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Should a Two-Year-Old Take the Stand

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SHOULD A TWO-YEAR-OLD TAKE THE STAND?

In re C.R.K. v. R.J.K.[1]

Child sexual abuse is a serious national problem which has provoked a great deal of public indignation in recent years.[2] The victims range from newborn infants to older teenagers, and belong to all socioeconomic classes.[3] Although sexual abuse is only one variety of child abuse, there are approximately 200,000 *reported* cases in the United States each year.[4] Many authorities believe the problem to be much worse; one survey showed that only six percent of child sexual abuse cases were reported.[5] It is difficult to imagine a more heinous or morally reprehensible crime, or one which elicits such a storm of anger and disgust from the public, along with loud demands for retribution.

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1. 672 S.W.2d 696 (Mo. Ct. App. 1984).

2. *See generally* THE MALTREATMENT OF THE SCHOOL-AGED CHILD (R. Volpe, M. Breton & J. Mitton eds. 1980) (causes and effects of abuse on school-aged children); V. FONTANA & D. BESHAROV, THE MALTREATED CHILD (4th ed. 1979) (overview of the pathology and psychology of child abuse); J. COSTA & G. NELSON, CHILD ABUSE AND NEGLECT (1978) (scholarly overview with an emphasis on remedial measures, including a comprehensive compilation of state statutory reporting requirements with names and addresses of agencies by county); S. NAGI, CHILD MALTREATMENT IN THE UNITED STATES (1977) (discussion of demographic and socioeconomic aspects of child abuse); H. JAMES, THE LITTLE VICTIMS (1975) (individual case studies); THE BATTERED CHILD (R. Helfer & C. Kempte 2d ed. 1974) (psychological aspects of child abuse); L. YOUNG, WEDNESDAY'S CHILDREN (1964) (early seminal work on child abuse); *The Nightmare of the Sexually Abused Child*, USA TODAY, Nov. 1985, at 54 (deleterious effects of sexual abuse on children and the epidemic nature of the problem); *California: Devilish Deeds?*, NEWSWEEK, Sept. 16, 1985, at 43 (children forced to participate in satanic worship rituals including infant torture and dismemberment); *Child Abuse at the Point?*, NEWSWEEK, July 8, 1985, at 45 (child sexual abuse in U.S. military); *Painful Secrets*, TIME, July 1, 1985, at 51 (widespread pederasty by priests); *A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 30 (prevalence of child abuse and its difficulty of detection).

3. U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, CHILD ABUSE AND NEGLECT 7-8 (1974-1975); James, *supra* note 2, at 102.

4. R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 6 (1979); Rogers, *Child Sexual Abuse and the Courts: Preliminary Findings*, SOCIAL WORK AND CHILD SEXUAL ABUSE 145 (1982).

5. Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 996 (1985).

Public indignation puts pressure on the legal system to assure the swift detection, conviction, and punishment of child sexual abusers. The nature of the crime itself, however, makes prosecution difficult.[6] When the abuser is a close relative, the victim is often unwilling to report the crime.[7] The abuser may use threats of physical harm or that "no one will believe you" to coerce the child-victim into silence. Children are sometimes afraid to report parental abuse because they fear that their family will break up or will be reduced to poverty if the abuser, who may be the breadwinner, goes to jail. Similar fears may move the spouse of an abusing parent to discourage the child from reporting the abuse.[8] Since child abuse—especially sexual abuse—is almost always committed in a secluded place (a bedroom at home, a deserted park or playground, an empty classroom), there are often no witnesses to the crime except the victim.

Physical evidence may be scanty or nonexistent. An adult, particularly one who is close to the child (a parent or other trusted relative), can exert psychological coercion on a child to obtain participation in a sexually abusive act, coercion which would not be effective against an adult, but which makes the use of physical force unnecessary.[9] Thus evidence of resistance commonly found in rape and adult sexual abuse cases (reddened wrists, bite marks, scratches, etc.) may be nonexistent. By the time the incident comes to light, it is not uncommon for weeks or months to have passed.[10] Finally, several forms of sexual abuse simply do not produce physical evidence. For example, if a child's genitals are fondled or orally stimulated, or if the child is forced to fondle or orally stimulate an adult's genitals, there may be no medically recognizable "symptoms" of any kind. Since physical evidence is lacking,

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6. *Id.* at 1000; *see also* Stafford, *The Child as a Witness*, 37 WASH. L. REV. 303 (1962).

7. *See* H. JAMES, *supra* note 2, at 101-07.

8. During the summer of 1985 at Fort Sill, Oklahoma, the author interviewed several child victims of parental abuse and spouses of abusers who voiced this fear as their reason for unwillingness to testify against an abusing breadwinner. *See generally* V. FONTANA & D. BESHAROV, *supra* note 2 (psychological factors which operate to discourage reporting of abuse by child-victims).

9. SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 85-98 (A. Burgess ed. 1978).

10. There are statutes in all 50 states requiring that physical abuse of children be reported to a designated state agency by those in positions of contact with children (teachers, social workers, pediatricians, etc.). *See* J. COSTA & G. NELSON, *supra* note 2. However, much abuse, particularly sexual abuse (which may not leave physical indications), only comes to light after the child reports the abuse to friends who report it to their parents, who report it to authorities. Alternately, abuse may be detected by a teacher who notices a difference in the child's behavior at school, or observes bruises or other marks on the child, perhaps during a gym class. In any event, there is delay in the abuse being brought to the attention of authorities, which is not conducive to the prosecution of the abuser.

testimony must be adduced from witnesses, and usually the abused child is the only witness.[11]

Adducing testimony from the child may mean subjecting the child to the ordeal of appearing and testifying in court, seated perhaps only a few feet away from the abuser. The child might endure the full rigors of cross-examination, including perhaps such "tricks" as the defense layer positioning himself in such a way that the child is forced to look at the defendant throughout the proceedings.[12] This is apt to be an extremely traumatic experience, perhaps as terrifying to the child as the original abuse.[13] Prosecutors and parents are often reluctant to force an already traumatized child to endure this type of trial by ordeal, and the child is often unwilling or unable to endure it. Yet, the prosecutor and the indignant parent are faced with the fact that, without testimony by the child, the case against the abuser may collapse.

Through the case of *In re C.R.K. v. H.J.K.*,[14] this Note explores the problems and issues which arise when the victim of child abuse is the sole witness to the crime. Topics examined include the competence requirements pertaining to children's testimony and alternate means of introducing evidence which eliminate the need for the young victim to testify personally in court.

The victim in *In re C.R.K. v. H.J.K.* was a 2-year-old girl whose parents were divorced. After returning from a visit with her father, C.R.K. reported to her mother than Hank (the father) had "pinched her butt," pointing to her vaginal area.[15] The mother testified that the child's vaginal area was red and swollen after visits with the father, and that the child told her that "Hank messed up my butt" and took a picture of her with her clothes off.[16]

The mother took C.R.K. to a police detective, who gave the child anatomically correct dolls and observed her with the dolls for over an hour. The detective testified that she undressed a doll and kissed it in the genital area. In response to the question "who does that," C.R.K. replied, "Hank."[17]

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11. Even when physical evidence is present, it is generally only circumstantial evidence that abuse has been committed. The eyewitness testimony of the child is often the only direct link between the child and the offender. *See* Meyers, *Little Witnesses*, 11 STUDENT LAW. 14 (1982).

12. Melton, *Child Witnesses and the First Amendment: A Psychological Dilemma*, 40 J. SOC. ISSUES 109 (1984).

13. B. CARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 70 (1954); Chaneles, *Child Victims of Sexual Offenses*, FED. PROBATION, June 1967, at 52, 54; Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court*, 15 U. MICH. J.L. REF. 131, 132 n.6 (1981).

14. 672 S.W.2d 696 (Mo. Ct. App. 1984).

15. *Id.* at 697.

16. *Id.*

17. *Id.* at 697-98.

A few weeks later the court issued an order assuming custody of C.R.K., placing the child temporarily in the legal custody of the Missouri Division of Family Services and in the physical custody of the mother. A few weeks after this order, a psychiatrist testified that C.R.K. replied to the question "what is Hank doing?" by pointing to her genitalia and saying that is where he puts his finger and mouth. After two and one-half hours together, the psychiatrist felt that there was a "strong possibility" of sexual abuse and that the child was telling the truth.[18] At trial, after denying a motion by the father requesting disqualification of the judge, the juvenile court found that the natural father had sexually abused the child and ordered counseling and supervised visitation. Pursuant to Missouri law, the father appealed the order, objecting, *inter alia*, to the admission of hearsay testimony, i.e., the statements of the child's mother, the police detective, and the child psychiatrist. The Missouri Court of Appeals, Eastern District, Southern Division, ruled that these statements were indeed hearsay testimony and inadmissible for any purpose.[19] However, the court noted that no attempt was made to establish C.R.K.'s competence to testify and further stated while she was presumed incompetent, she could have been qualified subject to the trial court's discretion if it were established that she had a present understanding of the obligation to speak the truth, mental capacity at the time of the event to observe and register the occurrence, memory sufficient to retain independent recollection, and capacity to relate the occurrences.[20] Because the court of appeals in *In re C.R.K. v. H.J.K.* had refused to admit the testimony of the child's mother, the police detective, and the child psychiatrist, holding it to be hearsay and inadmissible for any purpose, there was no conclusive medical or physical evidence. Thus, the submissibility of the case depended solely upon the testimony of C.R.K., testimony which was never given. Had C.R.K. been over 10 years of age, she would have been presumed competent to testify under the Missouri statute.[21] Since she was but two and one-half years

