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# A Step Forward: Rule 803(25), a New Approach to Child Hearsay Statements

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**A STEP FORWARD: RULE 803(25), A NEW APPROACH TO CHILD HEARSAY STATEMENTS**

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## I. INTRODUCTION

Preventing, detecting, and stopping sexual abuse of children is a national concern. Reports of child abuse have steadily increased in recent years. In 1980, an estimated 351,100 children were abused,<sup>1</sup> and this number grew to an estimated 507,700 children in 1986.<sup>2</sup> Of these, 119,200 children were sexually abused nationwide.<sup>3</sup> In Minnesota alone, there were 1,312 substantiated cases of sexual abuse by parents and caretakers in 1990.<sup>4</sup>

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1. NATIONAL CTR. ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *STUDY FINDINGS: NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT* 18 tbl. 4-1 (1981). This total only includes abuse by a parent or caretaker. *Id.* at 4; DEBRA WHITCOMB, U.S. DEP'T. OF JUSTICE, *WHEN THE VICTIM IS A CHILD* 1 (2d ed. 1992).

2. ANDREA J. SEDLAK, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *TECHNICAL AMENDMENT TO STUDY FINDINGS—NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988*, at 3 (1990).

Even more startling, 1,110 children died as a result of abuse in 1986. *Id.*

There is some question as to whether abuse has actually increased or whether increased public awareness has caused more cases to be reported. NATIONAL CTR. ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *EXECUTIVE SUMMARY: STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988*, at 7 (1988). The increase may also be attributed to new mandatory reporting laws and an increased number of mandatory reporters. *See, e.g.*, 42 U.S.C. § 13031 (Supp. IV 1992); MINN. STAT § 626.556 (1992 & Supp. 1993). Whatever the cause of the increase, a greater number of children are entering the judicial system.

3. SEDLAK, *supra* note 2, at 3.

4. NATIONAL CTR. ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM: WORKING PAPER 1, 1990 SUMMARY DATA COMPONENT 13* (1992).

As a result of the increase in reported abuse cases, more children are participating in the criminal justice system as witnesses. Many states have enacted statutes to protect child witnesses from the possibility of being traumatized by their participation in the criminal justice system.<sup>5</sup> These statutes, however, are not without opposition. Those who advocate for protection of child witnesses and those who advocate for protection of defendants' rights are locked in ongoing debate.<sup>6</sup>

The Minnesota legislature acted to protect child witnesses by passing a number of statutes that address the special evidentiary issues involved in sexual abuse cases.<sup>7</sup> However, as both the case law and the understanding of these evidentiary problems expanded, the urgent need for some of these statutes significantly decreased. Minnesota Statutes Section 595.02, subdivision 3 (the Minnesota child hearsay statute) is one example of a statute that, though necessary and beneficial at the time of enactment, currently serves only to complicate the evidentiary problems inherent in child sexual abuse cases.

This Comment examines the hearsay problems that arise in cases where children have been sexually abused, focusing specifically on

Substantiated cases of abuse are those where abuse was positively found to have occurred. In contrast, unsubstantiated cases include those cases where abuse either could not be positively ruled out or could not be positively found to have occurred. *Id.* at 69.

5. See, e.g., 18 U.S.C. § 3509 (Supp. IV 1992); MINN. STAT. § 595.02, subd. 4 (1992). Some states have addressed the problem by enacting statutes which provide for the admission of videotaped testimony. See, e.g., CAL. PENAL CODE § 1346 (West 1982 & Supp. 1994); IOWA CODE 910A.14(2) (1993); KAN. STAT. ANN. § 22-3434 (1988); MICH. COMP. LAWS ANN. § 600.2163a (Supp. 1993); MO. ANN. STAT. §§ 491.675-491.705 (Supp. 1993); NEB. REV. STAT. § 29-19216 (1989); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988 & Supp. 1993); WIS. STAT. ANN. § 967.04 (West 1985 & Supp. 1993). Some states address the matter by enacting statutes which provide for testimony via closed circuit television. See, e.g., CAL. PENAL CODE § 1347 (Supp. 1994); IOWA CODE § 910A.14(1) (1993); KAN. STAT. ANN. § 22-3434 (1988); MICH. COMP. LAWS ANN. § 600.2163a (Supp. 1993); N.Y. CRIM. PROC. §§ 65.00 to .30 (McKinney 1992); OHIO REV. CODE ANN. §§ 2151.3511, 2907.41, 2937.11 (Page 1993); TEX. CRIM. PROC. CODE ANN. § 38.071 (Supp. 1994).

6. See, e.g., *State v. Kraushaar*, 459 N.W.2d 346 (Minn. Ct. App. 1990), *rev'd on other grounds*, 470 N.W.2d 509 (Minn. 1991). In *Kraushaar*, the court stated, "[w]e recognize that whenever allegations of child sexual abuse are made, the system is confronted with a dilemma: on the one side is a child who must be protected; on the other side stands the accused, entitled to due process, who must not be unfairly convicted." *Id.* at 353.

7. For example, the Minnesota legislature recently revised the closed circuit television statute. Prior to revision, the statute allowed the child to testify via closed circuit television, but required that the defendant be able to see and hear the testimony in person or by a two-way video monitor. MINN. STAT. § 595.02, subd. 4 (1990). This statute was of little value given that the purpose of closed circuit television is to protect the child from the trauma and intimidation of testifying in the presence of the accused. See generally *Maryland v. Craig*, 497 U.S. 836 (1990). The statute was changed to allow the child to testify in a separate room, while the defendant and the jury observe the testimony from the courtroom. Crimes—Sex Offenders, Victims, Penalties—General Amendments, H.F. No. 1849 § 595.02, subd. 4 (1992).

Minnesota's child hearsay statute. Part II briefly addresses the effects abuse has upon both the child and the child's testimony. Part III examines the interaction between the child hearsay statute and the constitutional rights of the defendant. The development and requirements of the statute are the focus of Part IV. Parts V through VII present an analysis of the cases<sup>8</sup> interpreting the child hearsay statute.

The remainder of this Comment suggests a new approach to admitting children's out-of-court statements as substantive evidence. Parts VIII and IX examine the traditional hearsay exceptions, suggesting situations in which the exceptions apply, and addressing some of the challenges to the use of these exceptions. Part X advocates that the time for change has come. Finally, Part XI proposes a new rule of evidence—Rule 803(25)—to alleviate many of the recurring issues that arise when children's out-of-court statements are offered as evidence.

## II. THE IMPACT OF SEXUAL ABUSE

The prosecution of child sexual abuse cases does not occur in a vacuum. The dynamics of these cases are not present in any other type of prosecution. First, the abuse often has had a devastating impact on the child victim and the child's family.<sup>9</sup> Second, the victim is often very young and incapable of understanding the adversarial philosophy and procedures of the courtroom.<sup>10</sup> More significant, because the system of court rules and procedures was designed by adults for adult participants,<sup>11</sup> it is largely antagonistic to child victims and witnesses.<sup>12</sup> All of

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8. Several unpublished decisions are used for purposes of discussion. MINN. STAT. § 480A.08, subd. 3(b)(1992) provides that "[t]he decision of the court need not include a written opinion. A statement of the decision without a written opinion must not be officially published and must not be cited as precedent, except as law of the case, *res judicata*, or collateral estoppel." Unpublished opinions are used only for the purpose of demonstrating how courts are currently interpreting the statute. Although the need for a revised statute is apparent without these decisions, the use of these decisions reinforces this argument.

9. JOHN E.B. MYERS, *LEGAL ISSUES IN CHILD ABUSE AND NEGLECT* 135-36 (Jon R. Conte ed. 1992) [hereinafter MYERS, *LEGAL ISSUES*].

10. Researchers have found that children had "negative feelings about talking to the defense attorney and facing the defendant. They had mixed feelings about the judge, felt positively about the prosecutor, and wanted their (nonoffending) parent with them." WHITCOMB, *supra* note 1, at 29.

11. John C. Yuille, *The Systematic Assessment of Children's Testimony*, 29 CAN. PSYCHOL. 247, 247 (1988).

12. One attorney summarized this antagonism best when he said, "[c]hild victims of crime are specially handicapped. First, the criminal justice system distrusts them and puts special barriers in the path of prosecuting their claims to justice. Second, the criminal justice system seems indifferent to the legitimate special needs that arise from

these factors combine to present special problems in the prosecution of child abuse cases.

### A. *The Impact of Testifying on the Child*

Sexually abused children suffer serious and sometimes life-long emotional consequences. The common effects of abuse can include a combination of fear for personal safety and the safety of loved ones, depression, anxiety, embarrassment, nightmares, guilt, ambivalence, self-hatred, and aggressive or sexually acting-out behavior.<sup>13</sup> The impact of abuse ultimately depends on "the age of the child, his or her relative maturity, the relationship between child and offender, . . . and the response of the legal and social services systems."<sup>14</sup> Given time, and perhaps professional help, many of the psychological scars left by sexual abuse can heal.<sup>15</sup>

Unfortunately, most children have not had the time or the necessary help to work through this trauma by the time of trial. As a result, most sexually abused children do not enter the courtroom as well-adjusted, normal children, and testifying may result in one of two consequences. Some mental health researchers fear that the very system that was designed to protect children may in fact exacerbate some children's preexisting trauma, resulting in what is sometimes referred to as "system induced trauma."<sup>16</sup> Victims of child sexual abuse may feel that they are on trial, which may reinforce the feelings of guilt, self-blame,

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their participation." WHITCOMB, *supra* note 1, at 15 (quoting D. Lloyd, Testimony before the President's Task Force on Victims of Crime, *Final Report* 51 (Dec. 1982)).

13. See Brief of Amicus Curiae American Psychological Association at 5-6, *Maryland v. Craig*, 497 U.S. 836 (1990) (No. 89-478) [hereinafter Brief of APA]; Beth Bjerregaard, *Televised Testimony as an Alternative in Child Sexual Abuse Cases*, 25 CRIM. L. BULL. 164, 170 (1989); V. Kay Curtis, *Criminal Procedure: Closed-Circuit Testimony of Child Victims*, 40 OKLA. L. REV. 69, 72 (1987); Jennifer McLaren & Richard E. Brown, *Childhood Problems Associated with Abuse and Neglect*, 37 CAN. MENTAL HEALTH 1, 4 (1989).

For an excellent discussion of the development of the psychological impact of sexual abuse see John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 52-62 (1989) [hereinafter Myers, *Expert Testimony*].

14. Edward J. Saunders, *The Child Sexual Abuse Case: A Short Course for Judges*, JUDGES' J., Winter (1988), at 20, 23.

15. MYERS, LEGAL ISSUES, *supra* note 9, at 124 (quoting JOHN E.B. MYERS, THE AM. PROFESSIONAL SOC'Y ON THE ABUSE OF CHILDREN, GUIDELINES FOR PSYCHOSOCIAL EVALUATION OF SUSPECTED SEXUAL ABUSE IN YOUNG CHILDREN (1990)).

16. Paul S. Applebaum, *Protecting Child Witnesses in Sexual Abuse Cases*, 40 HOSP. & COMMUNITY PSYCHIATRY 13, 13 (1989). One research project reported that a group of abused children who went through the court system manifested symptoms of "greater depression, anxiety, and psychosomatic symptoms" than did children who did not testify. Brief of APA, *supra* note 13, at 9. See also DEBRA WHITCOMB ET AL., OFFICE OF JUV. JUST. AND DELINQ. PREVENTION, U.S. DEP'T OF JUSTICE, EXECUTIVE SUMMARY: CHILD VICTIM AS WITNESS RESEARCH AND DEVELOPMENT PROGRAM 7 (1991) [hereinafter WHITCOMB, EXECUTIVE SUMMARY]. Whitcomb's preliminary research findings, from a four-county jurisdiction study which includes Ramsey County, Minnesota, indicates that re-

and depression that they may already feel. In contrast, other researchers believe that testifying may empower the child<sup>17</sup> by giving the child a sense of control and power that was absent during the abuse.<sup>18</sup> The impact of testifying ultimately depends on the combined response of the child's support network and the response of those in the criminal justice system itself.<sup>19</sup>

### B. *The Impact of "System Induced Trauma" on the Child's Testimony*

"System induced trauma" may not only affect the child but may also distort the child's testimony. The trauma can potentially "damage the reliability, quality, and often the very existence of the child's testimony."<sup>20</sup> Once on the witness stand, the child may refuse to explain what happened, leave out key facts about the abuse, or, in the extreme, deny that the abuse ever occurred.<sup>21</sup> Alternatively, the child's testimony may differ from prior statements, not because of inaccuracy, but because of stress and trauma.<sup>22</sup> In addition, the manifestations of "system induced trauma" can negatively affect the jury's evaluation of the

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peated testifying and long, harsh cross-examination of children over the age of eight can produce significant adverse effects. *Id.*

17. Applebaum, *supra* note 16, at 14; accord John F. Tedesco & Steven V. Schnell, *Children's Reactions to Sex Abuse, Investigation, and Litigation*, 11 CHILD ABUSE AND NEGLECT 267, 268 (1987) (noting that testifying may increase "a child's sense of self-efficacy and can serve as a coping strategy").

18. WHITCOMB, EXECUTIVE SUMMARY, *supra* note 16, at 7.

19. See generally Desmond K. Runyan, *The Emotional Impact of Societal Intervention into Child Abuse*, in CHILD VICTIMS, CHILD WITNESSES 263-76 (Gail S. Goodman & Bette L. Bottoms eds., 1993).

20. Bjerregaard, *supra* note 13, at 170.

21. See Paula E. Hill & Samuel M. Hill, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 820 (1987); Brief of APA, *supra* note 13, at 18-19.

These factors are not wholly unique to children's testimony. They may also exist in an adult's testimony. However, given the age of the child, the likelihood of these factors being present in the child's testimony is greater.

The child's fear of the consequences of telling about the abuse may also cause the child to deny that the abuse occurred. Research indicates that children may be more likely to lie depending upon what they perceive as the consequence of lying. Kay Bussey et al., *Lies and Secrets: Implications for Children's Reporting of Sexual Abuse*, in CHILD VICTIMS, CHILD WITNESSES 147, 155-56 (Gail S. Goodman & Bette L. Bottoms eds., 1993) (listing consequences such as fearing getting into trouble, fearing blame for the abuse, wanting to protect the perpetrator, or being embarrassed). Thus, if the child was threatened with either personal harm or harm to loved ones, the child may, when brought face to face with the perpetrator in the courtroom, deny that the abuse occurred to avoid whatever the threatened consequence was. See *id.* at 161.

22. Gail S. Goodman et al., *Jurors' Reactions to Child Witnesses*, 40 J. OF SOC. ISSUES 139, 144 (1984); see also *George v. State*, 813 S.W.2d 792, 795 (Ark. 1991) (concluding that the child's slightly contradictory in-court testimony resulted from "[t]he austerity of the judge, the presence of the [defendant], the tension of her parents, and subtle antagonism of defense counsel").

child's truthfulness.<sup>23</sup> Justice Blackmun argued that the loss of the child's effective testimony as a result of "system induced trauma" undermines "the truth finding function of the trial itself."<sup>24</sup> If the child is unable to testify effectively by telling the jury about the abuse, it then becomes essential to get the child's out-of-court statements admitted as evidence.

*C. A Special Issue in Child Sexual Abuse Cases: The Availability and Competency of the Child Victim*

The availability and the competency of the child victim to testify are two factors somewhat unique to child abuse prosecutions. In Minnesota, every person "of sufficient understanding" is presumed competent to testify.<sup>25</sup> Minnesota's competency statute specifically states that children under ten are presumed competent to testify unless the court finds to the contrary.<sup>26</sup> This statutory language may cause an unjustified focus on the child victim's competency whenever the child is under ten.<sup>27</sup> A child victim will be considered incompetent, and therefore unavailable to testify, if the child is unable to remember events generally,<sup>28</sup> is too young to understand the oath,<sup>29</sup> or is unable to ef-

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23. Myers, *Expert Testimony*, *supra* note 13, at 120; Brief of APA, *supra* note 13, at 13-14.

24. Coy v. Iowa, 487 U.S. 1012, 1032 (1988) (Blackmun, J., dissenting).

25. MINN. STAT. § 595.02, subd. 1 (Supp. 1993); see State v. Fitzgerald, 382 N.W.2d 892, 894 (Minn. Ct. App. 1986), *review denied*, (Minn. Apr. 24, 1986).

26. Minnesota Statutes § 595.02, subd. 1(m) provides that:

A child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined. A child describing any act or event may use language appropriate for a child of that age.

MINN. STAT. § 595.02, subd. 1(m) (Supp. 1993). See State v. Brovold, 477 N.W.2d 775, 778 (Minn. Ct. App. 1991) (noting that the legislature intended the language of Minn. Stat. § 595.02, subd. 1(m) to require a case by case determination of competency), *review denied*, (Minn. Jan. 17, 1992); see also State v. Scott, 501 N.W.2d 608, 613 (Minn. 1993).

Importantly, the trial court has discretion to deny a demand by the defense for a psychological evaluation of the child to determine competency. State v. Moore, 433 N.W.2d 895, 900 (Minn. Ct. App. 1988).

27. In contrast to Minnesota's competency statute, the federal statute does not single out any age group as warranting extra care to ensure the child's competency to testify. Title 18, United States Code § 3509(c)(2) simply states that "a child is presumed to be competent." 18 U.S.C. § 3509(c)(2) (Supp. IV 1992). Moreover, the defendant cannot compel a competency hearing absent a written motion and an offer of proof of incompetency. The district court must also establish, "on the record, that compelling reasons exist." 18 U.S.C. § 3509(c)(3)-(4) (Supp. IV 1992).

28. The Minnesota Supreme Court has recently indicated that the trial court cannot ask specific questions about the child's anticipated testimony. Scott, 501 N.W.2d at 615. Although an inquiry into the child's general capacity to remember is permissible, an inquiry into the child's memory of the subject matter of the case is not permissible.



fectively communicate with the jury.<sup>30</sup> Additionally, some courts find that the child is unavailable to testify if testifying would cause the child significant emotional trauma.<sup>31</sup>

A finding of incompetency or unavailability should not have any effect on the trustworthiness and reliability of the child's out-of-court statements.<sup>32</sup> Incompetency and untrustworthiness are not interchangeable terms.<sup>33</sup> The evaluation of the reliability of the out-of-court statements must be conducted separately from the evaluation of the child's competency to testify.

*Id.*; see also 18 U.S.C. § 3509(c)(8) (Supp. IV 1992); *Kentucky v. Stincer*, 482 U.S. 730, 741-42 (1987).

29. The ability to understand the oath requires only the ability to differentiate between the truth and a falsehood. Research has indicated that four- and five-year-old children are able to understand the difference. See *Bussey et al.*, *supra* note 21, at 151. In fact, one study indicates that not only are four-year-old children able to tell when someone else lied in a situation but "also when [a] character [in a vignette] was coached by her mother to lie about a man touching her when he had not done so." *Id.* This finding casts some doubt on the argument that children are often coached to lie about abuse.

