. 1953) (finding 6 year old incompetent as a witness because she "was not testifying from her independent knowledge of what occurred, or from the impressions she received, but was merely reciting the story that her mother had told her to tell").

See 2 J. WIGMORE, supra note 17, at § 509, at 719.

See, e.g., Brown v. United States, 152 F.2d 138, 139 (D.C. Cir. 1945): Very young children often fail to distinguish between subjective and objective experiences, between events which they dream or imagine and events which happen in the external world. They often fail to realize the importance which adults attach to this distinction and the consequences which innocent failure to draw it may produce. They know little or nothing of the effects which their recitals may have upon the liberty and reputation of others.

See generally Note, Are Children Competent Witnesses?: A Psychological Perspective, 63 WASH. U.L.Q. 815, 829 (1985) (reviewing empirical studies and concluding that strict application of competency rules results in preventing "the admission of highly reliable and relevant testimony").
observation,

memory,

suggestibility,

susceptibility to leading

55 Id. at 820. Children may report less detail, unless the child is “more familiar with a particular event” than an adult would be, and “[c]hildren are more likely to answer correctly questions about central actions than questions about peripheral information or about the culprit’s description.” Goodman & Helgeson, Child Sexual Assault: Children’s Memory and the Law, 40 U. MIAMI L. REV. 181, 186 (1985-86); see Chance & Goldstein, Face-Recognition Memory: Implications for Children’s Eyewitness Testimony, 40 J. SOC. ISSUES (no. 2) 69, 82-83 (1984) (concluding that “identification accuracy increases with age”); “[f]ace recognition of familiar faces under conditions that permit a clear view of the whole face is quite good, even in children as young as 6 years”; “[b]riefly seen, disguised, and previously unfamiliar faces are poorly recognized by children under 10 years”; the length of time between observation and recall affects accuracy of identification; many other factors need additional research) (emphasis in original).

56 “There is considerable evidence that children typically recall less than adults.” Johnson & Foley, Differentiating Fact from Fantasy: The Reliability of Children’s Memory, 40 J. SOC. ISSUES (no. 2) 33, 34 (1984). But available evidence does not necessarily support the assertion “that forgetting occurs more rapidly in children.” Id. at 36. But see Note, Comprehensive Approach, supra note 1, at 1750 (“[S]ince a child’s memory fades rapidly over time, the account given closer in time to the actual event is the one more likely to be accurate.”).

57 Children are sometimes believed to have particularly malleable memories. See, e.g., Herzog, Child Sexual Abuse Defense: Pre-trial Investigation, Experts, and Proxy Testimony (pt. 3) 11 THE CHAMPION Jan.-Feb. 1987, at 10, 10 (“Prosecutors have sought to circumvent the unreliability, short memories, and suggestibility of small children by making an end run around these problems by use of adult proxies.”) (emphasis added). While evidence supports the conclusion that children may be more suggestible, comparisons with research about adult suggestibility yield interesting results:

Apart from actual memory loss, developmental differences in the ability to retrieve information could also lead to age differences in individual degrees of suggestibility. If, in general, children have greater difficulty than adults in retrieving information from long-term memory [sic]—and there is quite a bit of evidence to suggest that they do—perhaps children would be especially prone to rely on new (retrievable) information in their reports. The new information would simply be more accessible. One source of new information would be suggestive questioning. If retrieval failures can account for heightened suggestibility in children, the report of new but incorrect information might occur even though some of the original memory fragments were still intact. According to this conception, greater suggestibility of children could arise from developmental differences in the retrieval stage.

But other considerations lead to the prediction that children may at times be less suggestible than adults. Efficient information-processing often involves the ability to integrate diverse pieces of information. Occasionally this involves the generation of inferences that go beyond what is explicitly presented. Sometimes the integration process, which usually serves us quite well, leads to the creation of inaccurate memories. If children are less efficient at integrating information or less likely to generate inferences spontaneously, then they may also be less suggestible. More generally, it
questions, findings do not show conclusively that these shortcomings are significantly more severe in children than adults.

Some of the weaknesses of a witness' testimony are exposed upon cross-examination. While children can be intimidated

is well established that people's learning and remembering is strongly affected by what they already know. Such knowledge-dependency could mean that children may not process postevent inputs as efficiently, and would thus be less influenced by them.


There is some evidence that "with simplified forms of leading questions, children may be especially vulnerable." Loftus & Davies, supra note 57 at 61. "No clear developmental trend emerges, however, from recent studies on the effects of leading questions." Id. at 62.

While many examples of children's confusion between fantasy and reality have been described by Piaget and others, there is not much evidence comparing children with adults, and we know that adults too sometimes confuse fact and fantasy.

However, based on available laboratory studies, children do not seem more likely than adults to make such confusions. The importation into memory of erroneous information is usually based on extensive prior knowledge or preconceptions, that children may not possess or make use of.

Johnson & Foley, supra note 56, at 38-39. But "young children did have particular difficulty discriminating what they had done from what they had only thought of doing." Id. at 45.

See supra notes 55-59; see also Goodman & Helgeson, supra note 55, at 190 (concluding that "children can provide accurate testimony if questioned properly"); Johnson & Foley, supra note 56, at 45 (noting that "[f]ew developmental studies motivated by an interest in children's competence to testify have compared children and adults under equivalent circumstances").

"It is not doubtful that on cross-examination, so far as feasible by mere questions, the witness' physical capacity to observe (by sight, hearing, or the like) may be tested." 3A J. Wigmore, supra note 17, at § 993 (emphasis in original).

Every witness must have had some fair opportunity to observe the matter to which he testifies. The circumstances, therefore, which indicate that his opportunities of acquiring knowledge were less full and adequate than they might have been are always relevant to diminish the weight of his testimony:

(1) That these inquiries may be made on cross-examination is un-
through this process, defense counsel is not insensitive to the problem. Furthermore, it is within the power of the court to control cross-examination to protect the witness.

Despite greater receptivity toward child witnesses, young children may still be found incompetent as witnesses. When the prosecution offers a child’s extra-judicial statements in place of the child’s testimony, the competency determination continues to be pertinent to the admissibility of the hearsay.

II. The Hearsay Alternative

Children may not only be disqualified for a lack of testimonial capacity, they also may be unavailable as witnesses for

Id. at §994 (emphasis in original). “Subject to the general principle that the trial court’s discretion controls, the testing of a witness’ capacity of recollection by cross-examination upon other circumstances, even unconnected to the case in hand, is a recognized and common method of measuring the weight of testimony.” Id. at §995 (emphasis in original).