18. *Id.* at 696.
19. *Id.*
20. *Id.* at 699.
21. Mo. REV. STAT. § 491.060(2) (Supp. 1985). This provision modified the common law presumption that a child was competent to testify at 14 years of age. Case law requiring the "four point test" discussed in this Note is probably overruled by section 491.060(2), which provides that children under 10 who are victims of sexual abuse (and certain other enumerated crimes): "shall be allowed to testify without qualification in any judicial proceeding involving such alleged offense. The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony." Mo. REV. STAT § 491.060(2). As a practical matter, there is a strong possibility Missouri courts will continue to use some version of the four-point test as a "measuring stick" to evaluate the probative value of children's testimony. *See* State v. Young, 477 S.W.2d 114 (Mo. 1972); State v. Statler, 331 S.W.2d 525 (Mo. 1960); State v. Terry, 684 S.W.2d 874 (Mo. Ct. App. 1984).

old, her competency became a matter for the trial judge to decide by applying the four-point test noted above.[22]

The first point—present understanding (upon instruction) of an obligation to speak the truth—involves two separate sub-elements.[23] First, the child must understand the meaning of truth, as opposed to falsehood; the child must be able to distinguish fact from fantasy, true statements from lies. Second, the child must understand that some form of legal and moral disgrace attaches to the deliberate utterance of falsehood on the witness stand.[24]

In practice, these two elements are often blended. The term "knowing the meaning of an oath" has been used to embrace both concepts embodied in this first point of the four-point test.[25] However, a child who professes ignorance of "the meaning of an oath" may still be adjudged competent if it can be shown that the child in fact understands individually the two elements involved.[26] It should be stressed that more than a mere ability to differentiate between truth and falsity is required. The child must display an awareness of the consequences of lying under oath. As long as the child is aware that some form of punishment will result, courts have generally been lenient regarding the accuracy of the child's perception of what form the punishment or sanction will take.[27] A Georgia court held that a child's statement that if she lied under oath she would "go to the devil" was sufficient.[28] In *State v. Young*,[29] cited by the court in *In re C.R.K.* in support of its holding that C.R.K. could have been qualified to testify, an eleven-year-old girl who appeared to be of less than normal intelligence and who was considerably behind her age group in school, was held to be competent although admitting that she did not know what an oath was.[30] The girl stated that she knew what it was to tell the truth, and what a lie was, and that if you tell a lie "you get a whooping." Her testimony on deposition that she did not know what it meant to tell the truth or what a lie is did not preclude her trial testimony, since *at the time of trial* the trial court was convinced she then knew the difference.[31]

The second element of the four-point test, unlike the first, involves the child's capacity *at the time of the occurrence* to accurately observe and

22. *See* State v. Beisnir, 646 S.W.2d 74 (Mo. 1983); State v. Young, 477 S.W.2d 114 (Mo. 1972).
23. *See* Arnold v. State, 167 Ga. App. 720, 307 S.E.2d 526 (1983).
24. *Id.* at 721-22, 307 S.E.2d at 528.
25. Mackler v. State, 164 Ga. App. 874, 876, 298 S.E.2d 569, 591 (1982).
26. State v. Young, 477 S.W.2d 114, 116 (Mo. 1972).
27. *Id.* at 116.
28. Arnold v. State, 167 Ga. App. 720, 721, 307 S.E.2d 526, 528 (1983).
29. 477 S.W.2d 114 (Mo. 1972).
30. *Id.* at 116-17.
31. *Id.*

register the events. While it has been stated that children under seven rarely have the capacity to *lie*,[32] children are generally more prone to suggestion and influence than adults. Children may have difficulty distinguishing fact from fantasy, and may be unable to form rational judgments or draw logical conclusions about a sequence of events.[33] As one Missouri court stated:

> The force of suggestion, always strong, is particularly potent with the impressionable and plastic mind of childhood . . . without intending any such result, the repetition of supposed facts in the presence of a child often creates a mental impression or conception that has no objective reality in any actually existing fact.[34]

The third element of the four-point test concerns the strength and accuracy of the child's memory, or, as one Missouri court has stated, "the sufficiency of the child's memory to bridge the period intervening between the occurrence and the trial."[35] With children, as with adults, the greater the time lapse, the more suspect the recollection.[36] In most Missouri cases, a child's testimony from memory, pertaining to a crime committed upon the person of the child, is accorded more weight than would testimony pertaining merely to something which the child saw or observed. The theory is that the trauma of personal violation and injury would naturally leave a deeper and more lasting impression upon the child's mind.[37] The recollection must be an *independent* one.[38] A lawyer conducting direct examination of a child is generally permitted some freedom regarding prompting and leading questions.[39] A defense lawyer may, depending on the strategic situation, deliberately refrain from objecting to prompting and leading questions, hoping that the child's credibility to the trier of fact will be impaired. The child's testimony will be much more effective if it is seen as the child's own, as a truly independent, not prompted or memorized, recollection.[40]

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32. Silas, *Would a Kid Lie?* 71 A.B.A. J. 17 (Feb. 1985) (citing several research studies generally concluding that the word of children can be believed, but also mentioning that juries may not feel comfortable when relying on the testimony of young children; corroborating evidence may play a key role in determining the influence of children's statements).