30. See MINN. STAT. § 595.02, subd. 1(m) (Supp. 1993); *State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990), *cert. denied*, 498 U.S. 1033 (1991); *State v. Fader*, 358 N.W.2d 42, 45 (Minn. 1984); *Moore*, 433 N.W.2d at 899; *State v. Fitzgerald*, 382 N.W.2d 892, 895 (Minn. Ct. App. 1986), *review denied*, (Minn. Apr. 24, 1986); see also *Idaho v. Wright*, 497 U.S. 805, 814-15 (1990).

31. KENNETH S. BROUN ET AL., *McCORMICK ON EVIDENCE* § 253, at 446 (John W. Strong ed., 4th ed. 1992) [hereinafter *McCORMICK*]; *Thomas v. People*, 803 P.2d 144, 148 (Colo. 1990) (finding child unavailable where testifying would cause substantial and long-term psychological harm); *People v. Diefenderfer*, 784 P.2d 741, 750 (Colo. 1989) (holding that possible harm to child's emotional and psychological well-being equates unavailability); *People v. Rocha*, 547 N.E.2d 1335, 1340 (Ill. App. Ct. 1989) (noting unavailability includes children "who are unable to testify due to fear or similar factors"), *appeal denied*, 553 N.E.2d 400 (Ill., Apr. 4, 1990); *State v. Twist*, 528 A.2d 1250, 1257 (Me. 1987) (holding that possible psychological injury equates unavailability); *State v. Lonergan*, 505 N.W.2d 349, 353 (Minn. Ct. App. 1993) (finding the child unavailable within the meaning of Rule 804(a)(2) when child entered the courtroom, saw the defendant, and immediately began crying, begging not to be asked any questions, and refused to answer any questions put to him).

32. *State v. Scott*, 501 N.W.2d 608, 613 (Minn. 1993); *Lanam*, 459 N.W.2d at 659; *State v. Goldenstein*, 505 N.W.2d 332, 342 (Minn. Ct. App. 1993); *State v. Danowit*, 497 N.W.2d 636, 639 (Minn. Ct. App. 1993), *review denied*, (Minn. May 11, 1993); see also *Idaho v. Wright*, 497 U.S. at 824. The *Wright* Court did note that the trial court may consider unavailability to determine the reliability of the out-of-court statements. *Id.*

33. See *State v. Bellotti*, 383 N.W.2d 308, 314 (Minn. Ct. App. 1986) (noting that "[i]ncompetency to testify at trial does not alone render a statement inadmissible"), *review denied*, (Minn. Apr. 24, 1986); JOHN E.B. MYERS, *EVIDENCE IN CHILD ABUSE AND NEGLECT* § 7.44 [hereinafter *MYERS, EVIDENCE IN CHILD ABUSE*]. *But see* *United States v. Barrett*, 8 F.3d 1296, 1299-1300 (8th Cir. 1993). In *Barrett*, the Eighth Circuit indicated that if the child was incompetent to testify because she was unable to tell the difference between the truth and a lie, the answers given in the competency hearing would be admissible for impeachment purposes when other witnesses were called to testify about the child's out-of-court statements. *Id.* at 1299.

While the child's unavailability to testify does not necessarily destroy the child's credibility, it does significantly increase the need for out-of-court statements. Child sexual abuse is a "secret" crime and one typically not involving discernible signs of physical violence. Therefore, the child's statements may be the only evidence of the crime.<sup>34</sup> Absent the admission of these statements as substantive evidence, the chances of the case going to trial are very slim. This is especially true where other evidence is lacking. In order for these cases to be brought to trial, it becomes very important to get out-of-court statements admitted as substantive evidence.

### III. THE BALANCE BETWEEN THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION AND THE ADMISSIBILITY OF THE CHILD VICTIM'S OUT-OF-COURT STATEMENTS.

Much of the controversy that surrounds sexual abuse prosecutions stems from the competing interests of the child and the defendant. On the one hand, the child must be protected from "system induced trauma." On the other hand, the constitutional rights of the defendant must also be protected. When out-of-court statements are admitted as substantive evidence, the defendant's Sixth Amendment right to confront adverse witnesses can be violated.<sup>35</sup> Out-of-court statements are generally inadmissible as substantive evidence under the hearsay rule.<sup>36</sup> The exclusion of out-of-court statements results from the de-

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34. See *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992); *Bellotti*, 383 N.W.2d at 316; see also MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, at §§ 7.1, 7.42.

35. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Minnesota Constitution also protects a defendant's right to confront adverse witnesses. MINN. CONST. art. 1, § 6.

Unlike other Bill of Rights provisions, there is no clear indication of the first Congress's intent in adopting the Sixth Amendment Confrontation Clause. See *California v. Green*, 399 U.S. 149, 158 (1970); see also Eleanor L. Owen, *The Confrontation Clause Applied to Minor Victims of Sexual Abuse*, 42 VAND. L. REV. 1511, 1515 (1989). The Supreme Court has generally presumed that its purpose is to prohibit *ex parte* affidavits. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). See generally Frank M. Tuerkheimer, *Convictions Through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back To Square One*, 72 MARQ. L. REV. 47, 47-51 (1988) (providing an historical development of the fear of *ex parte* affidavits).

Judicial interpretation has established three specific protections of the Confrontation Clause: to ensure that the witness testifies under oath; to ensure that the witness is subject to cross-examination; and to ensure that the jury is permitted to observe the witness's demeanor. *Green*, 399 U.S. at 158. See also Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 593 (1988) (suggesting that another purpose of the Confrontation Clause is to prevent "flagrant abuses, trials by anonymous accusers, and absentee witnesses") (quoting *Green*, 399 U.S. at 179).

36. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

fendant's inability to cross-examine the witness and from uncertainty about the statement's reliability.<sup>37</sup>

The right to confrontation, however, is not absolute and must "occasionally give way to considerations of public policy and the necessities of the case."<sup>38</sup> The prosecution of child abuse is one situation that has required modification of the traditional confrontation requirements to enable the prosecution of perpetrators to go forward.<sup>39</sup> The total exclusion of out-of-court statements would undermine the truth-seeking function of the trial process itself.<sup>40</sup>

The United States Supreme Court, in *Ohio v. Roberts*,<sup>41</sup> attempted to strike a balance between the prosecution's need for the statement and the defendant's constitutional right to confrontation with a two-prong test to determine whether an out-of-court statement is admissible as substantive evidence.<sup>42</sup> Under the first prong, the statement must be necessary.<sup>43</sup> The necessity prong is satisfied if the proponent of the statement makes a good-faith effort to produce the declarant or shows that the declarant is unavailable.<sup>44</sup> Under the second prong, when the declarant is unavailable to testify, the statement must contain sufficient "indicia of reliability" so that cross-examination would serve no valua-

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asserted." MINN. R. EVID. 801(c). MINN. R. EVID. 802 then provides, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by the legislature." MINN. R. EVID. 802.

37. *Green*, 399 U.S. at 158 n.11. The Court stated, and subsequent courts have agreed, that cross-examination is the " 'greatest legal engine ever invented for the discovery of truth.' " *Id.* (quoting 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).

38. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

39. See, e.g., *Idaho v. Wright*, 497 U.S. 805, 824 (1990) (admitting the need for child's out-of-court statements as substantive evidence); *Maryland v. Craig*, 497 U.S. 836, 840 (1990) (allowing a child to testify via closed circuit television).

40. *Roberts*, 448 U.S. at 63.

41. 448 U.S. 56 (1980).

42. *Id.* at 65.

43. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

44. *Id.* at 65, 74.

Although the *Roberts* decision implied that the declarant must be unavailable before out-of-court statements are admissible, the Court clarified this issue in *United States v. Inadi*, 475 U.S. 387 (1986). The *Inadi* Court held that the declarant need not be unavailable before out-of-court statements are admissible. The necessity requirement is limited to those cases where testimony from prior hearings is offered as evidence. *Id.* at 394. The Court recognized that some out-of-court statements derive their significance from their context rather than from the content of the statement. *Id.* at 394-96. See also *White v. Illinois*, 112 S. Ct. 736, 742 (1992); McCORMICK, *supra* note 31, § 252 at 442 (suggesting that if the hearsay exception does not require unavailability, the Confrontation Clause will not require availability either). See generally Jennifer L. Guy, Note, *Has Wright Made Right?: The Interaction in Child Sexual Abuse Cases Between the Sixth Amendment Confrontation Clause and the Hearsay Rule Exceptions*, 31 U. LOUISVILLE J. FAM. L. 535 (1992).

ble purpose.<sup>45</sup> Reliability is presumed when the statement falls within one of the firmly-rooted hearsay exceptions.<sup>46</sup> If the statement does not fall within a firmly-rooted exception, there must be a showing of "particularized guarantees of trustworthiness" equal to those presumed to exist in the firmly-rooted exceptions.<sup>47</sup>

The decision in *Roberts* recognized the changing needs and the development of the judicial process. The Court described the judicial process as one of "gradual [change], building on past decisions, drawing on new experience, and responding to new conditions."<sup>48</sup> This description accurately describes the reaction of the judicial system to child sexual abuse prosecutions as the system slowly adapts to the special needs of children.<sup>49</sup> The prevalence of the ideas that children can be easily coached and that children cannot be relied upon to tell the truth accounts for some of the delay.<sup>50</sup>

As more sexual abuse cases entered the system and the case law evolved, the courts became more responsive to the needs of children.<sup>51</sup> Moreover, the United States Supreme Court acknowledged that the

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45. *Roberts*, 448 U.S. at 65-66. The purpose of cross-examination is "to challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.'" *Id.* at 71 (quoting David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378 (1972)).

46. See MINN. R. EVID. 803(2)-(24), 804(b)(1)-(b)(5); see also FED. R. EVID. 803(1)-(24), 804(b)(1)-(b)(5).

Rules 803 and 804 of the Minnesota Rules of Evidence contain the two categories of hearsay exceptions. Rule 803 applies whether or not the declarant is unavailable while Rule 804 requires that the declarant be unavailable. The major difference between the two categories is the focus on the declarant's availability to testify. This difference, however, appears only to have historical significance. MINN. R. EVID. 803 committee comment; see also McCORMICK, *supra* note 31, § 253, at 444.

Rule 803(2) through 803(23) are considered "firmly-rooted" exceptions because these rules represent the codification of a long-standing common law tradition of admitting certain types of out-of-court statements into evidence over hearsay objections. See *Idaho v. Wright*, 497 U.S. 805, 817 (1990); *State v. Goldenstein*, 505 N.W.2d 332, 343 (Minn. Ct. App. 1993); see also MICHAEL H. GRAHAM, HANDBOOK ON FEDERAL EVIDENCE § 803, at 830 (3d ed. 1991) (noting that "Rule 803 includes those hearsay statements which have been considered so trustworthy as to be admissible without requiring imposition of the time and expense associated with production of a declarant if available or in spite of the fact that the declarant of the statement actually testifies at trial.")

47. *Roberts*, 448 U.S. at 66.

48. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

49. See generally Yuille, *supra* note 11, at 247.

50. *Id.*

51. See, e.g., *Alexander v. State*, 692 S.W.2d 563 (Tex. 1985) (permitting use of anatomically correct dolls as demonstrative evidence in child abuse cases); Sheryl K. Essenburg, *Accommodating Child Victims in the Criminal Courtroom*, 78 ILL. B.J. 248 (1990) (relaying instance where six-year-old boy was permitted to testify while sitting on his father's lap); *State v. Hoversten*, 437 N.W.2d 240 (Iowa 1989) (permitting placement

prosecution of crimes against children is an important societal interest<sup>52</sup> that requires certain modifications to standard procedures.<sup>53</sup> Among these modifications were new standards recognizing that children's out-of-court statements are vital to the successful prosecution of child abuse.

#### IV. THE DEVELOPMENT OF THE MINNESOTA CHILD HEARSAY STATUTE

One of the most difficult evidentiary problems in the prosecution of child sexual abuse cases is the possibility that the child victim's out-of-court statements will be deemed inadmissible. The child victim's testimony is generally the most crucial and valuable piece of evidence.<sup>54</sup> The child and the perpetrator are usually the only persons involved, so the child's statements may be the only evidence against the perpetrator.<sup>55</sup> Unfortunately, the child victim may not be able to testify at all, or if the child is able to testify, the child may be unable to testify effectively.<sup>56</sup> In these cases, it is essential to the successful prosecution of the case that the child's out-of-court statements be admitted into evidence.<sup>57</sup> Even if the child does testify, out-of-court statements are use-

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of one-way mirror between defendant and step-daughter while step-daughter testified in sexual abuse case), *cert. denied*, 493 U.S. 875 (1989).

52. In *Maryland v. Craig*, 497 U.S. 836, 852 (1990), the Court recognized the state's interest in protecting children from the trauma that could result from testifying. In particular, the Court noted that testifying in the adversarial environment of the courtroom can have a significant and negative impact upon the child's psychological well-being. *Id.* at 852-57. The Court held that it would not second-guess the judgment underlying the state's measures to protect children from harm, provided the state makes an adequate showing of necessity for the means it chooses to protect children from harm. *Id.* at 856-57.

53. *Id.* at 852.

54. The victim's testimony alone is sufficient to support a sexual assault conviction. See MINN. STAT. § 609.347, subd. 1 (1992).

55. See *Pennsylvania v. Ritchie*, 480 U.S. 39 (1986). The Court recognized that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim." *Id.* at 60. See also *State v. Wright*, 751 S.W.2d 48, 52 (Mo. 1988); WHITCOMB, *supra* note 1, at 22.

56. This group of child witnesses includes those children who get on the stand and freeze and those children who can answer preliminary, nonthreatening questions but freeze when the abuse itself is discussed.

57. See *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992) (noting that exclusion of the unavailable child's statements "significantly reduces the likelihood of a successful prosecution") (quoting *State v. Joon Kyu Kim*, 398 N.W.2d 544, 551 (Minn. 1987)); accord *United States v. Inadi*, 475 U.S. 387, 394-95 (1986) (noting that there is no better version of the evidence than out-of-court statements when the declarant is unavailable); see also *Graham*, *supra* note 35, at 578 n.301 (reporting that children's statements may be the only probative evidence available when the child retracts earlier statements, is unable to recall the abuse, or is too young to testify); John C. Koski, *Idaho v. Wright: The Defenestration of Corroborating Evidence*, 46 U. MIAMI L. REV. 205, 214 (1991) (stating "[n]owhere is the need for out-of-court statements greater than in child abuse litigation") (quoting Brief of Amici Curiae American Professional Society on the Abuse of

ful to demonstrate the child's spontaneity, affect, and initial use of child-like vocabulary.<sup>58</sup>

Cognizant of both the difficulties of sexual abuse prosecutions and the *Roberts* two-prong test, many legislatures enacted statutes that specifically allow children's out-of-court statements to be admitted as substantive evidence.<sup>59</sup> These statutes responded to the apparent reluctance of the courts to admit a child victim's out-of-court statements and the resulting difficulty in prosecuting child sexual abuse cases. In 1984, Minnesota enacted its statute, modeled after several existing child hearsay statutes.<sup>60</sup>

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Children, American Academy of Pediatrics, American Medical Association, National Organization for Women, National Association of Counsel for Children, State of Rhode Island Office of the Child Advocate, and Support Center for Child Advocates at 5, *Idaho v. Wright*, 497 U.S. 805 (1990) (No. 89-260)).

58. See *State v. Robinson*, 735 P.2d 801, 814-15 (Ariz. 1987). This statement does not imply, however, that later statements or testimony are unreliable. If the child is subject to repeated questioning, answers may become very similar and sound rehearsed. See also *State v. Blohm*, 281 N.W.2d 651 (Minn. 1979). In *Blohm*, the child's out-of-court statements were admitted as prior consistent statements. *Id.* at 652. Accord *State v. Wright*, 751 S.W.2d 48, 52 (Mo. 1988) (suggesting that out-of-court statements are more reliable than in-court statements because of trauma and influence prior to trial); WHITCOMB, *supra* note 1, at 18. The child's true emotional response to the abuse may also be deadened as a result of answering repeated questions about the incident.

59. See ALA. CODE §§ 15-25-31 to -37 (1982 & Supp. 1993); ALASKA STAT. § 12.40.110 (1962 & Supp. 1993) (grand jury proceedings); ARIZ. REV. STAT. ANN. § 13-1416 (1989) (unconstitutional *Robinson*, 735 P.2d at 808); ARK. R. EVID. 803(25)(A) (1993); CAL. EVID. CODE § 1228 (West Supp. 1994); COLO. REV. STAT. § 13-25-129 (1987 & Supp. 1993); COLO. REV. STAT. § 18-3-411(1) (1991); COLO. REV. STAT. §§ 18-3-411(1), (3) (1986 & Supp. 1993); DEL. CODE ANN. tit. 11, § 3513 (Supp. 1992); FLA. STAT. ANN. § 90.803(23) (1993); GA. CODE ANN. § 24-3-16 (Michie Supp. 1993) (permits testimony of person to whom child's statement was made); IDAHO CODE § 19-3024 (1987 & Supp. 1993); 725 ILL. COMP. STAT. ANN. art. 5, § 115-10 (West 1992 & Supp. 1993); IND. CODE ANN. § 35-37-4-6 (Michie 1994); KAN. STAT. ANN. § 60-460(dd) (1983 & Supp. 1993); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1993); MD. CTS. & JUD. PROC. CODE ANN. § 9-103.1 (1989 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 233, § 81 (West Supp. 1993); MICH. R. EVID. 803A (1991); MISS. CODE ANN. § 13-1-403 (Supp. 1993) (unconstitutional *Hall v. State*, 539 So.2d 1338, 1347-48 (Miss. 1989); MISS. R. EVID. 803(25) (1993); MO. REV. STAT. § 491.075 (1986); NEV. REV. STAT. 51.385 (1991); N.J. R. EVID. 63(33) (1993); N.D. R. EVID. 803(24) (1992); OHIO R. EVID. 807 (1993); ORLA. STAT. tit. 12, § 2803.1 (1991 & Supp. 1993); OR. REV. STAT. § 40.460 (1993 & Supp. 1993); 42 PA. CONS. STAT. § 5985.1 (West Supp. 1993); R.I. GEN. LAWS § 14-1-69 (Supp. 1993); S.C. CODE ANN. § 19-1-180 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 19-16-28 (1987 & Supp. 1993); TEX. CODE CRIM. PROC. ANN. art. 38.072 (West 1979 & Supp. 1994); UTAH CODE ANN. § 76-5-411 (1990 & Supp. 1993); VA. CODE ANN. § 63.1-248.13:2 (Michie Supp. 1993); VT. R. EVID. 804a (1993); VT. R. CRIM. PROC. 26(d) (1993); WASH. REV. CODE ANN. § 9A.44.120 (1992). List compiled in part by the National Center for Prosecution of Child Abuse.

60. 1984 Minn. Laws ch. 588, § 4. The language of Minnesota's child hearsay statute is virtually identical to Washington's 1983 Revised Code Annotated § 9A.44.120, except Washington's statute applies only in sexual abuse cases. See WASH. REV. CODE § 9A.44.120 (1992).

