

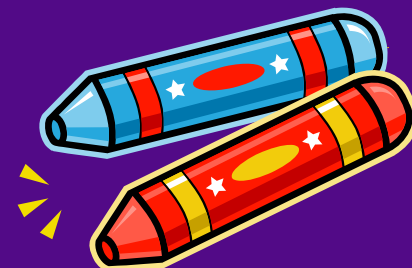
Legal Issues Involving Child Witnesses

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Objectives

- Thorough revelation of facts in order for most appropriate determination to be made
- Protect victim from further trauma
- Follow procedures that have the child's best interest at heart





Competency

- N.C.G.S. 8C-1, Rule 601
- Every person is generally deemed competent to testify except...
- A witness is disqualified when the court determines that he is:
 - Incapable of expressing himself concerning the matter in such a way as to be understood (directly or through interpretation); OR
 - Incapable of understanding the duty of a witness to tell the truth



Competency

- Within the sound discretion of the trial court
 - State v. Hicks, 319 N.C. 84
- Judge must rely on his own personal observations of the child's demeanor and responses to inquiry on voir dire
 - State v. Roberts, 18 N.C. App. 388
- State and defendant may not stipulate on this issue absent the trial judge's independent finding
 - State v. Fearing, 315 N.C. 167



Child Witnesses

- There is no fixed age below which a person is considered too young to testify
 - State v. Fearing, 315 N.C. 167, 173
 - Examples:
 - Age 4, events at age 2
 - Ward, 118 N.C. App. 389
 - Age 5, events at age 2 ½
 - Reeves, 337 N.C. 700
- Even mentally deficient persons may be called as witnesses
 - Artesani v. Gritton, 252 N.C. 463





Child Witnesses

- Fact that child is uncertain about times and dates does not render her incompetent to testify
 - State v. Fletcher, 322 N.C. 415
- Inconsistencies concerning knowledge of what it means to tell the truth do not render child incompetent to testify
 - State v. Ward, 118 N.C. App. 389
 - See also State v. Meadows, 158 N.C. App. 390 and State v. Andrews, 131 N.C. App. 374



Competency Determination

- Is the child able to understand their obligation to tell the truth and able to relate events which they have seen, heard, or experienced?
 - In re Faircloth, 137 N.C. App. 311





Competency Determination

- If child is determined to be incompetent:
 - Offer of proof is required for appellate review
 - An exception to the exclusion of evidence cannot be sustained absent demonstration on the record of what the witness' testimony would have been if she had been allowed to testify
- In re M.G.T.-B., 629 S.E.2d 916



Competency v. Availability

- A witness is unavailable when:
 - Exempt by privilege
 - Refuses to testify even when ordered to do so
 - Testifies to lack of memory
 - Unable to be present because of death or a “then existing” physical or mental illness or infirmity
 - Absent and proponent of his testimony is unable to procure attendance by process or reasonable means
- N.C.G.S. 8C-1, Rule 804(a)



Competency v. Availability

- Testimony that the event of testifying would be harmful to the child is not enough
- There must be evidence that the child's *presently* existing mental condition resulting from abuse profoundly affects the child's ability to relate events and to understand obligation to tell the truth
- In re Faircloth, 137 N.C. App. 311



So how do we protect
children from trauma
when it doesn't render
them incompetent or
unavailable?





Parental Rights

- Parents faced with loss of parental rights must be provided with “fundamentally fair procedures which meet the rigors of due process”
 - In re J.B., 172 N.C. App. 1





Eldridge Factors

- Due Process in parental rights termination determined by balancing three factors:
 - Private interest affected by the proceeding
 - Risk of error created by procedure
 - Governmental interest supporting the challenged procedure
- In re J.B., 172 N.C. App. 1



Private Interest

- “A parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is a commanding one”
 - Santosky, 455 U.S. at 758-759



