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by Paul A. Dorf

According to a 1981 study by the U.S. Department of Health and Human Services, PUB. No. 81-30325, *National Study of Incidents of and Severity of Child Abuse and Neglect*, at 11 (1981), over one million reports of child abuse or neglect are investigated by child protection agencies each year. These investigations result in approximately one hundred fifty thousand (150,000) court proceedings per year. 18 Fam. L. Q. 143 (Summer 1984). As might be expected, often the only witnesses to these crimes are the child victims themselves, and the psychological stress when a child abuse victim testifies can be very severe. This second victimization of the child has resulted in much criticism inside and outside the legal community. In recent years numerous reforms have been passed or proposed throughout the United States as a result of the increasing criticism and the lack of rights of the child victim. Even so, there are numerous problems in holding child abusers accountable for their actions.

In a recent *Law Forum* article entitled "Use of Closed Circuit Television for Victims of Child Abuse," 16 U. BALT. L. F. 18 (Spring 1986), Patricia A. Cleaveland analyzed the different approaches being developed to deal with the second victimization problems. As Ms. Cleaveland pointed out in her article, the Maryland legislature passed MD. CTS & JUD. PROC. CODE ANN. § 9-102 in 1985 which allows a child abuse victim's testimony to be taken outside of the courtroom by means of closed circuit television. While the Maryland legislature has taken a step in the right direction, additional legislation is necessary to save child abuse victims from additional unnecessary trauma and to hold the child abusers accountable. It is time for Maryland to enact another exception to the hearsay rule which would allow a child's out-of-court statements regarding the abuse to be admitted at trial.

At least nine states currently have legislatively enacted child victim hearsay exceptions allowing a child's out-of-court statements to be admitted at trial. ARIZ. REV. STAT. ANN. § 13-1416 (1984); COLO. REV. STAT. § 13-25-129 (1984); ILL. ANN. STAT. ch. 38 § 115-10 (Smith-Hurd 1985); IND. CODE ANN. § 35-37-4-6 (Burns 1985); KAN. STAT. ANN. § 60-460(dd) (1983); MINN. STAT. § 595.02(3) (1985); S.D. CODIFIED LAWS ANN. § 19-16-38 (1985); UTAH CODE ANN. § 76-5-411 (1985); WASH. REV. CODE ANN. § 9A.44.120 (1986). The typical hearsay statute requires that the court find the child is unavailable to testify, that the child's statement has sufficient indicia of reliability and that the child was not induced to make the statements by use of threats or promises. *See* 16 U. BALT. L. F. at 20. For example, the Kansas statute states that:

> In a criminal proceeding or in a proceeding to determine if a child is a deprived child under the Kansas Juvenile Code or a child in need of care under the Kansas Code for Care of Children, a statement made by a child, to prove the crime or that the child is a deprived child or a child in need of care, [may be admitted in evidence], if: (1) the child is alleged to be a victim of a crime, a deprived child or a child in need of care; and the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

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The Supreme Court of Kansas has upheld the constitutionality of KAN. STAT. ANN. § 60-460(dd) (1983), authorizing an additional exception to the general rule excluding hearsay with respect to extrajudicial statements of children. The court held that this child abuse hearsay exception did not violate the confrontation clause of the sixth amendment.

Under the Washington hearsay exception, WASH. REV. CODE ANN. § 9A.44.120 (1986), a child's out-of-court statements may be admissible even though the child is competent and testifies at the proceedings. The pertinent sections of that statute are as follows:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings in the courts of the state of Washington if:
>
> (1) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) the child either: (a) testifies at the proceedings; or (b) is unavailable as a witness: *Provided*, that when the child is unavailable as a witness, such state-

ment may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

In *State v. Ryan*, 691 P.2d 197 (Wash. 1984), the Supreme Court of Washington upheld the constitutionality of Washington's child abuse hearsay exception. The court held that although the exception was constitutional on its face, the conviction in that particular case had to be reversed because the prosecution had not proven that the witness was unavailable to testify, and since the witness did not testify, the conditions of the statute were not met. Finally, other jurisdictions such as Oregon, have provided judicial exceptions to enable statements of child abuse victims to get into evidence. *See, State v. Campbell*, 299 Or. 633, 705 P.2d 694 (1985).

In general, courts and those jurisdictions which do not have statutory or judicial exceptions to the hearsay rule specifically dealing with statements made by child abuse victims will admit hearsay statements if they can possibly fit within one of the other hearsay exceptions. *See generally, Id.* For example, statements tending to show a person's state of mind, such as motive or intent, are admissible when relevant, provided they are not used to prove the truth of the matter asserted. The excited utterance exception has been stretched to include statements made hours after the alleged abuse took place. McCORMICK on EVIDENCE, at 706-07 (2nd ed. 1972).

With trial judges stretching hearsay exceptions to their limits, and a number of states expanding exceptions, both legislatively and judicially, this author believes Maryland should codify a child abuse hearsay exception. A carefully drawn bill requiring corroborating evidence would enable Maryland to successfully prosecute child abusers while still protecting the rights of the accused and the rights of the abused. In fact, the innocent defendant will also be helped by having testimony admitted into evidence which may clear the charges. Therefore, a child abuse hearsay exception which is long overdue may benefit all involved, especially the child victim.

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After serving as Assistant City Solicitor from 1951 to 1959, he was appointed Chief Judge of the Baltimore City Traffic Court from 1959 to 1960. Following eight years as a Maryland State Senator, he served as Associate Judge of the Circuit Court for Baltimore City from 1968 to 1983. He was appointed to the Panel of Arbitrators by the American Arbitration Association in 1985 and is active in arbitration and mediation of civil and domestic disputes.