The Minnesota child hearsay statute has four main requirements for admissibility.<sup>61</sup> First, the out-of-court statement must be one which is not admissible under any other statute or rule of evidence.<sup>62</sup> Second, the trial court must hold a hearing to determine the reliability of the statement.<sup>63</sup> Third, if the child is available and testifies, the statement is admissible; or in the alternative, if the child is unavailable to testify, there must be corroborative evidence of the act.<sup>64</sup> Finally, the prosecution must give sufficient notice to the defendant of its intent to use the statement.<sup>65</sup>

The second and third requirements of the child hearsay statute mirror the *Roberts* two-prong test. The statute's second requirement, indicia of reliability, satisfies the trustworthiness prong of the *Roberts* test.<sup>66</sup> There must be an analysis of the statement's reliability when it is of-

61. See MINN. STAT. § 595.02, subd. 3 (1992). The statute provides:

[a]n out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child or person mentally impaired as defined in section 609.341, subdivision 6, either:

(i) testifies at the proceedings; or

(ii) is unavailable as a witness and there is corroborative evidence of the act; and

(c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

*Id.*

62. *Id.*

63. *Id.* § 595.02, subd. 3(a).

64. *Id.* § 595.02, subd. 3(b) (i), (ii). *But see* TEX. CODE CRIM. PROC. ANN. art. 38.072 (West 1985) (providing that the statute only applies when the child is available to testify); *contra* ALA. CODE § 15-25-31(2)(b) (1989) (providing that if the child is unavailable, the statement need only contain particularized guarantees of trustworthiness); VT. R. EVID. 804a (1992) (providing that the statute only applies when the child is available to testify).

For discussion on the unavailability of a child to testify, *see supra* notes 28-34 and accompanying text.

65. MINN. STAT. § 595.02, subd. 3(c) (1992).

66. *See supra* notes 43-44 and accompanying text.

ferred under the child hearsay statute because the statute is not a firmly-rooted hearsay exception.<sup>67</sup> The third requirement of the statute reflects the necessity prong of the *Roberts* test.<sup>68</sup> If the child victim is available to testify, the Confrontation Clause is not implicated because the child will testify under oath and will be subject to cross-examination by the defendant.<sup>69</sup> If the child is unavailable, the necessity prong of *Roberts* is fulfilled because the child's out-of-court statements and, possibly, physical evidence are generally the only available evidence.<sup>70</sup>

#### V. INTERPRETATIONS OF THE MINNESOTA CHILD HEARSAY STATUTE PRIOR TO *IDAHO V. WRIGHT*

The initial cases interpreting the child hearsay statute focused primarily on three of the statute's requirements and appeared to ignore the fourth.<sup>71</sup> The discussion in appellate court decisions focused on the determination of which factors indicated that the statement was sufficiently reliable to satisfy the requirements of the statute and the test enunciated in *Roberts*.<sup>72</sup> The courts summarily discussed the fac-

67. See *State v. Goldenstein*, 505 N.W.2d 332, 343 (Minn. Ct. App. 1993) (accepting the Eighth Circuit's determination that MINN. STAT. § 595.02, subd. 3, is not a firmly-rooted hearsay exception).

68. See *supra* notes 45-47 and accompanying text.

69. See *California v. Green*, 399 U.S. 149, 162 (1970). The Confrontation Clause is inherently satisfied when the declarant testifies under oath while admitting or denying the statement, is subject to cross-examination, and the jury is able to consider and observe the declarant's demeanor. *Id.* at 158-59; see also *United States v. Shaw*, 824 F.2d 601, 609 n.9 (8th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988); *State v. Bellotti*, 383 N.W.2d 308, 313 (Minn. Ct. App. 1986), *review denied*, (Minn. Apr. 24, 1986).

70. *Bellotti*, 383 N.W.2d at 314.

In light of the recent United States Supreme Court decision in *White v. Illinois*, 112 S. Ct. 736 (1992), it is questionable whether a finding of unavailability is still required. *White* involved a conviction for sexual abuse of a four-year-old girl. The victim was unable to testify and the trial court admitted the child's statements as spontaneous declarations and as statements made for the purposes of medical diagnosis. *Id.* at 740. The Court rejected the defendant's argument that the declarant must be unavailable before the statements are admissible. It stated that the "unavailability rule would . . . do little to improve the accuracy of fact finding . . ." *Id.* at 742. See also *Ring v. Erickson*, 983 F.2d 818, 819 (8th Cir. 1993) (noting that whether the minor was unavailable is irrelevant for purposes of the confrontation clause); Myrna S. Raeder, *White's Effect on the Right to Confront One's Accusers*, CRIM. JUST., Winter 1993, at 4-5 (questioning why the *Wright* court asked whether a showing of unavailability is required if the answer is always "no").

71. See, e.g., *State v. Dana*, 422 N.W.2d 246, 248-50 (Minn. 1988), *habeas corpus denied*, 958 F.2d 237 (8th Cir. 1992), *cert. denied*, 112 S. Ct. 3043 (1992); *State v. Burns*, 394 N.W.2d 495, 496-99 (Minn. 1986); *Bellotti*, 383 N.W.2d at 312-14.

72. The appellate courts gave primary attention to determining whether the hearing held by the trial court was adequate. Generally, the trial court's failure to hold a hearing to determine the statement's reliability was not reversible error. Acknowledging that the purpose of the hearing was to keep unreliable evidence from the jury, the appellate courts found the failure to hold a hearing harmless if the statement contained



tors used to find corroboration.<sup>73</sup> These factors overlapped with the factors used to establish reliability. The early court opinions also expanded the class of declarants to which the statute applied.<sup>74</sup> These early decisions suggest that, even at the statute's inception, the explicit requirements of the statute were not going to be followed in their entirety.

The appellate courts primarily focused on whether the child's out-of-court statement contained sufficient indicia of reliability. Trial courts considered a variety of factors to determine whether the statements were sufficiently reliable: the spontaneity of the statement,<sup>75</sup> the use of leading or suggestive questions,<sup>76</sup> the motive of the child or recipient of the statement to fabricate the abuse,<sup>77</sup> the fact that the statement is inconsistent with the type of knowledge expected at the child's age,<sup>78</sup> the time between the report and the alleged incident,<sup>79</sup> the defendant's opportunity to commit the crime,<sup>80</sup> the child's fear of the defendant,<sup>81</sup> the results of the judge's examination of the child's reliability

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sufficient indicia of reliability. *Dana*, 422 N.W.2d at 249. It was sufficient that the reliability of the statement was evident from the record. *Burns*, 394 N.W.2d at 497-98. The appellate courts also rejected arguments that there had to be testimony about the circumstances surrounding each statement before a determination of reliability could be made. *Dana*, 433 N.W.2d at 249. The reliability determination can be made on the arguments and submissions of the parties alone. *Id.* Although the statute specifically requires that a hearing be held to determine reliability, MINN. STAT. § 595.02, subd. 3(a) (1992), it was very clear from the initial interpretations of the statute that the court would modify and change the statutory requirements. See *Dana*, 422 N.W.2d at 249; *Burns*, 394 N.W.2d at 497-98.

73. See, e.g., *State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1988); *State v. Ring*, No. C1-89-1038, 1990 WL 462, at \*2 (Minn. Ct. App. Jan. 9, 1990), *habeas corpus granted sub nom Ring v. Erickson*, 968 F.2d 760 (8th Cir. 1992), *opinion vacated and superseded*, 983 F.2d 818 (1992); *State v. Biermaier*, No. CO-88-2364, 1989 WL 72223, at \*1-2 (Minn. Ct. App. July 3, 1989); *State v. Carver*, 380 N.W.2d 821, 826 (Minn. Ct. App. 1986).

74. See *infra* notes 96-97 and accompanying text.

75. *State v. Bellotti*, 383 N.W.2d 308, 313 (Minn. Ct. App. 1986), *review denied* (Minn. Apr. 24, 1986); *accord State v. Struss*, 404 N.W.2d 811, 816 (Minn. Ct. App. 1987) (finding spontaneous revelation of abuse where the victim was reluctant to stay with the defendant one week after the alleged incident and where the victim's behavior deteriorated), *review denied*, (Minn. June 9, 1987).

76. *Bellotti*, 383 N.W.2d at 313; *State v. Carver*, 380 N.W.2d 821, 826 (Minn. Ct. App. 1986); see also *Struss*, 404 N.W.2d at 816 (rejecting the argument that the initial use of leading questions indicated unreliability when the victim then freely discussed the matter).

77. *Conklin*, 444 N.W.2d at 276; *Bellotti*, 383 N.W.2d at 313.

78. *Bellotti*, 383 N.W.2d at 313.

79. *Id.* at 313; *Carver*, 380 N.W.2d at 826.

80. *State v. Bellotti*, 383 N.W.2d 308, 313 (Minn. Ct. App. 1986), *review denied*, (Minn. Apr. 24, 1986).

81. See *State v. Struss*, 404 N.W.2d 811, 816 (Minn. Ct. App. 1987), *review denied*, (Minn. June 9, 1987).

immediately before trial,<sup>82</sup> and the existence of corroboration of the abuse such as the child's fear of speaking to men.<sup>83</sup> Many of the appellate decisions, however, summarily found sufficient indicia of reliability without articulating the factors on which the trial courts relied.<sup>84</sup> When reviewing findings of reliability, the Minnesota Court of Appeals found several additional factors: consistent repetition,<sup>85</sup> deterioration in the victim's behavior,<sup>86</sup> and whether the child agreed with everything the interviewer asked.<sup>87</sup> As this extensive list of factors indicates, the courts examined the totality of the circumstances surrounding the statement to evaluate reliability.

The child hearsay statute requires, in addition to factors indicating reliability, that there be corroborative evidence of the act of abuse when the child is unavailable to testify.<sup>88</sup> The appellate courts have found corroborative evidence where there was a partial confession,<sup>89</sup> where there was testimony from other children who witnessed the abuse or who were themselves victims of the same perpetrator,<sup>90</sup> where the child's behavior changed following the alleged incident,<sup>91</sup> where the defendant was present in the home at the time of the incident,<sup>92</sup> and where the child exhibited a fearful or upset demeanor when making the statement.<sup>93</sup> As this list indicates, there is a significant overlap between the factors used to find reliability and those used to find corroboration.

The Minnesota child hearsay statute explicitly provides that its application is limited to those statements that are inadmissible under any other rule of evidence.<sup>94</sup> Contrary to this explicit statutory language,

82. *State v. Ring*, No. C1-89-1038, 1990 WL 462, at \*2 (Minn. Ct. App. Jan. 9, 1990), *habeas corpus granted sub nom Ring v. Erickson*, 968 F.2d 760 (8th Cir.), *opinion amended and superseded*, 983 F.2d 818 (8th Cir. 1992).

83. *Bellotti*, 383 N.W.2d at 313.

84. *Ring*, 1990 WL 462, at \*2; *State v. Biermaier*, No. C0-88-2364, 1989 WL 72223, at \*3 (Minn. Ct. App. July 3, 1989); *State v. Ronnebaum*, 446 N.W.2d 699, 701 (Minn. Ct. App. 1989), *rev'd on other grounds*, 449 N.W.2d 722 (Minn. 1990).

85. *Struss*, 404 N.W.2d at 816; *State v. Bellotti*, 383 N.W.2d 308, 313 (Minn. Ct. App. 1986), *review denied*, (Minn. Apr. 24, 1986); *State v. Carver*, 380 N.W.2d 821, 825 (Minn. Ct. App. 1986).

86. *State v. Struss*, 404 N.W.2d 811, 816 (Minn. Ct. App. 1986), *review denied*, (Minn. June 9, 1987).

87. *Bellotti*, 383 N.W.2d at 313.

88. MINN. STAT. § 595.02, subd. 3(b)(ii) (1992).

89. *Bellotti*, 383 N.W.2d at 314.

90. *State v. Ring*, No. C1-89-1038, 1990 WL 462, at \*2 (Minn. Ct. App. Jan. 9, 1990), *habeas corpus granted sub nom Ring v. Erickson*, 968 F.2d 760 (8th Cir. 1992), *opinion amended and superseded*, 983 F.2d 818 (8th Cir. 1992); *Bellotti*, 383 N.W.2d at 314.

91. *State v. Carver*, 380 N.W.2d 821, 826 (Minn. Ct. App. 1986) (citing *M.N.D. v. B.M.D.*, 356 N.W.2d 813, 818 (Minn. Ct. App. 1984)).

92. *Ring*, 1990 WL 462, at \*2.

93. *Id.*

94. MINN. STAT. § 595.02, subd. 3 (1992).

at least two courts first applied the child hearsay statute and, upon finding it inapplicable, turned to the other rules of evidence.<sup>95</sup> The application of the statute where other rules of evidence should have been applied demonstrates the state of confusion about the statute's purpose and indicates a need for clarification.

Curiously, the courts also have interpreted the child hearsay statute to apply to statements made by children who are not describing their own abuse. The Minnesota Supreme Court held that the statute permits the admission of out-of-court statements made by children who witnessed the complainant's abuse, provided the witness was simultaneously abused by the perpetrator.<sup>96</sup> This interpretation is puzzling in light of explicit statutory language limiting the statute's application to statements that are "alleging, explaining, denying, or describing" any abuse of that child.<sup>97</sup> The court was apparently willing to stretch the interpretation of a very explicit statutory requirement to reach a just result.

The child hearsay statute does not require that the child's out-of-court statement be made to any particular person before the statute will apply.<sup>98</sup> Accordingly, no judicial restraints were imposed.<sup>99</sup> Statements made to doctors,<sup>100</sup> parents and foster parents,<sup>101</sup> police of-

95. *State v. Dana*, 422 N.W.2d 246, 250 n.2 (Minn. 1988), *habeas corpus denied*, 958 F.2d 237 (8th Cir. 1991), *cert. denied*, 111 S. Ct. 693 (1991); *State v. Smith*, 384 N.W.2d 546, 549 (Minn. Ct. App. 1986), *review denied*, (Minn. May 29, 1986); *see also State v. Biermaier*, No. C0-88-2364, 1989 WL 72223, at \*2 (Minn. Ct. App. July 3, 1989) (confusing the requirements of the statute with those of the rules of evidence).

96. *Dana*, 422 N.W.2d at 250. This decision overrules an earlier Court of Appeals decision holding that the statute is applicable only to statements made by the complainant. *State v. Bellotti*, 383 N.W.2d 308, 313 (Minn. Ct. App. 1986). Although the court in *Bellotti* held that this use of the statute was in error, the admission of the statement was upheld under Rule 803(24) of the Minnesota Rules of Evidence. *Id.*

The Court of Appeals later extended the holding in *Dana* to include situations in which the testifying child was an earlier victim of the defendant. *State v. Voelker*, No. C8-90-412, 1990 WL 204269, at \*2 (Minn. Ct. App. Dec. 18, 1990). *But see* FLA. STAT. ch. 90.803(23) (1993) (providing specifically for the admission of statements by children who observed the abuse).

97. MINN. STAT. § 595.02, subd. 3 (1992).

98. *Contra* MD. CTS. & JUD. PROC. CODE ANN. § 9-103.1 (1989 & Supp. 1993) (allowing only statements made to licensed physicians, licensed psychologists, licensed social workers or teachers to be admissible under the Maryland child hearsay statute).

99. Some commentators suggest that statements made to police officers and social workers are less likely to be admitted because they are not considered to be sufficiently reliable. *See* Graham, *supra* note 35, at 537.

100. *State v. Conklin*, 444 N.W.2d 268, 275 (Minn. 1989) (dictum); *State v. Carver*, 380 N.W.2d 821, 825 (Minn. 1986).

101. *See Conklin* 444 N.W.2d at 276 (questioning the reliability of foster parents' statements because their desire to adopt the child provided a motive for fabrication); *Carver*, 380 N.W.2d at 825; *State v. Biermaier*, No. C0-88-2364, 1989 WL 72223, at \*1 (Minn. Ct. App. July 3, 1989).

ficers,<sup>102</sup> social workers,<sup>103</sup> and psychologists<sup>104</sup> have all been admitted under the statute. As long as the child's statement contained sufficient indicia of reliability and the other statutory requirements were met, the statement was admitted.

The initial decisions interpreting the child hearsay statute indicate that the appellate courts were willing to admit children's out-of-court statements and to use the statute to facilitate the admission of those statements. Yet, these decisions also suggest that the courts are not quite as willing to require total compliance with all of the statute's requirements. Instead, the courts seemingly modified the statute's requirements to enable children's statements to be admitted.<sup>105</sup> The courts failed to work with the existing hearsay rules and failed to expressly exercise their inherent rule-making authority<sup>106</sup> to address the troubling aspects of admitting children's out-of-court statements. Minnesota courts finally received some guidance from the United States Supreme Court on how to deal with child victims' out-of-court statements when the Court decided *Idaho v. Wright*.

## VI. THE INFLUENCE OF *IDAHO V. WRIGHT*

In the 1990 decision of *Idaho v. Wright*,<sup>107</sup> the United States Supreme Court directly addressed the issue of the admissibility of children's out-of-court statements and signalled a turning point for this area of the law. The Court clarified a number of issues and provided much needed guidance on the admission into evidence of children's out-of-court statements using the existing rules of evidence.

### A. *The Facts and Lower Court Decisions*

Laura Wright and Robert Giles were each convicted of two counts of lewd conduct with a minor under sixteen.<sup>108</sup> The victims were Wright's two daughters.<sup>109</sup> The abuse was discovered when the older

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102. *Conklin*, 444 N.W.2d at 270; *Biermaier*, 1989 WL 72223, at \*1; *State v. Bellotti*, 383 N.W.2d 308, 313 (Minn. Ct. App. 1986), *review denied*, (Minn. Apr. 24, 1986).

103. *Bellotti*, 383 N.W.2d at 314.

104. *Biermaier*, 1989 WL 72223, at \*1.

105. This modification of the statute may be an indirect exercise of the Minnesota Supreme Court's authority to establish the rules of evidence. *See infra* note 274 and accompanying text.

106. *See also* *State v. Nielsen*, 467 N.W.2d 615, 620 (Minn. 1991) (noting that the separation of powers doctrine requires that the court, not the legislature, has primary responsibility for adopting rules of evidence); *State v. Willis*, 332 N.W.2d 180, 184 (Minn. 1983) (noting that courts inherently "have the power to establish rules of evidence").

107. 497 U.S. 805 (1990).

108. *Id.* at 804.

109. The older daughter was five-and-a-half years old, while the younger daughter was only two-and-a-half years old. *Id.* at 808.

daughter told her father's girlfriend that Giles "had sexual intercourse with her while [Wright] held her down and covered her mouth."<sup>110</sup> Both girls were examined by a pediatrician who had extensive experience in examining sexual abuse victims.<sup>111</sup> The trial court found that the younger daughter, age three at the time of trial, was incapable of communicating with the jury.<sup>112</sup> She, therefore, did not testify at trial.<sup>113</sup>

The trial court's admission of the younger daughter's statements to the pediatrician was the subject of Wright's appeal. The doctor testified about the conversation he had with the younger daughter when he conducted her physical examination.<sup>114</sup> He stated that she responded affirmatively to questions about vaginal-penile contact between herself and Giles.<sup>115</sup> The doctor also indicated that when they talked about sexual contact, the younger daughter became silent and did not elaborate upon her answers, whereas in the general conversation she was very animated and talkative.<sup>116</sup>

The Idaho Supreme Court reversed Wright's conviction for the abuse of the younger daughter.<sup>117</sup> The Idaho court held that the doctor's testimony violated Wright's Sixth Amendment right to confrontation, even though the trial court had properly admitted the statement

110. *Id.* at 809. Wright and her ex-husband, Louis Wright, had an informal joint custody agreement for the older daughter. *Id.*

111. The pediatrician's examination of the younger daughter revealed physical evidence "strongly suggestive of sexual abuse with vaginal contact." *Id.* The older daughter's examination also revealed that it was "highly possible that vaginal penetration had been occurring on a relatively regular basis." *State v. Giles*, 772 P.2d 191, 192 (Idaho 1989).