“The defendant’s counsel often tries to intimidate the young witness in an attempt to discredit the testimony. As a result of intimidation, the child is likely to become sullen and uncommunicative on the stand.” Note, Competency Requirement, supra note 1, at 283.

A problem area in defending a child abuse case is identified: “How does the criminal defense attorney effectively handle the complainant on cross-examination without increasing for her the jurors’ sympathy and acceptance.”? Heeney, Coping With “The Abuse of Child Sex Abuse Prosecutions”: The Criminal Defense Lawyer’s Viewpoint, 9 The Champion Aug. 1985, at 12, 17

Both the embarrassment and psychological trauma of a victim involved in a sex-related crime are compounded when the victim is a child. A child understandably may be hesitant or unwilling to volunteer specific testimony concerning the actual elements of a sexual offense. These factors are all circumstances which the trial court, in its discretion, may consider in determining whether or not to permit leading questions to be asked of a complaining witness in a sex-related crime.

State v. Jenkins, 326 N.W.2d 67, 70 (N.D. 1982); see Alford v. United States, 282 U.S. 687, 694 (1931) (recognizing the court’s duty to protect the witness “from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him”); 2 C. Torcia, supra note 41, at §379 (noting “[t]he trial judge must make certain that the examination of witnesses is conducted reasonably and fairly”); Note, Competency Requirement, supra note 1, at 283 (recommending than when a child has been intimidated during cross-examination, “the court should recess to allow the child to talk with parents or counsel and to regain composure before continuing to give testimony”).

See supra notes 49-60 and accompanying text.

See supra notes 2-3 and accompanying text.

See infra notes 103-13 and accompanying text.
other reasons, including a finding that they would suffer psychologically by testifying. These concerns have prompted prosecutors to “attempt to circumvent proof problems in child sexual abuse cases by entering the victim’s out-of-court statements through the testimony of another.” This practice gives rise to defense challenges to the admissibility of hearsay evidence.

---

68 See supra notes 4-7 and accompanying text.
69 See, e.g., supra note 8 and accompanying text; Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 618 (1982) (Burger, C.J., dissenting) (noting trauma, embarrassment, humiliation, and “risk of severe psychological damage caused by having to relate the details of the crime in front of a crowd” at trial); Altmeyer v. State, 496 N.E.2d 1328 (Ind. Ct. App. 1986) (upholding the constitutionality and application of Ind. Code Ann. § 35-37-4-6(c)(2)(i) (1986 Supp.): videotape testimony admissible if “[t]he child testifies at the trial; or [i]s found by the court to be unavailable as a witness because a psychiatrist has certified that the child’s participation in the trial would be a traumatic experience for the child.”)

“Vulnerability due to immaturity, coupled with the nature of the sexual crime itself, increases the likelihood of trauma to the child during the legal process.” Comment, Children’s Testimony in Sexual Abuse Cases: Ohio’s Proposed Legislation, 19 Akron L. Rev. 441, 443 (1985-86); see also Pierron, A Comparative Analysis of Nine Recent State Statutory Approaches Concerning Special Hearsay Exceptions for Children’s Out-of-Court Statements Concerning Sexual Abuse, in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES 221, 228 (1985) (noting ‘‘second victimization’’); Skolar, New Hearsay Exceptions for a Child’s Statement of Sexual Abuse, 18 J. Marshall L. Rev. 1, 40 (1984) (noting that a growing body of ‘‘empirical data, case studies and increasingly sophisticated ‘fireside inductions’, however, suggests that child sexual assault victims are in fact traumatized by the experience of testifying.’’). But see Berliner & Barbieri, supra note 1, at 135 noting that: [T]he experience of testifying in court can have a therapeutic effect for the child victim. The child can learn that social institutions take children seriously. Some children report feeling empowered by their participation in the process. Some have complained, when the offender pled guilty, that they did not have an opportunity to be heard in court.


70 Note, Can You Hear, supra note 1, at 422; see Herzog, supra note 57, at 40; Skolar, supra note 69, at 40 (“One of the primary rationales for the new hearsay proposals is that most child victims are psychologically unavailable to testify, and that they would be traumatized and psychologically damaged by the experience of having to recount sexual abuse under normal courtroom conditions.”); Note, Two Legislative Innovations, supra note 1, at 807 (noting that the child victim “may be found incompetent to testify, or upon testifying may be unable to recall crucial details or to relate them to the jury. And parents sometimes decline to press charges rather than subject their abused child to the ordeal of extended litigation requiring endless repetition of a painful and best-forgotten episode.”).
The rule against hearsay\textsuperscript{71} is premised on the risks of untrustworthiness present in all testimony: "(1) perception, in the sense of capacity and actuality of observation through any of the senses, (2) recordation and recollection (sometimes called memory), (3) narration (sometimes called ambiguity), and (4) sincerity (sometimes called fabrication)."\textsuperscript{72} Hearsay testimony is suspect because it lacks the usual safeguards of testimonial evidence—that it was made under oath, by a person present before the trier of fact, and subject to cross-examination by the adverse party.\textsuperscript{73}

When the evidentiary need\textsuperscript{74} and the trustworthiness\textsuperscript{75} of out-
of-court statements can be shown, they may be admissible under an exception to the hearsay rule.\(^7\) Hearsay statements made by child declarants may be deemed necessary evidence because the child is unavailable or because the statements were made under circumstances rendering them particularly reliable: \(^7\) Even if the court finds that the statements are admissible under a hearsay exception, the defendant may also challenge their admissibility as a violation of his right to confront his accusers. \(^8\)

### III. Unavailability and Confrontation

Because he cannot be cross-examined, the unavailable witness raises concerns with the underlying rationale of both the hearsay rule \(^9\) and the confrontation clause. \(^8\) The Supreme Court ad-

---

\(^{76}\) See, e.g., supra notes 24-25 and accompanying text; infra notes 125, 142, 171, and accompanying text.

\(^{77}\) See supra notes 74-75.

\(^{78}\) See supra note 35. In a recent decision holding that a defendant has no per se right to be present at the competency hearing of a child witness, the Supreme Court discussed the rationale behind the confrontation clause:

> The Court has emphasized that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination." The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested."

