

Psychologists' Roles in Evaluating Child Witnesses

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ABSTRACT

Although different words are used, most tests of child witness competency stress three basic concepts: perception, memory, and ability to communicate. The ability to distinguish truth from falsehood and the capacity to carry out the obligation to speak the truth are additional requirements. Psychologists assist courts in helping to determine whether child witnesses are competent. Psychologists also assist courts in determining whether children's hearsay statements are "reliable", and whether there is corroboration of accusations children make. Finally, psychologists assist courts in determining when a child witness is unable to testify as long as that child is in view of the defendant.

PART I: CHILD WITNESS COMPETENCY: HISTORICAL BACKGROUND

Our common-law rules of evidence were derived from a centuries long process of courts trying to get at the truth. The rules of evidence must allow enough evidence to be adduced to resolve disputes, but must not allow evidence to be heard which is likely to be unreliable or untrustworthy. Courts need rules of evidence which help to move cases on expeditiously, but not at the cost of lack of fundamental fairness. Our rules have not been perfected through a scientific empirical process. As it is always difficult to know in a given case what the truth is, so it is difficult to determine whether the rules have allowed for the truth to be heard. The rules of evidence have been perfected in a gradual evolutionary manner, in response to challenges presented by individual cases. Our rules of evidence have been primarily derived from cases involving adults, as child witnesses are relatively rare in court.

One rule is that only competent witnesses may testify at all. Competent witnesses are those who are thought to be likely to tell the truth. In various cultures certain classes of individuals were thought to be less likely to tell the truth, and thus were barred from testifying as witnesses. For example, under Roman law, family ties were thought to be a strong incentive to perjury, so parties, spouses, and children were precluded from testifying.¹ English common law disqualified infants, witnesses with pecuniary interest in the outcome of a case, and the spouse of a party.² Those convicted of a felony or those who were mentally deranged were at times also precluded from testifying, or those who were not the majority race were deemed unfit to testify. Atheists were sometimes forbidden to testify under the theory that swearing before God to tell the truth would not ensure truth telling among non-believers.

The requirement that trial witnesses must testify only under oath is a relatively modern one. In seventeenth century England most adult witnesses did not testify under oath. However, as the testimony of children was thought to be particularly suspect, in 1779 it became English law that children could give evidence only if they were competent to take an oath. They had to demonstrate that they "possesse [d] a sufficient knowledge of the nature and consequence of an oath.... Admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood".³ Most young children were precluded from testifying because of their perceived inability in a religious sense to understand the significance of the oath. The requirement that witnesses take an oath is applicable now to adults as well tell as children, but most state statutes require that a child be able to understand the meaning of an oath to tell the

¹ McGough, LS (1994). *Child Witnesses: Fragile Voices in the American Legal System*. (pp. 87). New Haven: Yale University Press.

² *Id.* (pp. 97).

³ *The King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), citing in McGough, page 99.

truth. Indeed, in some states this is only competency standard for children.⁴ Using this “Oath Understanding” test most courts will attempt to determine if the child appreciates the difference between a true and a false statement, and/or if the child realizes that lying can bring on punishment of some sort.

In the United States the Salem witch trials took place at the end of the Seventeenth Century; they are the earliest recorded instance of children testifying in America, and they have had long-lasting effects on our attitudes about child witnesses.⁵ At that time children were thought to be particularly truthful because of their innocence and naiveté, and adults believed that children’s innocence enabled them to recognize evils that adults could not recognize.⁶ After the Salem witch trials belief in the infallibility of children’s testimony waned, and during most of our history the testimony of children has been disfavored.

However, due to the child witness protection movement of the 1980’s, rules excluding the testimony and hearsay of children have been relaxed, and many courts now freely accept the live testimony and hearsay of toddlers. It was perceived that adults who abused children sexually or physically were avoiding conviction for their crimes because often the only witnesses to these crimes were the child victims. Thus, rules about the testimony of children have been liberalized in most states. Indeed, under the Federal Rules of Evidence, there is no requirement that an inquiry must be made into a child’s competency to be a witness regardless of the child’s age. Although there is a requirement that every witness take an oath (Rule 603), there is no requirement that a child be questioned about his understanding of the oath. Numerous states have adopted the federal position. Even England has abandoned any test of child witness competency in criminal prosecutions.⁷

The state of Washington retains the old common-law idea that competency of a child witness involves much more than a mere ability to determine truth from falsehood and understanding of an oath. The witness needs to have been able to *perceive* the event at the time that it happened, needs to be able to have faithfully *remembered* the event until the time of trial, and needs to be able to accurately *communicate* about the event in court. This is often referred to as the “Full Inquiry” test. The “Full Inquiry” test recognizes that children often do have problems in perceiving, correctly remembering events, and communicating about them, especially if a considerable period of time elapses between the event and the time of trial, during which memory-fade or suggestibility might interfere with the truth-seeking process. The competency test’s requirements of perception, memory, and communication closely resemble modern psychological theories about memory, which are couched in terms of “encoding”, “storage”, and “retrieval”.⁸

Modern society seems to be in considerable conflict about the credibility of children’s testimony. One side seems to believe that any statements a child makes to a parent or a therapist, no matter how coercive or suggestive the techniques used to elicit them, and no matter how bizarre the accusations, should always be believed. The proponents of this side of society believe that children do not generate false reports of sexual victimization. The other side views such accounts from young children with skepticism, realizing that small children are more prone to leading questions and suggestions than are older children and adults. Proponents of this position point to studies on interviewer bias with young children, the effects of

⁴ McGough, LS (1994). Child Witnesses: Fragile Voices in the American Legal System. (pp. 10). New Haven: Yale University Press.

⁵ Ceci, Stephen, and Maggie Bruck (1999). Jeopardy in the Courtroom: A Scientific Analysis of Children’s Testimony. (pp. 8). Washington, D.C.: American Psychological Association.

⁶ *Id.* (pp. 9).

⁷ Child Witness Act 1991.

⁸ Ceci, Stephen, and Bruck, Maggie. (1999). Jeopardy in the Courtroom: A Scientific Analysis of Children’s Testimony. (pp. 39-46). Washington, D.C.: American Psychological Association.

repeated questioning with young children, and the effects of suggestive interviews with very young children.⁹

Most cases involving child witnesses are criminal cases in which children are making accusations of physical or sexual abuse, although children may, of course, testify in criminal matters about other issues as well. Many of the accused are adults, but many of them are children, since when children do abuse others their victims are almost invariably children younger than themselves. In criminal cases the burden of proof is set very high (“beyond a reasonable doubt”) because it is felt it is better that 10 guilty defendants go free than that one innocent defendant be punished. In criminal cases it is very important to ensure that children’s testimony is not admitted unless it is competent, reliable, and corroborated to ensure against convictions based on false allegations. Because of the burden of proof in criminal cases it is less important to ensure against false denials of sexual abuse, cases in which abuse occurred but children are denying it.

However, many cases involving child witnesses come up in dependency cases, in which the standard of proof is considerably less (in Washington “clear, cogent and convincing”). In dependency cases the choice is often between removing a child from an alleged abusive situation or leaving the child in that situation. Thus, in dependency cases the courts must be worried about both types of errors: finding that abuse did occur based on false allegations, and failing to find that abuse occurred when the allegations are actually true, which often happens because children falsely deny abuse occurred, or because they recant earlier truthful allegations they have made. However, because the burden of proof is still strongly stacked against the government, in dependency cases courts must be more concerned about false allegations than false denials.

Children also testify in civil cases, most commonly in child-custody cases, although they occasionally testify in other types of civil cases. In these cases the burden of proof is even lower (“preponderance of the evidence”). In these cases the fact finder must balance both types of errors equally. Therefore, the courts must be equally worried not only about the possibility that the allegations are false, but also about the possibility that children’s denials of abuse are false.

Because the focus of this paper is primarily on child witnesses as participants in criminal and dependency cases, this paper will concern itself primarily with the possibility of false accusations, and will concern itself less with the possibility of false denials. It is well accepted that children are often reluctant to reveal abuse because of their desire to protect the offender, who is usually a family member. Children are often very reluctant to accuse a parent of wrongdoing, and will often later recant an initial allegation of abuse.¹⁰

It must be remembered that these burden of proof issues are only operative during the trial phases of cases, but that all of the issues discussed in this paper are decided at pre-trial hearings having to do with whether a child’s evidence will be admissible at trial. Judges are supposed to decide whether evidence is admissible without regards to what is alleged or what type of case it is. Burden of proof issues go to whether the evidence should be deemed to be sufficient by the fact-finder once it has first been deemed admissible by the judge. Once a child has been ruled competent to be a witness’ and the trial begins, any inconsistencies in the testimony or other credibility issues go to the weight of the testimony in the eyes of the fact finder, not to the admissibility of the evidence.¹¹

⁹ Id.

¹⁰ For discussion of the research on false denials and false recantations see Lyon, T.D. (1995). False Allegations and False Denials in Child Sexual Abuse. *Psychology, Public Policy, and Law*, 1:2, 429-37.

¹¹ See *Jenkins v. Snohomish County Public Utility District No.1*, 105 Wn. 2d 99 (1986); *State v. Strange*, 53 Wn. App. 638 (1991).

THE LEGAL TEST FOR A CHILD'S COMPETENCY TO TESTIFY

"A child of any age may be permitted to testify so long as the trial judge is satisfied that the child possesses the ability to observe, recollect, and communicate".¹² Essentially the same three-part standard is used for determining whether a witness is incompetent to testify due to "unsoundness" of mind. "Unsoundness must be of such degree that the person's ability to perceive, recall, and testify are so impaired that the witness testimony is worthless."¹³ The "Full Inquiry" test seems to stress that a competent witness must have been able to *perceive* the incident about which he is to testify, must be able to *remember* the incident, and must be able to *communicate* about the incident.

A court's determination concerning the competency of a child witness will not be disturbed by an appellate court absent a manifest abuse of discretion.¹⁴ A trial court is granted wide discretion with regard to this determination, as the competency of a child witness is not easily reflected in a written record.¹⁵ Great reliance is placed on the trial court's determination related to the child's competency because the trial court "is in a position to assess the body language, the hesitation or lack thereof, the manner of speaking, and all the intangibles that are significant in evaluation but are not reflected in a written record (cite omitted)." Whenever a child under 10 years old is offered as a witness, the court must assume the initiative in determining his competency,¹⁶ although most trial judges would not require a full competency hearings in cases of articulate and bright nine year olds.