112. *Idaho v. Wright*, 497 U.S. 805, 809 (1990).

113. *Id.*

114. The younger daughter's statements were admitted under Rule 803(24) of the Idaho Rules of Evidence. *Id.* at 811-12. This rule is substantially the same as Rule 803(24) of the Minnesota Rules of Evidence. *See infra* note 250.

The Court did not address the application of IDAHO R. EVID. 803(4), Statements for Purpose of Medical, Diagnosis or Treatment. The Court also did not analyze whether the Confrontation Clause requires that the declarant be unavailable. *See State v. Larson*, 472 N.W.2d 120, 124 n.1 (Minn. 1991), *cert. denied*, 112 S. Ct. 965 (1992). The *Wright* Court assumed for purposes of its discussion that she was unavailable. *Idaho v. Wright*, 497 U.S. at 816.

115. The Court focused on four specific questions: "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" *Id.* at 810. The younger daughter responded affirmatively to and elaborated on the first and second questions; she merely responded affirmatively to the third question; and she failed to respond to the fourth question. *Id.* at 810-11. She also volunteered, "[D]addy does do this with me, but he does it a lot more with my sister than with me." *Id.* at 811. The doctor admitted on cross-examination that his notes were summarized and that he failed to record any specific statements or to note any emotional change during the examination. *Id.*

116. *Id.* at 810-11.

117. *Id.* at 812 (citing *State v. Wright*, 775 P.2d 1224 (Idaho 1989)).

under the residual hearsay exception.<sup>118</sup> The Idaho Supreme Court concluded that, because of the lack of video recording and the use of leading questions by an interviewer with a preconceived idea of what the child should disclose, the out-of-court statements lacked sufficient indicia of reliability.<sup>119</sup> The United States Supreme Court affirmed the Idaho Supreme Court's decision.<sup>120</sup>

### B. *The Analysis*

The United States Supreme Court began its analysis by noting that a very thin line exists between the protections of the Confrontation Clause and the provisions of the hearsay exclusion rules.<sup>121</sup> A finding of inadmissibility based on a violation of the Sixth Amendment will supersede any finding of admissibility under the rules of evidence.<sup>122</sup> In order to be admissible, therefore, the child's out-of-court statement must satisfy the provisions of both the applicable hearsay exception and the Confrontation Clause.

The Court further recognized two categories of hearsay exceptions, those that are firmly-rooted and those that are not.<sup>123</sup> Statements not falling within a firmly-rooted exception are presumptively unreliable and inadmissible, unless particularized guarantees of trustworthiness exist to satisfy the reliability prong of *Roberts*.<sup>124</sup> The Court held that Rule 803(24) of the Idaho Rules of Evidence is not a firmly-rooted

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118. *Id.* at 812, 816.

Wright and Giles filed separate appeals. *State v. Wright*, 775 P.2d 1224, 1225 (Idaho 1989). Wright argued that the doctor's testimony violated her right of confrontation, while Giles only argued inadmissibility under Rule 803(24) of the Idaho Rules of Evidence. *Id.* The Idaho Supreme Court held that the statements were properly admitted under the rules of evidence and affirmed Giles conviction. *State v. Giles*, 772 P.2d 191, 195 (Idaho 1989). In Wright's case, however, the court concluded that the statements lacked the reliability necessary to satisfy the Confrontation Clause. *Id.* at 1231. The court did not feel it could address this same issue in Giles' appeal because he did not raise it. *Giles*, 772 P.2d at 195 n.3 (Huntley, J., concurring).

It is interesting to note the Idaho court's presumed mutual exclusivity of factors used for the different admissibility evaluations. In *Giles*, the court established reliability based on physical evidence that corroborated the sexual abuse, the absence of a motive to fabricate, the absence of a custody battle, and the opportunity of the defendant to commit the crime. *Giles*, 772 P.2d at 194, 195 n.2. These factors outweighed the doctor's use of leading questions. *Id.* at 195. In *State v. Wright*, however, the statements were held to be constitutionally unreliable because of the doctor's failure to record the statements on videotape, his use of leading questions, and his preconceived idea of what the younger daughter would say. 775 P.2d at 1227. With the exception of one element, the court did not look to any of the same factors to find or deny reliability.

119. *Idaho v. Wright*, 497 U.S. at 812-13.

120. *Id.* at 813.

121. *Id.* at 814.

122. *Id.*; see also *White v. Illinois*, 112 S. Ct. 736, 741 (1992).

123. *Idaho v. Wright*, 497 U.S. at 816-17.

124. *Id.* at 818.

hearsay exception and that statements offered under it are inadmissible absent a finding of sufficient indicia of reliability.<sup>125</sup> In this case, the Court found that the younger daughter's statements lacked the necessary indicia of reliability and that the Idaho Supreme Court had properly determined that the statements were inadmissible.<sup>126</sup>

Although the Court agreed with the result reached by the Idaho Supreme Court, it rejected the lower court's determination of unreliability based on the lack of procedural safeguards.<sup>127</sup> It labelled the reliance on procedural safeguards an "artificial litmus test," unnecessary for constitutional purposes.<sup>128</sup> The Court acknowledged that "[o]ut-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances" and stated, "we do not believe the Constitution imposes a fixed set of procedural prerequisites" to a finding that a statement is admissible.<sup>129</sup>

Rather than focusing on superficial procedural safeguards, the Court held that trial courts must consider the totality of the circumstances surrounding the child's out-of-court statement.<sup>130</sup> In looking at the totality of the circumstances, however, the trial court must ignore corroborative evidence.<sup>131</sup> The Court derived this conclusion by examining why statements that meet the requirements of the firmly-rooted hearsay exceptions are admissible without additional evaluation of the statement's reliability. The Court specifically focused on the excited utterance exception,<sup>132</sup> the dying declaration exception,<sup>133</sup> and the medical treatment or diagnosis exception.<sup>134</sup> Statements falling within these exceptions derive their trustworthiness not from outside corroborative evidence, but rather from the surrounding circumstances that indicate the unlikelihood the declarant was lying.<sup>135</sup> Subsequent cross-examination about these statements at trial "would be of marginal utility" or superfluous.<sup>136</sup> To be admissible, therefore, an

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125. *Id.* at 817. The Court described the residual hearsay exception as an *ad hoc* accommodation for statements that do not fall within the traditional hearsay categories. *Id.*

126. *Id.*

127. *Id.*

128. *Idaho v. Wright*, 497 U.S. 805, 819 (1990).

129. *Id.* at 818.

130. *Id.* at 819.

131. *Id.*

132. *Id.* at 820. See FED. R. EVID. 803(2); see also MINN. R. EVID. 803(2). See *infra* notes 183-211 and accompanying text.

133. *Idaho v. Wright*, 497 U.S. at 820. See FED. R. EVID. 804(b)(2); see also MINN. R. EVID. 804(b)(2).

134. *Idaho v. Wright*, 497 U.S. at 820. See FED. R. EVID. 803(4); see also MINN. R. EVID. 803(4). See *infra* notes 212-247 and accompanying text.

135. *Idaho v. Wright*, 497 U.S. at 820.

136. *Id.*

out-of-court statement must be so inherently truthful that cross-examination to test its truthfulness would be futile.<sup>137</sup>

The Court then enumerated some of the factors courts should consider in light of the totality of the circumstances *existing* at the time the statement was made.<sup>138</sup> These include spontaneity, consistent repetition,<sup>139</sup> the mental state of the declarant,<sup>140</sup> the child's use of terminology that is inconsistent with the child's age,<sup>141</sup> motive to fabricate, the use of leading questions,<sup>142</sup> and prior questioning of the child.<sup>143</sup>

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137. *Id.* at 820-21.

138. *Id.* at 821-22.

139. Care must be exercised when looking at the consistency of the statement. If the focus is on the internal consistency of an individual statement, this factor relates to circumstances surrounding the statement and is consistent with the Court's decision. *See, e.g., State v. Edwards*, 485 N.W.2d 911, 916 (Minn. 1992) (considering the internal consistency of the statement). If, however, the focus is on the consistency of all of the child's statements, this is a corroborative factor. The consistency of all the statements adds corroboration and believability, but it may not add to the internal reliability of the individual statement.

Aside from looking at the consistency of the statements for reliability purposes, care must be exercised in evaluating the consistency of all of the child's statements. Children who have been subjected to repeated abuse may not be able to distinguish one abuse incident from another or may describe different abuse incidents each time a statement is made. *Myers, Expert Testimony, supra* note 13, at 88. This does not mean that the child has been coached or is lying. It simply means that the child has been abused so frequently that the child is no longer able to distinguish one incident from another.

Where the child gives apparently inconsistent statements, such as those described above, attempts must be made to determine whether the child is talking about the same incident or multiple incidents. This can be accomplished by asking the child "landmark" questions such as "Was it before or after school?", "Was it dark or light outside?", "Was it before or after Christmas?", "Was it before or after Mom/Dad came home from work?", etc. These questions clarify what the child is describing and negate attempts to argue that a particular statement is not reliable.

140. Emphasis on the child's mental state may be somewhat deceptive. Young children may not know that what occurred was wrong, and, consequently, they may not have a "normal" emotional response when they reveal the abuse. *WHITCOMB, supra* note 1, at 88. *See, e.g., Commonwealth v. Sanford*, 580 A.2d 784 (Pa. Super. Ct. 1990). *Sanford* noted that the victim's mother, in describing the look on her child's face, stated that the child did not seem to know whether the sexual contact she was describing was right or wrong. *Id.* at 789.

141. This factor has been interpreted to mean that use of age-appropriate language in describing the abuse is not an indication of reliability. *See Ring v. Erickson*, 983 F.2d 818, 821 (8th Cir. 1992). This interpretation ignores the fact that the use of age-appropriate language may well undermine allegations of fabrication or coaching, as the child would be expected to adopt the language used by the adult in these situations.

142. The Court specifically noted that the use of appropriate leading questions does not necessarily make the statement unreliable. *Idaho v. Wright*, 497 U.S. 805, 819 (1990) (citing *JOHN E.B. MYERS, CHILD WITNESS LAW AND PRACTICE*, § 4.6, at 129-34 (1987)).

143. *Id.* at 821-22. Most of these factors were selected from cases applying various hearsay exceptions. *Id.*



The Court afforded trial courts considerable discretion to determine which factors, under the circumstances of the particular case, are relevant to the reliability determination.<sup>144</sup> However, corroborative evidence cannot be used in this determination.<sup>145</sup> The decision in *Idaho v. Wright* has become the cornerstone in analyzing whether a child's out-of-court statement was properly admitted as substantive evidence.

## VII. POST-IDAHO V. WRIGHT INTERPRETATIONS OF THE MINNESOTA CHILD HEARSAY STATUTE: A CHANGE IN FOCUS

The United States Supreme Court's decision in *Idaho v. Wright* marked a subtle change in the interpretation of Minnesota's child hearsay statute. Decisions following *Idaho v. Wright* reveal the constructive, if not the actual, abandonment of the requirement that all four parts of the child hearsay statute must be satisfied before a statement can properly be admitted. The appellate courts began to focus only on the reliability of the child's out-of-court statements. *Idaho v. Wright* also left the Minnesota courts in somewhat of a quandary. While *Idaho v. Wright* emphatically rejected the use of corroborative evidence to determine admissibility, the Minnesota child hearsay statute requires the additional factor of corroborative evidence if the child is unavailable to testify.<sup>146</sup>

The post-*Idaho v. Wright* decisions also reveal that the appellate courts have confused the requirements of the child hearsay statute with the requirements of the residual hearsay exceptions.

### A. Focus on Reliability

Like the pre-*Idaho v. Wright* decisions, few post-*Idaho v. Wright* decisions acknowledged the first requirement of the child hearsay statute: that the out-of-court statement must first be inadmissible under the other rules of evidence.<sup>147</sup> It was only recently that the Minnesota Supreme Court expressly recognized this requirement. The supreme court acknowledged that, when a statement is admissible under any of the evidentiary hearsay exceptions, the child hearsay statute should not be used.<sup>148</sup> It was not until this express acknowledgement that the Court of Appeals began, in a few cases, to also acknowledge this re-

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144. *Id.* at 822.

145. *Id.* The Court also rejected the use of factors such as physical evidence of the abuse. *Id.* at 826.

146. See MINN. STAT. § 595.02, subd. 3(a), (b)(ii) (1992).

147. *Id.* § 595.02, subd. 3.

148. *State v. Edwards*, 485 N.W.2d 911, 915 (Minn. 1992) (upholding admission under Rule 803(24)); *State v. Larson*, 472 N.W.2d 120, 126 (Minn. 1991) (upholding admission under Rule 803(24) instead of MINN. STAT. § 595.02, subd. 3), *cert. denied*, 112 S. Ct. 965 (1992).

quirement.<sup>149</sup> The majority of the post-*Idaho v. Wright* cases have simply ignored the child hearsay statute's requirement that the statement must not be admissible under any of the rules of evidence and focused instead on the reliability requirement.<sup>150</sup>

Post-*Idaho v. Wright* decisions were dominated by discussions of whether the statements contain sufficient indicia of reliability.<sup>151</sup> The factors listed in *Idaho v. Wright* were primarily used to determine whether or not the statement contained sufficient indicia of reliability to meet the second requirement of the statute.<sup>152</sup>

*State v. Lanam*<sup>153</sup> is a clear example of the reliance Minnesota courts have placed on *Idaho v. Wright*. In *Lanam*, a three-year-old child's statements to her foster mother were admitted under the child hearsay statute.<sup>154</sup> The *Lanam* court first reviewed the reliability factors which Minnesota courts had relied on prior to *Idaho v. Wright* and then acknowledged that some of the factors were in fact corroborative factors.<sup>155</sup> The court then enumerated a revised list of factors Minnesota courts should consider when determining the reliability of a particular statement.<sup>156</sup> The *Lanam* factors include the spontaneity of the statements, consistent repetition, the use of non-leading questions, the fact

149. Compare *Dolny v. State*, No. C5-91-23, 1991 WL 109230, at \*1 (Minn. Ct. App. June 25, 1991) (acknowledging that the child's statement was admissible under Rule 803(4) but affirming the admission under the child hearsay statute) with *State v. Christopherson*, 500 N.W.2d 794, 797 (Minn. Ct. App. 1993) (disregarding the admissibility issue under the child hearsay statute where the child's extrajudicial statements were admissible under the rules of evidence). But see *State v. Ligon*, No. C4-92-2162, 1993 WL 405306, at \*1 (Minn. Ct. App. Oct. 12, 1993), review denied, (Minn. Dec. 14, 1993); *State v. Goldenstein*, 505 N.W.2d 332, 343-44 (Minn. Ct. App. 1993) (conducting the reliability analysis of Rule 803(24) but upholding admissibility under the child hearsay statute).

150. See, e.g., *State v. Lanam*, 459 N.W.2d 656, 660-62 (Minn. 1990); *State v. Danowitz*, 497 N.W.2d 636, 638-39 (Minn. Ct. App. 1993); *Ligon*, 1993 WL 405306, at \*1-2; *State v. Salazar*, No. C9-92-228, 1993 WL 599, at \*2 (Minn. Ct. App. Jan. 5, 1993); *State v. Scott*, No. CO-91-2101, 1992 WL 174665, at \*2 (Minn. Ct. App. July 28, 1992); *Dolny v. State*, 1991 WL 109230, at \*1; *State v. Sybrant*, No. C9-90-1908, 1991 WL 102950, at \*1 (Minn. Ct. App. June 18, 1991); *State v. Lovejoy*, No. C8-90-880, 1991 WL 21614 at \*2-3 (Minn. Ct. App. Feb. 26, 1991); *State v. Voelker*, No. C8-90-412, 1990 WL 204269, at \*1-2 (Minn. Ct. App. Dec. 18, 1990).

151. See, e.g., *Lanam*, 459 N.W.2d at 660-62; *Dolny*, 1991 WL 109230, at \*1; *Lovejoy*, 1991 WL 21614, at \*2-3; *Voelker*, 1990 WL 204269, at \*1-2.

152. See McCORMICK, *supra* note 31, § 252 at 443. McCormick suggests that courts will simply begin with the stricter constitutional analysis of *Wright* rather than first analyzing the statement under the rules of evidence. *Id.*

For the factors considered in *Idaho v. Wright*, see *supra* notes 139-43 and accompanying text.

153. 459 N.W.2d 656 (Minn. 1990), cert. denied, 498 U.S. 1033 (1991).

154. *Id.* at 658.

155. *Id.* at 659-61. For a review of these factors see *supra* notes 139-43 and accompanying text.

156. *Id.* at 661.

that information provided by the victim was not of the type a child typically knows,<sup>157</sup> the interviewer's preconceived idea of what the child should reveal, and the lack of a motive by the child or the foster parent to fabricate the abuse.<sup>158</sup> The *Lanam* factors continue to serve as guidance for courts to determine the admissibility of out-of-court statements.<sup>159</sup> Consistent with other post-*Idaho v. Wright* decisions, the *Lanam* decision discussed only the reliability of the statement and failed to mention any of the other statutory requirements.<sup>160</sup>

In addition to the factors outlined in *Idaho v. Wright* and *Lanam*, Minnesota courts consider several other factors to determine whether or not a statement is reliable. These include the timing of the report in relation to the abuse,<sup>161</sup> the child's disclosure of any threats made by the alleged perpetrator,<sup>162</sup> the possibility that the child was coached by the alleged perpetrator,<sup>163</sup> the amount of description and detail contained in the statement,<sup>164</sup> and the existence of strong corrobora-

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157. A recent Minnesota Supreme Court case provides an interesting interpretation of this factor. *State v. Scott*, 501 N.W.2d 608 (Minn. 1993), involved allegations of digital penetration of a nine-year-old girl. *Id.* at 611 n.1. Although *Scott* involved the admission of hearsay statements pursuant to Rule 803(24), the reliability factors are the same as those used for MINN. STAT. § 595.02, subd. 3. *Id.* at 617 (discussing *State v. Lanam*, 459 N.W.2d 656 (Minn. 1990), which involved MINN. STAT. § 595.02, subd. 3). The court found that because the statements made by the victim were not as "lurid" as those found in previous cases, the statements had less reliability. *Id.* at 618-19. While the details a young child can provide are helpful, this decision raises a question of how the court would react in a fondling case, where the descriptions of the abuse tend not to be as "lurid."

158. *Lanam*, 459 N.W.2d at 661.