33. Inker, *Evidentiary Problems in Custody Trials*, 6 FAMILY ADVOCATE 16 (1984) (citing F. BAILEY & H. ROTHBLATT, CROSS-EXAMINATION IN CRIMINAL TRIALS (1978)).

34. Hildreth v. Key, 341 S.W.2d 601, 610 (Mo. Ct. App. 1960) (quoting People v. Delaney, 52 Cal. App. 765, 769, 199 P. 896, 900 (1921) and Cross v. Commonwealth, 195 Va. 62, 67, 77 S.E.2d 447, 452 (1953)).

35. *Id.* at 609.

36. *Id.*

37. *Id.* at 611-12; Burnam v. Chicago Great W. R.R., 340 Mo. 25, 35, 100 S.W.2d 858, 862 (1936).

38. State v. Wilson, 554 S.W.2d 511 (Mo. Ct. App. 1977).

39. Inker, *supra* note 33, at 16.

40. *Id.*

The fourth and final hurdle involves the child's ability to articulate his or her testimony on the witness stand.[41] The ease or difficulty of this will vary greatly depending on the age and the individual child. The standard does not appear to be inordinately high and is merely a requirement that the child be able to relate the experience in his or her own words. This test calls for a level of precision of expression appropriate to the child's age.[42] It is significant that the standard refers to *words*; this would seem to preclude a demonstration by a very young child on the stand with anatomically correct dolls in lieu of verbal articulation beyond his or her capabilities. Such a demonstration might be allowed, however, as an accompaniment to oral testimony. Under Missouri case law, the trial judge has broad discretion in weighing the different factors which comprise the fourfold test. The judge's decision whether to allow the child witness to testify would be overturned only for clear abuse of discretion.[43]

In July 1985 an amendment to Missouri Revised Statutes section 491.060 was enacted, providing that children under ten who are alleged victims of offenses under Chapters 565, 566, or 568 (child abuse and other crimes against the person) shall be considered competent and allowed to testify without qualification.[44] The previous statutory presumptions of incompetence for children under ten has thus been removed. The trier of fact is permitted to determine the weight and credibility of the testimony. The practical effect is that the child victim of abuse will get a chance to be heard in court. Under the former statute, a judge could rule the child incompetent under the four-point test and in effect silence the child. This is no longer allowed, but it is likely that the four-point test will continue in use, perhaps subconsciously, as criteria of credibility for children's testimony.

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41. State v. Edwards, 657 S.W.2d 343 (Mo. Ct. App. 1983); State v. O'Neal, 651 S.W.2d 624 (Mo. Ct. App. 1983); State v. Grady, 649 S.W.2d 240 (Mo. Ct. App. 1983); State v. Smith, 641 S.W.2d 463 (Mo. Ct. App. 1983); State v. Russell, 642 S.W.2d 136 (Mo. Ct. App. 1982).

42. The standard has been variously described as "capacity to relate the occurrences," *In re C.R.K.*, 672 S.W.2d at 699; "capacity truly to translate into words the memory of such observation," State v. Sanders, 533 S.W.2d 632, 633 (Mo. Ct. App. 1976); "demonstrated capacity to verbally describe what happened to him at the hands of the defendant," State v. Kennell, 605 S.W.2d 819, 819 (Mo. Ct. App. 1980); "capacity to articulate that memory," State v. Grady, 649 S.W.2d 240, 243 (Mo. Ct. App. 1983); "capacity truly to translate into words memory of observation," State v. Smith, 641 S.W.2d 463, 466 (Mo Ct. App. 1983); and "descriptive powers to testify about crime." *Id.*

43. State v. Price, 513 S.W.2d 392, 395 (Mo. 1974); State v. Young, 477 S.W.2d 114, 116 (Mo. 1972); State v. Jones, 360 Mo. 723, 727, 230 S.W.2d 678, 680 (1950); Petty v. Kansas City Pub. Serv. Co., 354 Mo. 823, 834, 191 S.W.2d 653, 658 (1945).

44. Child Victim Witness Protection Law, Mo. REV. STAT. §§ 491.675-.693 (Supp. 1985).

The "chance to be heard in court" may become more of a curse than a blessing for the child involved and the parents; it may be little more than a chance to undergo a trial by ordeal, with the dual intimidations of cross-examination and the presence of the defendant abuser. There are better alternatives.

In *In re C.R.K.*, the juvenile office was unable to persuade the appeals court to sustain the trial court order adjudging that H.J.K. abused his child: the only evidence in the record supporting the father's responsibility for the abuse was found to be hearsay by the appeals court and inadmissible for any purpose.[45] The only alternative was for a two and one-half year old girl, C.R.K., to take the stand. The appeals court stated that this might have been permissible.[46] However, the little girl may have been unable or unwilling to testify in open court just a few feet away from her alleged abuser, even though her mother and psychologist may have permitted her to.