> The right to cross-examination, protected by the Confrontation Clause, thus is essentially a "functional" right designed to promote reliability in the truth-finding functions of a criminal trial. The cases that have arisen under the Confrontation Clause reflect the application of this functional right. These cases fall into two broad, albeit not exclusive, categories: "cases involving the admission of out-of-court statements."

> In the first category of cases, the Confrontation Clause is violated when "hearsay evidence [is] admitted as substantive evidence against the defendant[,]" with no opportunity to cross-examine the hearsay declarant at trial, or when an out-of-court statement of an unavailable witness does not bear adequate indications of trustworthiness.

\(^{79}\) See supra note 73 and accompanying text.

\(^{80}\) See supra note 78 and accompanying text.
dressed this problem in *Ohio v Roberts*. The Court explained how "'[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay'" The Court stated:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Although the Court did not define "unavailability," it did recognize "a basic litmus of Sixth Amendment unavailability" "'[A] witness is not "unavailable" for purposes of the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.'" Unavailability has been viewed as a

---

81 448 U.S. 56 (1980).
82 Id. at 65.
83 Id. at 66 (emphasis added). The Court, in its more elaborate explanation, based its criteria for unavailability on reasons supporting the confrontation clause and the hearsay rule.

First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case, the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule."

84 Id. at 65.
85 Id. at 74.
86 Id. (citing Barber v. Page, 390 U.S. 719, 724-25 (1968)) (omission and emphasis in original); see Note, *Confrontation and the Unavailable Witness: Searching for a Standard*, 18 Val. U.L. Rev. 193, 195 (1983-84) ("If a hearsay statement was made by a 'witness against' the defendant, the prosecution must make a reasonably intense effort to produce the declarant at trial."). *But see Altmeyer v. State, 496 N.E.2d 1328, 1331 (Ind. Ct. App. 1986) ("It appears that where the prosecutor is seeking to prevent a witness from having to testify in court because his participation would be traumatic for him, the requirement that the prosecutor make a good faith effort to produce the witness for trial would be incongruous ")*. 


requirement\textsuperscript{66} for the admission of hearsay. It has been construed strictly\textsuperscript{67} according to the definition in Federal Rule 804(a).\textsuperscript{68} But the Court recognized in Roberts that "[a] demonstration of unavailability, however, is not always required."\textsuperscript{69} Thus, the

\textsuperscript{66} In other words, if the hearsay declarant is not produced for cross-examination, a showing of unavailability will normally be required before the hearsay will be constitutionally admissable.

The Court appeared not to recognize the sweeping potential ramifications of such an unavailability requirement. If broadly applied, it would severely restrict the use by prosecutors of numerous hearsay exceptions that have traditionally been available. The vast majority of hearsay exceptions, under both the common law and the Federal Rules of Evidence, do not contain a requirement that the unavailability of the declarant be shown.


\textsuperscript{68} 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 the 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.

Fed. R. Evid. 804(a).

While unavailability is an aspect of the necessity principle at common law, see supra note 74, it is a prerequisite to admissibility under only five categories of hearsay statements according to the Federal Rules: former testimony, statement under belief of impending death, statement against interest, statement of personal or family history, and the residual rule. Fed. R. Evid. 804(b)(1)-(5).

\textsuperscript{69} Roberts, 448 U.S. at 65 n.7 (citing Dutton v. Evans, 400 U.S. 74 (1970) as an example of when "the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness").

The Court also noted policy considerations it recognized in past decisions: "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." Id. at 64. "Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence
lower courts were left with an ambiguous standard of unavailability to apply. Six years later, the Court clarified its holding by stating: "Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."90

90 United States v. Inadi, 475 U.S. 387, 394, 1126 (1986). The Court also explained, however, that when the out-of-court testimony has no "independent evidentiary significance of its own," but is only a weaker substitute for live testimony, the unavailability rule should apply. Id.

If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.

Id.
Under the guiding principle that "the Confrontation Clause normally requires a showing of unavailability," state and federal courts have considered the admissibility of extra-judicial statements by children who would not be testifying at trial. Most have found incompetency or psychological unavailability satisfactory to meet the Roberts unavailability criterion. This simple equation under the first prong of the Roberts "test" has al-

---

91 Roberts, 448 U.S. at 66 (emphasis added).
92 See Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984); State v. Robinson, 735 P.2d 801, 813 (Ariz. 1987) (affirming trial court's finding of unavailability because of existing mental unfitness based solely on expert testimony "indicating the [child] would be uncommunicative if asked about the assault and could be further traumatized by courtroom proceedings"); Lancaster, 615 P.2d at 723 (finding child unavailable as a witness due to age); Glendenning v. State, 503 So. 2d 335, 337 (Fla. Dist. Ct. App. 1987) (upholding special hearsay statute with unavailability provision for absence due to substantial likelihood of severe emotional or mental harm); Perez v. State, 500 So. 2d 725 (Fla. Dist. Ct. App. 1987); People v. Lewis, 498 N.E.2d 1169 (Ill. App. Ct. 1986), cert. denied, 107 S. Ct. 2487 (1987); Altmeyer, 496 N.E.2d at 1329 (finding child unavailable, though competent, because trial "participation would be a traumatic experience"); State v. Jackson, 721 P.2d 232 (Kan. 1986); State v. Myatt, 697 P.2d 836 (Kan. 1985); Clark, 730 P.2d at 1104; State v. Gregory, 338 S.E.2d 110 (N.C. Ct. App. 1985); Newbury v. State, 695 P.2d 531 (Okla. Crim. App. 1985); State v. Bounds, 694 P.2d 566, 568 (Or. Ct. App. 1985) (approving stipulation by state and defendant that child incompetent, and thus unavailable, due to age); State v. Gitchel, 706 P.2d 1091 (Wash. Ct. App. 1985); see also Note, Minnesota's Hearsay Exception, supra note 1, at 815-17 (asserting that "[a] determination of incompetency constitutes unavailability within the meaning of the hearsay exceptions and the confrontation clause"); Comment, Sexually Abused Infant Hearsay Exception: A Constitutional Analysis, 8 J. Juv. Law 59, 70 (1984) (concluding that "child's incompetence or refusal to answer questions when on the stand does not preclude such admission and can, therefore, be considered equivalent to legal unavailability") [hereinafter Comment, Sexually Abused]; cf. State v. Campbell, 705 P.2d 694, 706 (Or. 1985) (holding "that before any out-of-court declaration of any available ["unavailability" defined as in Federal Rule 804(a)] living witness may be offered against a defendant in a criminal trial, the witness must be produced and declared incompetent by the court"). But see Note, Two Legislative Innovations, supra note 1, at 818-19 asserting that the state must demonstrate the impossibility of in-court testimony to justify frustrating the defendant's clear interests in confronting and cross-examining the witness since neither the likelihood of emotional trauma nor the incompetency of the child makes it impossible for him or her to testify in court, neither warrants a finding that the child is unavailable as a witness.