159. See, e.g., *State v. Goldenstein*, 505 N.W.2d 332, 343 (Minn. Ct. App. 1993); *Dolny v. State*, No. C5-91-23, 1991 WL 109230, at \*1 (Minn. Ct. App. June 25, 1991); *State v. Lovejoy*, No. C8-90-880, 1991 WL 21614, at \*2 (Minn. Ct. App. Feb. 26, 1991); *State v. Lundquist*, No. C0-90-419, 1990 WL 188729, at \*2 (Minn. Ct. App. Dec. 4, 1990).

160. *Lanam*, 459 N.W.2d at 659-61. For other cases ignoring or summarily finding that the other statutory requirements were met, see *Goldenstein*, 505 N.W.2d at 343-44 (ignoring the other statutory requirements); *State v. Scott*, No. C0-91-2102, 1992 WL 174665, at \*2 (Minn. Ct. App. July 28, 1992) (summarily finding that the other factors of the statute were met); *State v. Graif*, No. C4-91-1518, 1992 WL 95876, at \*1 (Minn. Ct. App. May 12, 1992) (determining the admissibility of the statements based solely on reliability requirement); *Dolny*, 1991 WL 109230, at \*1 (determining the admissibility of the statements based solely on reliability).

161. *Dolny*, 1991 WL 109230, at \*1; *State v. Voelker*, No. C8-90-412, 1990 WL 204269, at \*1 (Minn. Ct. App. Dec. 18, 1990).

162. *Wiggins v. State*, No. C2-90-2723, 1991 WL 144757, at \*3 (Minn. Ct. App. Aug. 6, 1991).

163. *State v. Danowit*, 497 N.W.2d 636, 639 n.2 (Minn. Ct. App. 1993), *review denied*, (Minn. May 11, 1993).

164. *State v. Sybrant*, No. C9-90-1908, 1991 WL 102950, at \*1 (Minn. Ct. App. June 18, 1991), *review denied*, 472 N.W.2d 639 (Minn. 1991).

tive evidence.<sup>165</sup> This range of factors indicates the court's liberal use of the discretion given in *Idaho v. Wright*<sup>166</sup> to evaluate the reliability of the statement in light of the special circumstances that surround that particular statement.

Although *Idaho v. Wright* advocated the consideration of a variety of factors to determine reliability,<sup>167</sup> the Minnesota courts have differed as to the number of factors that are necessary to evaluate the reliability of a particular statement. Some appellate courts have identified only one or two factors supporting the reliability of the statement, while others have identified as many as six.<sup>168</sup> The variety in substance and numbers of factors necessary to establish reliability does not provide any clear guidance as to which factors are most important or necessary, although the *Idaho v. Wright* and *Lanam* factors were the most frequently considered.<sup>169</sup>

### B. The Use of Corroborative Evidence

The third requirement of the child hearsay statute specifically requires corroborative evidence if the child is unavailable to testify.<sup>170</sup> Despite this specificity, only three of eleven decisions involving an incompetent child witness discussed corroborating evidence.<sup>171</sup> The corroborative evidence in two of these cases consisted of testimony by another child who witnessed the act.<sup>172</sup> The other eight decisions focused only on the reliability of the statement.<sup>173</sup> Once those courts

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165. *State v. Scott*, No. C0-91-2102, 1992 WL 174665, at \*2 (Minn. Ct. App. July 28, 1992). This factor should not have been relied upon by the court. See *supra* notes 157-60 and accompanying text.

166. See *supra* notes 138-44 and accompanying text.

167. See *supra* notes 139-43 and accompanying text.

168. Compare *State v. Salazar*, No. C9-92-228, 1993 WL 599, at \*2 (Minn. Ct. App. Jan. 5, 1993) (relying only on the absence of suggestive interview techniques); *Scott*, 1992 WL 174665, at \*2 (relying on strong corroborative evidence and lack of motive to fabricate) with *State v. Edwards*, 485 N.W.2d 911, 916 (Minn. 1992) (relying on a lack of a preconceived idea of what the child should be saying, lack of motive to fabricate, the fact that the statement was not the type expected of a child the victim's age, consistent repetition, and an immediate ring of credibility); *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990), cert. denied, 498 U.S. 1033 (1991) (relying on the reliability of the witness to the statement, spontaneity, lack of leading or suggestive questions, lack of motive to fabricate, the fact that the statement/terminology was not the type expected of a child the victim's age, and consistent repetition).

169. See *supra* notes 153-60 and accompanying text.

170. MINN. STAT. § 595.02, subd. 3(b)(ii) (1992).

171. *Salazar*, 1993 WL 599, at \*2; *State v. Voelker*, No. C8-90-412, 1990 WL 204269, at \*1 (Minn. Ct. App. Dec. 18, 1990); *State v. Lynch*, No. C9-90-306, 1990 WL 173842, at \*1 (Minn. Ct. App. Nov. 13, 1990).

172. *Voelker*, 1990 WL 204269, at \*1; *Lynch*, 1990 WL 173842, at \*1.

173. *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990), cert. denied, 498 U.S. 1033 (1991); *State v. Scott*, No. C0-91-2102, 1992 WL 174665, at \*2 (Minn. Ct. App. July 28, 1992); *State v. Graif*, No. C4-91-1518, 1992 WL 95876, at \*1 (Minn. Ct. App. May 12,

found sufficient indicia of reliability, they upheld the statement's admissibility, apparently without considering the additional statutory requirement of corroborative evidence.

*C. Confusing the Requirements of the Child Hearsay Statute and Residual Hearsay Exception*

The Minnesota Supreme Court recently reviewed the application of the child hearsay statute in *State v. Edwards*.<sup>174</sup> *Edwards* involved a pre-trial appeal of the trial court's finding that the child witness's statements were not reliable.<sup>175</sup> The Minnesota Supreme Court reversed the trial court's decision.<sup>176</sup> The court also rejected the trial court's reliance on the child hearsay statute and held that the statements were admissible under Rule 803(24).<sup>177</sup> The court, finding that the require-

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1992); *Wiggins v. State*, No. C2-90-2723, 1991 WL 144757, at \*3 (Minn. Ct. App. Aug. 6, 1991); *Dolny v. State*, No. C5-91-23, 1991 WL 109230, at \*1 (Minn. Ct. App. June 25, 1991); *State v. Fulmer*, No. C3-90-1452, 1991 WL 30333, at \*1 (Minn. Ct. App. Mar. 12, 1991); *State v. Lovejoy*, No. C8-90-880, 1991 WL 21614, at \*3 (Minn. Ct. App. Feb. 26, 1991); *State v. Lundquist*, No. C0-90-419, 1990 WL 188729, at \*2 (Minn. Ct. App. Dec. 4, 1990).

It is noteworthy that the only case that thoroughly discussed the corroborating evidence requirement was a divorce case. See *Jirik v. Jirik*, No. C5-90-1601, 1991 WL 4040, at \*1 (Minn. Ct. App. June 22, 1991).

174. 485 N.W.2d 911 (Minn. 1992).

175. The procedural history of *Edwards* is illustrative of the confusion and misapplication of the child hearsay statute. The decision discussed in the text is the third pre-trial appeal of the hearsay issue. The first appeal involved the trial court's general denial of the admissibility of the victim's statements. *State v. Edwards*, No. C2-90-2429, 1991 WL 65080, at \*1 (Minn. Ct. App. April 30, 1991). The court of appeals remanded the case because it could not determine, based on the record, what the trial court had relied on to deny the admission of the statement. *Id.* at \*2. The court concluded that, if lack of notice was the issue, this problem was cured by the time of the appeal. *Id.* Further, the court rejected the trial court's use of the child's incompetency to exclude the statements. *Id.*

The second appeal again involved the admissibility of the child's out-of-court statements. *State v. Edwards*, No. C3-91-1171, 1991 WL 271514, at \*1 (Minn. Ct. App. Dec. 24, 1991). The court first found that the trial court had not abused its discretion by refusing to admit some of the statements as excited utterances. It concluded, however, that the trial court again erroneously relied upon the events at the child's competency hearing to exclude the statements and again remanded the case. *Id.* at \*3.

On appeal to the Minnesota Supreme Court, however, the court resolved the issue of admissibility of the statements "rather than remand to the trial court to again give it the opportunity of deciding the issue according to applicable criteria." *Edwards*, 485 N.W.2d at 915.

176. *Edwards*, 485 N.W.2d at 915.

177. *Id.* See also *State v. Christopherson*, 500 N.W.2d 794, 797-98 (Minn. Ct. App. 1993) (rejecting the use of the child hearsay statute and relying instead upon Rule 801(d)(1)(B)). *Contra* *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989). The Colorado Supreme Court, when faced with this same issue, relied upon the child hearsay statute. *Id.* at 750-51. It held that because of its specificity, the Colorado courts should rely upon the child hearsay statute to admit statements in sexual abuse cases. *Id.* at 752.

ments of Rule 803(24) are similar to those of the child hearsay statute, properly concluded that the child hearsay statute could not be used because the statements were admissible under the rules of evidence.<sup>178</sup>

The *Edwards* ruling on the similarity between Rule 803(24) and the child hearsay statute is only partially correct and it is indicative of the persistent confusion surrounding the statute. The court failed to recognize that the child hearsay statute, unlike Rule 803(24), requires corroboration in addition to reliability when the child is unavailable.<sup>179</sup> Although this conclusion of similarity between the child hearsay statute and Rule 803(24) was incorrect, the *Edwards* court's rejection of the child hearsay statute was correct. The corroborative evidence requirement provides no additional guarantees of trustworthiness to the individual statement. Furthermore, the corroborative evidence requirement directly conflicts with the U.S. Supreme Court's rejection of corroborative evidence.<sup>180</sup>

#### VIII. A PRIMARY MEANS OF ADMISSIBILITY: RULES 803(2), 803(4), 803(24), 804(B)(5) OF THE MINNESOTA RULES OF EVIDENCE

The law on the admissibility of children's out-of-court statements has changed significantly since the Minnesota child hearsay statute was first adopted. Minnesota must now decide how to proceed. Previously, the courts rarely employed the traditional hearsay exceptions to admit children's out-of-court statements. Now, the courts recognize that the traditional hearsay exceptions apply in child sexual abuse cases in the same way that these exceptions apply in any other case. The court's willingness to apply the traditional hearsay exceptions and to admit children's out-of-court statements calls into question the continued need for the child hearsay statute as it currently exists. The issue of whether or not to admit a child's out-of-court statements would be more appropriately addressed by utilizing the existing rules of evidence. Furthermore, it would be more appropriate for Minnesota to adopt an evidentiary rule that deals specifically with the admissibility of children's out-of-court statements rather than to rely on the current child hearsay statute.

The remaining sections of this article look at the theories behind some of the traditional hearsay exceptions and the types of situations to which they should or should not be applied.

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The current confusion and inconsistency in the Colorado case law results from the differing requirements of the residual hearsay exception and the child hearsay statute. *Id.* But see *State v. Goldenstein*, 505 N.W.2d 332, 343 (Minn. Ct. App. 1993) (continuing to rely upon Minn. Stat. § 595.02, subd. 3 when Rules 803(4) and 803(24) of the Minnesota Rules of Evidence are applicable).

178. *Edwards*, 485 N.W.2d at 915.

179. MINN. STAT. § 595.02, subd. 3(b)(ii) (1992).

180. See *supra* note 145 and accompanying text.

## IX. THE APPLICABILITY OF THE MINNESOTA RULES OF EVIDENCE IN CHILD SEXUAL ABUSE CASES.

Several commentators have expressed a pessimistic view toward the applicability of the firmly-rooted hearsay exceptions in child sexual abuse cases.<sup>181</sup> Because of this pessimistic attitude, many states have adopted specific child hearsay statutes to combat the hearsay problems.<sup>182</sup> However, an analysis of the theories underlying the firmly-rooted hearsay exceptions and an awareness of the specific circumstances under which a particular statement was made demonstrates that these rules are applicable in child abuse cases. Specifically, Rule 803(2), Excited Utterances; Rule 803(4), Statements for the Purposes of Medical Treatment or Diagnosis; and Rules 803(24) and 804(b)(5), the Residual Exceptions, will be used to demonstrate the applicability of the traditional rules of evidence.

### A. *Rule 803(2) of the Minnesota Rules of Evidence, Excited Utterances*

The first traditional hearsay exception applicable in child sexual abuse cases is Rule 803(2) of the Minnesota Rules of Evidence, the excited utterance exception.<sup>183</sup> The admissibility of statements under Rule 803(2) depends entirely on the emotional affect of the declarant at the time the statement was made and on the nature of the event that

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181. See, e.g., Anna Frissell & James M. Vukelic, *Application of the Hearsay Exceptions and Constitutional Challenges to the Admission of A Child's Out-of-Court Statements in the Prosecution of Child Sexual Abuse Cases in North Dakota*, 66 N.D. L. REV. 599 (1990). Frissell and Vukelic maintain that the excited utterance exception under Federal Rules of Evidence 803(2) does not necessarily apply to children's statements because there is research indicating that "most children do not view a sexual assault episode as shocking . . ." *Id.* at 620. Furthermore, the delay between the event and the child's statement also calls into question the applicability of this exception. They ultimately characterize the use of the excited utterance exception as "stretching." *Id.* at 621.

See also Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257 (1989). Mosteller maintains that the exception for statements made for the purposes of medical diagnosis has been applied by courts in such a way as to "result in decisions which are theoretically, as well as constitutionally, infirm." *Id.* at 257.

See also JoEllen S. McComb, *Unavailability and Admissibility: Are a Child's Out-of-Court Statements About Sexual Abuse Admissible if the Child Does Not Testify at Trial?*, 76 Ky. L. J. 531 (1980). "[C]ommentators complain that reliance on spontaneity, and lapse of time between the event and the statements limit the usefulness" of the excited utterance exception. *Id.* at 556-57. In regard to the medical diagnosis exception, McComb states that "statements of children that are admitted under the medical diagnosis or treatment exception are sometimes seen as 'torturing' the exception by stretching it 'beyond its intended scope.'" *Id.* at 558.

182. See WHITCOMB, *supra* note 1, at 86-89, app. at 167; see *supra* note 59 and accompanying text.

183. The rule provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not inadmissible as hearsay. MINN. R. EVID. 803(2).

prompted the statement.<sup>184</sup> Because of the emphasis on the emotional affect of the declarant, Rule 803(2) works most effectively when the child witness's statement was made shortly after a specific abuse incident or where an abuse incident was interrupted by a third party.

1. *The Requirements of Rule 803(2) of the Minnesota Rules of Evidence*

A statement falls within Rule 803(2) only when the declarant is "under the aura of excitement" from the event.<sup>185</sup> The victim is under the "aura of excitement" when (1) there was a startling event or condition; (2) the statement is reflective of that startling event or condition; and (3) the statement was made under the stress caused by the event or condition.<sup>186</sup> This exception is premised on the belief that a statement made under the stress of a startling event is more reliable than a statement made after the stress of the event has passed. A declarant who is excited is presumed to lack the capacity to fabricate the statement or to reflect upon the consequences of the statement.<sup>187</sup> Given these circumstances, the reliability and credibility of these statements cannot be replicated in the "relative calm of the courtroom."<sup>188</sup>

The circumstances surrounding the statement also play a critical role in the admissibility of statements under this exception.<sup>189</sup> The most important factors to consider are the timing of the statement in relation to the incident<sup>190</sup> and the affect of the declarant. The determination of whether too much time has elapsed for the "aura of excitement" to exist in the legal sense is largely dependant on the nature of the incident. The more traumatic the incident, the greater the expected duration of the distress.<sup>191</sup>

184. *Id.*

185. *Id.*

186. *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992) (citing MINN. R. EVID. 803(2) advisory committee comment) (quoted in *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986)).

The committee comment to Rule 803(2), adopted by Minnesota in *Daniels*, 380 N.W.2d at 782, suggests that the trial court should also consider "the length of the time elapsed, the nature of the event, the physical condition of the declarant, [and] any possible motive to falsify." MINN. R. EVID. 803(2) committee comment.

187. *White v. Illinois*, 112 S.Ct. 736, 742-43 (1992); see also *State v. Berry*, 309 N.W.2d 777, 783 (Minn. 1981) (finding statement admissible as long as the declarant did not have an opportunity to calm down and reflect on the statement).

188. *White*, 112 S.Ct. at 743.

189. *Daniels*, 380 N.W.2d at 783 n.7.

190. See *id.* at 783. But see Eleanor Swift, *The Hearsay Rule at Work: Has it Been Abolished DeFacto by Judicial Decision?*, 76 MINN. L. REV. 473, 494 (1992) (suggesting a new test which focuses on the time between "the 'first real opportunity' to report the events" and the report, and not on the time between the event and the statement).

191. 4 JACK B. WEINSTEIN AND MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, ¶ 803(2)[01], at 803-34 (1993).



## 2. *Specific Problems When Rule 803(2) is Used in Child Sexual Abuse Cases*

The use of Rule 803(2) in child sexual abuse cases can raise potential problems. Specific concerns include the amount of time that has elapsed between the abuse incident and the statement, the affect of the child declarant, and the accuracy of the child's statements. The focus on the time that has elapsed between the event and the statement may pose the most significant barrier to the use of the excited utterance exception in child sexual abuse cases. There can be little doubt that the abuse itself was a startling event. However, child sexual abuse can occur over a significant period of time before it is discovered or before the child makes a disclosure.<sup>192</sup> Although, under the excited utterance exception, appellate courts appear willing to accept statements made anywhere from one minute<sup>193</sup> to ninety minutes<sup>194</sup> after the incident, critical statements may still be excluded.<sup>195</sup> In many situations, the child does not report the abuse until days or weeks after the incident.<sup>196</sup> In cases of long-term abuse, the victimization may be discovered only through behavioral changes<sup>197</sup> or through small disclosures by the child over an extended period of time.<sup>198</sup> In these situations, Rule 803(2) would arguably not apply because too much time has probably elapsed between the abuse incident and the child's statement.

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192. Disclosure is often delayed because of confusion, shame, guilt, and fear. *State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984).

193. *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992).

194. *State v. Berrisford*, 361 N.W.2d 846, 850 (Minn. 1985); see also *Edwards*, 485 N.W.2d at 915 (implying that a statement made one hour after the incident may also be an excited utterance); WHITCOMB, *supra* note 1, at 87 (noting that some states allow statements under this exception weeks or months after the abuse, depending on the reason for the delay).

195. MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.30, at 167 (noting that some courts are adopting a more liberal approach on the time element of the excited utterance exception in child abuse cases).

196. *State v. Quinnild*, 231 Minn. 99, 107-08, 42 N.W.2d 409, 413-14 (1950) (finding no excited utterance where during the intervening hour and a half to two hours, the victim did not say anything when he returned, took a shower, thought about the abuse, and slept).

197. See *State v. Struss*, 404 N.W.2d 811, 816 (Minn. Ct. App. 1987) (noting that the abuse was revealed by the victim's reluctance to stay with the defendant and a deterioration in the victim's behavior), *review denied*, (Minn. June 9, 1987); WHITCOMB, *supra* note 1, at 88.

198. WHITCOMB, *supra* note 1, at 23. Children often make a partial disclosure to test reaction to the disclosure. MYERS, LEGAL ISSUES, *supra* note 9 at 134. Disclosure over time may also result where the abuse has been repressed and the child does not reveal it until he or she is able to put the pieces together. See also *State v. Garden*, 404 N.W.2d 912, 916 (Minn. Ct. App. 1987) (relying on the testimony of two psychologists, the court noted that victims often reveal more details over time as they build confidence and as they feel they are being supported), *review denied*, (Minn. June 25, 1987).