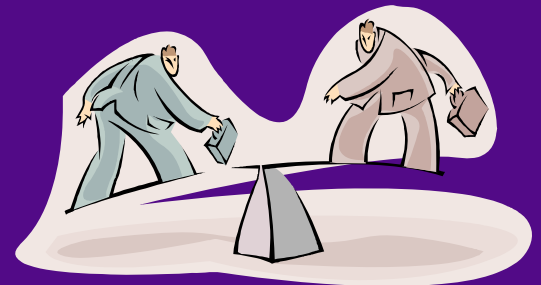


Government Interest

- Right to be present, to testify, and to confront witnesses is NOT without limitations
 - State v. Murphy, 105 N.C. App. at 658
- This includes the State's interest in insuring a "fair hearing and correct decision and protecting the dignity of the courtroom"
 - In re Faircloth, 153 N.C. App. 565
- State's also has a traditional and "transcendent interest in protecting the welfare of children"
 - Ginsberg v. New York, 390 U.S. at 640

Risk of Error

- Determination hinges upon what procedures are in place to protect from error
- Example:
 - Closed-circuit television that allows parent to observe testimony from another room and communicate via attorney
 - In re J.B., 172 N.C. App. 1





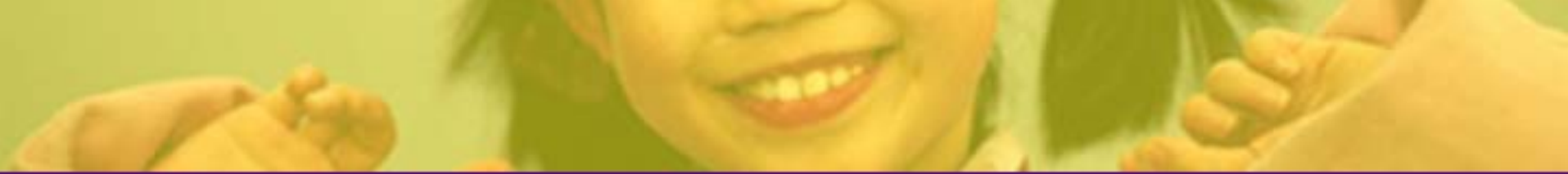
What about the
child's interests?





Courtroom Control

- N.C. Gen. Stat. § 8C-1, Rule 611 (2006)
 - The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.



Courtroom Control

- Judges are given large discretionary power as to the conduct of a trial
- In the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion
 - State v. Rhodes, 290 NC 16





Courtroom Control

- “Courts have systematically recognized that special exceptions to general courtroom procedures are often required to more effectively question child witnesses in sexual abuse cases”
 - In re Stradford, 119 N.C. 654



Closed Circuit Television

- Allowed when:
 - Necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, AND
 - That trauma would impair the child's ability to communicate
- Maryland v. Craig, 497 U.S. 836



Closed Circuit Television

- Court must hear evidence and make findings that procedure is:
 - Necessary to protect welfare of the child witness
 - Child would be traumatized by testifying in presence of defendant (not by courtroom generally)
 - Trauma would render the child unavailable or substantially harm the child or undermine the accuracy of the child's testimony
- Maryland v. Craig, 497 U.S. 836



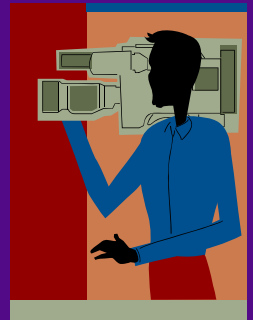
Closed Circuit Television

- Procedure must comply with Confrontation Clause
 - Under oath
 - Subject to full cross-examination
 - Judge, jury and defendant must be able to observe victim while testifying
- Maryland v. Craig, 497 U.S. 836



Closed Circuit Television

- Approved in NC by:
 - *State v. Jones*, 89 N.C. App. 584
 - *In re Stradford*, 119 N.C. App. 654
- AOC has equipment for courtroom use (919.733.7107)





How much trauma?