(emphasis in original).

93 Little or no analysis precedes the conclusion that incompetency/psychological unavailability constitutes unavailability for confrontation clause purposes. See cases cited supra note 92.
allowed courts to dispose of the reasons for the declarant’s absence from the courtroom before applying the second prong, "indicia of reliability". But a relationship between unavailability and reliability may exist nonetheless.

IV RELIABLE EXTRA-JUDICIAL STATEMENTS BY CHILDREN

The Supreme Court clarified the foundation for reliability analysis in *Lee v Illinois*. The interest in "accuracy in the factfinding process," which is augmented by "ensuring the defendant an effective means to test adverse evidence," underlies the confrontation clause, as well as the rule against hearsay and its exceptions. Therefore, "the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule."" Contrary to the majority view, a few courts have found a direct relationship between a child’s incompetency and the reliability of his or her out-of-court statements offered into evidence, resulting in the exclusion of these statements.

---

94 See supra note 83 and accompanying text.
95 "It must be remembered that unavailability due to testimonial incompetency also relates to the question of reliability, since the unavailability here is caused by the lack of a requirement for being a witness. This highlights the conceptual problem we deal with in the area of hearsay." Pierron, supra note 69, at 227.
96 106 S. Ct. 2056, 2063-64 (1986) (commenting on Ohio v. Roberts); see supra note 78.
97 Id. at 2064 (citing Roberts).
98 Id.
99 Id.
100 See supra notes 73-76 and accompanying text.
101 Lee, 106 S. Ct. at 2064.
102 See State v. Paster, 524 A.2d 587, 590 (R.I. 1987) ("[W]hen a trial justice has ruled a witness incompetent to testify because the justice is not convinced that the witness is capable of relating a capacity to observe, to recollect, to communicate, or to appreciate truthfulness, the justice has already made the determination that the witness's [sic] assertions are unreliable."); State v. Ryan, 691 P.2d 197, 203 (Wash. 1984) ("The declarant’s competency is a precondition to admission of his hearsay statements as are other testimonial qualifications.").

Applying the principle in *Ryan*, *id.*, the Washington Court of Appeals found hearsay statements of an unavailable witness admissible, distinguishing incompetency from unavailability due to an inability to "understand the significance of the oath." State v. Frey, 718 P.2d 846, 848 (Wash. Ct. App. 1986). In *Ryan*, the child’s statements were found unreliable because the child’s incompetency was "based on ‘the inability [of child witnesses] to receive just impressions of the facts concerning the event.’" Id. at
An important distinction can be drawn between the competence of the witness and the competence of the evidence. A child may lack testimonial capacity due to an inability to respond to questions and testify as an adult under oath on the witness stand, yet have had the requisite capacity to perceive, recollect, narrate and tell the truth\textsuperscript{103} at the time the statement was made. While Wigmore observed that “admission of hearsay statements, by way of exception to the rule, therefore presupposes that the assertor possessed the qualifications of a witness in regard to knowledge and the like,”\textsuperscript{104} he also recognized an exception for spontaneous exclamations\textsuperscript{105} and indicated no special testimonial qualifications for statements of a mental or physical condition.\textsuperscript{106}

A finding that a child is incompetent to testify [because she appeared incapable of relating just impressions of the facts] does not automatically render inadmissible all hearsay statements of the child, as long as the reliability of the statements is ensured by the circumstances bringing them within the scope of an exception to the hearsay rule. However, where the asserted exception depends on the declarant’s ability to understand the purpose of questioning and to relate accurate information, it is significant that the declarant has been disqualified.

Id. at 1135 n.6. Justice Erickson filed a vigorous dissent, in which he argued that “the basis for the victim’s testimonial incapacity appears to preclude a finding of equivalent guarantees of trustworthiness required for the purposes of determining admissibility under CRE 803(23).” Id. at 1138 (Erickson, J., dissenting).

See, e.g., Logsdon v. Commonwealth, 286 S.W 1067 (Ky. 1926). Appellant’s contention that incompetent evidence was permitted to go to the jury upon the trial hereof cannot be sustained. He complains that the mother of his 3 year old victim was permitted to testify that when she returned to her home, where only appellant and her child were, the latter said, “Mama, look what Bill has done to me.” That testimony was competent, though the child was of such tender years as to be incapable of testifying herself.

Id. at 1067; see also Huff v. White Motor Corp., 609 F.2d 286, 289 (7th Cir. 1979) (finding in civil case that “unless the declarant was not mentally competent when he made the statement, it should have been admitted.”); Ryan, 691 P.2d at 208 (Dimsch, J., concurring) (emphasizing “the distinction between the present and past competence of a child witness.”) [A determination of incompetency [to take the stand as a witness] at the time of trial [does not] necessarily indicate that the child was incompetent at the time of making the hearsay statement’); cf. Reynoldson v. Jackson, 552 P.2d 236, 237 (Or. 1976) (finding 89 year old's statements offered in personal injury case “inherently suspect” because of declarant's confusion at the time of making the statement).

\textsuperscript{103} See J. Wigmore, supra note 17, at § 1424 (emphasis in original).
\textsuperscript{104} id. at § 1751(c)(1).
\textsuperscript{105} Id. at §§ 1714-1740.
Further, he noted that "[t]he time of the utterance of the testimony is ordinarily the time when the qualifications must exist . . ."107. Therefore, a statement made by a child who is found incompetent as a witness could be admissible as competent evidence.