Missouri's position of not admitting hearsay evidence represents the conservative, majority view.[47] An increasing number of jurisdictions, however, are beginning to allow some use of hearsay, typically the kind of hearsay which the juvenile office sought to introduce in *In re C.R.K.* Eleven states have now adopted, by statute, a special hearsay exception designed to facilitate the successful prosecution of child abuse cases.[48] Most of these statutes

45. *In re C.R.K.*, 672 S.W.2d 696.

46. *Id.* at 699.

47. Although Missouri represents the conservative majority view, there is a clear trend, led by the federal courts, to admit evidence of child abuse cases under various hearsay exceptions. *Cf.* United States v. Iron Shell, 633 F.2d 77, 83-85 (8th Cir. 1980) (child victim's description to doctor of sexual abuse admissible because cause of injury was reasonably pertinent to treatment), *cert. denied*, 450 U.S. 1001 (1981); United States v. Nick, 604 F.2d 1199, 1201-02 (9th Cir. 1979) (per curiam) (physician allowed to testify as to child victim's statements of causation but not as to statements concerning identity of the molester). It is arguable that in those states which have adopted evidence codes based on the Federal Rules of Evidence, statements such as those made by C.R.K. to the child psychologist might have been admissible under FED. R. EVID. 803(4). Rule 803(4) provides: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensation, or the inception or general character of *the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment*" are admissible as exceptions to the hearsay rule. *Id.* (emphasis added). These may include statements of a then existing physical state or statements of medical history or of causation if "reasonably pertinent" to treatment or diagnosis, but would not include statements as to fault. *Id.* (advisory committee's note); *see also* E. CLEARY, K. BROWN, G. DIX, E. GELLHORN, D. KAYE, R.F. MEISENHOLDER, E. ROBERTS & J. STRONG, MCCORMICK ON EVIDENCE § 292, at 839-40 (1972) [hereinafter MCCORMICK ON EVIDENCE]. If C.R.K. had talked to a doctor about the cause of her reddened vagina, the physician's testimony might have been admissible under this provision, but Missouri does not follow the Federal Rules of Evidence.

48. ARIZ. REV. STAT. ANN. § 13-1416 (1985); COLO. REV. STAT. § 18-3-411(3)(1985); Ill. 83rd Gen. Assem. P.A. 83-1067 Sec. 115-10, ILL. ANN. STAT. Ch.

require that the child testify or be found unavailable, and that the court find the statement to be "reliable."[49]

In child sexual abuse cases, there are different approaches to a finding of unavailability. Psychological harm caused by the abuse may fall into the category of mental infirmity.[50] Failure of memory, refusal to testify (based on threats of harm to the child by the defendant), and incompetency may be other categories of unavailability.[51] An Indiana statute creates a special definition of unavailability for child sexual abuse victims.[52] A psychiatrist must certify that the child's participation in the trial would be a traumatic experience, a doctor must certify that the child cannot participate in the trial for medical reasons, or the court must determine that the child is incapable of understanding the nature and obligation of an oath.[53] In California, unavailability of a child due to psychological harm must be established by expert testimony.[54] An "expert" for purposes of this statute may be a licensed clinical social worker or licensed marriage, family, or child counselor, in addition to the more orthodox categories such as physician, surgeon, psychiatrist, and psychologist.[55]

To protect the accused's constitutional right to confront witnesses, a hearsay statement may be admitted only if it has sufficient "indicia of reliability."[56] Where the evidence falls into a firmly rooted hearsay exception,

37, para. 704-6(4)(c) (Smith-Hurd Supp. 1982); IND. CODE ANN. § 35-37-4-6 (Burns 1984); IOWA CODE § 232.96(6) (1983); KAN. STAT. ANN. § 60-460(dd) (1982); MINN. STAT. § 595.02(3) (1984); S.D. CODIFIED LAWS ANN. § 19-16-38 (1985); UTAH CODE ANN. § 76-5-411 (1982); WASH. REV. CODE § 9A.44.120 (1982); VT. R. EVID 804a, 807. *See generally* Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICKINSON L. REV. 645, 649-55 (1985) (article provides a comprehensive overview of all state legislation establishing a special hearsay exception and discusses similarities and differences among the statutes, as well as factors which determine the constitutionality of such legislation).