- Expert witness testified that the child victim in a sexual abuse case exhibited “intense fear” of the defendant and could suffer emotional harm if forced to testify in his presence
 - Jones, 89 N.C. App. 584
- Expert testified it would be “further traumatizing” if the two children were subject to face-to-face confrontation with defendant
 - Stradford, 119 N.C. 654



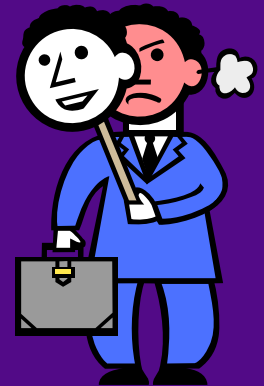
Right of Confrontation?

- Where the “excluded party’s presence during testimony might intimidate the witness and influence his answers, due to that party’s position of authority over the testifying witness, any right to confront the witness is properly limited”
 - In re Barkley, 61 N.C. App. 267, 270



Properly Limited?

- Intimidation and Influence:
 - Court considered testimony that the child was faced with “a moral dilemma” testifying in front of his mother
 - Also testimony that his mother had a “tendency to be very enmeshed with” the child
 - In re J.B., 172 N.C. App 1





Specific Findings?

- Trial court is NOT required to make specific findings and conclusions regarding the minimum requirements of fundamental fairness and its relation to the decision to exclude the respondent
 - In re J.B., 172 N.C. App. 1
 - In re Murphy, 105, N.C. App. 651



Proper Procedure

- Court must follow proper procedures:
 - Respondent (person excluded) should be able to view and hear testimony
 - Should be able to communicate with counsel
 - Separate room with TV monitor and telephone access to attorney is sufficient
 - Witness should be told that respondent is watching/listening and communicating with attorney
 - In re. J.B., 172 N.C. App. 1



In Chambers Questioning

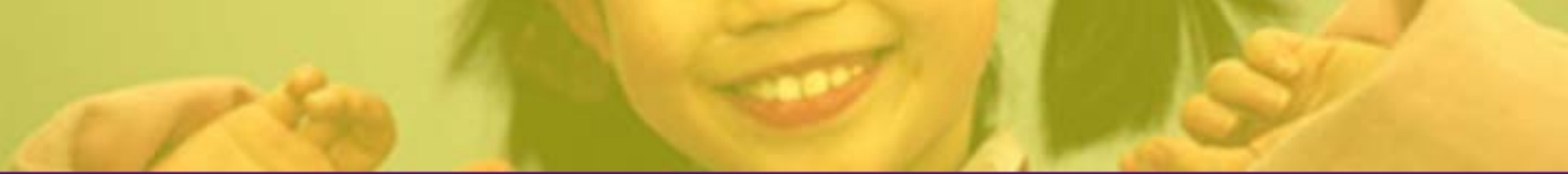
- Child may be questioned in chambers by judge as long as all attorneys, including counsel for respondent, are present and have opportunity to question the child
 - In re Williams, 149 N.C. App. 951
- Private conference with child in absence of counsel and parties is reversible error unless consented to by both parties
 - Cook v. Cook, 5 N.C. App. 652



Exclusion of Bystanders

- Judicial discretion allows judge to exclude bystanders from the courtroom in rape or sexual offense cases
 - Except court personnel and those engaged in the trial
 - N.C.G.S. 15-166
 - State v. Burney, 302 N.C. 529





Exclusion of Bystanders

- Court must make findings:
 - Party seeking closure has advanced an overriding interest that is likely to be prejudiced
 - Closure no broader than necessary to protect that interest
 - Consider reasonable alternatives
 - Make findings adequate to support closure
- *State v. Jenkins*, 115 N.C. App. 520 (1994)



Closure of Hearings

- N.C.G.S. 7B-801
- Court has discretion to close hearings based upon consideration of:
 - Circumstances of the case
 - Nature of allegations
 - Age and maturity of juvenile
 - Benefit to juvenile of confidentiality or open hearing
 - Extent to which confidentiality of the juvenile's record will be compromised by open hearing



Sequestration of Witnesses

- At request of defendant or prosecutor, judge has discretion to exclude or sequester certain witnesses so they cannot hear other witnesses' testimony
 - N.C.G.S. 15A-1225
- With child witnesses, parent or guardian may be present even if defendant requests sequestration and that parent or guardian may later be called to testify as a witness
 - State v. Stanley, 310 N.C. 353