On the other hand, the child may be found incompetent as a witness for reasons relevant to the reliability of extra-judicial statements. If so, the evidence is likewise incompetent. For example, in State v Griffith108 the court found error in the trial court's admission of a child's statements when "the time, content, and circumstances surrounding the victim's hearsay statements [did] not demonstrate adequate indicia of reliability"109. One of the factors the court considered was that the child had alternately accused two different individuals of the crime, and thus must have been lying about one of them.110 The trial court had disqualified the victim from testifying in part because of "the purported inconsistency between her accusations depending on who asked the questions."111 When the reasons for the child's incompetency cast doubt upon the hearsay statement's reliability, admitting the statement compromises the court's interest in "'accuracy in the fact-finding process.'"112 Statements that are both untrustworthy and untested by the defendant should not be admitted.113

"'Whether a child's hearsay statement is accompanied by sufficient particularized guarantees of trustworthiness turns on the facts of the case.'"114 Yet, one of the most common features of analysis is the assumption that statements about sexual abuse by children are inherently trustworthy115. Like other generaliza-

---

107 3 Id. at § 483 (emphasis in original).
109 Id. at 254.
110 Id.
111 Id. at 251.
112 Lee, 106 S. Ct. at 2064 (quoting Roberts).
113 See supra notes 96-101 and accompanying text.
115 Pierron, supra note 69, at 230; see Ellison v. Sachs, 769 F.2d 955, 957 (4th Cir. 1985) (noting observations of several courts and commentators "that a young child's
tions about children,\(^\text{116}\) research findings are mixed.\(^\text{117}\) Evidence that false accusations occur\(^\text{118}\) reveals the need to look more

---

\(^\text{116}\) See supra notes 52-60 and accompanying text.

\(^\text{117}\) Whether out-of-court statements by children are intrinsically reliable is questionable. Some courts and commentators hold that such statements, standing alone, are trustworthy. Two justifications are commonly offered. First, it is highly unlikely that children persist in lying to their parents or other figures of authority about sex abuse. Second, children do not have enough knowledge about sexual matters to lie about them. In contrast, other courts and commentators, focusing on the well-established tendency of children to fantasize and tell stories, have concluded that these statements are not inherently reliable.

Note, Comprehensive Approach, supra note 1, at 1751.

\(^\text{118}\) To make the question one of whether or not children lie about sexual abuse is a mistake. To lie assumes deliberate, willful, and intentional purpose and malice. Few children, indeed, are likely to have either the competence or the balefulness to embark upon such a course, although some adolescents may do so. Rather, given the plastic and malleable nature of children the question is what degree, kind, and type of influence has been exerted upon them. Again, it does not necessarily require a deliberate and malicious intent on the part of an adult to trigger the kind of influence that will result in shaping, molding, and essentially teaching a child to produce a tale that is false. The essential engineering or fabrication of a false allegation can result from intent to do good coupled with a preconceived idea of what has happened, a lack of awareness of the susceptibility of children to influence and a lack of understanding of the stimulus value of adults.

critically at allegations of sexual abuse.\textsuperscript{119}

Rather than ignoring the relationship between unavailability and reliability,\textsuperscript{120} or drawing generalizations about children's statements regarding sexual abuse,\textsuperscript{121} courts should consider the basis for the child's incompetency or unavailability when it undertakes reliability analysis\textsuperscript{122} in each case.\textsuperscript{123} In the following...
sections, some of the approaches which courts have taken in evaluating the reliability of hearsay statements will be examined by category of hearsay exception.

A. "Firmly Rooted" Hearsay Exceptions

Spontaneous Declarations: The vast majority of out-of-court statements by unavailable child declarants are offered and admitted as spontaneous declarations. The usual requirements are: (1) a startling occurrence; (2) a statement made before there has been time to fabricate and while reflective powers are "yet in abeyance"; and (3) the utterance must relate to the startling event.

The need component is met because these statements have a special connection to the exciting event. Thus, their value is superior to in-court testimony. Given this intrinsic evidentiary characteristic, the competency of the declarant is not a prerequisite to their admissibility.

meet the requirements of a recognized exception to the hearsay rule); Bishop v. State, 581 P.2d 45, 48 (Okla. Crim. App. 1978) (ruling "that the fact a witness is ruled incompetent to testify because of age does not by itself negate the independent indicia of reliability which excited utterances possess"); State v. Doe, 719 P.2d 554, 558 (Wash. 1986) (The court stated "that a determination of incompetency would not necessarily make the statements unreliable. The trial court must determine whether extrinsic evidence, or the nature of the comments themselves, make the child's statement sufficiently reliable. The child's lack of competency may be a factor, but it is not controlling.").

124 See supra text accompanying note 83.
125 Spontaneous declarations encompass a number of distinct categories of hearsay exceptions, but all recognize "spontaneity as the source of special trustworthiness." E. Cleary, McCormick on Evidence § 288 (3d ed. 1984).

(I) This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stils the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock.

6 J. Wigmore, supra note 17, at § 1747.
126 Id. at § 1750.
127 Id.
128 "[T]he events themselves speak through the instinctive words and acts of the participants." State v. Taylor, 704 P.2d 443, 454 (N.M. App. 1985).

129 See supra note 74.
130 6 J. Wigmore, supra note 17, at § 1751(c)(1); Stafford, The Child as a Witness, 37 Wash. L. Rev. 303, 307 (1962); see Lancaster v. People, 615 P.2d 720, 722-23 (Colo.
If the requirements for spontaneous declarations are fulfilled, reliability can be inferred because the statements are admitted under "a firmly rooted hearsay exception." Further, children's spontaneous declarations are considered particularly trustworthy.

Some proponents of special statutory hearsay exceptions for child victims of sexual abuse complain that "[c]ourts have . . . tended to stretch existing hearsay exceptions to accommodate a child victim's out-of-court statements because they are deemed uniquely necessary and trustworthy . . . [thereby threatening] the destruction of the certainty and integrity of the exceptions." By the same token, commentators complain that


131 See supra text accompanying note 83.

132 See Beausoliel v. United States, 107 F.2d 292, 295 (D.C. Cir. 1939) (noting that with a victim of tender age, it is "improbable that her utterance was deliberate and its effect premeditated"); State v. Boody, 394 P.2d 196, 199 (Ariz.), cert. denied, 379 U.S. 949 (1964) (finding assault victim's age would " 'render it improbable that his utterance was deliberate and its effect premeditated in any degree' " (citing Soto v. Territory, infra this note)); Soto v. Territory, 94 P. 1104, 1105 (Ariz. 1908); People in Interest of O.E.P., 654 P.2d 312, 318 (Colo. 1982) ("The element of trustworthiness underscoring the excited utterance exception, particularly in the case of young children, finds its source primarily in 'the lack of capacity to fabricate rather than the lack of time to fabricate.' ") (emphasis added); Lancaster, 615 P.2d at 723 (recognizing "that children of tender years are generally not adept at reasoned reflection and at concoction of false stories under these circumstances"); People v. Ortega, 672 P.2d 215, 218 (Colo. App. 1983) (citing O.E.P and Lancaster, supra this note); People v. Meredith, 503 N.E.2d 1132, 1141-42 (Ill. App. Ct. 1987) (stating "it is unlikely that a child of tender years will have any reason to fabricate stories of attacks," but noting elsewhere that "the reliability, and, therefore, admissibility, of a spontaneous declaration comes not from the reliability of the declarant, but from the circumstances under which the statement is made"); State v. Padilla, 329 N.W.2d 263, 266 (Wis. Ct. App. 1982) (noting "characteristics of young children work to produce declarations 'free of conscious fabrication' for a longer period after the incident than with adults").