Washington further fleshed out its competency test by including two more requirements for child witnesses:¹⁷ understanding the obligation to speak the truth, and the capacity to understand simple questions about the incident in question.

"The true test of the competency of a young child as a witness consists of the following:

1. an understanding of the obligation to speak the truth on the witness stand;
2. the mental capacity at the time of the occurrence concerning which he is to testify;
3. a memory sufficient to retain an independent recollection of the occurrence;
4. capacity to express in words his memory of the occurrence, and
5. the capacity to understand simple questions about it."

Washington's statutes provide that any person of "sound mind and discretion" may testify¹⁸ and under ER 601, every person is presumed competent to testify, but persons "who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly" are not competent to testify.¹⁹

The Washington test for child witness competency is perhaps more completely set forth in a recent Washington Court of Appeals case from Division II,²⁰ which cites authority from other Washington cases for the various parts of the test. Footnotes citing those other cases are omitted.

"Under any of these formulations, the competency of a witness turns on three basic preliminary questions of fact. One is whether the witness, at the time of his or her in-court statement (i.e., his or her "testimony"), is describing an event that he or she had the capacity to accurately *perceive* (or, in alternative terms, an event about which he or she could "receive just impressions"). Another is whether the witness, at the time of his or her in-court statement, is describing an event that he or she has the capacity to accurately *recall*. A third is whether the witness, at the time of his or her in-court

¹² *Pocatello v. U.S.*, 394 F.2d 115 (1968).

¹³ *U.S. v Roach*, 590 F. 2d 181 (1979).

¹⁴ *State v. Przybylski*, 48 Wn. App. 661, 664, 739 P.2d 1203 (1987).

¹⁵ *Id.* at 665.

¹⁶ *State v. Clark*, 53 Wn. App. 120 (1988).

¹⁷ *State v. Allen*, 70 Wn. 2d 690 (1967).

¹⁸ RCW 5.60.020.

¹⁹ RCW 5.60.050 (2).

²⁰ *State v. Karpenski*, 94 Wn. App 80 (1999).

statement, is describing an event that he or she has the capacity to accurately *relate*. The third question subdivides into at least the following: (a) whether the witness has the capacity to understand simple questions about the event; (b) whether the witness has the capacity to express in words his or her memory of the event; (c) whether the witness has the capacity to speak in a formal courtroom setting; (d) whether the witness has the capacity to distinguish truth from falsehood; and (e) whether the witness has the capacity to understand and carry out his or her obligation to speak the truth.”

A recent case makes it clear that in order to satisfy the first part of the test (the one relating to perception) it must be possible to fix the approximate date of the alleged incident with some degree of certainty. In a recent Washington Supreme Court case,²¹ the court found “having reviewed the entire record, we find nothing establishing the date or period of the alleged sexual abuse”. The court then went on to conclude that A.E.P. should have been found incompetent (overturning the trial court’s ruling that she had been competent to testify) based only on the lack of any evidence showing an even approximate date for the event. *A.E.P.* establishes the rule that the child’s mental capacity at the time the event occurred to be able to perceive an accurate impression of the event cannot be established if there is no evidence when the event took place.

Psychologists, judges, and lawyers often attempt to test a child’s ability to have accurately perceived and remembered an event by asking the child about another event in the child’s life (birthday, holiday, first day of school, etc.) which occurred around the same approximate time period. To the degree that the child can accurately recite what happened at such an event from the same time period, it is supportive of the idea that the child should be able to accurately perceive, remember, and relate the event in question.

In *State v. Pham*²², in order to determine whether the nine-year-old child witness demonstrated the mental capacity to receive an accurate impression of the incident, the court considered her ability to recollect details about an automobile accident in Canada, which had occurred a short time before the incident with the defendant. The child remembered the auto accident, remembering who she was with, where her family was, and the injuries suffered. This evidence convinced the court she had the capacity to receive an accurate impression about the sexual incident. Upon review, the Washington State Court of Appeals agreed with the trial court’s analysis, even though the child had been unable to state where she lived, when her birthday was, and the name of her school. The trial court is not required to examine a child witness regarding the actual facts of the case in making a determination of competency as long as the child demonstrates ability to accurately recite events that occurred contemporaneously with the incidents at issue.²³

One interesting Washington case illustrates the difference between competency, and credibility, clearly separate issues. In *State v. Griffith*,²⁴ a six-year-old girl was left at home with her father and her uncle James. When the mother returned home she asked the victim if someone had hurt her, and the girl reportedly said her father had touched her vagina with his finger. The child was taken to a hospital where she told a physician her father had stuck his finger inside her vagina. The following day a detective interviewed the child, and she told him that her father had “put his ding-dong in my pooky”. However, later that evening the mother brought the child back to the police station, and the victim said her previous story had been a lie. She said “Uncle Jimmy” had molested her, but said she had earlier said her father had been the one who had molested her because

²¹*Dependency of A.E.P.*, 135 Wn. 2d 208 (1998).

²²*State v. Pham*, 75 Wn. App. 626 (1994).

²³*State v. Przybylski*, 48 Wn. App. 661 (1987).

²⁴*State v. Griffith*, 45 Wn. App. 728 (1986).

Uncle Jimmy had threatened to hurt her father if she did not say her father had done it. At a competency hearing she repeated that version, but the trial judge found her incompetent because of the conflicting stories. However, her hearsay statements (to her mother, the physician, and the detective) were allowed, and her father was convicted. Upon appeal the court held she should not have been found incompetent simply because of her conflicting stories, and because she was “susceptible to leading questions”. The appellate court stated,

“our review of her testimony indicates the crucial issue was not whether the crime had been committed, but who had committed it. At the time of the incident, the victim said her father, Mr. Griffith, subsequently she said Uncle Jimmy. Although the record indicates the victim may have responded to the suggestiveness of the questions, there is, likewise, an indication she named her father as the perpetrator in response to the suggestiveness of her mother during the original questioning. Given that she remembered the incident, remembering initially stating that Mr. Griffith was the perpetrator, and was found to be capable of telling the truth, it appears the court may have her incompetent to testify simply because it disbelieved her testimony about Uncle Jimmy. However, the jury, not the judge, is the sole and exclusive judge of the credibility of witnesses (cite omitted). Moreover, any inconsistency in her testimony went to credibility, not admissibility (cite omitted). Thus, the record suggests the trial court abused its discretion in ruling the victim incompetent.”

However, see also *Jenkins v. Snohomish Co. PUD*,²⁵ in which a child who gave inconsistent statements was not found competent to be a witness.

EVALUATION FOR CHILD WITNESS COMPETENCY

Psychologists and other mental health professionals apply their expertise to the issue of the competency of child witnesses. If the child is very young, the defendant (or adverse party in a civil case) can move to have the child evaluated by its expert to determine whether the child is competent to be a witness. Judges will usually not allow such evaluations without some initial showing of possible lack of competency. Attorneys may bring psychologists along to help them during the attorney’s pre-trial interview with the child as part of normal discovery, and can sometimes thereby obtain enough information to make a showing that a formal evaluation should be done. Many judges are not prone to grant motions for examination of child-witnesses by an expert hired by the defendant or an adverse party, for fear the expert might not be sensitive to the needs and feelings of the child, or might be biased towards one party. Some judges appoint their own experts on child witness competency in an effort to be fair to the child and to both parties. Other judges conduct their own competency evaluations, usually in open court, during which they ask children questions such as the difference between truth and lies. Such unsystematized intuitive examinations may provide little testing of some of the domains involved in the competency test.

When an expert is hired either by the court or by one side in the dispute to give an opinion as to a child’s competency to be a witness, the expert will need to assess the child’s abilities in each of the domains involved in the competency test.

However, a simple assessment of the child’s abilities is not enough – the clinician also needs to learn the alleged facts of the case by reviewing police reports and witness statements. The clinician needs to know exactly what it is the child is supposed to have perceived, how many times he has been questioned about it and by whom, and what these questioners have reported about their interrogation of the child. By this means the clinician can attempt to determine what factors if any might have interfered with the child’s memory. Furthermore, the child’s ability to communicate accurately about the event will depend not only on the child’s communicative abilities, but also on the complexity of the alleged events themselves. The clinician will need information about the facts of the case in order to determine if there is a good

²⁵*Jenkins v. Snohomish Co. PUD*, 105 Wn. 2d 99 (1986).

fit between the child's abilities and the requirements that will be placed on the child under the facts of the specific case. Indeed, depending on what the event is that the child supposedly perceived, remembered, and is to communicate about, different psychological tests may be chosen.

Thus, the expert should assess the child's ability to have accurately perceived the event in question. The substantial body of scientific evidence concerning eyewitness testimony would be applicable here, as would standard age appropriate tests of perception. Obviously, the psychologist would be unable to offer much of an opinion on the issue of the child's ability to have accurately perceived at the time unless the approximate date of the event in question could be fixed or determined, so that the psychologist can have some idea of how to extrapolate back what the child's perceptual abilities would have been when the alleged event occurred. Whereas young children may be able to recognize familiar faces and to absorb simple scenarios, recognition of more complex events or complex scenes may require processes that are more likely to develop with age.²⁶ Thus the child's competency may turn on the facts of the case, such as whether he is to have seen and to have perceived facial features (an identification case), heard a conversation, or tactilely experienced a sexual act.

The expert should also assess the child's memory, using one or more of the standardized tests of children's memory. Because legal proceedings often occur months or even years after the relevant event, the capacity to remember is just as important as the capacity to observe. A child who does not have a memory sufficient to retain an independent recollection of an event is not competent to testify.²⁷ Because a person's capacity to remember events is inseparable from the person's capacity to resist suggestion from other sources, research on both memory-fade and suggestibility are important here.

Research on children's memory shows that as the time interval between the event and recall lengthens, children do not do as well as adults in recalling events.²⁸ Obviously the clinician needs to know over what period of time the child had to remember the event.

Young children are not as proficient as older children and adults at responding to open-ended questions that call for free recall because free recall in children is often incomplete. Young children have not yet mastered the memory strategies used by older individuals. What they do recall is usually fairly accurate, but their accounts tend to be relatively brief.²⁹ Since young children often provide insufficient detail during free recall, cues and prompts must sometimes be used to trigger additional memories. However, as the questions become more focused and specific they may eventually cross the line into leading questions. Obviously the challenge is to find ways to improve children's memory without influencing children's statements.

