

Child (and other) Evidence Issues

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Types of Child Evidence Issues

- Child taking stand
- Others taking stand to repeat what child said (or other statements)
- Others taking stand to give opinion about child (or other opinions)

Values, Not Just Rules

- Avoid unreliable evidence
 - Rules re personal knowledge, hearsay, opinion, competency
- Minimize prejudicial distractions
 - Rules re relevance
- Promote social policies
 - Rules re privilege
- Ensure fairness
 - Predictability and notice

Competency Procedures (p. 11)

- Mr. Parker has issued subpoenas for both children; attorney advocate objects.
 - What is the legal standard for determining whether a child (or other witness) may testify?
 - How do you determine whether the standard has been met?
 - Are there other grounds for objection?
 - If a child is competent to testify, what steps may you take when the child testifies?

Mechanisms for Taking Testimony

- Remote testimony
- Excluding bystanders
- Excepting witnesses from sequestration order
- Oath
- Leading questions
- Positioning on witness stand
- Recesses
- In camera testimony with judge only???

Now I Get It!

- Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.
- When the out-of-court statement is being used to prove its truth . . .
 - the evidence's value depends on *the credibility of the out-of-court declarant.*
- When the out-of-court statement is not being offered for its truth . . .
 - the evidence's value usually depends on *the credibility of the in-court witness.*

Is It Really Hearsay?

- Is the statement an assertion, offered for its truth?
 - Teacher Carol Lark testifies that Bobby said "Dad threw hot coffee on Angel." (p. 9)
 - Teacher Carol Lark testifies that Bobby said "Angel was playing the radio really loud" right before Dad came in." (p. 9)
 - Is a statement by a child an "admission of a party opponent"?

Rule 803 Exceptions

- Statements are admissible regardless of availability of witness because they carry inference of reliability or sincerity
- Principal exceptions are
 - Excited utterance
 - State of mind
 - Medical diagnosis or treatment
 - Business records
 - Public records

Business and Public Records Rules

- First set of requirements concerns method and circumstances of preparation
 - Proponent must establish foundation, including authenticity, by qualified witness
- The following do not disqualify record:
 - Maker of record need not lay foundation; another employee of organization may do so
 - Record prepared in regular course of business also may be prepared in anticipation of litigation

Limits on Business and Public Records

- Information within record must have been provided by person with knowledge
- Information must have been provided by person with duty to report information accurately
 - Statements of third parties without business duty must qualify under hearsay rules and exceptions
- Opinion must satisfy rules on opinion testimony

Business/Public Records?

- Key requirements
 - Foundation?
 - Personal knowledge by reporter?
 - Duty to report accurately by reporter?
 - × If not, hearsay rules satisfied?
 - Admissible opinion?
- Report to DSS of suspected neglect “testifies” (p. 7)
 - Someone said “There are problems with children’s appearance, school attendance, etc.”
- Mr. Cates notes “testify” (p. 9)
 - Bobby fell asleep in class
 - Bobby got into fights

Excited Utterances

- Basic requirements
 - sufficiently startling experience, and
 - spontaneous reaction
- Special rules for children
 - Special characteristics of young children that prolong stress, fear, and spontaneity

Excited Utterance?

- **Factors**
 - Lapse of time
 - Location (at or away from scene)
 - Spontaneously uttered
 - Appearance of declarant
 - Nature of statement
 - Conduct after event
- **Neighbor Mike Toomey testifies (p. 10) that Bobby said to him**
 - "Two bullies pushed me, kicked me, and hit me with a baseball bat."
 - "Don't tell my Dad."
- **And Dad said to Toomey**
 - "The kid has gotta learn how to fight."

State of Mind

- **Rule 803(3) excepts**
 - "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered."

State of Mind?

- **"[O]ur courts have created a sort of trichotomy in applying Rule 803(3)."**
 - Statements that recite only emotions are admissible
 - Statements that recite emotions and the facts underlying those emotions are likewise admissible
 - Statements that merely recite facts are not admissible
- GAL testifies that Bobby said to me "I was just joking when I said my father hit me and threw the coffee on Angel." Bobby looked really ashamed when he said that (p. 11).