133 See infra notes 168-82 and accompanying text.

134 State v. Myatt, 697 P.2d 842 (Kan. 1985); Nat'l Legal Resource Center, Recommendations, supra note 42, at 35; Skolar, supra note 69, at 7.
reliance on spontaneity, and lapse of time between the event and the statement limit the usefulness of this exception.

The requirements focus on the excitement of the declarant because this renders "the utterance spontaneous and unreflecting." Courts disagree about the level of excitement required. The statement need not be contemporaneous with the event, as long as it is made at the first opportunity. However, when lapse of time is the reason for declining to admit the hearsay, the analytic framework of the spontaneous exclamation exception in child sex abuse cases and the exception's criteria of trustworthiness are built on the premise that the declarant has the psychology, behavior, and experience of an adult and reacts accordingly. Invocation of the exception in this context assumes that the rationale, criteria, and application of the exception are identical for the statements of both children and adults. This view, however, is unfounded. By treating child declarants as adults, the exception fails to take into account the special circumstances surrounding child sex abuse. It ignores the unusual need for child hearsay statements and, in addition, fails to analyze properly their reliability.

Note, Comprehensive Approach, supra note 1, at 1755-56. The author claims that a major weakness of this exception stems from "undue reliance of spontaneity as an indicator of trustworthiness, to the exclusion of other equally valid indicia of reliability." Id. at 1756. Most children "do not view a sexual episode as shocking," particularly if it is an incestuous relationship. Id. The author recommends examining the following to determine accuracy of the statement:

circumstances such as the age of the child, his or her physical and mental condition, the exact circumstances of the alleged event, the language used by the child, the presence of corroborative physical evidence, the relationship of the accused to the child, the child's family, school, and peer relationships, and the reliability of the testifying witness.

Id. at 1758.

See supra text accompanying notes 126-27.

Compare Alston v. United States, 462 A.2d 1122, 1127 (D.C. 1983) (requirements not met "when there is no evidence that the declarant suffered mental disturbance of physical shock as a result of the event") and D.R., 518 A.2d at 1130 (finding that the child's description of the sexual activity, "not accompanied by evident 'stress of nervous excitement,' " did not meet spontaneous declaration requirements) with Commonwealth v. Fuller, 506 N.E.2d 852, 855 (Mass. 1987) (finding that "whether children manifest excitement or hysteria when they make a statement is not determinative whether the child is reliably reporting a traumatic event").

courts also note that persistent or leading questions were used to elicit the child’s statements.\textsuperscript{141}

\textit{Statements Made for Purposes of Medical Treatment}: Another well-established hearsay exception permits admission of statements made for purposes of medical diagnosis or treatment.\textsuperscript{142} Here, reliability is assured not by spontaneity, but “by the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he provides the physician.”\textsuperscript{143} Contemporary statements of bodily condition are considered competent evidence,\textsuperscript{144} which may be more informative than courtroom testimony. When such statements are properly admitted under this exception, reliability can be inferred “without more.”\textsuperscript{145}

Like statements admitted under the spontaneous declarations exception, statements of children that are admitted under the medical diagnosis or treatment exception are sometimes seen as “torturing” the exception by stretching it “beyond its intended scope.”\textsuperscript{146} The perceived barriers to admitting children’s statements under this exception are: how the identity of the perpetrator is pertinent to medical diagnosis or treatment, and whether the statements carry the same trustworthiness when made by someone who is not “aware of the importance of telling the truth to a doctor in order to secure proper medical care.”\textsuperscript{147}

Following the Eighth Circuit’s lead in \textit{United States v Iron Shell},\textsuperscript{148} a number of courts have found statements to doctors


\textsuperscript{142}See, e.g., FED. R. EVD. 803(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.”

\textsuperscript{143}E. Cleary, supra note 125, at § 292.

\textsuperscript{144}6 J. Wigmore, supra note 17, at § 1718.

\textsuperscript{145}See supra note 83 and accompanying text.


\textsuperscript{147}Graham, Indicia, supra note 114, at 24-25.

\textsuperscript{148}633 F.2d 77 (8th Cir. 1980).
identifying the perpetrator of sexual abuse pertinent to medical diagnosis and treatment. In those cases, courts seem to review carefully the child's awareness of the importance of truthfulness.

In conclusion, courts usually fail to consider the reason for the child's unavailability to testify to be probative of the reliability of hearsay statements offered under traditional hearsay exceptions. As long as the statements meet the requirements for application of the spontaneous declarations exception, this oversight is probably consistent with the rationale for the exception. But, if the basis for the child declarant's unavailability relates to his or her ability to receive and relate accurate cognitive impressions, and that inability was present both at the time of the event and when making subsequent statements for medical treatment, the statements are inadmissible.


150 See State v. Robinson, 735 P.2d 801, 809 (Ariz. 1987) (reasoning that because "sexually abused children may not always grasp the relation between their statements and receiving effective medical treatment [i]t is particularly important, therefore, to ask whether the information sought by the treating doctor was reasonably pertinent to effective treatment"); W.C.L. v. People, 685 P.2d 176, 181 (Colo. 1984) (refusing to admit statement under medical exception because the child was too young to understand the need to be truthful, and the child was referred to the doctor not for medical treatment "but for confirmation of child abuse as a step in law enforcement proceedings").

151 See supra text accompanying notes 126-27.

152 See supra note 125.

153 Oldsen, 732 P.2d at 1138-39 (Erickson, J., dissenting).
B. The Residual Rule

Many jurisdictions recognize the catch-all exception\(^{154}\) to the hearsay rule. Courts turn to this exception when extra-judicial statements by children are not admissible under an established exception.\(^{155}\) As the exception is not "firmly rooted,"\(^{156}\) courts must consider independently the reliability of the statement before admitting it.\(^{157}\) Because the residual rule contains reliability

\(^{154}\) See supra notes 25-26 and accompanying text.