Many studies of children's memory are open to criticism that they do not approximate the type of real-life situations involved in real cases of sexual abuse. Obviously it is not ethically possible to involve children in abuse and then to study what they are able to remember. One solution to this problem is to study painful and stressful medical procedures involving the genitalia. In a famous study³⁰ children ages three to ten years old were interviewed after undergoing urethral catheterization. The three and four year-olds were less accurate with their memories than the older children, although the children's understanding of the event, parental

²⁶ Johnson, M. and Foley, M. (1984). Differentiating Fact From Fantasy: The Reliability of Children's Memory. *Journal of Social Issues*, 40:2, 33.

²⁷ See *Jenkins v. Snohomish County Public Utility District No.*, 105 Wn. 2d 99 (1986).

²⁸ Flin, R., et al. (1992). The Effect of a Fire Month Delay on Children's and Adult's Eyewitness Memory. *British Journal of Psychology*, 83, 323; see also Myers, J.E., Saywitz, K.J & Goodman, G.S. (1996). Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony. *Pacific Law Journal*, 3, 28.

²⁹ Hutcheson, G.D., Baxter, J.S., Telfer, L.J., Warden, D. (1995). Child Witness Statement Quality: Questions Type and Errors of Omission. *Law and Human Behavior*, 19, 63.

³⁰ Goodman, G.S., et al. (1994) Predictors of accurate and inaccurate memories of traumatic events experienced in childhood. *Consciousness and Cognition*, 3, 269-94.

communication, and children's own reactions also predicted accuracy. Children who displayed PTSD-like symptoms were particularly likely to make commission errors in response to both specific and open-ended questions.

Most authorities agree that a child's memory can be made inaccurate by multiple interviews, and attention has focused on improving the skill of interviewers. Multiple interviews may stress vulnerable children, and the more interviews there are the more likely some unnecessarily suggestive questions will be asked. One study involved two groups of non-abused pre-school age children, with three and four year olds in one group, and five and six year olds in the other.³¹ The children were interviewed seven to ten times over a three-month period about actual and fictitious events. Children were told about "some of the things that may have happened to you, and I want you to think real hard about each one of them". For both groups true events were nearly always recalled accurately, but when asked to recall fictitious events, 44% of the younger children assented to a false event at the first interview, whereas 25% of the older children assented to a false event at the first interview. In a related experiment the interviewer told the children they had actually experienced the fictitious events, and asked them if they remembered having done so. By the 11th interview children's false assent rate had increased to over 80%. Repeated questioning within a single interview may have similarly deleterious effects on accuracy, as children who are asked the same question more than once may assume they gave the "wrong" answer the first time.

An interviewer can create an atmosphere that is accusatory regarding a particular person, typically a suspect, by describing him in terms of a negative stereotype. In one study a research assistant posed as a "police officer" who questioned non-abused four year-old children eleven days after they had seen a staged event, and had played with a person called "a babysitter".³² Just before the interview with the "police officer" in one condition a real police officer spoke to the children, telling them, "I am concerned that something bad might have happened the last time you were here. I think that the babysitter you saw here last time might have done some bad things, and I am trying to find out what happened the last time you were here when you played with the babysitter". Many children in that condition could be misled to state that the babysitter might have done some "bad things".

In another study³³ of non-abused preschool age children, one group was told on several occasions about Sam Stone, who was according to the story very clumsy. Another group was also told about Sam Stone, but were not left with the impression that he was clumsy. Later, Sam Stone visited the children's preschool, where he stayed for two minutes, doing nothing clumsy or unusual. Both groups of children were interviewed once a week for four weeks. Some were asked leading questions suggesting that Sam Stone had ripped a book or soiled a teddy bear. Children who had received the stereotyping message about Sam Stone were more likely than other children to provide misinformation in response to leading questions.

Most studies also indicate that young children are more suggestible than adults.³⁴ Children over 10 or 11 years of age tend to show adult levels of resistance to leading questions.³⁵ However, children under the age of six may acquiesce fairly frequently to leading, detached, incriminating, and repeated questioning, especially over multiple interviews.³⁶ For a

³¹ Ceci, S.J., Huffman, M.L., Smith, E. & Loftus, E.F. (1994). Repeatedly thinking about a non-event: source misattributions among preschoolers. *Consciousness and Cognition*, 3, 388.

³² Tobey, A.E., & Goodman, G.S. (1992). Children's eyewitness memory: Effects of participation and forensic context. *Child Abuse and Neglect*, 16, 779.

³³ Leichtman, M.D. & Ceci, S.J. (1995). The effects of stereotype and suggestions on pre-schoolers reports. *Developmental Psychology*, 31, 568.

³⁴ Melton, G., et al. (1997). *Psychological Evaluations for the Courts*. (pp. 16). New York: Guilford Press.

³⁵ Ceci, S. and Bruck, M. (1993). The suggestibility of the child witness, a historical review, and synthesis. *Psychological Bulletin*, 113, 403.

³⁶ See Cassel, W.S., Roebbers, C.E., & Bjorklund, D.F. (1996). Developmental patterns of eyewitness responses to repeated and increasingly suggestive questions. *Journal of Experimental Child Psychology*, 61, 116-33.

general description of the suggestibility research, see articles published in *1 Psychology, Public Policy, and Law* (Nov 2, 1995).

Some studies suggest that repeatedly asking preschool children to “think real hard” about whether fictitious events actually happened to them can cause them to come to believe the events actually happened to them.³⁷ When the children do form false memories of events that did not actually occur, professionals from the fields of psychology, psychiatry, social work and law enforcement were fooled by the children’s narratives, and were unable to reliably detect true memories from false-memories. In a related study, instead of merely asking children if they remember experiencing a fictional event, the children were repeatedly told that the fictional event actually did happen, and the children were asked to create a mental picture of the event in their head and then to say if they remembered it.³⁸ By the 12th session 43% of preschoolers falsely claimed they remembered experiencing a fictional event. These findings suggest that it is possible to mislead preschoolers into believing they experienced a fictional event.

All of this research suggests that the clinician evaluating competency should review the interviews the child has had with the police in an effort to discern whether leading, suggestive and/or repetitive questions were asked. Frequently this is difficult to do, as there is no legal requirement that child interviews be videotaped. In *Dependency of A.E.P.*³⁹ Washington’s Supreme Court declined to adopt a taping requirement, pointing out that the legislature had recently considered and then rejected such a requirement.⁴⁰

The expert should also test for the child’s ability to express himself orally with a standardized test of oral expression. Such testing would also address (a) “whether the witness has the capacity to understand simple words about the event, (b) whether the witness has the capacity to express in words his or her memory of the event, and (c) whether the witness has the capacity to speak in a formal courtroom setting”.⁴¹

Many of the difficulties encountered with child witnesses are a function of miscommunication between adults and children. Researchers in one study evaluated the ability of young research subjects to repeat questions that had been asked of actual child witnesses. Children in the study misunderstood many common courtroom questions.⁴² Questions in court often require child witnesses to pinpoint time, date, location, distance, height, or weight. These systems of measurement are learned only gradually over the course of the elementary school years. Until about the age of seven or eight children are not usually able to tell time.⁴³ Young children do not have a good ability to know when they understand a question and when they do not, so young children sometimes mistakenly believe they understand questions, and may try to answer questions they do not understand. Children may not understand, but realize the adult is waiting for an answer, and may try to answer by focusing on a fragment of the question they do comprehend.⁴⁴ Children are significantly less accurate in reporting events when questioned with complex developmentally inappropriate questions rather than simple questions.⁴⁵ Obviously communication is a two-way street, and the child’s ability to communicate turns to a large degree on the complexity of the topic and the ability of questioners to speak at the child’s

³⁷ Ceci, S.J., et.al. (1994). Repeatedly thinking about a non-event: Source misattributions among preschoolers. *Consciousness and Cognition*, 3, 388-407.

³⁸ Ceci, S.J., et.al. (1994). The possible role of source misattributions in the creation of false beliefs among preschoolers. *The International Journal of Clinical and Experimental Hypnosis*, XLII: 4, 304-20.

³⁹ *Dependency of A.E.P.*, 135 Wn 2d 208 (1998).

⁴⁰ See *S.S.B.5087, 55th Legislature Regular Session* (Wash 1997).

⁴¹ *State v. Karpenski*, 94 Wn. App. 80 (1999).

⁴² Brennan, M. & Brennan, R.E. (1989). *Strange language: child victims under cross-examination* (3rd), Wagga Wagga, New South Wales: Riverina Literary Centre.

⁴³ Friedman, W.J. (1982). *The developmental psychology of time*, New York, Academic Press.

⁴⁴ Saywitz, R.N. & Synder, L. (1993). Credibility of child witnesses: The role of communicative competence. *Language Disorders*, 13, 59.

⁴⁵ Carter, C.A., Bottoms, B.L. & Lewine, M. (1996). Linguistic and socioemotional influences on the accuracy of children’s reports. *Law and Human Behavior*, 20:3.

level. It is clear that if the child is completely unable to express in words any memory of the event, then the child has nothing to offer the trier of fact, and should not be allowed as a witness.⁴⁶

As far as I know, no formal scientific test has yet been devised which could test “(d) whether the witness has the capacity to distinguish truth from falsehood”, but intelligence testing would be applicable to the final *Karpenski* issue of (e) “whether the witness has the capacity to understand and carry out his or her obligation to speak the truth.” Research shows that these are not problem areas even for very young children. One study of children aged four to six showed that most understood the difference between truth and a lie.⁴⁷ The clinician should ask the child to define the difference between truth and a lie. Washington case law indicates that a child does not have to be able to define “truth”⁴⁸, so if the child is not able to do so, the clinician should ask the child whether obvious statements are true or false, such as, “I’m wearing glasses”. Children should also be asked what would happen to them if they lied. Research shows that young children may often refuse to answer such hypothetical questions as to what might happen to them if they lied, but will usually answer hypothetical questions about what will happen to a fictitious story child if he lied.⁴⁹ Interestingly, Washington does not require that the child take an oath as long as he or she is adequately apprised of the importance of telling the truth.⁵⁰

Intelligence testing is appropriate, especially measurement of verbal intelligence, since most of the demands in court will have to do with verbal abilities. A child with high verbal intelligence is likely to be better able to perceive, remember, and communicate than a child of the same age with low verbal intelligence. Washington’s most recent Supreme Court case on competency⁵¹ stresses that “intelligence” (not youth) is the proper standard to be used in assessing the competency of a child witness.