One way to alleviate this problem is to focus not on the time between the event and the statement, but on the time between “the ‘first real opportunity’ to report the events” and the statement.<sup>199</sup> Some courts have impliedly adopted this theory by allowing statements to be admitted weeks or months after the abuse, depending on the reason for the delay in reporting.<sup>200</sup> In cases of delayed reporting, however, admitting a statement as an excited utterance theoretically detracts from the inherent reliability assigned to these statements because the passage of time allows for allegations of fabrication. In these situations, it may be more appropriate to admit the statement under another rule of evidence.

Rule 803(2) poses an additional problem with its emphasis on the affect of the declarant. Generally, the declarant must display some traditional sign of distress.<sup>201</sup> For example, if the child was crying hysterically or was visibly frightened when the statement was made, and if the statement was made close in time to the incident, the statement probably falls within Rule 803(2).<sup>202</sup> This specific reaction, however, may not exist in all children. Children sometimes do not understand that the abuse is wrong and may in fact consider it to be normal, thus inhibiting “normal” signs of distress.<sup>203</sup> Additionally, if a child is severely traumatized, or if the abuse has extended over a long period of time, the child may make the statement in a detached or unemotional manner.<sup>204</sup>

Arguably, Rule 803(2) should still apply because an unemotional reaction may itself be a manifestation of distress. Furthermore, the reaction of a child should be analyzed in terms of a child’s, rather than an

199. MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.30, at 170-71; Swift, *supra* note 190, at 494; *see also* State v. Daniels, 380 N.W.2d 777, 783 (Minn. 1986) (noting that time may not always be determinative).

200. WHITCOMB, *supra* note 1, at 87.

201. *See* MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.30, 172-79. Myers lists several factors courts have considered to determine whether the child was under the excitement of the event when a statement was made. These include the child’s emotional and physical condition, whether the child was crying, whether the child has slept between the startling event and the statement, the content of the statement, the child’s speech pattern, the child’s lack of recall, the age of the child, the nature of the event described, the intelligence of the child, the questioning of the child, and corroborative evidence of the event described. *Id.*

202. State v. Daniels, 380 N.W.2d 777, 784 (Minn. 1986); *see also* United States v. Ironshell, 633 F.2d 77, 86 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). *Ironshell* indicated that courts should consider “the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the events.” *Id.*

203. MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.29, at 161; WHITCOMB, *supra* note 1, at 88; Cynthia J. Hennings, Comment, *Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions*, 16 OHIO N.U. L. REV. 663, 667 (1989).

204. Myers, *Expert Testimony*, *supra* note 13, at 118.

adult's, emotional reaction. An abused child's emotional reaction should be evaluated in light of what that child experienced to determine whether the aura of excitement still exists.

Another problem with the use of Rule 803(2) in child sexual abuse cases are the challenges to the accuracy of the child's out-of-court statement. Rule 803(2) relies on the declarant's state of distress to establish reliability. Critics argue that the declarant's excitement or distress in fact makes the statement less accurate because the declarant's emotions detract from the factual accuracy of the statement.<sup>205</sup> In cases of child sexual abuse, however, the facts contained in the child's statements are not likely to be overly compact. Statements made close in time to an abuse incident are likely to contain only a very simple description of the incident and perhaps the name of the perpetrator.<sup>206</sup> Such statements rarely contain an abundance of factual information, making it difficult to seriously challenge the accuracy of these statements. Even if these statements do contain a lot of factual information, that does not mean the statement is unreliable. The content of that information can be compared with the age of the child to see if the child would ordinarily know that kind of information. The content of the statement can also be compared with the circumstances surrounding the abuse, such as the alleged perpetrator's access to the child, to test the reliability of the statement.

### 3. *The Advantages of Using Rule 803(2)*

Under Rule 803(2), the content of the statement must only relate to the startling incident. Consequently, the child's identification of the perpetrator,<sup>207</sup> the description of the abuse, and any other matters relating to the abuse are admissible as excited utterances.<sup>208</sup> Valuable factual information, therefore, can be admitted as evidence under Rule 803(2).

It is important to note that questioning the child during the moment of excitement does not, in and of itself, destroy the applicability of Rule 803(2).<sup>209</sup> Asking non-suggestive questions or clarifying questions in response to the child's exclamation does not destroy the presumption that the excitement interferes with the child's capacity to fabricate.<sup>210</sup> Attention, however, must still be paid to the content of

205. WEINSTEIN & BERGER, *supra* note 191, ¶ 803(2)[01], at 803-86.

206. The exclamation, "Daddy put his wee-wee in my pee-pee!" is one such example.

207. See *infra* notes 220-246 and accompanying text (discussing the debate about whether identity is admissible when the statement was made for the purpose of medical treatment or diagnosis).

208. WEINSTEIN & BERGER, *supra* note 191, at 803-35.

209. *United States v. Ironshell*, 633 F.2d 77, 85 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *State v. Daniels*, 380 N.W.2d 777, 783 (Minn. 1986); see also *In re Welfare of Chuesburg*, 305 Minn. 543, 546, 233 N.W.2d 887, 889 (1975).

210. See MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.30, at 178.

the questions put to the child, especially where leading or suggestive questions were used. If the central tenet of Rule 803(2) is the lack of opportunity to fabricate, leading or suggestive questions may, in fact, do much to destroy this presumption.<sup>211</sup> While the statement may still be admissible under another exception, the use of leading questions may remove a particular statement from the protective parameters of Rule 803(2).

Although there are some problems with the use of Rule 803(2) in child abuse cases, this exception can still be helpful. It is highly applicable where the abuse is still discovered shortly after the incident. If a significant amount of time has passed between the abuse and the disclosure, other rules of evidence provide an alternative for getting the child's out-of-court statements admitted as evidence. Turning to other rules of evidence also avoids an incorrect application of the principles underlying the excited utterance exception.

*B. Rule 803(4) of the Minnesota Rules of Evidence: Statements for the Purposes of Medical Treatment or Diagnosis*

The second traditional hearsay exception applicable in child sexual abuse cases is Rule 803(4) of the Minnesota Rules of Evidence, the medical statements exception.<sup>212</sup> Statements made to physicians and psychologists for the purposes of diagnosis or treatment are admissible under Rule 803(4). The applicability of Rule 803(4) in child abuse cases is often questioned because of the age of the child victim or the nature of the examination. These objections, however, overlook the original intent and theories behind the exception. The child's statements to a physician or psychologist should be admitted under Rule 803(4) when the child sees a physician or psychologist for treatment of the injuries resulting from the abuse or when the child is evaluated to determine if the abuse in fact occurred.

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211. See *id.* at 179; *State v. Gorman*, 229 Minn. 524, 527, 40 N.W.2d 347, 349 (1949). *Gorman* noted that a statement "made in response to a question may be less indicative of spontaneity than an uninvited one." *Id.* (quoting *Meyer v. Travelers' Ins. Co.*, 130 Minn. 242, 244, 153 N.W. 523, 524 (1915)). The court in *Gorman*, however, concluded that the statement was admissible under Rule 803(2) because the statement did not contain any of the question's suggested facts. *Id.*

212. The Rule 803(4) exception provides for the admission of

[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

MINN. R. EVID. 803(4).

### 1. *The Requirements of Rule 803(4) of the Minnesota Rules of Evidence*

Statements made for either diagnostic or treatment purposes are admissible under Rule 803(4).<sup>213</sup> The inherent reliability of Rule 803(4) statements is premised on the “selfish-motive doctrine.”<sup>214</sup> The “selfish-motive doctrine” presumes that patients have a strong motivation to tell the truth when describing their symptoms or the cause of their injury because treatment and diagnosis often depends on what the patient tells the doctor.<sup>215</sup> Given these circumstances, the reliability of the statements cannot be replicated in the courtroom.

A statement relates to the patient’s treatment or diagnosis if it is the kind of statement traditionally relied on by members of that profession to make medical decisions.<sup>216</sup> It is sufficient that the physician or psychologist bases part of the medical findings or conclusions on the patient’s statement.<sup>217</sup> This aspect of Rule 803(4) represents an attempt to make the rule consistent with the physician’s ability to state the basis for an expert opinion at trial, even if the facts upon which the physician relied are not admissible as evidence.<sup>218</sup> As with an adult, the physician must question the child to determine which types of physical injuries may be present.<sup>219</sup> Physicians often make final diagnoses based on a combination of the information learned from the child victim and from a physical examination.<sup>220</sup> As long as the statement was reasonably directed toward treatment or diagnosis, the statement should be admitted under Rule 803(4).

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213. WEINSTEIN & BERGER, *supra* note 191, ¶ 803(4)[01], at 803-146.

214. *Id.* at 803-144 (noting that the patient has a “motive to disclose the truth because his treatment will in part depend upon what he says.” (quoting *Meaney v. United States*, 112 F.2d 538, 540 (2d Cir. 1940)).

215. *Id.*

216. MINN. R. EVID. 803(4) committee comment.

217. WEINSTEIN & BERGER, *supra* note 191, at 803-147 to 803-149. In *United States v. Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981), the court noted that a two part test could be applied in a Rule 803(4) analysis. The first question is whether “the declarant’s motive is consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment.” *Id.* at 84.

218. *See* MINN. R. EVID. 703; MINN. R. EVID. 803(4) committee comment.

219. *See* *United States v. Balfany*, 965 F.2d 575, 580 (8th Cir. 1992) (rejecting the argument that Rule 803(4) can only be used “if the doctor has no alternative source for the information other than direct questioning of the patient”); *Iron Shell*, 633 F.2d at 84 (noting that “[d]iscovering what is not injured is equally as pertinent to treatment and diagnosis as finding what is injured”); *State v. Bellotti*, 383 N.W.2d 308, 312 (Minn. Ct. App. 1986) (noting that preliminary questions by the physician were admissible as medical history pertinent to treatment).

220. *Bellotti*, 383 N.W.2d at 312.

## 2. *Popular Arguments and Rebuttals to Using Rule 803(4) in Child Sexual Abuse Cases*

The use of Rule 803(4) in child sexual abuse prosecutions has been the subject of several challenges. Those opposing the use of the rule argue that young children do not know who a doctor is or what purpose the doctor serves; that statements made to psychologists, social workers, or doctors specializing in the child abuse area do not fall under Rule 803(4); and that the identification of the perpetrator does not fall under Rule 803(4).

The child's presumed lack of understanding about physicians and medical care is the most recent challenge to the use of Rule 803(4) in child sexual abuse cases. Opponents argue that young children do not know who a doctor is or what purpose the doctor serves. If this were the case, then the underlying premise of the rule would be defeated because the child would not have a selfish motive to tell the truth. However, even young children can have an understanding of what doctors do.<sup>221</sup>

The Eighth Circuit Court of Appeals addressed this argument in *Ring v. Erickson*.<sup>222</sup> A Minnesota trial court had admitted the three-year-old child's statements to an examining physician under Rule 803(4).<sup>223</sup> Reversing the conviction, the Eighth Circuit concluded that Rule 803(4) did not apply because the record did not reflect that the child knew she was speaking to a doctor.<sup>224</sup> The court held that Rule 803(4) could be used only where the child's testimony, or the testimony of an adult, establishes that the child had this knowledge.<sup>225</sup>

The holding in *Ring* seemingly contradicts the recent United States Supreme Court decision in *White v. Illinois*.<sup>226</sup> In *White*, the trial court

221. See MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.36, at 221 (noting that the question of whether the child understands he or she is speaking with a doctor varies with the developmental age of the child and varies among individual children).

222. 983 F.2d 818 (8th Cir. 1993).

223. *Id.* at 819, 820 n.1.

224. *Id.* at 820 n.1. *Contra* Dana v. Dep't. of Corrections, 958 F.2d 237, 239 (8th Cir. 1992) (concluding that because the four-year-old child's statements fell within Rule 803(4) reliability could be inferred), *cert. denied*, 112 S.Ct. 3043 (1992).

225. *Ring v. Erickson*, 983 F.2d at 820 n.2. *But see* State v. Lonergan, 505 N.W.2d 349, 354 (Minn. Ct. App. 1993) (holding the child's age of nine, without more, was sufficient to establish that he was old enough to have a motive to tell the truth so he could be treated properly).

In contrast to the Eighth Circuit's arguments, Myers argues that even if the child did not understand the importance of being truthful with the person with whom he or she was talking, the statement may still be the type ordinarily relied upon by doctors to provide treatment. MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.36, at 218. In these cases, Myers argues that each rationale provides independent basis for admissibility and the statement can still be admitted under Rule 803(4), even if only one rationale is present. *Id.* at 218-19.

226. 112 S.Ct. 736 (1992).

admitted a four-year-old child's statement to a doctor and nurse under Rule 803(4) of the Illinois Rules of Evidence.<sup>227</sup> The Court, affirming the admission of the statement, noted that the reliability of statements made to medical doctors cannot be duplicated by live in-court testimony.<sup>228</sup> The Court did not require a specific predicate finding that the child knew she was speaking to a doctor.

Even assuming that such a finding is required, this is not a substantial barrier to the use of Rule 803(4). A simple question to the child or parent about whether the child understands who a doctor is eliminates this challenge. Challenges can also be defeated by asking physicians and psychologists, either while testifying or during the preliminary hearing, whether they told the child who they are and why the child was being examined or evaluated.<sup>229</sup> The answer to this question will help the court determine whether or not the child's out-of-court statement should be admitted under Rule 803(4). The mere age of the child, without more, should not raise a presumption that the child did not understand who the doctor was or why the child was seeing the doctor or psychologist.

A second frequent challenge is whether statements to psychologists and social workers fall within the parameters of Rule 803(4). Opponents argue that the admission of a child's statements to these professionals contradicts the assurances of reliability provided by Rule 803(4).<sup>230</sup> An examination of the purpose of the rule and the special nature of child sexual abuse reveals the weakness of this argument.

The medical statements exception was never intended to be limited to statements made to physicians.<sup>231</sup> In fact, statements made to ambulance drivers, hospital attendants, and even family members were contemplated as falling within the parameters of Rule 803(4).<sup>232</sup> Further, a child's statements to psychologists and social workers are very critical because they help establish the course of psychological treatment or diagnosis.<sup>233</sup> A sexually abused child's treatment does not end with the diagnosis or treatment of the physical manifestations of abuse.<sup>234</sup>

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227. *Id.* at 740. The child was called as a witness but she was unable to respond to any questions because of "emotional difficulties." *Id.* at 739.

228. *Id.* at 743.

229. See MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.36, at 223.

230. See, e.g., WHITCOMB, *supra* note 1, at 86-7.

231. MINN. R. EVID. 803(4) committee comment.

232. *Id.*

233. WEINSTEIN & BERGER, *supra* note 191, ¶ 803(4)[01], at 803-150 (noting that Rule 803(4) does not specifically reject applicability to statements made to psychologists).

234. See *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985). *Renville* held that a "physician must be attentive to treating the emotional and psychological injuries which accompany [sexual abuse]." *Id.* at 437; cf. *United States v. Cherry*, 938 F.2d 748, 757 (7th Cir. 1991) (admitting child's statements to physician as relevant to psychological injury).

Therapy is often crucial to help the child deal with, and recover from, the emotional impact of the sexual abuse. Therapy is often the only treatment a physician can suggest, as the physical manifestations of the abuse may not need treatment or may have already healed.<sup>235</sup> Admitting into evidence the statements made by a child to a psychologist or social worker for purposes of treatment is consistent with the intent of Rule 803(4) that statements made during the course of treatment should be admitted over hearsay objections. Narrowly interpreting the rule to exclude psychologists and social workers is inconsistent with that intent.

Similarly, opponents argue that the child is not being treated or diagnosed when seen by a physician or psychologist who specializes in the area of child abuse.<sup>236</sup> In these situations, it has been argued that the child is being examined solely for litigation purposes and not for the purposes of treatment or diagnosis.<sup>237</sup> Somehow, opponents of the use of Rule 803(4) in child abuse cases presume that a suspicion of abuse removes the diagnosis aspect of the child's visit to a specialist.

Again, this argument finds no support in the history or intent of Rule 803(4). The basic tenet of Rule 803(4) is that the statement must be "reasonably pertinent to diagnosis and treatment" before it is admissible.<sup>238</sup> Moreover, Rule 803(4) makes no distinction between treating and nontreating physicians. Therefore, the rule not only applies where a physician treats the child, but also where an expert physician makes a diagnosis.<sup>239</sup> The theoretical framework supporting the use of statements made for diagnostic purposes existed at the adoption of the Minnesota Rules of Evidence. These same theoretical underpinnings should apply in child abuse cases just as they do in other cases. Consequently, arguments to exclude a child's statement to an expert who specializes in child sexual abuse are groundless.

The argument that Rule 803(4) should not cover statements made to physicians or psychologists who specialize in the child abuse area is also defeated by looking at the reason why such an evaluation is necessary. In some child sexual abuse cases, unlike most personal injury

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235. *United States v. Balfany*, 965 F.2d 575, 578 (8th Cir. 1992) (doctor conducting the initial examination was unable to find any evidence of sexual abuse).

236. *United States v. Whitted*, 11 F.3d 782, 787 (8th Cir. 1993).

237. *Id.*; see also *State v. Thompson*, 820 P.2d 335, 339-40 (Ariz. Ct. App. 1991).

238. MINN. R. EVID. 803(4) committee comment.

239. See MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.35, at 217 (noting that the experience of the professional who examines the child increases the reliability of the child's statements because of the professional's understanding of the importance of her evaluation); *Whitted*, 11 F.3d at 787 (citing *United States v. Iron Thunder*, 714 F.2d 765, 772-73 (8th Cir. 1983)) (noting that "Rule 803(4) applies to statements made for the sole purpose of diagnosis, which includes statements made to a doctor who is consulted only to testify as an expert witness"); *State v. Lonergan*, 505 N.W.2d 349, 354 (Minn. Ct. App. 1993).



cases, only an expert may be able to determine whether sexual abuse did occur or whether the injuries of the child are consistent with the type of abuse that has been alleged.<sup>240</sup> Because of the special nature of sexual abuse, an examination and diagnosis by a specialist or expert may be crucial to establishing an essential element of the charged offense.<sup>241</sup>

Perhaps one of the most contested issues is whether a child's statement identifying the perpetrator is reasonably related to the medical diagnosis and treatment to allow admission under Rule 803(4). Generally, statements of causation are admissible while statements of fault are not admissible.<sup>242</sup> The standard example is that a patient's statement that he was struck by an automobile would be admissible, but a statement that the car was driven through a red light would not be admissible.<sup>243</sup>

By analogy, a child's statement alleging genital penetration would be admissible but a statement that "Daddy did it" or "Mommy did it" would not be admissible. At a superficial level, this conclusion appears to be correct. The relevance of the statements of fault in these two situations is, however, vastly different. The fact that a car went through

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240. See *State v. Lanam*, 459 N.W.2d 656, 657 (Minn. 1990) (scarring on child's hymen and an enlarged vaginal opening were the only physical signs of abuse), *cert. denied*, 111 S.Ct. 693 (1991); *State v. Bellotti*, 383 N.W.2d 308, 312 (Minn. Ct. App. 1986) (rejecting the argument that an allegation of sexual abuse does not warrant a physical examination because it presumes there was no physical injury), *review denied*, (Minn. Apr. 24, 1986).