49. Bulkley, *supra* note 48, at 650.

50. MCCORMICK ON EVIDENCE, *supra* note 47, § 253, at 753.

51. *See* United States v. Iron Shell, 633 F.2d 27 (8th Cir. 1980) (failure of memory), *cert. denied*, 450 U.S. 1001 (1981); People v. Stritzinger, 34 Cal. 3d 505, 509, 668 P.2d 738, 746, 194 Cal Rptr. 431, 439 (1983); Warren v. United States, 436 A.2d 821 (D.C. 1981) (unavailability of witness due to mental infirmity encompassing psychological harm; this case notes that nineteen states have statutes with mental infirmity as a category of unavailability and includes an excellent discussion on psychological harm from testifying as an unavailability basis for admitting prior testimony); *see, also*, Rice v. Marshall, 709 F.2d 1100 (6th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976) (refusal to testify based on threats of harm to the child by the defendant).

52. IND. CODE ANN. § 35-37-4-6 (Burns 1984).

53. *Id.*

54. *See, e.g.*, People v. Stritzinger, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).

55. CAL. EVID. CODE § 240 (West 1986).

56. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

such reliability may be presumed.[57] Even if the statement does not fall into the firmly rooted exception group, it may still be admitted if the statement is shown to have certain particularized guarantees of trustworthiness.[58] In *Dutton v. Evans*,[59] The United States Supreme Court enumerated four criteria used to test the trustworthiness of hearsay. The *Dutton* criteria are: the statement contains no express assertion of past fact; cross-examination could not show the declarant's lack of knowledge; the possibility of declarant's faulty recollection is remote; and the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement. Courts have held that all four *Dutton* factors need not be present in order to admit a statement over confrontation objections, and in fact, if other factors indicate reliability, a statement need not satisfy any of the elements.[60] In *In re C.R.K.* there was no apparent inherent unreliability in the hearsay testimony of the mother, the police detective, or the child psychologist. Nevertheless, the court felt constrained by longstanding precedent to refuse to admit the hearsay. Missouri could have followed Indiana and chosen to enact a statutory hearsay exception tailored to fit the child abuse situation.[61] Instead, in 1985, Missouri enacted the Child Victim Witness Protection Law, permitting videotaped depositions to be introduced into evidence.[62] This statute, which will be considered below, appears to be Missouri's response to the problem of prosecuting child abuse cases involving children of "tender years." Although children of any age are now presumed competent and allowed to testify "live" in child abuse cases, the use of videotaping seems more desirable in that it would spare the child the trauma of the personal appearance before the abuser and his attorney.

In adopting a statute allowing the videotaping of a child's testimony, Missouri seems to be following the most common trend among the states in recent years.[63] In 1982, four states allowed videotaped testimony. By early 1986, thirteen states had statutes permitting videotaped trial, preliminary hearing or deposition testimony.[64] The criteria among the states for admission

57. *Id.*

58. *Id.* It may be difficult for a prosecutor to establish trustworthiness. It is always better to attempt to admit the hearsay statements of child sexual abuse victims under one or more of the long-standing or accepted exceptions. This relieves the court of the duty of making particularized findings of trustworthiness.

59. 400 U.S. 74, 88 (1970).

60. *See, e.g.*, United States v. Perez, 658 F.2d 654 (9th Cir. 1981).

61. IND. CODE ANN. § 35-37-4-6 (Burns 1984).

62. MO. REV. STAT. §§ 491.675-.693 (Supp. 1985).

63. Bulkley, *supra* note 48, at 657.

64. *See* ARIZ. REV. STAT. ANN. §§ 13-4251 to -4253 (1985); ARK STAT. ANN. §§ 43-2033 to -2036 (Supp. 1983); CAL. PENAL CODE §§ 1346-47 (West Supp. 1985); COLO. REV. STAT. § 18-3-413 (1983); FLA. STAT. §§ 92.53-.54 (Supp. 1985); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1984); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1985); MO. REV. STAT. § 573.050 (1986); MONT. CODE ANN. §§ 46-15-401 to

of videotaped testimony varies. Some states permit videotaped testimony only if the court finds that the child's testimony in open court would cause severe emotional trauma. Others allow videotaped testimony if the court finds the child to be "medically unavailable" because testimony would cause emotional trauma, or otherwise "unavailable" as defined in a state's evidence code sections relating to the admissibility of hearsay or prior testimony. Missouri allows videotaped testimony on motion of the prosecuting attorney in any case where a child has been allegedly abused. This gives the court discretion to admit the videotaped recording for use as substantive evidence.[65] The court also has the power to exclude the defendant from the deposition proceedings and to sequester the child from the view of the defendant during all pre- and post-deposition matters. According to the statute, the judge is to consider the elements of the offense charged, and the emotional or psychological trauma the child would suffer if required to testify in court or if brought into the presence of the defendant.[66]

The objections to videotaped testimony are based on the defendant's right to fair trial with due process,[67] the right to confront witnesses,[68] and the right to attend criminal trials.[69] Traditionally, it has been the fact finder's job to evaluate the credibility of the alleged victim and other prosecution witnesses by observing their demeanor on the witness stand. A videotape may not capture subtle but important nuances in the witness' facial color and expression. It may not pick up a quaver in the voice, a nervous gulp, a downcast of the eyes, or a trembling which would otherwise be detectable by a jury sitting a few feet away from the witness. These are important clues by which a judge or jury assesses the credibility of a witness, and ought not be diluted by a videotaping procedure which provides only an electronic reproduction of the witness' demeanor. Anyone who has watched a baseball game at the ballpark and has seen one on television knows that there is a world of difference between "live" observation and looking at an image on a screen. However, with modern high-fidelity techniques of visual image recording and retrieval, the danger of the fact-finder being misled may be outweighed by the harm to the child of being forced to testify in person.