When standardized psychological testing is available the trial judge will have information from several tests showing how well this particular child performs in each domain (perception, memory, communication, intelligence, ability to determine truth from falsehood, and ability to understand the oath) compared to other children of that age, obviously very valuable information, since the judge will know for each test whether the child has more or less ability in each area than an average child of that age, and the judge will also know that particular child’s areas of strengths and weaknesses.

Psychologists and other mental health professionals not only administer standardized testing, but also take a detailed history in order to better understand the particular child’s medical and psychological make-up. Any mental or emotional problems are uncovered and described, as are any issues relating to the child’s school performance. In many cases it may be advisable to review school records to gain information about the child’s cognitive functioning. Important family issues are also discussed. Family members and teachers may be asked questions to better elucidate how well the child is able to determine fact from fantasy. Obviously the clinician should be aware of any history of mental health treatment the child may have received, and should review treatment records if at all possible.

Some psychologists actually ask the child to recite the event in question, under the rationale that it is the best way to determine whether the child can give a competent account. Others only ask questions about contemporaneous events (as discussed above) such as holidays, birthdays, or other significant events that occurred close to the time of the alleged

⁴⁶ *State v. Justiniano*, 48 Wn. App. 572 (1987).

⁴⁷ Havgaard, J. et al. (1991). Children’s definitions of truth and their competency as witnesses in legal proceedings. *Law and Human Behavior*, 15, 253.

⁴⁸ *State v. Sims*, 4 Wn. App. 236 review denied, 79 Wn. 2d 1002 (1971).

⁴⁹ Lyon, TD, et.al. (2001). Reducing maltreated children’s reluctance to answer hypothetical oath-taking competency questions. *Law and Human Behavior*, 25, 81.

⁵⁰ *State v. Collier*, 23 Wn. 2d 678 (1945).

⁵¹ *State v. Allen*, 70 Wn. 2d 690 (1987).

incident. The rationale of these psychologists is that questions may arise as to whether children become confused about what actually happened if they are required to recite their story too many times. If the child is asked about the relevant event the questioning should be done very carefully. Yuille suggests asking for a free narrative account, and only if that is ineffective, proceeding to open-ended questions, specific yet non-leading questions, and finally leading questions.⁵²

PART II: CROSS-EXAMINATION AND THE HEARSAY RULE

Traditionally it has been thought that one of the best ways to test a witness's statement is through the time-honored method of cross-examination. Through cross-examination skillful lawyers can reveal when child witnesses had limited ability to perceive, remember, or communicate about an event. All witnesses who appear in court are subject to cross-examination, which is questioning through frequent use of leading questions by counsel for the adverse side of the lawsuit. One of the tenets of our jurisprudence is that it is important that witnesses appear in court in person so that their demeanor can be observed, particularly during cross-examination.

The repeating of statements made by people who are not present to testify in court by witnesses who are present is called "hearsay".⁵³ The general rule is that hearsay evidence is not allowed, as hearsay evidence cannot be effectively cross-examined. However, there are a large number of exceptions to the hearsay rule.

One group of exceptions is types of evidence that are considered so reliable or trustworthy that cross-examination is not necessary. For that group of hearsay exceptions, sometimes called "presumptively reliable" hearsay, it is not necessary that the person who made the statement (referred to as the "declarant") is available for trial. These types of hearsay statements are considered to be just as reliable if not more reliable than what the declarant might have said in court. These exceptions are referred to as the 803 exceptions, based on their placement in Rule 803 of the Federal Rules of Evidence. Many of these exceptions concern written records, such as family records, business records, boundaries, etc. Remember that hearsay may be written if the person who wrote the document is not present in court, but a party has the document in court, and is attempting to introduce it.

There are four "presumptively reliable" types of hearsay that often are involved with child declarants. They are called "present sense impression"; "statements about then existing mental, emotional, or physical condition"; "excited utterance"; and "statements for purposes of medical diagnosis or treatment". The first three are closely related, since all involve what the child said during or immediately after the event, so they all work to prevent any distortion from a fading memory or by suggestive questioning by admitting only those statements which were close in time to the event.

A "present sense impression" is defined under the federal rules as "an out-of-court statement which describes or explains an occurrence or condition made at the time the declarant was perceiving the condition or occurrence or immediately thereafter."⁵⁴ The limitation that these impressions be "present" ones is thought to negate the possibility that the statement is deliberately untrue, and to eliminate the risk of fading of memory over time. In the "existing mental, emotional, or physical condition" exception⁵⁵ perceptions of emotional feeling or physical conditions relating to the causative event can be allowed even if they are not made close in time to the causative event. The idea with this exception is that there can be no better

⁵² Yuille, J.C., et al. (1993). Interviewing children in sex abuse cases, in child victims, child witness', understanding and improving children's testimony, Edited by Goodman, G. & Bottoms, B. New York: Guilford Press.

⁵³ Technically, out-of-court statements offered in court to prove the truth of the matter asserted therein are considered hearsay under ER 801.

⁵⁴ Rule 803 (1).

⁵⁵ Rule 803 (3).

evidence of a person's pre-existing condition then what that person said while experiencing that condition. In the "excited utterance" exception⁵⁶, statements the declarant made while speaking spontaneously and greatly excited about an event are considered highly reliable. In Washington one factor in determining spontaneity is the amount of time between the startling event and the utterance, so that if between the occurrence of the event and the making of the statement the defendant had been calm and had engaged in normal activities, the statements would be less likely to be admissible.⁵⁷ In other words, excited utterances are spontaneous statements made while under the influence of external physical shock before the declarant has time to calm down enough to make a calculated statement based upon self-interest.⁵⁸ The idea here is that when a person is sufficiently startled to make a spontaneous statement, that statement is likely to be true, as there has not been time to fabricate. In *State v. Ramirez*,⁵⁹ five hours between the event and the purported "excited utterance" was thought to be too long, and it was ruled the hearsay should therefore not have been allowed. In all three of these exceptions the idea is that out-of-court statements made after an opportunity for reflection are unreliable, since witnesses can alter their account to their advantage. Statements made close in time to the witnessed event are deemed to be reliable because there has been less opportunity for reflection and fabrication.

The last "presumptively" reliable hearsay exception is the "medical diagnosis or treatment" exception.⁶⁰ Under this exception a physician or therapist can repeat in court what the child told him if the health care professional was offering "medical diagnosis or treatment". This exception is based on the assumption that no one seeking diagnosis or treatment of a medical condition would tell lies to someone attempting to provide help. In the case of young children, it is debatable whether pre-schoolers know when they are speaking to a therapist or physician that they are there for medical diagnosis and/or treatment. In Washington, Division III requires an affirmative showing that the child understood he or she needed to give accurate and truthful responses to a counselor's questions.⁶¹ In that case Division III held that in a case where a child has not himself sought medical treatment, but instead makes statements to a counselor procured by him or her by a state social service agency, the state's burden under ER 803 is more onerous, such that the record must affirmatively demonstrate the child made the statements understanding that they would further the diagnosis and possible treatment of the child's condition. Other jurisdictions take the opposite position, applying the same standard to cases involving children as to cases involving adults, and taking the position that inquiries into the declarant's motive and understanding are "not contemplated by the rule".⁶² Under this

⁵⁶Rule 803 (2). A child's statements should not be excluded on the basis of his or her incompetence to testify when they otherwise qualify for admission under the excited utterance exception to the hearsay rule. *State v. Bouchard*, 31 Wn. App. 381, review denied, 97 Wn. 2d 1021 (1982).

⁵⁷*State v. Chapin*, 118 Wn. 2d 681 (1992).

⁵⁸*Id.*

⁵⁹*State v. Ramirez*, 46 Wn. App. 223(1986).

⁶⁰ In Washington the medical diagnosis and treatment exception is not considered to be a "firmly rooted" or "presumptively reliable" hearsay exception in the context of child hearsay, so before allowing the hearsay evidence the court must determine whether there are particularized guarantees of trustworthiness supporting the statements, and whether it is likely the child is fabricating. If there are guarantees of trustworthiness the statement may be admitted even if the child did not understand the statements were being made for the purposes of diagnosis and treatment. *State v. Florczak*, 76 Wn. App. 55 (1994), review denied, 126 Wn. 2d 1010 (1995). Normally the identity of the perpetrator is not admissible under this exception, but in Washington an exception is made to this rule when the alleged victim is a child. *State v. Aschroft*, 71 Wn. App. 444 (1993). In Washington a statement made to a physician by a parent about what a child had previously said may be admissible if the court feels the child was incapable of relating this information to the physician himself. See *State v. Justiniano*, 48 Wn. App. 572 (1987), in which the trial court permitted Dr. Reimer to testify regarding what Jane's mother told her Jane said.

⁶¹*State v. Carol M.D.*, 89 Wn. App. 77 (1997).

⁶²*United States v. Joe*, 8 F. 3d 1488 (10th Cir. 1993).

hearsay exception, statements made over the course of hundreds of hours of psychotherapy will usually be admitted, and therapy for sexual abuse qualifies as medical treatment for purposes of the rule.⁶³ The most controversial use of this exception is the in “recovered memory” cases during which a child “remembers” an event in therapy which he has earlier “repressed.”

Hearsay statements which are not “presumptively reliable”, and can only be allowed when the declarant is “unavailable” for trial, the so-called “necessity” exceptions under rule 804, are cases in which the courts are faced with either letting the hearsay be allowed or doing without critical evidence altogether. Rule 804 of the Federal Rules of Evidence lists only four of these types of “necessity” exceptions. These include “statements made under the belief of impending death” (“dying declarations”), “statements of personal or family history”, “statements against the declarant’s interest”, and “former testimony”.

These types of hearsay rarely involve children as witnesses. “Dying declarations” rarely occur among children; the expectation of death is assumed to motivate a declarant to tell the truth since he or she will have little to lose in life, and might gain a reward in the after-life for honesty. “Statements against interest” are comments made by a declarant which admit liability of some sort, so that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. “Statements about personal or family history” would include statements such as the declarant’s mother’s birthday, etc.⁶⁴ The “former testimony” exception allows statements to be admitted that a declarant made at an earlier occasion as a witness in court or at a deposition only if the witness is unavailable for the new trial. The party against whom the testimony is to be used must have had an opportunity on the earlier occasion to cross-examine the witness. Since children rarely testify in court anyway, this exception is rarely used with children.