\(^{155}\) See, e.g., W.C.L., 685 P.2d at 182 (finding statements would have been admissible under residual rule after rejecting admissibility under excited utterance or medical exceptions); Posten, 302 N.W.2d at 641 (admitting child's utterances spoken during a nightmare); McCafferty, 356 N.W.2d at 162 (admitting statements made to teachers and psychiatrist during play with anatomically correct dolls under residual rule). But see Brown, 341 N.W.2d at 14-15 (refusing to admit pretrial identification from photographic array under residual rule); Souder, 719 S.W.2d at 734-35 (finding that pointing and demonstrations to social worker during play with dolls would not have qualified under residual rule requirements).

\(^{156}\) Ohio v. Roberts, 448 U.S. 56, 66 (1980).

\(^{157}\) The most significant requirement is that the statement must possess "circumstantial guarantees of trustworthiness" equivalent to that of statements admitted under one of the traditional hearsay exceptions (the first twenty-three exceptions contained in Rule 803 and the first four exceptions contained in Rule 804(b)). In order to evaluate the trustworthiness of a prior statement, the courts look to several criteria: (1) certainty that the statement was made, which should include, where appropriate, an assessment of the credibility of the person testifying in court to the existence of the statement; (2) assurance of the declarant's personal knowledge of the underlying event or condition; (3) whether the statement was made under oath; (4) the practical availability of the declarant at trial for meaningful cross-examination concerning the underlying event or condition (obviously inapplicable to Federal Rule of Evidence 804(b)(5)); and finally, (5) an ad hoc ascertainment of trustworthiness based upon the totality of the surrounding circumstances. Relevant factors which bear upon such ascertainment of trustworthiness include: (1) the declarant's partiality (interest, bias, corruption, or coercion); (2) the presence or absence of time to fabricate; (3) suggestiveness brought on by the use of leading questions; and (4) whether the declarant has ever reaffirmed or recanted the statement. In child sexual abuse cases, the court should also consider whether the child's statement: (1) discloses an embarrassing event; (2) is a cry for help; (3) employs appropriate child-like language; or (4) describes an act of sexual contact that the child is not likely to realize is either possible or sexually gratifying to an adult unless actually experienced by the child. The age and maturity of the child, the nature and duration of the sexual contact, the physical and mental condition of the child when the statement was made, and the relationship of the child and the accused are also appropriately considered. On the other hand, the court should also consider whether the
factors,\textsuperscript{158} one approach has been to find that the ""indications of reliability' referred to by the Roberts Court and 'the circumstantial guarantees of trustworthiness' language in the residual exception to the hearsay rule are synonymous."\textsuperscript{159}

The trial court, in determining the sufficiency of the indications of reliability, should consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertions and the reliability of the child witness. A young child is unlikely to fabricate a graphic account of sexual activity because such activity is beyond the realm of his or her experience.\textsuperscript{160}

Under this approach, a court might consider the reason for the child declarant's unavailability within its analysis of the statement's reliability. However, the assumption that a young child is unlikely to fabricate may allow the court to overlook the possibility that a third party could have helped the child to interpret an innocent act as sexual abuse.\textsuperscript{161}

The Court of Appeals of New Mexico analyzed the admissibility of hearsay statements in exemplary fashion in \textit{State v Taylor} \textsuperscript{162} To determine whether the statements had the requisite "equivalent circumstantial guarantees of trustworthiness,"\textsuperscript{163} the court tested them against the four primary hearsay dangers: ambiguity, lack of candor, faulty memory, and misperception.\textsuperscript{164} While the court found the statement of the event of abuse reliable, it would not admit the statement identifying the per-

\textsuperscript{158} See supra notes 25-26.
\textsuperscript{159} McCafferty, 356 N.W.2d at 163.
\textsuperscript{160} Id. at 164.
\textsuperscript{161} See supra note 118.
\textsuperscript{162} 704 P.2d 443 (N.M. Ct. App. 1985).
\textsuperscript{163} See supra notes 25-26.
\textsuperscript{164} Taylor, 704 P.2d at 451; see text accompanying note 72.
The most troublesome requirement for introducing out-of-court statements by unavailable children under the residual rule is that "the statement [be] more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." If in-court testimony would be more probative than the extra-judicial statement, "[i]t would seem that 'reasonable efforts' would include calling the child-declarant to the witness stand and eliciting the desired testimony."  

C. Special Statutory Exceptions

Professor Graham noted the rapid adoption of new hearsay exceptions for statements by child victims of sexual abuse: "In 1982, only two states had special statutory exceptions (Kansas and Washington), whereas eighteen states had adopted such
exceptions by October, 1985. That number has grown to at least twenty-six as of June, 1987.

The Washington statute has been recommended as a model and is similar to other recommended provisions. Because these statutes incorporate some of the requirements of the residual rules for statements made by an unavailable child


170 Telephone interview with Howard Davidson of the National Legal Resource Center of Child Advocacy and Protection (July 10, 1987). He added California, Georgia, Idaho, Kentucky, Mississippi, New York, Oklahoma, and Pennsylvania to the list found id. at 7 n.9. See generally Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARY. J.L. & PUB. Pol'y 539 (1985) (noting counterproductive effect of related child abuse laws which employ imprecise definitions and lack standards); Bulkeley, supra note 50, at 647-48 ("[A]lthough one may accept the need to reform laws and legal procedures, the assumptions and purposes underlying proposals need to be examined, and the legal and practical consequences should be analyzed thoroughly before states adopt innovative approaches"); Comment, Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception, 7 U. PUGET Sound L. Rev 387 (1983-84) [hereinafter Comment, Confronting Child Victims].

171 A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington 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: Provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
A statement may 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.

WASH. REV. CODE § 9A.44.120 (Supp. 1987) (emphasis in original).

172 See Note, Comprehensive Approach, supra note 1, at 1766.


174 A statement made by a child, when under the age of 10, describing an act of sexual contact performed with or on the child by another is admissible in evidence in criminal proceedings, civil proceedings, and de-
declarant, the reliability analysis may follow along similar lines. The reliability of the child victim will be considered generally, and if the surrounding circumstances do not indicate sufficient reliability, the statements will not be admitted, consistent with the dictates of Ohio v. Roberts.