The primary drawback of the videotaped testimony is that it thwarts the defendant's right to face-to-face confrontation at trial. The right to confrontation is comprised of two elements. First, there is a right to a face-to-face meeting with the accuser at trial, so that the jury may judge whether

-15-402 (1983); N.M. STAT. ANN. § 30-9-17 (1978); S.D. CODIFIED LAWS ANN. §§ 23A-12-9 to -12-10 (Supp. 1984); TEX. CRIM. PROC. CODE ANN. art. 38.071 (Vernon Supp. 1985); WIS. STAT. § 967.04(7) (1985).

65. MO. REV. STAT. §§ 491.680(1) (Supp. 1985).
66. *Id.* §§ 491.680(2), .685.
67. U.S. CONST. amend. XIV.
68. U.S. CONST. amend. VI.
69. U.S. CONST. amend. I.

the witness is being truthful by observing the witness' demeanor while testifying in the presence of the one person who knows if he or she is being truthful. Second, there is the right to cross-examine the adverse witness. Although the United States Supreme Court has seemed to say that the right to cross-examine is the real focus of the right of confrontation,[70] it has never relinquished the requirement of face-to-face confrontation. Several cases imply that the right of confrontation means the right to physically confront the accuser at trial, unless the accuser is unavailable.[71]

The question then becomes, what is "unavailable"? Dying declarations, for example, are admissible partly because the declarant is actually physically unable to testify in person.[72] It is clear, however, that unavailability in the context of the right of confrontation may be something less than physical unavailability.[73] The probability of the child-witness' traumatization by forced physical confrontation with the defendant may constitute a kind of "medical unavailability" which would satisfy this prong of the right to confrontation.[74] The constitutionality of the introduction of videotaped testimony has been the subject of numerous recent scholarly articles in legal literature,[75] and will not be explored in detail in this Note. However, if the sixth amendment contemplates the right to a face-to-face, "live" physical confrontation with the accusing witness in all cases excepting actual physical unavailability, then there may be no alternative but to put a two-year-old on the stand.[76]

The constitutionality of the Missouri Child Victim Witness Protection Law has not yet been tested.[77] In *United States v. Benfield*,[78] the Eighth Circuit held that an actual physical face-to-face confrontation was mandated by the confrontation clause.[79] In view of this decision, the Missouri statute

70. *See* Douglas v. Alabama, 380 U.S. 415, 418 (1965); Pointer v. Texas, 380 U.S. 400, 406-07 (1963).

71. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980); Davis v. Alaska, 415 U.S. 308, 315-18 (1974); Barder v. Page, 390 U.S. 719, 722-25 (1968).

72. *See, e.g.*, Mattox v. United States, 156 U.S. 237, 243 (1985).

73. *See* United States v. Benfield, 593 F.2d 815, 821-22 (8th Cir. 1979). *Benfield* concerned a showing of unavailability based on psychological damage to a witness and testimony via a two-way closed circuit television. The court acknowledged that the damage to the witness which would result from her testimony in open court was a basis for finding unavailability of a witness. This procedure, however, which did not allow the defendant to actively participate in the televised deposition, violated his sixth amendment right to confrontation. The video-tape procedure did not provide the same guarantees of reliability that would be found if the defendant was allowed a face-to-face confrontation with the witness. *Id.*

74. Bulkley, *supra* note 48, at 660.

75. *See, e.g.*, Comment, *Abandoning Trial by Ordeal: Missouri's New Videotaping Statute*, 51 Mo. L. Rev. 515 (1986).

76. Bulkley, *supra* note 48, at 661.

77. Comment, *supra* note 75, at 521.

78. 593 F.2d 815 (8th Cir. 1979).