Under English common law a declarant was “unavailable” when “the person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testifying.”⁶⁵ The number of reasons that excuse the appearance of a hearsay declarant has been broadened under the Federal Rules to include witnesses claiming a Fifth Amendment privilege, witnesses claiming privileged communications arising out of a spousal, attorney-client, doctor-patient, or priest-penitent relationship, cases where the declarant refuses to answer any questions in court despite having been ordered to do so, and cases where the declarant testifies and states that he lacks all memory of the subject matter of his earlier declaration (Rule 804 [a][1][5]). These last two cases in which the declarant refuses to answer despite being ordered to do so, or in which the witness lacks memory of the earlier statement, are the ones most commonly used with child witnesses. A trial court should not find a child “unavailable” simply because of inconsistencies in his or her testimony, and to do so constitutes reversible error.⁶⁶

Under federal law an open-ended “catch all” hearsay exception is included with both classes of hearsay: presumptively reliable hearsay (in which the appearance of the declarant is excused), and necessity hearsay (in which the appearance of the declarant is excused only if the declarant is “unavailable”). In deciding whether a particular hearsay statement is admissible under these catchall exceptions, courts are to determine whether there are “equivalent circumstantial guarantees of trust worthiness” in deciding on a case-by-case basis whether hearsay statements will be admitted. Washington does not have such “catchall” exceptions.

SPECIAL CHILD HEARSAY STATUTE

⁶³*In re Dependency of M.P.*, 76 Wn. App. 87 (1994), review denied, 126 Wn. 2d 1012 (1995).

⁶⁴Rule 804 (b)(3).

⁶⁵Wigmore McGough, LS (1994). *Child witnesses: fragile voices in the American legal system*. (pp.140). New Haven: Yale University Press.

⁶⁶*State v. Griffith*, 45 Wn. App. 728 (1986).

When a child's hearsay statements will not fall under any other enumerated exception, courts have often used the catchall exceptions to allow the child's statement into evidence. The problem with these exceptions is that courts are given little guidance as to how to decide whether these are "sufficient indicia of reliability". Because of challenges to using the "catchall" exceptions to introduce children's testimony, and in an effort to broaden the ability to allow hearsay declarations of children, in the 1980's most states created special hearsay exceptions for children's testimony about sexual abuse or neglect. Although most of these statutes are limited to criminal prosecutions of sexual abuse and neglect, Washington's also applies to dependency (abuse or neglect) proceedings in the juvenile courts.⁶⁷ Again, however, these statutes provide little guidance as to how trial judges are supposed to decide whether to allow the hearsay. Washington's statute provides only "that the time, content, and circumstances of the statement provide sufficient indicia of reliability".⁶⁸ The Washington model also requires that if the child does not appear at trial as a witness, his hearsay statements cannot be admitted unless other corroborating evidence is presented.⁶⁹ In a U.S. Supreme Court case, *Idaho v. Wright*,⁷⁰ however, the court seemed to hold that child hearsay evidence must have inherent indicia of reliability in and of itself, and corroborative evidence may not be considered in a trial court's initial determination of whether such hearsay is reliable.

CHILD HEARSAY RULE- COMPETENCY AT THE TIME OF HEARSAY STATEMENT

In *State v. Jones*,⁷¹ the Washington Supreme Court commented on the purpose of Washington's special child hearsay exception.

"RCW 9A.44.120 is principally directed at alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse. Acts of abuse generally occur in private, and in many cases leave no physical evidence. Thus, prosecutors must rely on the testimony of the child victim to make their cases. Children are often ineffective witnesses, however. Feeling intimidated and confused by courtroom processes, embarrassed at having to describe sexual matters, and uncomfortable in their role as accuser of a defendant who may be a parent, or other relative or friend, children often are unable or unwilling to recount the abuses committed on them. In addition, children's memories of abuse may have been dimmed with the passage of time. For these reasons, the admissibility of statements children make outside the courtroom, and especially statements made close in time to the acts of abuse they describe, is crucial to the successful prosecution of many child sex offenses."

The Washington child hearsay statute⁷² applies only in dependency cases and criminal cases, including juvenile offender cases. This statute applies when a child younger than the age of ten describes sexual or physical abuse of himself or herself (or abuse of another child he or she has witnessed) to another person. Hearsay statements made to parents, therapists, child protective services workers, investigators, etc., are routinely admitted by most trial courts under this statute, if the child involved is found competent to testify and actually testifies at the trial as to the abuse. "If both the hearsay declarant and the hearsay recipients testify at trial and are subject to full cross-examination, no issue of truly constitutional magnitude is involved."⁷³ However, if the child is found to be incompetent, or does not testify for other reasons, the child is then thought to be "unavailable" as a witness. As discussed above "unavailability" is usually based on the physical absence of the witness, but may also arise when the witness has

⁶⁷RCW 9A.44.120 [Rev.1988].

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Idaho v. Wright*, 497 U.S. 805 (1990).

⁷¹*State v. Jones*, 112 Wn. 2d 488 (1989).

⁷²RCW 9A.44.120.

⁷³*State v. Quigg*, 72 Wn. App. 828 (1994), citing *State v. Leavitt*, 111 Wn. 2d 66 (1988). See also *State v. Ralph G*, 90 Wn. App. 16 (1998).

asserted a privilege, refuses to testify, or claims lack of memory.⁷⁴ The child was not considered to have “testified” and was thus “unavailable” in a case where the state called the child to the stand but examined her only about her school, her pets, and other matters unrelated to the proceeding at hand.⁷⁵

Obviously the question arises as to whether a hearsay statement can be introduced from a child who has been deemed incompetent to testify at trial. The trial setting requires that a witness give testimony under oath and that a witness be able to participate in cross-examination, so the witnesses’ ability to distinguish truthful statements from false statements, and knowledge of his sworn obligation to tell the truth is important. On the other hand, hearsay exceptions necessarily contemplate that the declarant’s perception, memory, and credibility will not be explored through the use of cross-examination. Instead, with hearsay statements the trial court must find that the circumstances surrounding the making of the statement render the statement inherently trustworthy. *State v. C.J.*,⁷⁶ a recent Washington Supreme Court decision, held that a trial court does **not** need to find a child was competent to testify at the time hearsay statements were made in order for them to be admissible, as long as the statements are deemed to have been **reliable**.⁷⁷

However, when there is evidence that the child could not distinguish truth from lies at the time he spoke, this “may be considered as part of the totality of circumstances indicating reliability”. *State v. C.J.* (cited above).

⁷⁴ *State v. Ryan*, 103 Wn. 2d 105 (1984).

⁷⁵ *State v. Rohrich*, 132 Wn. 2d 472 (1997).

⁷⁶ No 71867-9, 63 P. 3d 765 (Feb 6, 2003), Over-ruling *State v. Karpenski*, 94 Wn. App 80 (1999).

⁷⁷ See *State v. Ryan*, 103 Wa. 2d 165 (1984), and Part III of this paper.

PART III: THE CHILD HEARSAY RULE- RELIABILITY

The child hearsay statute makes an additional requirement that before the hearsay may be admitted as evidence the court must find in a pre-trial hearing “that the time, content, and circumstances of the statement provide sufficient indicia of reliability”.⁷⁸ According to *State v. Ryan*⁷⁹ these indicia must come from the time, content and circumstances of the statement itself, not from other evidence showing it to be true. As mentioned above trial courts will usually admit the hearsay statements of children who are deemed to be competent and do testify at trial, but technically even these hearsay statements must meet the test of “reliability”. However, the issue is usually much more critical (and contested) in cases where the child does not testify at trial, and in those cases additional “corroboration” of the hearsay statements is also required before the hearsay will be allowed.⁸⁰

In an attempt to define what “sufficient indicia of reliability” meant, *Ryan* set forth nine factors to determine reliability of child hearsay, five from *State v. Parris*⁸¹ and four from *Dutton v. Evans*⁸²,

The *Parris* factors are:

1. Whether there is an apparent motive to lie⁸³
2. The general character of the declarant
3. Whether more than one person heard the statements
4. Whether the statements were made spontaneously⁸⁴, and
5. The timing of the declaration and the relationship between the declarant and the witness

The *Dutton v. Evans* factors are:

6. The statement contains no express assertion about the past fact⁸⁵
7. Cross-examination could not show the declarant’s lack of knowledge⁸⁶

⁷⁸RCW 9A.44.120 (1).

⁷⁹*State v. Ryan*, 103 Wn. 2d 165 (1984).

⁸⁰RCW 9A.44.120 (2)(4a).

⁸¹*State v. Parris*, 98 Wn. 2d 140 (1982).

⁸²*Dutton v. Evans*, 400 U.S. 74 (1970).

⁸³ It is of course possible that children might consciously and deliberately lie with their testimony as opposed to giving testimony they think to be true that is actually false. There is evidence that even very young children sometimes do lie with full appreciation of the differing perspectives of their listeners. For example 88 percent of three year-olds who were instructed not to peek at a toy actually did peek. When asked if they did peek only 34 percent admitted it. Lewis, M., Stranger, C. & Sullivan, M. (1989). Deception in three-year olds. *Developmental Psychology*, 25, 439-443. Mothers report that the most frequent motivation for their four year-olds to lie is to avoid punishment. Bussey, K. (1992). Children lying and truthfulness: Implications for children’s testimony, in Ceci, S.J., Leichtman, M. & Putnick, M. (eds.). *Cognitive and social factors in preschoolers’ deception*. (pp. 89-110). Hillsdale, New Jersey: Erlbaum. Young children will consciously distort their reports of what they have witnessed, often to avoid embarrassment or because of fear of reprisal. Ceci, S.J. & Bruck, M. (1993). Suggestibility of the child witness: A historical review and synthesis. *Psychological Bulletin*, 113:3, 427.

⁸⁴ For purposes of child hearsay analysis, spontaneous statements are statements the child volunteered in response to questions that were not leading and did not in any way suggest an answer. Unlike an excited utterance, the statements need not be contemporaneous with the events in question. See *State v. Henderson*, 48 Wn. App. 543, review denied, 109 Wn. 2d 1005 (1987). A trial judge may find child hearsay statements unreliable on the ground that there has been a lapse of time or “intervening counseling” between the abuse and the statements at issue only when the evidence demonstrates that the lapse or counseling somehow affected the child’s statements. *State v. Carlson*, 61 Wn. App. 865 (1991).

⁸⁵ Note: some courts hold that this factor has been eliminated under Washington Law. See *State v. Strange*, 53 Wn. App. 638, review denied 113 Wn. 2d 1007 (1989).

8. The possibility of the declarant's faulty recollection is remote, and
9. The circumstances surrounding the statement (in the case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

These nine "*Ryan* factors" are commonly applied by trial courts to determine whether there are sufficient indicia of reliability for child hearsay. There is no guidance given as to which factor(s) should be given the most weight.