These same arguments support the need for an assessment by a psychologist with experience in working with abused children. Cf. *Whitted*, 11 F.3d at 787 (contrasting the ability of a nurse, who had never seen a sexually abused child, to give psychological opinions, with a physician, who had attended many sexual abuse workshops and treated many sexually abused children).

241. See *United States v. Balfany*, 965 F.2d 575 (8th Cir. 1992). The facts of *Balfany* illustrate the importance of a suspected abuse victim being examined by a physician with both training and experience in detecting sexual abuse. The child in *Balfany* was initially examined by a general practitioner after her aunt suspected abuse. *Id.* at 578. No physical signs of sexual abuse were discovered. *Id.* The child later reported the abuse to a teacher and she was again examined, this time by a doctor with both training and experience in diagnosing sexual abuse. *Id.* At trial, the physician testified that he had observed a significant rounding of the hymen and a healed tear on the hymen. *Id.* at 578-79. The physician suggested that the first doctor missed these indicators of abuse because he did not have the training and experience necessary to differentiate a normal hymen from an abnormal one. *Id.* at 579. The experienced physician also attributed the first doctor's failure to see these indicators of abuse to the fact that a culdoscopy was not used in the examination. *Id.* A culdoscopy enables a doctor to fully examine the genital area. *Id.* at 578 n.2. The Eighth Circuit affirmed the admission of the child's statements to the doctor, rejecting the argument that the examination was conducted only for the purposes of litigation. *Id.* at 579-80. Without an examination by a specialist, the sexual abuse would most likely have gone undetected.

242. See FED. R. EVID. 803(4) advisory committee's note.

243. *Id.*

a red light has no impact upon the treatment of broken bones and lacerations. In contrast, identifying the perpetrator may be crucial to help ensure the future safety of the child. The treatment of sexual abuse may include removing the child from the home or at least ensuring that the child has no contact with the alleged perpetrator.<sup>244</sup> The child's treatment, whether physical or psychological, has no meaning if the child is treated only to return home to, or within the reach of, the perpetrator.<sup>245</sup> For these reasons, a physician, psychologist, or social worker should be allowed to testify about the child's identification of the perpetrator under Rule 803(4).<sup>246</sup>

As the above theories and arguments indicate, Rule 803(4) does apply in child sexual abuse cases. It should apply when the child makes a statement to a doctor while either receiving treatment or being diagnosed for possible abuse. Similarly, statements made to a psychologist should also be admitted under Rule 803(4) because psychological treatment can be a necessary part of the treatment of a child abuse victim. The theories and reasoning behind Rule 803(4) apply equally in cases of child sexual abuse as in cases involving adults and should be relied upon to admit children's statements. If, however, the theories and reasoning behind Rule 803(4) cannot logically be applied to a particular case, the other rules of evidence should be used.<sup>247</sup>

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244. Importantly, physicians, social workers and psychologists are required to report any suspected cases of child abuse. MINN. STAT. § 626.556, subd. 3 (1992).

245. See *United States v. Shaw*, 824 F.2d 601, 608 (8th Cir. 1987) ("statements of fault made to a physician by a child who has been sexually abused by a household member are admissible under Rule 803(4)"), *cert. denied*, 484 U.S. 1068 (1988); *United States v. Renville*, 779 F.2d 430, 436-37 (8th Cir. 1985) ("Information that the abuser is a member of the household is therefore 'reasonably pertinent' to a course of treatment . . ."); *Swift*, *supra* note 190, at 496-97. The identity of the perpetrator is also crucial where the child is diagnosed with a sexually transmitted disease. *Whitcomb*, *supra* note 1, at 86.

246. It is interesting to note that in *White v. Illinois*, 112 S.Ct. 736 (1992), the Court upheld the admission of a four-year-old's statements under Rule 803(4). *Id.* at 739-40. These statements identified the perpetrator who was only a friend of the child's mother and was not staying at the house. *Id.* at 739.

The physician, psychologist, or social worker should be permitted to testify about the alleged perpetrator's identity whenever the alleged perpetrator is a parent, a family member living near or having frequent contact with the child, a parent's significant other, or a child care provider. Although the identification of a person not falling within this group should also be admitted under Rule 803(4) because the statement was reasonably related to treatment, it is more likely that a challenge to the admission of the child's statement will be successful in this case.

247. For example, if the examination occurred within a relatively short period of time after the abuse, the statement may be more properly offered under Rule 803(2). A statement that identifies the perpetrator is admissible under Rule 803(2) because the rule only requires that the statement relate to the startling event. See *supra* notes 185-211 and accompanying text.

C. *Rules 803(24) and 804(b)(5) of the Minnesota Rules of Evidence: The Residual Rules of Evidence*

Many of the statements made by abused children containing vital factual information about the nature of the abuse and the identity of the perpetrator fall within Rule 803(2) and 803(4). However, a child's statements to family members, teachers, or friends may also contain significant factual information. These statements and their attendant circumstances may be the only evidence that the abuse actually occurred.

At present, there are three alternative means of getting these types of statements admitted as substantive evidence. These three means are Rules 803(24) and 804(b)(5) of the Minnesota Rules of Evidence (the residual exceptions), and the Minnesota child hearsay statute. The residual exceptions may apply to any statement that does not fall within the firmly-rooted hearsay exceptions. The five requirements of the residual exceptions must, however, be met before the out-of-court statements can be admitted as substantive evidence.

The purposes of the residual exceptions and the child hearsay statute are similar in that they all were designed to apply in those cases where the traditional hearsay exceptions do not apply.<sup>248</sup> Although the residual exceptions and the child hearsay statute have the same purpose, their requirements are not identical. Yet, the courts have seemingly merged the analysis under the residual rules with the analysis under the child hearsay statute, creating a quasi-residual hearsay exception.<sup>249</sup>

To alleviate this common law merger of the rules of evidence with a statutory rule, a new rule of evidence should emerge. Prior to discussing this new rule, however, the requirements of Rules 803(24) and 804(b)(5) must be reviewed.

1. *The Requirements of the Residual Hearsay Exceptions*

Both Rule 803(24) and Rule 804(b)(5) have five requirements.<sup>250</sup> The only difference between the two rules is that Rule 804(b)(5) re-

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248. MINN. STAT. § 595.02, subd. 3 (1992); MINN. R. EVID. 803(24); MINN. R. EVID. 804(b)(5).

249. Cf. MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.43, at 249 (noting that "child hearsay exceptions are simply residual exceptions for children's out-of-court statements").

250. MINN. R. EVID. 803(24) and MINN. R. EVID. 804(b)(5) both provide:

[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a state-

quires that the declarant be unavailable to testify, whereas the declarant's availability is irrelevant under Rule 803(24).<sup>251</sup> Though the analysis under each is virtually identical, the availability or unavailability of the declarant will determine which of the two rules should be used in a particular case.

Both of the residual hearsay exceptions require that the child's out-of-court statement contain circumstantial guarantees of trustworthiness.<sup>252</sup> Minnesota courts have relied exclusively upon the *Idaho v. Wright* analysis to determine reliability.<sup>253</sup> They have also relied upon *Idaho v. Wright's* prohibition of the use of corroborative evidence to establish reliability, even though the residual exceptions themselves do not contain such a prohibition.<sup>254</sup> The factors frequently relied on include the spontaneity of the statements, consistent repetition, the use of nonleading questions, sexual knowledge inconsistent with the child's age, the interviewer's preconception of what the child should reveal, and the motivation of either the person hearing the statement or the child to fabricate.<sup>255</sup> Reliability under Rules 803(24) and 804(b)(5) is, therefore, determined only from the circumstances surrounding the statement.<sup>256</sup>

The second requirement of the residual rules is that the statement must provide evidence of a material fact.<sup>257</sup> This requirement simply reiterates the general rule that evidence must be relevant to be admissible.<sup>258</sup> The materiality of children's out-of-court statements is readily apparent because these statements generally describe the abuse or

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ment may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, [the proponent's] intention to offer the statement and the particulars of it, including the name, address, and present whereabouts of the declarant.

*Id.*

251. See MINN. R. EVID. 803(24), 804(b)(5); MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.42, at 242.

252. See MINN. R. EVID. 803(24), 804(b)(5).

253. See *supra* notes 146-69 and accompanying text.

254. See *supra* notes 122-37 and accompanying text. The initial cases interpreting the statute recognized that the factors indicating reliability for the child hearsay statute are the same as those used for the residual hearsay exceptions. See *State v. Bellotti*, 383 N.W.2d 308, 313 (Minn. Ct. App. 1986), *review denied*, (Minn. Apr. 24, 1986); *State v. Carver*, 380 N.W.2d 821, 825 (Minn. Ct. App. 1986); see also *Graham*, *supra* note 35, at 534-35.

255. *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990), *cert. denied*, 498 U.S. 1033 (1991).

256. Some courts have indicated that as the trustworthiness of the statement increases, the reasons for excluding it decrease. See, e.g., *United States v. Shaw*, 824 F.2d 601, 609 n.9 (8th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988).

257. MINN. R. EVID. 803(24)(A), 804(b)(5)(A).

258. See *McCORMICK*, *supra* note 31, § 184, at 338.

identity of the perpetrator. Both the nature of the abuse and the identity of the perpetrator are material elements of sexual abuse.<sup>259</sup>

The residual hearsay rules also require that the out-of-court statement be more probative than any other evidence the proponent could reasonably produce.<sup>260</sup> Discussion of this factor is noticeably absent from appellate decisions, as is discussion about the second requirement of the residual hearsay rules.<sup>261</sup> This lack of discussion may discourage the use of the residual exceptions because of a fear that the probative value of the statements cannot outweigh the potential prejudice.

Probative value can be easily established. Statements that best demonstrate an element of the offense are the most probative evidence of that specific element.<sup>262</sup> Probative value can also exist if the out-of-court statement's context and content cannot be reproduced in the courtroom.<sup>263</sup> Although some of the statements may be cumulative, they may help the jury to evaluate other evidence which would establish the probative value of the statements.<sup>264</sup>

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259. See generally MINN. STAT. §§ 609.342-345 (1992 & Supp. 1993). In addition to prohibiting sexual penetration or contact by force or coercion, these sections proscribe either sexual penetration or contact when certain age disparities, a significant relationship, or a relationship of authority exists between the victim and the perpetrator.

260. MINN. R. EVID. 803(24)(B), 804(b)(5)(B).

261. See, e.g., *State v. Scott*, 501 N.W.2d 608, 618-19 (Minn. 1993); *State v. Edwards*, 485 N.W.2d 911, 915 (Minn. 1992).

262. The probative value requirement requires only that it be the most probative evidence "on the point for which it is offered," not that it be the most probative evidence of the crime itself. See MINN. R. EVID. 803(24)(B), 804(b)(5)(B) (emphasis added).

263. See *United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987), cert. denied, 484 U.S. 1068 (1988). In *Shaw*, the out-of-court statements of the child who testified were the most probative evidence because these statements were the first known statements made by the child, were made very shortly after the abuse, and contained specific dates. *Id.* at 610. Accord *People v. Rocha*, 547 N.E.2d 1335, 1343 (Ill. App. Ct. 1989) (noting that a child's earlier statement is "the kind of irreplaceable substantive evidence that might be more probative than in-court testimony"), appeal denied, 553 N.E.2d 400 (Ill. App. Ct. 1990); *State v. Myatt*, 697 P.2d 836, 841 (Kan. 1985) (recognizing the "potentially superior trustworthiness" of hearsay statements as compared to in-court testimony); *Jones v. State*, 781 P.2d 326, 329 (Okla. Crim. App. 1989) (rejecting the argument that statements were cumulative because each statement not only described the circumstances under which the abuse was discovered, but also described the nature of the abuse); Cf. *White v. Illinois*, 112 S.Ct. 736, 743 (1992) (noting that out-of-court statements may have substantial probative value that could not be duplicated by the declarant later testifying in court).

264. WEINSTEIN & BERGER, *supra* note 191, ¶ 803(24)[01], at 803-379 (1985).

Even if the child does fully testify, the statements may be admissible to corroborate the child's testimony. MINN. R. EVID. 801(d)(1)(B). See *State v. Dana*, 422 N.W.2d 246, 248 n.1 (Minn. 1988) (admitting child's out-of-court statements as corroborative evidence even if they were not admissible under the child hearsay statute), *habeas corpus denied*, 958 F.2d 237 (8th Cir. 1992), cert. denied, 112 S.Ct. 3043 (1992); see also *State v. Kruse*, 302 N.W.2d 29, 31 (Minn. 1981) (affirming the admission of the details of the victim's complaint as corroboration); *State v. Arndt*, 285 N.W.2d 478, 481 (Minn. 1979)

Moreover, the probative value of out-of-court statements significantly increases when the child is unavailable to testify. Rule 804(b)(5) specifically provides for the admission of statements where the declarant is unavailable.<sup>265</sup> In fact, the advisory committee for the rules of evidence anticipated greater use of Rule 804(b)(5) than Rule 803(24)<sup>266</sup> because the declarant's unavailability significantly increases the need for the out-of-court statements.<sup>267</sup> If the child victim is unavailable, then strong probative value lies in the lack of any other evidence to establish the content of what the child's testimony would have been.<sup>268</sup>

The fourth requirement of the residual exceptions is that the statement's admission must be consistent with the rules of evidence and the interests of justice.<sup>269</sup> Commentators indicate that this requirement has no appreciable effect on the admissibility of a statement because the requirement is rarely addressed by the courts when evaluating a statement's admissibility.<sup>270</sup>

Finally, the residual rules require that the proponent of the statement give sufficient notice of intent to use out-of-court statements so the defendant has time to prepare.<sup>271</sup> This requirement also has no appreciable effect on the admissibility of a statement as it is a procedural requirement rather than one requiring a detailed substantive analysis.

## X. AT AN EVIDENTIARY CROSSROADS: A TIME FOR CHANGE

The cases that have appeared before the Minnesota appellate courts reflect a misinterpretation of the child hearsay statute by attorneys seeking to admit a child's out-of-court statements. These cases consistently involve the use of the Minnesota child hearsay statute where other hearsay rules not only apply, but also provide an easier path to admissibility. The evidentiary hearsay exceptions, grounded in years of

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(holding that the out-of-court statement was not substantive evidence but rather corroborative evidence); Graham, *supra* note 35, at 542. If the evidence is not offered for the truth of the matter asserted and the declarant testifies under oath and is cross-examined, it is not considered hearsay and is admissible corroborative evidence. State v. Hesse, 281 N.W.2d 491, 492 (Minn. 1979).

265. Rule 804 contains five definitions of unavailability. Three of these definitions may apply in child sexual abuse cases: MINN. R. EVID. 804(a)(2) (refusal to testify); MINN. R. EVID. 804(a)(3) ("lack of memory of the subject matter" of the out-of-court statement); and MINN. R. EVID. 804(a)(4) (inability to testify because of existing mental illness or infirmity).

266. MINN. R. EVID. 804(b)(5) committee comment.

267. *Id.*

268. See *supra* notes 262-263 and accompanying text.

269. MINN. R. EVID. 803(24)(C), 804(b)(5)(C).

270. MCCORMICK, *supra* note 31, § 324, at 539.

271. MINN. R. EVID. 803(24), 804(b)(5); MINN. STAT. § 595.02, subd. 3(c) (1992).

application and interpretation, are passed over in favor of the child hearsay statute.

Despite the apparently widespread use of the child hearsay statute by practitioners, the Minnesota Supreme Court has expressly held that the statute should not be relied upon when other rules of evidence apply.<sup>272</sup> This suggests that the supreme court will only look to the child hearsay statute when none of the rules of evidence apply. Should such a case present itself, however, it seems unlikely that the court would use the child hearsay statute to uphold the admissibility of the child's out-of-court statements because of the similarity between the requirements of the child hearsay statute and the residual hearsay exception.

Curiously, the decisions of the Minnesota Court of Appeals seem to contradict the decision of the Minnesota Supreme Court. A few of the court of appeals' decisions continue to apply the child hearsay statute in cases where a residual hearsay exception clearly should have been applied.<sup>273</sup> Although these decisions result in the admission of children's out-of-court statements, an inconsistent body of law has developed where the child hearsay statute and the residual hearsay exceptions are being interchanged. This inconsistent body of law only exacerbates the confusion over when the child hearsay statute should be applied.

Aside from the problems of the child hearsay statute at a practical level, the statute also represents overreaching by the legislature. Although the child hearsay statute fulfilled a serious need at the time it was enacted, the legislature lacked the authority to enact such a statute. Only the Minnesota Supreme Court has the authority under the Separation of Powers Clause of the Minnesota Constitution to pronounce rules of evidence.<sup>274</sup> Where the legislature enacts statutory evidentiary rules, the court will enforce the rules "as a matter of comity where the rules [are] not in conflict with the Minnesota Rules of Evidence."<sup>275</sup> The court has taken this approach toward the child hearsay statute.<sup>276</sup> Given the court's recent holding that the child hearsay stat-

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272. See *supra* note 148 and accompanying text.

273. See *State v. Ligon*, No. C4-92-2162, 1993 WL 405306 (Minn. Ct. App. Oct. 12, 1993), *review denied*, (Minn. Dec. 14, 1993); *State v. Goldstein*, 505 N.W.2d 332, 343-44 (Minn. Ct. App. 1993) (conducting the reliability analysis of Rule 803(24) but upholding admissibility under Rule 803(24)). See also *supra* note 149.

274. See MINN. CONST. art. III, § 1; *State v. Willis*, 332 N.W.2d 180, 184 (Minn. 1983).

275. *State v. Larson*, 453 N.W.2d 42, 46 (Minn. 1991), *rev'd*, 111 S.Ct. 29, *aff'd on remand*, 472 N.W.2d 120 (1991), *cert. denied*, 112 S.Ct. 965 (1992); *State v. Dana*, 422 N.W.2d 246, 249 (Minn. 1988), *habeas corpus denied*, 958 F.2d 237 (8th Cir. 1992), *cert. denied*, 112 S.Ct. 3043 (1992); *Willis*, 332 N.W.2d at 184.

276. *Larson*, 453 N.W.2d at 46 n.3; *Dana*, 422 N.W.2d at 249.

Some states have found their version of the child hearsay statute to be unconstitutional because of the Separation of Powers issue. The Arizona Supreme Court, in *State*

ute should not be used where the rules of evidence apply,<sup>277</sup> it is questionable whether the court will continue to follow this approach.