79. *Id.* at 821.

may be unconstitutional. However, strong argument has been made that the confrontation clause contemplates the "benign intimidation" of face-to-face confrontation with an adult, which may help elicit truth; "malign intimidation" when the witness is a frightened, psychologically ravaged child, would serve to hinder the search for truth, thus defeating the rationale for requiring such a confrontation. The application of a balancing test would tip the scales in favor of protecting the child.[80]

The use of closed-circuit television is another relatively new and untried potential solution to the problem of balancing the rights of the accused and society's interest in prosecuting child abusers. In contrast to the use of a videotaped recording of a deposition or other testimony taken prior to the trial, closed-circuit television would enable the testimony to be "live" in every sense. The accused and accuser would be able to see and hear each other during the proceedings, but they would not be physically present in the same room. Some commentators feel this would produce the most acceptable balance between the conflicting rights of accuser and accused.[81] It is much less traumatic to the child than the traditional courtroom setting, yet approximates most of the elements of physical presence. Therefore, closed-circuit television may be more likely to pass constitutional muster than the use of a previously-recorded videotape. As with the use of videotapes, care must be taken to ensure that the mechanical aspects of the image and voice transmission do not distort the witness' testimony. Camera angle, lighting, use of makeup, and other techniques may present a problem of misleading the jury. The visual clues which a jury uses to ascertain whether a witness is telling the truth are subtle. If the camera does not faithfully reproduce the demeanor of the witness, these subtle clues may be unavailable to the jury.

The "child courtroom" is a special courtroom designed to produce a satisfying balance between the conflicting requirements of protecting both the alleged child abuser and the child victim who must testify for there to be a realistic chance of conviction. First proposed in 1969 by David Libai,[82] the "child courtroom" is designed to take a victim's testimony in an informal and relaxed manner, while the child can see only four persons around him: the judge, the prosecutor, the defense counsel, and a "child examiner." The "child examiner" would be a person trained in the subtleties of child behavior and experienced in interviewing techniques. Such examiners would generally be chosen from the ranks of clinical psychologists, psychiatric social workers,

80. *See* Comment, *supra* note 75, at 525.

81. *See* Note, *supra* note 5, at 1018 (author believes it strikes best balance between state's interest and defendant's interest); *cf.* Comment, *supra* note 75, at 533 (author believes the new Missouri statute could be of questionable constitutionality if not used with caution).

82. *See generally* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System* , 15 WAYNE L. REV. 877 (1969).

psychiatrists, probation officers, and child care workers. They would be instructed in legal procedure and rules of evidence, especially in matters relevant to sex offenses. Libai contemplates that most or all of the actual questioning of the child be done through the "child examiner."[83]

The "child courtroom" is physically set up in such a way so as to contribute to the security and psychological comfort of the child. The accused, the jury and the audience are seated behind a two-way mirror, separating them from the child but enabling them to see and hear everything clearly. The accused is able to communicate with his counsel by electronic means. The defense attorney can request brief pauses in the examination of the child to consult with or advise her client, and normally such requests are granted. One of the advantages of the "child courtroom," as opposed to both videotaping and closed circuit television, is that the jury sees not a distorted image on a video screen, but the actual child through the equivalent of a clear glass window.

All of the alternative methods discussed above may be constitutionally infirm. The Eighth Circuit, in *United States v. Benfield*,[84] stated that face-to-face confrontation via a two-way closed circuit television might be constitutional only under a showing of extraordinary circumstances, by agreement of the parties, or if the procedure closely adheres to traditional courtroom scenes.[85] The Libai "child courtroom" is not an adherence to a traditional courtroom scene, but has the advantage of allowing distortion-free viewing by the jury, while shielding the child from the "malign" intimidation of the accused. Allowing a previously recorded testimonial videotape at trial seems to be subject to the greatest degree of constitutional objection, since there is no opportunity for "live" cross-examination, and the image is subject to the greatest distortion. Closed circuit television appears to present the best balance as it simulates a "live" confrontation, except for actual physical presence. The real issue seems to come down to this: Does the "benign intimidation" tending to elicit truth from the usual adult witness become "malign intimidation," frustrating the quest for truth and justice, when the witness is a frightened, traumatized child abuse victim? Based upon common sense, the answer seems an unqualified "yes." The Missouri Child Victim Witness Protection Law,[86] if constitutional, provides a solution to the dilemma which has confronted parents and prosecutors in Missouri.

Evidentiary problems in child abuse cases greatly hamper their prosecution. Yet the crime is one of the most heinous imaginable, and one which jeopardizes this nation's greatest asset, her children. Given the nature of the

83. *Id.* at 1013.
84. 593 F.2d 815, 821 (8th Cir. 1979).
85. *Id.*
86. Missouri Child Victim Witness Protection Law, Mo. REV. STAT. §§ 491.675-.693 (Supp. 1985).

crime, the testimony of the only witness—the victimized child—is essential. But, understandably, many parents wish to spare their children the further trauma of testifying in court. It is ironic that a system which is supposed to uphold the rights of the victim ends up causing further victimization. The Missouri Legislature has responded to this serious problem by passage of the Child Victim Witness Protection Law. Also, a child of any age, without qualification, may now testify in court. The court in *In re C.R.K.* had no alternative, under the law then in effect, but to suggest that the two-year-old victim could be qualified under the four-point test to testify in person. While the court's intentions were laudable, the legislature's passage of the Witness Protection law provides a much better solution, a way out of the dilemma. A child abuser must not go unpunished, but neither should a two-year-old take the stand. If videotapes of the victim's testimony are constitutionally admissible, then neither unpalatable alternative is necessary.

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