Relying on a similar statute, the Kansas Supreme Court remanded a case to the trial court for findings of fact on reliability, including that "the child was not induced to make the statement falsely" One last common safeguard worthy of note is the requirement of additional corroborative evidence.

pendency and delinquency proceedings in juvenile court if:

(2) The testimony of the child is unavailable at the trial or hearing and the statement
(a) was made by a child possessing personal knowledge of the sexual conduct described, and
(b) the statement possesses circumstantial guarantees of trustworthiness equivalent to that possessed by statements admitted pursuant to a firmly rooted hearsay exception, and
(c) the proponent of the statement notifies the adverse party of 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, provided further,
(d) there is adequate corroborative evidence introduced at trial of the act of sexual contact described in the statement.

Graham, Indicia, supra note 114, at 48-49.

175 Id. at 53-55. Professor Graham adds or emphasizes the following factors which bear on trustworthiness: "(3) the physical and mental condition of the child when the statement was made; (4) suggestiveness, brought on by the use of leading questions coupled with an evaluation of the child's relationship to the questioner, considered in light of surrounding circumstances." Id. at 54; see supra note 157.


177 Griffith, 727 P.2d at 253 (noting that child only accused defendant after two hours of questioning by mother, and in response to question, "Did Daddy do this to you?").

178 See supra note 83 and accompanying text.


180 See, e.g., supra note 174; State v. Carver, 380 N.W.2d 821 (Minn. Ct. App. 1986).

The corroboration requirement stems from a due process concern that the trier of fact may be too willing to convict an accused sexual offender, that is, find that the state has satisfied its burden of proof beyond a reasonable doubt, on the basis of evidence of alleged out of court statements of
But "corroboration that abuse occurred does not lend particular trustworthiness to the child's statement regarding the identity of the abuser, usually a central issue at trial."^{181}

In summary, while those who drafted some of the special hearsay exceptions have attempted to cure hearsay dangers present when the defendant is unable to cross-examine his or her accuser, the discretion of the judge in reliability analysis can still be influenced by notions about the inherent trustworthiness of children's statements about sexual abuse.^{182} Considerations of why the declarant is unavailable may be subsumed within the reliability analysis under both the residual rule and the special statutory exceptions. But there is no guarantee that a judge can or will detect the basis for erroneous allegations as a preliminary admissibility matter.

CONCLUSION

When critical evidence in a child sexual abuse prosecution is available only through statements of the child witness, the child should testify if possible.\textsuperscript{183} If the child's powers of observation, memory and narration were and are substantially intact, and the children that describe socially repugnant sexual conduct.

Graham, Indicia, supra note 114, at 58. But see Ryan, 691 P.2d at 204 (concluding that corroboration cannot supply adequate indicia of reliability).

\textsuperscript{181} Comment, Confronting Child Victims, supra note 170 at 402.

If the prosecution has strong corroboration of the abuse, there is little need for hearsay. If, however, the evidence is inconclusive, the state may need the hearsay to prove its case. When the state's case is weak, the defendant is most vulnerable to the dangers posed by the hearsay and in greater need of his confrontation rights. Thus, the greater the threat to the defendant's rights, the more likely the prosecution will be to use the Act to admit the hearsay. The result will be to use the Act mainly in instances where it will tend to undermine a defendant's right to confrontation.

\textsuperscript{182} See supra note 115 and accompanying text; see also Note, Two Legislative Innovations, supra note 1, at 819-20 (commenting that the opinion that "kids don't lie about things like that" could fulfill the requirement of "particularized guarantees of trustworthiness").

\textsuperscript{183} See, e.g., Harris v. Spears, 606 F.2d 639, 641-42 (5th Cir. 1979) (murder); Ketcham v. State, 162 N.E.2d 247, 249 (Ind. 1959) (rape); State v. R.W., 514 A.2d 1287, 1292 (N.J. 1986) (sexual assault of a minor); State v. Faster, 524 A.2d 587, 590-91 (R.I. 1987) (sexual assault); State v. Ryan, 691 P.2d 197, 208 (Wash. 1984) (indecent liberties) (Dimmick, J., concurring); see also supra note 90.
child shows practical understanding of the need for truthfulness, his or her testimonial capacity is sufficient. The burden on the court of determining competency can hardly compare with that of determining the reliability of out-of-court statements, especially when they are offered under an exception which is not "firmly rooted."

If the child testifies, the defendant will have an opportunity to explore matters such as confusion about the identity of the perpetrator or the possibility that the characterization of the event as sexual abuse originated not in the mind of the child, but in that of a parent or social worker. The judge may control the course of cross-examination should it become abusive.

When a child's competency is challenged, or the prosecutor declines to call the child for psychological protection, or his unavailability is stipulated, the judge should hold a hearing and make findings on the record. "Holding a hearing ensures factual support for the trial court's finding and gives an appellate court a basis with which to uphold the trial court's determination."

If the child is found incompetent or truly unavailable for psychological reasons, and hearsay statements by the child are offered and challenged, the court should conduct a full inquiry into the statements' reliability. For admissibility under any exception, the court should consider all relevant criteria, including the basis for the child's unavailability and how that might bear on reliability, and the possibility that a domestic dispute or some other external influence might be the source of the child's allegations.

The judge should return to the underlying rationales of the hearsay rule and the confrontation clause as a final check on admissibility. If cross-examination of the declarant would have served to expose the untrustworthiness of the out-of-court statement, denial of the right to confrontation is clear constitutional error. The court's analysis of the statement's trustworthiness

---

184 See supra notes 49-50.
185 See supra notes 158-60, 171-75 and accompanying text.
187 Bulkley, supra note 50 at 653. The Washington statute-based special hearsay exceptions incorporate this requirement; see supra note 171.
188 See Fed. R. Evid. 804(a)(4).
also should be made on the record,\textsuperscript{190} so that the factors consid-
ered will be available for appellate review.

Only reliable hearsay should be admitted in any case. A repugnant charge "does not destroy the presumption of innocence"\textsuperscript{191} or justify a conviction based on untrustworthy or incompetent evidence.

\textit{JoEllen S. McComb}\textsuperscript{*}


\textsuperscript{191} Jones v. United States, 231 F.2d 244, 246 (D.C. Cir. 1956).

* The author would like to express her appreciation to Dean Robert G. Lawson for his suggestions and support.