## XI. THE RESOLUTION: A NEW CHILD HEARSAY RULE

One solution to the problems surrounding the Minnesota child hearsay statute would be to simply abolish the statute. Courts have constructively, if not actually, abandoned the use of a statutory analysis under the child hearsay statute, using instead a quasi-residual hearsay exception analysis.<sup>278</sup> The child hearsay statute was adopted only to supplement the existing rules of evidence and statutes, not to supersede them.<sup>279</sup> Until recently, the supplemental nature of the statute has been ignored by the courts.<sup>280</sup> More significant, the child hearsay statute is more stringent and less flexible than the firmly-rooted and residual hearsay exceptions because of its age limitation and its requirement of corroborative evidence when the child is unavailable to testify.<sup>281</sup>

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*v. Robinson*, 735 P.2d 801 (Ariz. 1987), found that the statute's terms were contradictory, contrary to the rules of evidence, and totally engulfing of the rules of evidence. *Id.* at 808. Further, the court held that it had exclusive power to promulgate evidentiary rules. *Id.* at 807. Therefore, the legislature has only severely limited authority to enact rules of evidence. *Id.* The Arkansas Supreme Court found its child hearsay statute facially unconstitutional because it encourages the use of corroborating factors to find reliability in violation of *Idaho v. Wright*. *George v. State*, 813 S.W.2d 792, 796 (Ark. 1991). And finally, the Mississippi Supreme Court similarly found its child hearsay statute unconstitutional because only the Mississippi judiciary has the power to adopt rules of evidence. *Hall v. State*, 539 So.2d 1338, 1340 (Miss. 1989).

277. See *supra* note 148 and accompanying text.

278. See *supra* note 249 and accompanying text.

279. MINN. STAT. § 595.02, subd. 3 (1992) (noting that it applies to statements "not otherwise admissible by statute or rule of evidence").

Interestingly, the first child hearsay statutes were adopted because those states did not have residual hearsay exceptions. Sheryl K. Peterson, *Sexual Abuse of Children: Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 816 (1983); see also Stephanie A. Wilson, Note, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 J. JUV. L. 59, 61 (1984). As a result, firmly-rooted exceptions, like the excited utterance exception, were being "tortured" to admit children's statements. *State v. Myatt*, 697 P.2d 836, 842 (Kan. 1985); Peterson, *supra* at 818. The child hearsay statutes in these states eliminated this need because the statute directly addressed the admission of children's out-of-court statements. *Id.* at 819. Minnesota, unlike these states, has residual exceptions and therein lies the problem. See *supra* notes 250-271 and accompanying text.

280. See *supra* notes 148-49 and accompanying text.

281. The child hearsay statute applies only to children under ten years of age and requires a showing of corroborative evidence when the child is unavailable. MINN. STAT. § 595.02, subd. 3(b)(ii) (1992). More importantly, it applies only when the other rules of evidence do not apply. *Id.* This is unlike the traditional hearsay exceptions which apply regardless of the applicability of the other rules. To properly use MINN. STAT. § 595.02, subd. 3, the proponent of the statement must complete a thorough analysis of all other possibly applicable rules of evidence before resorting to the child hearsay statute. See *supra* text accompanying notes 94-95.



The presence of a child hearsay statute does, however, serve a valuable purpose. It provides direct permission to the courts to admit the out-of-court statements of child victims and prevents the reentrenchment of the belief that those statements are unreliable and inadmissible. The statute also provides specific guidelines for the admissibility of out-of-court statements.<sup>282</sup> Its presence alone is a valuable reminder that children's out-of-court statements are often admissible. However, in light of the current interpretation and application of the child hearsay statute, this reminder alone is insufficient to warrant the retention of the statute in its present form.

To avoid total elimination of the statute, but to provide for consistent and correct interpretation of the hearsay rules, Minnesota needs a revised child hearsay rule. The new child hearsay exception should be appended to the existing exceptions found in Rule 803 of the Minnesota Rules of Evidence. The inclusion of a new exception in Rule 803 would be appropriate for two reasons. First, it would resolve the separation of powers problem that presently exists with the child hearsay statute. Second, the new rule would set out an appropriate exception to the general rule that out-of-court statements should not be admitted into evidence. The out-of-court statements of child victims of sexual abuse are offered to prove the truth of the matter asserted and, therefore, would appropriately be included with other similar hearsay exceptions.<sup>283</sup> Minnesota's current child hearsay statute should be revised and adopted as Rule 803(25) of the Minnesota Rules of Evidence.<sup>284</sup>

A. *Rule 803(25) of the Minnesota Rules of Evidence: The Residual Hearsay Exception For Child Abuse Cases*

An out-of-court statement made by a child under the age of eighteen years or a person who is mentally impaired as defined in section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or mentally impaired person, any act of physical abuse of the child or the person who is mentally impaired, any act of emotional neglect or any act of neglect as defined by Minnesota Statutes Section 609.378, or any statement by a child witnessing the foregoing, or any statement of identification of the perpetrator of the foregoing acts, not otherwise admissible under Rule 803(2) through (23) of these rules of evidence is admissible as substantive evidence if:

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282. See Note, *Minnesota's Hearsay Exception for Child Victims of Sexual Abuse*, 11 WM. MITCHELL L. REV. 799, 811 (1985).

283. See MINN. R. EVID. 801(c).

284. For states which include the child hearsay statute within their rules of evidence, see MICH. R. EVID. 803A; MISS. R. EVID. 803(25); N.J. R. EVID. 63(33); N.D. R. EVID. 803(24); OHIO R. EVID. 807; VT. R. EVID. 804a.

(a) the court or person authorized to receive evidence holds an evidentiary hearing prior to the admission of such statements, outside the presence of the jury; and

(b) finds, upon the record, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made, excluding corroborative evidence, provide sufficient indicia of reliability; and

(c) the child or person who is mentally impaired either testifies at the proceeding or is found to be unavailable as a witness; and

(d) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to meet the statement.

For purposes of this exception, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

An unavailable witness includes children or persons who are mentally impaired and are unable to remember events in issue; unable to understand the difference between truth and a lie when asked in terms appropriate to the mental age of the child or the person who is mentally impaired; unable to effectively communicate with the jury; or unable to testify without suffering severe emotional trauma as supported by the testimony or affidavit of a mental health specialist.<sup>285</sup>

### B. *The Advantages of Rule 803(25) Over the Minnesota Child Hearsay Statute*

This new rule of evidence would give the courts explicit permission to admit children's out-of-court statements and would also provide concrete guidelines for determining whether or not the statement is admissible evidence. It would also eliminate some of the troubling aspects of the current child hearsay statute, while retaining many of its fundamental elements. More important, Minnesota Rule of Evidence 803(25) would create a consistent body of law in the area of child hearsay and would eliminate the use of a quasi-residual hearsay exception.

#### 1. *Rule 803(25) Expands the Class of Declarants*

The first paragraph of Rule 803(25) tracks the language of the current child hearsay statute while expanding the class to which the rule would apply. The current child hearsay statute seems to reflect the language of the old competency law in which children under the age

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285. See *People v. Newbrough*, 803 P.2d 155, 158-59 (Colo. 1990) (using the child's therapist to establish the psychological unavailability of the child); *Altmeyer v. State*, 496 N.E.2d 1328, 1331 (Ind. Ct. App. 1986) (using a psychiatrist to establish the fact that testifying would be a severely traumatic experience for the child).

of ten were presumed incompetent unless shown otherwise.<sup>286</sup> By using this language, the legislature may have intended to counter the outdated assumption that children under the age of ten could not be trusted to tell the truth in court. Rule 803(25) would apply to all out-of-court statements made by child abuse victims. The arbitrary line created by the current child hearsay statute serves no valid purpose. The need to admit a child's out-of-court statements does not necessarily decrease just because the child has attained ten years of age.

Rule 803(25) also would be applicable in cases involving sexual abuse, physical abuse, emotional abuse, and neglect.<sup>287</sup> The need for the child victim's out-of-court statements in emotional abuse and neglect cases is as strong as it is in physical and sexual abuse cases. This is especially true in cases involving emotional abuse, where there is typically no physical evidence.<sup>288</sup>

Out-of-court statements made by children who witnessed sexual, physical, or emotional abuse or neglect would also be included in Rule 803(25). In expressly providing that the statements made by those child witnesses are admissible, the rule would eliminate the need to rely solely on judicial interpretation.<sup>289</sup> In those rare cases where other children have witnessed the abuse, it is essential to the successful prosecution of the perpetrator that these children testify or that their statements are admitted. This evidence enhances the prosecution's case. Without this evidence, the case simply involves the child victim's word against the alleged perpetrator's word.

## 2. *Rule 803(25) Retains the Limited Applicability Provision*

Rule 803(25) would retain the limiting provision found in the current child hearsay statute. The other rules of evidence, excluding the

286. The current competency statute provides that children under the age of ten are competent unless shown otherwise. See *supra* note 26.

287. There are five general categories of emotional neglect: 1) Rejecting—failure to acknowledge the child's worth and emotional needs; 2) Isolating—prevention of outside contacts and friendships; 3) Terrorizing—use of language to terrify and bully the child so the child feels "the world is capricious and hostile;" 4) Ignoring—failure to respond to the child or provide the stimulation necessary for emotional and intellectual growth; and 5) Corrupting—teaching anti-social destructive and corrupting behavior. MYERS, LEGAL ISSUES, *supra* note 9, at 150 (quoting JAMES GARBARINO ET AL., THE PSYCHOLOGICALLY BATTERED CHILD 8 (1986)).

288. For child hearsay statutes that apply in cases involving crimes in addition to physical or sexual abuse see: ALA. CODE §§ 15-25-31 to -39 (1982 & Supp. 1993) (entice-ment of a child and pornography); COLO. REV. STAT. § 13-25-129 (1987 & Supp. 1993) (child prostitution); IDAHO CODE § 19-3024 (1987 & Supp. 1993) (any other criminal conduct committed with or upon the child); IND. CODE ANN. § 35-37-4-6 (Michie 1994) (kidnapping and neglect); KAN. STAT. ANN. § 60-460(dd) (1983 & Supp. 1993) (endangering welfare of a child); TEX. CODE CRIM. PROC. ANN. art. 38.072 (West Supp. 1994) (solicitation of a child and sexual performance by a child).

289. See *supra* notes 96-97 and accompanying text.

residual exceptions, should still be used before Rule 803(25). Rule 803(25) would, therefore, still be a last resort. As the discussion on Rule 803(2)<sup>290</sup> and Rule 803(4)<sup>291</sup> indicates, the analysis of whether a child's out-of-court statement is admissible can be less strenuous under these provisions than under the residual exceptions or the child hearsay statute. The firmly-rooted exceptions also provide a more certain basis for admitting the statement because those exceptions have been used for a longer time period than either the child hearsay exception or the residual hearsay exceptions.

Rule 803(25) would also eliminate the current competition between the residual rules and the child hearsay statute.<sup>292</sup> Those statements which do not meet the requirements of the firmly-rooted exceptions would be admissible under one single alternative exception. This would result in one consistent body of law.

### 3. *Rule 803(25) Rejects the Corroborative Evidence Requirement*

One important advantage of Rule 803(25) over the current child hearsay statute is that the rule would not require corroborative evidence when the child is unavailable to testify. The corroborative evidence requirement is simply an additional hurdle that could prevent a child abuse case from being presented to a jury. This hurdle is not required under either the firmly-rooted or residual hearsay exceptions.<sup>293</sup> According to the current child hearsay statute, the declarant's age and availability are the determinate factors as to whether there must be corroborative evidence before the child's out-of-court statement can be admitted. The standards for the admissibility of a child's out-of-court statement should not be higher simply because the declarant is a child.<sup>294</sup>

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290. See *supra* part VIII.A.

291. See *supra* part VIII.B.

292. See *supra* notes 174-180 and accompanying text.

293. See *supra* note 46 and accompanying text. *Accord* State v. Robinson, 735 P.2d 801, 808 (Ariz. 1987) (holding that the Minor Sexual Victim Testimony Act unconstitutionally infringes on the court's rule-making authority and that admissibility of child hearsay statements should be determined under the rules of evidence). The *Robinson* court also noted that the child hearsay statute was more restrictive because it required sufficient indicia of reliability even when the child testifies. *Id.* See also State v. McCafferty, 356 N.W.2d 159, 164 (S.D. 1984) (noting that the corroborative evidence requirement of South Dakota's child hearsay exception goes beyond the requirements of the residual hearsay exception).

294. See United States v. Dunn, 851 F.2d 1099, 1101 (8th Cir. 1988) (noting that "the young age of the attesting witness should enhance the trustworthiness of the declarations, not serve to undercut it"); United States v. Dorian, 803 F.2d 1439, 1444-45 (8th Cir. 1986) (noting that " 'a declarant's young age is a factor that may substantially lessen the degree of skepticism with which we view [her] motives,' and mitigates in favor of the trustworthiness and admissibility of her declarations") (quoting United States v. Renville, 779 F.2d 430, 441 (8th Cir. 1985)).

Corroborative evidence is sometimes lacking in child sexual abuse cases. Sexual abuse is a private crime. The child and the perpetrator are usually the only participants, so there often are no independent witnesses.<sup>295</sup> Sexual abuse is also not typically a crime of physical violence. Physical evidence often is absent, especially in fondling cases.<sup>296</sup> The difficulty of prosecuting child abuse cases should not be enhanced by a requirement which adds little to the evaluation of the internal reliability of the statements.

Few of the appellate cases in Minnesota have ever addressed the corroborative evidence requirement on appeal. Some Minnesota appellate courts blatantly reject the requirement.<sup>297</sup> Moreover, the United States Supreme Court rejects the use of corroborative evidence to determine the admissibility of out-of-court statements.<sup>298</sup> The Court's rejection indicates that the defendant's constitutional rights are not violated when the child's out-of-court statement is admitted without a requirement of corroborative evidence in addition to indicia of relia-

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295. See *supra* note 55; see also *State v. Myatt*, 697 P.2d 836, 841 (Kan. 1985) (noting that witnesses other than the victim and perpetrator are rare because people usually do not molest children in front of others).

296. See Allan De Jong & Mimi Rose, *Legal Proof of Child Sexual Abuse in the Absence of Physical Evidence*, 88 PEDIATRICS 506, 506 (1991) (study indicates that physical evidence is often lacking in sexual abuse cases); MYERS, LEGAL ISSUES, *supra* note 9, at 33.

Of the cases reviewed, only one case contained external physical evidence. In *State v. Ross*, 451 N.W.2d 231 (Minn. Ct. App. 1990), *cert. denied*, 498 U.S. 837 (1990), the child had small, healed scars on his rectum. *Id.* at 233. These are hardly the type of injuries that would be noticed without a specific examination. Physical signs of the abuse generally involve internal genital damage, visible only to physicians. See, e.g., *United States v. Balfany*, 965 F.2d 575, 578-79 (8th Cir. 1992) (finding significant rounding of the hymen and a healed tear on the hymen).

The corroborative evidence requirement may indirectly facilitate the perpetrator's predation on young victims. Young children are sometimes unavailable to testify for a variety of reasons. See *supra* text accompanying notes 26-31. If the state is required to show corroboration, the statements may be inadmissible. The perpetrator may then elude conviction and perhaps continue to victimize other young children. *Accord State v. Bellotti*, 383 N.W.2d 308, 316 (Minn. Ct. App. 1986) (concluding that "[t]he legislature did not want to allow child abusers to escape conviction merely by choosing victims who, due to their age or otherwise, are unavailable to testify at trial"), *review denied*, (Minn. Apr. 24, 1986); *People v. Diefenderfer*, 784 P.2d 741, 750 (Colo. 1989) (noting that absent the admission of out-of-court statements, "molesters of small children, especially incestuous molesters, would rarely be punished") (quoting *Nelson v. Farrey*, 874 F.2d 1222, 1229 (7th Cir. 1989)).

297. See *Dolny v. State*, No. C5-91-23, 1991 WL 109230, at \*1 (Minn. Ct. App. June 25, 1991); *State v. Lovejoy*, No. C8-90-880, 1991 WL 21614, at \*3 (Minn. Ct. App. Feb. 26, 1991).

298. *Idaho v. Wright*, 497 U.S. 805, 822-24 (1990). See also *George v. State*, 813 S.W.2d 792, 796 (Ark. 1991) (finding the Arkansas child hearsay statute "constitutionally defective on its face" because it encourages use of corroborating factors in determining reliability).

bility.<sup>299</sup> The corroborative evidence requirement of the current child hearsay statute can, therefore, be eliminated without violating the defendant's constitutional rights.<sup>300</sup>

Rule 803(25) would not prevent the admission of corroborative evidence, if it exists, to avoid a conviction based solely on out-of-court statements. Evidence that the defendant had access to or custody of the child at the time of the abuse,<sup>301</sup> the defendant's confession,<sup>302</sup> and other corroborative evidence can be admitted for the jury's evaluation. Corroborative evidence does allow the jury to evaluate the child's statements outside of, and in light of, the facts contained in the statement itself. It is important to note, however, that corroborative evidence is not necessary for a conviction under Minnesota's criminal sexual conduct statutes.<sup>303</sup> Corroborative evidence should only be used to strengthen the case, not as a condition precedent to the admission of out-of-court statements.

## XII. CONCLUSION

The admissibility of child hearsay statements is the subject of ongoing debate and evolution. This issue will not disappear until child abuse disappears. The law should accommodate prosecutions of perpetrators of child abuse to the fullest extent it can within the limitations of the Constitution. Such an accommodation was found in the Minnesota child hearsay statute. This statute, though necessary and

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299. Although it may not violate the defendant's constitutional rights, it may provide an avenue for error. Judges, faced with corroborative evidence which is stronger than the circumstantial guarantees of trustworthiness, may be tempted to rely equally, if not more so, on corroborative evidence to admit the statement. If the judge does so, the conviction potentially can be reversed and result in a new trial. See *Idaho v. Wright*, 497 U.S. at 823; *State v. Ring*, No. C1-89-1038, 1990 WL 462, at \*1-2 (finding that the defendant's opportunity to commit the crime technically constitutes corroborative evidence and remanding for a new trial), *habeas corpus granted*, 968 F.2d 760 (8th Cir. 1992), *opinion vacated and superseded by*, 983 F.2d 818 (1992). But see *State v. Ligon*, No. C4-92-2162, 1993 WL 405306, at \*2 (Minn. Ct. App. Oct. 12, 1993) (noting that reliance "on some improper factors does not, however, necessarily require exclusion of the statement.").

300. MYERS, EVIDENCE IN CHILD ABUSE, *supra* note 33, § 7.43, at 246 (noting that the *Idaho v. Wright* court found that the "Sixth Amendment prohibits a court from considering corroborating evidence").

301. For cases using the defendant's opportunity to commit the crime to establish reliability see *State v. Bellotti*, 383 N.W.2d 308, 314 (Minn. Ct. App. 1986), *review denied*, (Minn. Apr. 24, 1986) and *State v. Ring*, No. C1-89-1038, 1990 WL 462, at \*2 (Minn. Ct. App. Jan. 9, 1990), *habeas corpus granted*, 968 F.2d 760 (8th Cir. 1992), *opinion vacated and superseded by*, 983 F.2d 818 (1992).

302. *Bellotti*, 383 N.W.2d at 314.

303. See MINN. STAT. § 609.347, subd. 1 (1992); see also *State v. Hesse*, 281 N.W.2d 491, 492 (Minn. 1979) (holding that corroborative evidence is not required to support a victim's statements because the judge can grant relief when the evidence is legally insufficient).

beneficial at the time of enactment, no longer fulfills its original purpose but serves to complicate the law on child hearsay. Enacting a new hearsay rule would solve many of the problems and end the confusion that now exists. Minnesota should adopt Rule 803(25) to alleviate these problems.

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