Notice here that the trial judge must only consider evidence about the "time, content, and circumstances of the statement" when determining reliability, and is not allowed to "boot-strap" by using other corroborative evidence adduced at trial to validate otherwise "unreliable" evidence. Similarly, the trial court is not allowed to decide the hearsay was "unreliable" based on evidence which does not corroborate. For example, in *State v. Gregory*,⁸⁷ the defendant wished to introduce a polygraph test he had taken as proof of the lack of reliability of a child's out-of-court statement, but the Washington State Court of Appeals upheld the trial court's finding that consideration of the polygraph was improper in determining "reliability", stating that for purposes of considering whether a child's hearsay should be admitted, the relevant questions was "reliability", not "credibility."

TAINT DUE TO IMPROPER SUGGESTIONS OR MISATTRIBUTION

Often times challenges to the "reliability" of a child's hearsay statement have to do with the possibility that a child's memory might have been tainted by improper or suggestive interview techniques. Some of the problems with suggestive questioning of children can be attributed to inadequacies of children's memories. A number of studies show that children have special problems remembering source information, such as when and where a particular incident occurred. Preschoolers may mix together bits and pieces of different past episodes, or may even come to believe that fantasies occurred. In one study⁸⁸ preschoolers visited "Mr. Science" at a university laboratory and watched him carry out some experiments. Four months later parents received written descriptions of other experiments the child had not witnessed, and a further incident that had not actually occurred. Parents read the stories to their children three times. When asked later about what they had seen in the laboratory, children frequently remembered witnessing experiments that had been mentioned only in the stories read to them by their parents.

A 1998 study⁸⁹ with preschoolers used praise and rewards for sought after information, expressed disappointment when the children failed to come up with the desired answer, and made invitations to speculate about what might have happened by imagining. This was called the "social incentive group", and it was compared with a control group which was subjected to suggestive questioning only but was not offered the "social incentives". In the social incentive condition, five and six year olds replied positively to less than 10% of the misleading questions. However, three year olds replied positively to 81% of the misleading questions in the social incentive group, compared to only 31% in the control condition. It appears preschoolers' recollections of events can be greatly influenced by such "social incentives".

There is some authority from other jurisdictions that a trial court should hold a separate pretrial "taint" hearing before admitting statements from children in cases where the accused

⁸⁶ Some courts believe that skillful cross-examination will usually if not always show some lack of knowledge, and therefore suggest this factor should not be considered when deciding whether the hearsay should be admitted. See *Dependency of S.S.*, 61 Wn. App. 488, review denied, 117 Wn. 2d 1018 (1991).

⁸⁷ *State v. Gregory*, 80 Wn. App. 516 (1996).

⁸⁸ Poole, D.A. & Lindsay, D.S. (1995). Interviewing preschoolers: Effects of non-suggestive techniques, parental coaching, and leading questions on reports of non-experienced events. *Journal of Experimental Child Psychology*, 60, 129-154.

⁸⁹ Garren, S., Wood, J.M., Malpass, R.S. & Shaw, J.S. (1998). More than suggestion: The effects of interviewing techniques from the McMartin Preschool Case. *Journal of Applied Psychology*, 83, 347-59.

first shows some evidence that the child's statements may have resulted from suggestive or coercive interviewing. In *New Jersey v. Michaels*,⁹⁰ Kelly Michaels was convicted of 115 counts of various crimes against children at the Wee Care Nursery School in New Jersey, where she was employed as a teacher. Many of the investigative interviews were video-taped or audio-taped, and the tapes indicate that the investigators asked the children to keep Kelly in jail, showed investigators threatening to tell a child's friends that he wouldn't cooperate and depicted investigators giving children sexual information. The New Jersey Supreme Court established the requirement in that state for "taint" hearings in such circumstances.

The Washington Supreme Court declined to require such taint hearings in *Dependency of A.E.P.*,⁹¹ a similar case (although it was a dependency case) in that there was evidence of suggestive interviewing. However, the Washington Supreme Court discussed two different ways that evidence of "taint" caused by suggestive or improper interviewing should be addressed. First, the court stated that improper or suggestive and thus "tainted" interviewing could make a witness incompetent because of faulty memory: "If a defendant can establish a child's memory of events has been corrupted by improper interviews it is possible the third *Allen* factor, "a memory sufficient to retain an independent recollection of the occurrence", may not be satisfied."⁹² Second, the court also stated that statements made by children under the child hearsay statute could be challenged because of improper or suggestive interviewing under the nine *Ryan* factors at a pre-trial hearing pursuant to RCW 9A.44.120 (1).

The Washington Supreme Court in *A.E.P.* specifically indicated that the fifth, eighth, and ninth *Ryan* factors would be relevant to claims of improper or suggestive interviewing. In *A.E.P.* the petitioner had hired a psychologist, Stuart Greenberg, Ph.D., who had testified that "over 80 percent of the studies showed children from three-to-five years old are at the height of suggestibility", and who had suggested the child's statements were unreliable because of the suggestive and improper interviewing. The court seemed to have some doubts about both A.E.P.'s "credibility" and whether her hearsay statements had been "reliable", clearly separate issues, and stated the possibility a child's memory or testimony may have been tainted by improper interviewing should be addressed under the fifth, eighth and ninth *Ryan* factors.

"The timing of the declaration and the relationship between the declarant and the witness," *Ryan*, 103 Wn.2d at 176 (fifth factor) allow the court to consider the exact nature of the exchange through which the witness obtained the child's statements. Suggestive interviewing can also affect the eighth *Ryan* factor, "the possibility of the declarant's faulty recollection is remote." *Id.* (eighth factor) "The circumstances surrounding the statement...", *Id.* (ninth factor) also make room for argument concerning the methodology of the interview. The possibility of suggestive interviews leading to tainted child hearsay statements should definitely be considered by a trial court; and Petitioner did present the issue in the dependency hearing.

Petitioner challenges the trial court's finding that all of A.E.P.'s hearsay statements were reliable. We agree the circumstances surrounding A.E.P.'s disclosures to the Montgomeries would appear to render her initial disclosures highly unreliable. Certain aspects of the subsequent interviews with Kyle Smith and Detective Kelley also cast suspicions on the credibility of A.E.P.'s statements. Petitioner has not alleged any impropriety by Dr. Greenberg or Dr. Cillis, who both interviewed A.E.P. on two different

⁹⁰*New Jersey v. Michaels*, 625 A. 2d 489 (1993), affirmed 642 A. 2d 1372 (1994).

⁹¹*Dependency of A.E.P.*, 135 Wn. 2d 208 (1998).

⁹²*State v. Allen*, 70 Wn. 2d at 692.

occasions; but A.E.P. refused to say her father had touched her in those interviews.⁹³ Ultimately, we decline to rule on the reliability of A.E.P.'s hearsay statements under *Ryan*, because the statements—even if reliable—must still satisfy the corroboration requirement.”

As A.E.P. illustrates, psychologists also get involved in testifying about the “taint” issue as to whether the child’s memory of the events to which the testimony relates has been so corrupted by improper or suggestive interviewing techniques that the child’s subsequent testimony is irretrievably tainted. In A.E.P. the Washington Supreme Court stated this issue is to be analyzed by the trial judge under the nine *Ryan* factors as discussed above. In that dependency case the petitioner hired a psychologist, Dr. Stuart A. Greenberg, who interviewed the two girls who had reportedly stated that the petitioner (their father) had engaged in sexualized behavior with them. Dr. Greenberg was “questioned in depth about proper versus improper interviewing techniques”; and as mentioned above he “stated that 80% of the studies showed children from three to five years old are at the height of suggestibility.” The Washington Supreme Court ruled that A.E.P. had been incompetent to testify because of the second *Allen* factor, under which “A.E.P. must have had the mental capacity at the time of the alleged abuse to receive an accurate impression of it. Having reviewed the entire record, we find nothing establishing the date or period of the alleged sexual abuse.”

In at least one case, which happened to involve one of the notorious Wenatchee child sex abuse prosecutions, an appellate court reversed a trial court’s decision not to authorize expert testimony about “false memory syndrome”, which would have explained how Detective Perez’s interviewing methods could have led to inaccurate testimony.⁹⁴ In cases in which psychologists or other experts are testifying as to how a child’s recollection could have been tainted by suggestive questioning, many judges worry that such testimony might invade the province of the jury to determine witness credibility. Thus, experts should be careful to state that they have formed no opinion as to whether the child is telling the truth, but rather that the opinion goes to the *level* of risk of unreliability based on the way the child was interviewed.

PART IV: CHILD HEARSAY RULE—CORROBORATION

Psychologists also give expert testimony as to whether there is sufficient “corroboration” of the child’s hearsay statements under the child hearsay statute⁹⁵ in cases where the child does not testify. The most effective types of corroboration for child sexual abuse cases are eyewitness testimony, a confession by the accused, or medical or scientific testimony documenting abuse. However, in many if not most cases of child sexual abuse there is no direct physical or testimonial evidence to corroborate the child’s statement. Consequently the corroboration requirement must reasonably be held to include indirect evidence of abuse.⁹⁶ In *State v. Swan*,⁹⁷ the Washington State Supreme Court stated, “A child’s sexual behavior can corroborate, if an expert persuades the court that it is abnormal in a child of that age”. Obviously the defendant (or adverse party) could also put on expert testimony that given behaviors on the part of the child were not corroborative of physical or sexual abuse. Experts would utilize the extensive literature on child sexual abuse and/or physical abuse in addressing that issue of corroboration.

In a recent study a multi-disciplinary team investigated the diagnostic utility of sexual behavior problems in diagnosing sexual abuse using the Child Sexual Behavior Inventory. Sexually abused children were just as likely to have high CSBI scores as non-sexually abused

⁹³ See *State v. Young*, 62 Wn. App. 895 (1991). The reliability of a child’s hearsay is enhanced if the accusations are made to a professional (and is diminished if they are not repeated during an interview with a professional), since professionals are thought to be “objective”.

⁹⁴ *State v. Carol M.D.*, 89 Wn. App. 77 (1997), cert denied, 111 S. Ct. 752 (1991).

⁹⁵ RCW 9A.44.120.

⁹⁶ *State v. Swan*, 114 Wn. 2d 613 (1990).