Medical Treatment

- Party may offer opinion of medical provider, or medical records containing provider's opinion, if opinion satisfies rules on opinion testimony

Medical Treatment

- If provider recounts patient's statements, or medical records contain statements of patient, proponent of evidence must establish:
 - declarant made statements understanding that they would lead to medical diagnosis or treatment, and
 - statements were reasonably pertinent to diagnosis or treatment

Medical Treatment? (p. 8)

- Medical records "testify"
 - Bobby has an old arm fracture and numerous bruises
 - Bobby said to me "Dad got mad at me and beats me"
 - Mandy has untreated cold and ear infection
 - Angel has recent splash burn, which is not of accidental type
 - Bobby said to me "Splash not accidental"
 - Mandy is developmentally delayed
 - Children are underweight
 - Children's demeanor playful
- Alternatively, nurse Gloria Stone testifies to above

Residual Hearsay

- **Unavailability**
 - Required under 804(b)(5)
 - Not required under 803(24) but is factor in determining trustworthiness and probative value
- **Other conditions for admissibility**
 - Advance notice and sufficient guarantees of trustworthiness, among others
- **Factors showing trustworthiness**
 - Spontaneity, consistency, mental state of declarant, personal knowledge, unexpected terminology, motive

Non-Substantive Theories of Admissibility

- **Corroboration**
 - Out-of-court statements are admissible as corroboration if consistent with witness's in-court testimony
- **Impeachment**
 - Proponent may impeach own witness but may not call witness knowing that witness would not reiterate prior statement
- **In both instances**
 - Witness must have taken stand
 - Prior statements do not constitute substantive evidence

Lay "Opinion"

- **A lay witness's testimony in the form of an opinion or inference is permitted if it is:**
 - rationally based on the perception of the witness, and
 - helpful to a clear understanding of the witness's testimony or a determination of a fact in issue
- **Shorthand statements of fact are not necessarily opinion**

Lay "Opinion"?

- **Teacher Daisy Brown testifies (p. 9):**
 - I think the Parkers often keep Angel out of school to help with the younger children
 - Angel just seems too serious
- **Neighbor Mike Toomey testifies (p. 10):**
 - What Parker says about Bobby is true—that the kid is liable to get himself killed if he pretends to be John Cena (pro wrestler)

Weight Guessers (and other experts)

- **One of the parties wants to call a State Fair weight guesser as an expert to testify that he saw the children during the period in question**
 - In the weight guesser's opinion, the children were underweight/not underweight

Weight Guessers (cont'd)

- **The proponent argues that the opinion satisfies the requirements for expert opinion, asserting that the:**
 - expert is qualified in that method
 - testimony is relevant, that is, it would assist the trier of fact
 - opinion is not excessively uncertain
 - opinion is not legal conclusion

Rule 702(a)

- If scientific, technical or other specialized knowledge will assist the trier of fact . . . a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion . . . if all of the following apply . . .
 - Sufficient facts or data
 - Reliable principles and methods
 - Reliable application of principles and methods to facts of case

Daubert and Howerton

- “Subject of an expert’s testimony must be ‘scientific . . . knowledge.’” *Daubert*
- *Howerton* rejected *Daubert* as test in North Carolina
 - But, *Howerton* continued to require that judge be satisfied that expert’s opinion is sufficiently reliable as area for expert testimony
- Rule 702 adopts *Daubert*

Shortcuts: Prior Cases

- Blood spatter interpretation
 - Yes
- Barefoot impression analysis
 - No
- Penile plethysmograph
 - Definitely no
- Credibility
 - No

Admissible Expert Opinion?



- Social worker testifies children are underweight (p. 7)
- Social worker testifies to x-ray results (p. 7)
- GAL testifies that neglect is clear (p. 11)