Support Persons

- Mother of victim properly allowed to remain while other witnesses sequestered as a support person for an 18 year old
 - State v. Dorton, 172 N.C. App. 759
- Child properly allowed to testify from lap of a support person (step-mother) when person is instructed not to influence the child in any way
 - State v. Reeves, 337 N.C. 700
- Other ideas:
 - Support person to sit with or hold hand of child during testimony
 - Should follow from Reeves



Timing of Testimony

- Limit length of time child is on the witness stand to accommodate shorter attention span
 - Limit time on stand without a break
 - Schedule regular recesses (every 15-20 minutes)
- Ask for recess if child becomes upset
 - State v. Higgenbottom, 312 N.C. 760
- Set testimony for a specific time of day
 - Morning is best, not after lunch
 - Similar to normal schedule





Anatomically-Correct Dolls

- Supreme Court has approved use of anatomically-correct dolls to illustrate children's testimony
 - *State v. Fletcher*, 322 N.C. 415 (1988)
 - *State v. DeLeonardo*, 315 N.C. 762 (1986)
 - *State v. Spelier*, 102 N.C. App. 697 (1991)
- Caution: Only if you know how!



Oath Simplification

- Simplify the oath. See Thomas D. Lyon and Karen J. Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3 Applied Development Science 16-27 (1999).
- Exclude trick questions: What is the difference between the truth and a lie?



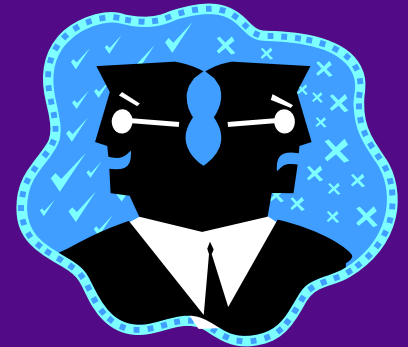


Type of Questioning

- Leading questions allowed for child witnesses on direct
 - When the witness “has difficulty in understanding the question because of immaturity, age, infirmity, or ignorance, or when the inquiry is into a subject of delicate nature such as sexual matters
 - State v. Greene, 285 N.C. 482
 - See also State v. Brice, 320 N.C. 119
- Caveat: Leading v. Suggestive

Line of Questioning

- Avoid “lawyer speak”
- Avoid “do you remember” questions
 - Who, What, When, Where
- Avoid double negatives or negative construction:
 - “Isn’t it true”
 - “Didn’t he”
 - “Mom wasn’t home”
- Avoid compound questions
- Avoid unnecessary repetition of questions





Line of Questioning

- Use names instead of relationships or pronouns:
 - “Your stepfather”
 - “He”
 - “There” [geographic, location on body, etc.]
- Avoid the use of quantifiers
 - “a couple”
 - “several”
- Avoid abstract and vague terms:
 - “How did it feel when he touched you there with that?”



Line of Questioning

- Direct child when shifting topics
- Direct child when shifting back and forth in time
- Give the child time to formulate an answer before rephrasing question
- Use developmentally appropriate language
- Think about what question would mean to child:
 - Example: “Did you put your mouth on his pee-pee?”
- Be mindful of your tone of voice
 - Ask judge to control tone of objections



Use of Terminology

- Allow the child to use their own terms for body parts and sexual organs
 - Example: “coodie cat”
 - State v. Watkins, 318 N.C. 498
- Don’t use the “real” words or legal words the child doesn’t understand
- Do not assume that the child knows what the word means OR that you mean the same thing
 - “He put his pee on me.”
 - He “tickled” me



The ultimate measure of a man is not where he stands in moments of comfort and convenience but where he stands at times of challenge and controversy. The true neighbor will risk his position, his prestige and even his life for the welfare of others. In dangerous valleys and hazardous pathways, he will lift some bruised and beaten brother to a higher and more noble life.

~Dr. Martin Luther King, Jr.