⁹⁷ *Id.*

children⁹⁸. Thus, it appears the commonly believed idea that sexually abused children exhibit more sexual behavior problems may be in error. For years many people believed that a child's style of play with anatomically correct dolls could corroborate sexual abuse, but there is now general agreement that that use of the dolls is improper.⁹⁹

What a child says while asleep may provide corroboration. Statements made by a child while asleep are not considered hearsay, as they are not considered to be conscious or intentional assertions of fact or opinion. In one case¹⁰⁰ two children living in different homes had nightmares in which they yelled the defendant's name. The trial court relied on expert testimony that nightmares are a common symptom of sexual abuse.

The Washington Supreme Court actually decided to overturn the trial court's decision to allow *A.E.P.*'s hearsay statements into evidence based on lack of corroboration.¹⁰¹ The requirement for "corroboration" does not exist in cases where the child-witness is found to be competent and testifies at trial about the incident.¹⁰² The court compared the *A.E.P.* case, in which there was little or no corroboration, to the *Swan* case, in which the victim's hearsay statements were corroborated by parallel disclosures, precocious sexual knowledge, masturbatory behavior, behaviors with an anatomically correct doll, complaints of pain upon urination, and other physical and emotional evidence.

In *Swan* the child victim described episodes of fellatio, ejaculation and intercourse. The *Swan* court held that the three-year-old alleged victim's accurate description of such acts indicated precocious sexual knowledge which corroborated the children's allegations of abuse. The *Swan* court held that the children's precocious sexual knowledge was sufficient corroborative evidence on the basis that the children could only have learned it as the result of having been abused. Obviously experts would have much to offer in this area, as there is an extensive literature on which factors are actually correlated with sexual abuse, and just as importantly, which factors are actually not correlated with sexual abuse. Experts can and do testify as to whether the child's behavior offers independent corroboration of an alleged act of sexual abuse. Each act described in the hearsay statement sought to be admitted must be separately corroborated.¹⁰³ Corroborative evidence need not be conclusive — it needs only support a reasonable inference that the acts alleged in the hearsay statements occurred.¹⁰⁴ However, an "inconclusive physical exam" that has consistent with abuse (digital fondling) but also consistent with lack of abuse was deemed to be insufficient corroboration in *Dependency of A.E.P.*¹⁰⁵

USING GROUP DATA IN INDIVIDUAL CASES TO ESTABLISH CORROBORATION

The scientific database for the behavioral sciences on which researchers and clinicians rely is generally nomothetic, i.e. principles of behavior are derived from comparisons of groups differing on particular dimensions. However, legal decisions must be made about individuals. Considerable controversy exists as to whether probability estimates about an individual case should be allowed based on group data. Clearly all scientific evidence about individuals which is based on group data is probabilistic in nature.

⁹⁸ Drach, K.M., Wientzen, J. & Ricci, L.R. (2001). The diagnostic utility of sexual behavior problems in diagnosing sexual abuse in a forensic child abuse evaluation clinic. *Child Abuse and Neglect*, 25, 489-502.

⁹⁹ Koocher, G.P., et al (1995). Psychological science and the use of anatomically detailed dolls in child sexual assessments. Final Report of the American Psychological Association Anatomical Doll Task Force. *Psychological Bulletin*, 118:2.

¹⁰⁰ *State v. Stevens*, 58 Wn. App. 478, review denied, 115 Wn. 2d 1025 (1990); numerous cites are provided to support the proposition that nightmares are a common symptom of sexual abuse.

¹⁰¹ RCW 9.A.44.120 (2)(b).

¹⁰² *State v. Pham*, 75 Wn. App. 626 (1994).

¹⁰³ *State v. Jones*, 112 Wn. 2d 488 (1989).

¹⁰⁴ *State v. Swan*, 114 Wn. 2d 613 (1990); *State v. Bishop*, 63 Wn. App. 15 (1991).

¹⁰⁵ *Dependency of A.E.P.*, 135 Wn. 2d. 208 (1998).

Consider a case in which an expert were to testify that children who have been abused frequently keep secrets, delay disclosure, and retract their allegations, and the prosecution were to attempt to admit that expert opinion as corroboration to attempt to prove that a child had been truthful in her initial allegation which she had since retracted.

Whereas it is frequently true that abused children do exhibit this “child abuse accommodation syndrome”¹⁰⁶ there is no evidence it occurs more frequently among abused children than among non-abused children. Thus, such testimony is properly admitted to show that some abused children do show accommodation, educating the jury that abused children can keep secrets, delay disclosure, and retract. However, the testimony would not be properly admitted to show that a given child was indeed abused; because the fact a child exhibits sexual abuse accommodation does not increase the likelihood the child was indeed abused. It is important for jurors to hear that a surprising number of sexually abused children do retract their allegations. Otherwise, they may assume that retractions prove abuse did *not* occur.¹⁰⁷

Consider also a case in which an expert testified that a child met the “profile” or “syndrome” of a battered child, or a sexually abused child, and that evidence was used as corroboration to show the child was likely to be telling the truth about the abuse. Such testimony would be intended to show that the purported victim shows behavioral characteristics exhibited by a certain proportion of victims of a particular type of offense. There is considerable controversy as to whether there is scientific basis to a “child abuse syndrome”.¹⁰⁸ Even assuming that such evidence were strong scientifically, and that a valid profile of a sexually abused child could be constructed, the testimony would be inherently misleading due to base rate differences. Melton¹⁰⁹ offers a hypothetical example. Suppose that a test could be devised that was so powerful that 90 percent of children who had actually recently been sexually abused would be identified by the “profile”, and 90 percent of children who had not been sexually abused would be correctly identified. Assume that five percent of children in the general population have recently been sexually abused, a percentage which probably substantially exceeds the actual base rate of recent sexual abuse. If a given individual child fits the profile, what is the probability she has actually recently been sexually abused? If 1000 children randomly selected were given the test, it would correctly identify 90% of the group of children who had actually been recently sexually abused (true positives). There would be on average 50 children out of the 1000 tested who had actually recently been sexually abused, and the test would correctly identify 90% of them, or 45 of them. However, the test would also identify 10% of the group of children who had not recently been sexually abused. Out of the 950 children who had not recently been sexually abused, the test would identify 10% or 95 of them, as having been recently sexually abused. The test would identify 130 children (45+95) as having been recently sexually abused, but only 45 of those, or 35%, would actually have been recently sexually abused. However, a judge or jury, hearing that the victim met the profile, would probably not realize that because of the base rates the probability the particular child had been sexually abused was so low.

What if a mental health expert were to testify that the defendant had certain characteristics which were commonly found among child abusers or child molesters, and that evidence was offered as corroboration to suggest the defendant was guilty? When applied to criminal defendants such evidence is character evidence, which is not usually admissible unless

¹⁰⁶ Summit, R.C. (1983). The child abuse accommodation syndrome. Journal of Child Sexual Abuse, 1, 153-163.

¹⁰⁷ See Lyon, T.D. (2001). Scientific support for expert testimony on child abuse accommodation, to appear in J. Conte (Ed.), The knowns and unknowns of child sexual abuse. Thousand Oaks: Sage. The paper is available at tlyon@law.usc.edu.

¹⁰⁸ Conte, J.R. and Berliner, L. (1987). The Impact of Sexual Abuse of Children: Empirical Findings, in Handbook of Sexual Abuse of Children: Assessment and Treatment Issues. Edited by Lenore Walker. New York: Springer Pub. Co.

¹⁰⁹ Melton, G.B. (1997). Psychological Evaluations for the Courts (2nd ed.). (pp.15). New York: Guildford Press.

the defendant puts his character at issue by claiming that he is not the type of person who would commit the crime.¹¹⁰ Even though there may be a true correlation, which has been established through good research between particular traits or identifiers and involvement in certain types of offenses, such testimony is almost always deemed too prejudicial to permit except in response to defense assertions. For example, in *State v. Maule*,¹¹¹ in which the defendant was the father of one of the alleged victims, and a father figure to the other, an interviewer at Harborview Medical Center interviewed the two girls, both of who later testified at trial. The interviewer also testified at trial about characteristics of abused children in general, stating that both girls manifested characteristics during their interviews consistent with those of sexually abused children. She also testified that a majority of child abuse cases involved a male parent figure as the perpetrator, with biological parents in the majority. The court held that the theory that sexually abused children manifest particular identifiable characteristics “was not shown to be supported by accepted medical or scientific opinion”. The court went on to say that even if the interviewer’s theory that the majority of perpetrators were fathers were valid (and thus relevant under Evidence Rule 404), its admission into evidence was prejudicial to the defendant under Evidence Rule 403, which excludes evidence that is relevant but involves a danger of unfair prejudice. Citing another Washington Case, *State v. Steward*,¹¹² in which it was held to be reversible error to admit expert testimony in a murder prosecution of a babysitting boyfriend that “serious injuries to children are often inflicted by either live-in or babysitting boyfriends”, the court reversed the decision to allow the evidence. It appears that in Washington, given the presumption of innocence for criminal defendants, defendants must be convicted on the basis of what they did, not who they are.

PART V: THE SIXTH AMENDMENT’S CONFRONTATION CLAUSE

The Sixth Amendment of the U.S. Constitution states: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...”. A strict reading of the confrontation clause would suggest that no hearsay should ever be admitted in a criminal trial unless the declarant were present in court to give testimony. However, in 1892 the U.S. Supreme Court declared that the confrontation clause does not forbid hearsay introduced by the state in a criminal case. Hence, the confrontation clause does not require the state to produce every accuser.¹¹³ The court has struggled to devise some way of deciding which types of hearsay would be allowed in criminal cases. In *Ohio v. Roberts*,¹¹⁴ the U.S. Supreme Court indicated that the prosecution must either produce the hearsay declarant as a witness, or demonstrate the witness’s “unavailability”, and in addition must demonstrate that the hearsay is trustworthy unless it falls “within a firmly rooted hearsay exception”.

However, in *White v. Illinois*,¹¹⁵ the U.S. Supreme Court seemed to back away from the requirement that all hearsay declarants must be shown to be unavailable. The four-year-old girl who had allegedly been sexually abused by her mother’s former boyfriend experienced “emotional difficulty” on being brought into the courtroom, and “...departed without testifying”, but the prosecution sought to introduce her hearsay statement. The court decided that at least for “firmly-rooted” hearsay exceptions that are “long-established”, reliability is the exclusive test for determining the admissibility of hearsay. The court thought that when a hearsay statement is actually thought to be more reliable than an in-court version the declarant would give, cross-examination in order to test truthfulness is not necessary. However, unavailability must still be demonstrated when the hearsay exceptions do not fall within the presumptively reliable exceptions. As mentioned above, under the Federal Rules of Evidence a declarant is

¹¹⁰Fed Rule of Evidence 404.

¹¹¹*State v. Maule*, 35 Wn. App. 287 (1983).

¹¹²*State v. Steward*, 34 Wn. App. 221 (1993).

¹¹³*Mattox v. U.S.*, 146 U.S. 140 (1892).

¹¹⁴*Ohio v. Roberts*, 448 U.S. 56 (1980).

¹¹⁵*White v. Illinois*, 112 S.Ct. 736 (1992).

“unavailable” as a witness when “though present, the declarant refuses to answer any questions despite a court order to do so”¹¹⁶ and”, where the declarant testifies, but only to state that he or she lacks memory of the subject matter of the earlier declaration”.¹¹⁷ As already discussed, these two types of unavailability are most frequently seen in criminal prosecutions involving child witnesses. In *State v. Shidel*,¹¹⁸ Washington has decided that a child with no memory of the event at time of trial was “unavailable”.

“Incompetency” is not specified as a ground for unavailability under the Federal Rules, but a Washington case suggests that in Washington State it is.¹¹⁹ A related issue is whether the state and federal confrontation clauses preclude allowing hearsay under the child hearsay statute consisting of previous statements of a child that abuse occurred if that child then takes the stand at trial and “recants”, saying that the previous statements were lies. In *State v. Clark*¹²⁰ an eight-year-old girl took the witness stand and recanted her prior allegations that her stepfather had molested her, saying she had lied because Clark had left her family, leaving them without a phone or car. Clark’s attorney was, of course, afforded an opportunity to cross-examine the child. Her prior statements to a school-interventionist and a prosecutor child-interviewer that abuse had occurred were admitted under the special child hearsay statute, as were Clark’s confession that on three occasions he had woken up to find the girl masturbating him, and he had allowed it to go on until he ejaculated. He was convicted of three counts of child molestation in the first degree. The Washington Supreme Court held, “while Clark may view his conviction notwithstanding (the girl’s) clear statements that her hearsay statements were lies as a miscarriage of justice, it is nevertheless not a violation of the confrontation clause”.

USE OF SPECIAL SCREENS OR CLOSED CIRCUIT TELEVISION IN COURT

Adults who refuse to testify can be held in contempt of court. Although statutes empower the court to conduct contempt proceedings and impose detention as a sanction, children are very rarely held in contempt when they refuse to testify. One of the most common reform measures enacted specifically for child witnesses in the 1980’s was aimed at avoiding cases failing because of a child witness’s refusal to testify by authorizing the use of special screens or closed-circuit television so that the child would not have to see the accused while giving testimony in the courtroom. In *Coy v. Iowa*,¹²¹ the U.S. Supreme Court reviewed Iowa’s statute, which permitted the placement of a screen between the child and the accused so that the child could not see the accused. Coy was convicted, but appealed on the ground this procedure was violative of the confrontation clause. The U.S. Supreme Court reversed the decision by a five to four vote, and it appeared other states’ “shield” laws were also in danger of being held unconstitutional. However just two years after the Coy decision the U.S. Supreme Court revisited the issue, in *Maryland v. Craig*¹²², and upheld the validity of a Maryland statute which required a preliminary hearing on the issue of whether the potential child witness would experience “serious emotional distress such that the child cannot reasonably communicate”, when viewing the accused face-to-face. If so, the court could allow the child victim’s testimony by closed-circuit television, which made it impossible for the child to see the defendant. In order that the confrontation clause is not violated, the court must make three findings. First, the court must determine that in the particular case at hand trauma to the child will probably occur. Second, the trauma must be caused by the physical presence of the defendant rather than just by mere fear of the courtroom setting. Third, the trauma experienced by the child must be

¹¹⁶804 [a] [1].

¹¹⁷804 [a][2].

¹¹⁸*State v. Shidel*, 688 P. 2d 538 (Wash. App. 1984), review denied, 103 Wn. 2d 1013 (1985).

¹¹⁹*State v. Karpenski*, 94 Wn. App.85 (1999).

¹²⁰*State v. Clark*, 139 Wn. 152 (1999).

¹²¹*Coy v. Iowa*, 487 U.S. 1012 (1988).

¹²²*Maryland v. Craig*, 497 U.S. 836 (1990).

“more than de minimis “, i.e., more than: “mere nervousness or excitement or some reluctance to testify”.¹²³ The decision clearly anticipated that expert witnesses would be called to testify about the psychological impact that face-to-face confrontation would create in the child witness. Although the U.S. Supreme Court did not discuss any empirical evidence that face-to-face confrontation can inhibit children’s testimony, since the *Craig* decision one study has been presented showing that for young children face-to-face presence between a child and a defendant can inhibit truthful testimony.¹²⁴ Another study showed that jurors were no more able to detect when children were lying in a face-to-face condition than through a closed circuit TV condition.¹²⁵

Washington enacted RCW 9A.44.150, which only comes into play when there was an alleged act or an attempted act of sexual contact or physical abuse. This statute permits a child under the under the age of ten upon motion by the prosecuting attorney to testify by means of one-way closed circuit television in a criminal case. Washington’s statute closely follows the rules laid down¹²⁶, so it is “constitutional on its face”.¹²⁷ The trial judge must find “by substantial evidence, in a hearing conducted outside the presence of the jury, that requiring the child to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at trial. If the defendant is excluded from the presence of the child, the jury must also be excluded”.

The statute also requires as a prerequisite to allowing testimony by closed circuit television that the court must find “that the prosecutor has made all reasonable efforts to prepare the child for testifying, including informing the child or the child’s parent or guardian about community counseling services, giving court tours, and explaining the trial process. If the prosecutor fails to demonstrate that preparations were implemented or the prosecutor in good faith attempted to implement them, the court shall deny the motion.”¹²⁸ This statutory provision was closely tailored after *Ohio v. Roberts*¹²⁹, which requires that witnesses cannot be determined to be constitutionally “unavailable” unless the prosecutor has made a good faith effort to obtain the witness’s presence at trial. *State v. Foster*¹³⁰ held that this statute was not unconstitutional under article I, section 22 of the Washington Constitution, (Washington’s “confrontation clause”) which provides, “In criminal prosecutors the accused shall have the right ... to meet the witnesses against him face-to-face”, or under the U.S. Constitution’s confrontation clause.

In the *Foster* case the trial court had conducted two competency hearings. In the first the six year old child witness and the defendant were in the courtroom together, and the child repeatedly responded that “maybe” she would be able to tell the truth about what happened, or that she “didn’t know” if she would be able to do so. When asked by the prosecutor whether if she couldn’t see the defendant, would she be able to tell the truth about what happened, she said she would, and when specifically asked whether it was because she could see him that she felt unable to tell the truth, she responded, “yes”. During the second competency hearing, which was held by means of closed circuit television a few days later, the girl promptly promised to tell the truth, and the trial judge ruled she was competent, noting “a great deal of difference between the child that testified the other day and the child who testified today.” The trial court made a specific finding that there was substantial evidence that requiring her to testify in front of

¹²³*Maryland v. Craig*, (1990) at 856.

¹²⁴Peter, D. (1991). “Confrontational Stress and Children’s Testimony: Some Experimental Findings”, presentation, Society for Research in Child Development, Seattle WA, April 21.

¹²⁵Orcutt, H.K., et.al. (2001). Detecting Deception in Children’s Testimony: Factfinders’ Abilities to Reach the Truth in Open Court and Closed-Circuit Trials. Law and Human Behavior, 25:4, 339-72.

¹²⁶*Maryland v. Craig*, 497 U.S. 836 (1990).

¹²⁷*State v. Foster*, 81 Wn. App. 444 (1996).

¹²⁸RCW 9A.44.150 (4)(e).

¹²⁹*Ohio v. Roberts*, 81 Wn. App. 444 (1986).

¹³⁰*State v. Foster*, 81 Wn. App. 444 (1986).

the defendant would cause her to suffer serious emotional or mental distress which would prevent her from reasonably communicating at trial. In *Foster* the Washington State Court of Appeals upheld the trial court's decision. Although expert testimony had not been required in that case, the Court of Appeals specifically discussed that expert testimony could be necessary in some cases to establish whether it would be difficult or impossible for a given child to communicate effectively in front of the accused due to serious emotional or mental distress caused by his presence, such that the child would be "unavailable" in the constitutional sense. The state need not show permanent psychic scarring to the child, only that the child's emotional distress is sufficiently serious that it prevents the child from communicating at trial.

Experts undertaking these types of evaluations would address whether there would be "serious emotional or mental distress" caused by the defendant's presence in the courtroom, which was not caused by "mere nervousness excitement, or some reluctance to testify". If so, the expert would then address whether that emotional or mental distress would make it difficult or impossible for the child to communicate effectively in front of the accused.

The solution to the child's reluctance to testify may not always be screening or closed circuit TV. In one Washington case¹³¹ the trial court permitted a child at a competency hearing to whisper answers to questions to an adult who was sworn to truly and correctly report the answers. The Washington State Supreme Court held this procedure did not constitute reversible error. The mere fact that a child witness is reluctant to testify at a competency hearing or at trial does not necessarily render the child incompetent.¹³²

CONCLUSION

There are four areas in which expert psychological opinions are offered in cases involving child witnesses. The first is whether the child is competent to testify at the time of trial. This involves assessment of the child's ability to have perceived the incident, to recall the incident, and to express himself about the incident, as well as the child's ability to distinguish truth from falsehood and to understand and carry out his or her oath and obligation to speak the truth.

The second issue about which expert psychological opinions may be offered involves whether the interviewing process was suggestive or improper. The *A.E.P.* court held that the nine *Ryan* factors were to be utilized in doing this analysis, to determine the statement's "reliability".

The third issue about which expert opinions may be offered is whether there is independent *corroboration* of the abuse. This issue also only arises if the child witness is "unavailable" to testify or thought to be "incompetent" at trial to be a witness. As outlined in *Swan* the psychologist testifies as to whether there is independent corroboration of physical and or sexual abuse other than the child's statement alleging abuse.

The fourth issue about which expert opinions may be offered is whether a screen or closed-circuit television system is necessary in order to make it possible for a traumatized child witness to testify truthfully. This occurs in cases in which the child is so traumatized when able to see the defendant that the child cannot testify truthfully unless the child is unable to see the defendant.

¹³¹ *State v. Leavitt*, 111 Wn. 2d 661 (1988).

¹³² *State v. Carlson*, 61 Wn. App. 865 (1991), review denied, 120 Wn. 2d 1022 (1993).