



1987

# Maryland's Statutory Hearsay Exception for Reliable Statements by Alleged Child Abuse Victims: A Hesitant Step Forward

Lynn McLain

*University of Baltimore School of Law, lmclain@ubalt.edu*

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Family Law Commons](#)

### Recommended Citation

McLain, Lynn (1987) "Maryland's Statutory Hearsay Exception for Reliable Statements by Alleged Child Abuse Victims: A Hesitant Step Forward," *University of Baltimore Law Review*: Vol. 17: Iss. 1, Article 2.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol17/iss1/2>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

## MARYLAND'S STATUTORY HEARSAY EXCEPTION FOR RELIABLE STATEMENTS BY ALLEGED CHILD ABUSE VICTIMS: A HESITANT STEP FORWARD

Lynn McLain†

*The Maryland General Assembly recently passed legislation, effective July 1, 1988, which grants a trial court the opportunity to allow a physician, psychologist, social worker, or teacher to testify to an out-of-court statement made by an alleged child abuse victim if the court finds that the circumstances in which the statement was made exhibit sufficient particularized guarantees of reliability. This article discusses the need for such an exception to the rule precluding admission of hearsay for statements made by alleged victims of child abuse, exposes the inadequacies of pre-existing exceptions, addresses the constitutional considerations raised by admission of such hearsay statements, and studies the approaches taken by other jurisdictions. The author critiques the new Maryland statute and urges the adoption of liberalizing amendments.*

### I. INTRODUCTION

In a child abuse prosecution, the state must prove beyond a reasonable doubt not only that the child victim was abused, but also that the defendant was the abuser. Thus, even overwhelming physical evidence of abuse will be insufficient to support a conviction absent compelling proof of the identity of the abuser. Although the state may have other testimony to the physical evidence of abuse and any resulting emotional problems manifested by the child, because child abuse — particularly sexual abuse — generally occurs in secret, with only the abuser and the victim present, the child almost always will be the only witness who can identify the assailant. If the child cannot testify at trial, and the child's prior statements identifying the defendant are inadmissible in evidence, the prosecution must be dropped.<sup>1</sup>

---

† Professor of Law, University of Baltimore School of Law. B.A., 1971, University of Pennsylvania; J.D., 1974, Duke University Law School. The author wishes to express her appreciation to Elizabeth Conklyn for her research assistance.

1. See Note, *Videotaping the Testimony of an Abused Child: Necessary Protection for the Child or Unwarranted Compromise of the Defendant's Constitutional Rights?*, 3

For example, a child sexual abuse prosecution against Jamal Craig, the teenaged son of the operator of the Craig Country Preschool in Howard County, Maryland, was dismissed in the summer of 1987 when the trial judge found the seven-year-old alleged victim incompetent to testify because she had no memory at the time of trial of the alleged abuse.<sup>2</sup> Under then applicable Maryland law, no hearsay exception existed under which the child's out-of-court statement, which identified the alleged abuser, might have been admissible in evidence. A considerable number of states, on the other hand, had recognized a hearsay exception for reliable out-of-court statements by alleged child abuse victims.<sup>3</sup>

In the 1988 legislative session, the Maryland General Assembly passed a bill that recognized, under certain circumstances, a hearsay exception for reliable out-of-court statements made by alleged child abuse victims when they were eleven years old or younger.<sup>4</sup> Under the resulting enactment (the "1988 Act") the state may offer the testimony of a physician, psychologist, social worker, or teacher<sup>5</sup> with respect to an out-of-court statement of the alleged child abuse victim, provided that the state gives the defendant pretrial notice of its intention to offer such testimony and notice of the content of the statement.<sup>6</sup> The defense may depose the witness whom the state intends to call.<sup>7</sup> Then, in a hearing outside the presence of the jury, the trial judge will determine on the record whether the out-of-court statement has sufficient circumstantial guarantees of trustworthiness to be admitted in evidence.<sup>8</sup>

Once the judge finds that the statement is reliable, it is admissible in evidence if one of two conditions exists: Either (1) the child victim is available to testify in person or by closed circuit television and can be

---

UTAH L. REV. 461, 461 & nn. 1 & 4 (1956); Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721, 721-22 (1985) (cases reported dropped for this reason include one where three-year-old boy had gonorrhea of the mouth, penis, and rectum).

The same reasoning that is applicable to criminal prosecutions applies to civil proceedings regarding allegations of child abuse, such as those concerning custody awards and visitation rights. This article should be read with this thought in mind. Although the confrontation clauses, *infra* at text accompanying notes 40-63, do not apply in civil cases, the applicability of the due process clause of the fourteenth amendment to the United States Constitution mandates much the same constitutional analysis of the hearsay exception proposed here. Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775, 853-54 (1986).

2. See *Craig Witness Said to Identify Other Abusers*, Baltimore Sun, Aug. 25, 1987, at 2D, col. 6; *Howard Prosecutors Drop One Abuse Case Against Craig Youth; Other Cases Remain*, Baltimore Sun, July 29, 1987, at 1D, col. 3.
3. See *infra* note 64 and accompanying text.
4. S. 66, 1988 Md. Laws 548 (adding new section 9-103.1 to the Courts and Judicial Proceedings article of the Maryland Annotated Code, enacted concurrently with identical H.D. 1018, 1988 Md. Laws 549) [hereinafter "S. 66"].
5. S. 66 § 9-103.1 (b)(2).
6. *Id.* § 9-103.1(c)(3).
7. *Id.* § 9-103.1(c)(4).
8. *Id.* § 9-103.1(e).

cross-examined about the statement;<sup>9</sup> or (2) the child victim is unavailable to testify due to the child's "death; absence from the jurisdiction, for good cause shown, and the state has been unable to procure the child's presence by subpoena or other reasonable means; serious physical disability; or inability to communicate about the alleged offense due to serious emotional distress;"<sup>10</sup> the statement is not covered by any other hearsay exception; and there is corroborative evidence.<sup>11</sup> The child's statement would not be admissible, however, if the child's inability to communicate about the alleged offense is caused by any reason other than serious emotional distress.<sup>12</sup>

This article will discuss the need for and the constitutionality of a hearsay exception for reliable out-of-court statements by alleged child abuse victims under Maryland law. It will then give examples of the approaches which have been adopted by other states and endorsed by various commentators and groups and will discuss in detail Maryland's approach, the 1988 Act. Finally, the author proposes adoption of amendments that will broaden the 1988 Act in certain respects.

## II. THE NEED FOR A CHILD ABUSE VICTIM HEARSAY EXCEPTION

The purpose of the hearsay rule is to exclude unreliable evidence, the credibility of which the trier of fact will not be in a position to evaluate effectively.<sup>13</sup> The rule excludes from evidence an out-of-court<sup>14</sup> statement<sup>15</sup> offered to prove the truth of the matter asserted by the out-of-court declarant at the time he or she made the statement.<sup>16</sup> Because the exclusion of all such out-of-court statements would be to exclude a great deal of reliable evidence, many "hearsay exceptions" have evolved.

Each exception makes admissible a particular class of out-of-court statements which is believed to have circumstantial guarantees of trustworthiness. The Federal Rules of Evidence recognize twenty-nine hearsay exceptions,<sup>17</sup> including two "catch-all" exceptions for necessary and reliable hearsay not falling within more specific exceptions.<sup>18</sup> Twenty-

---

9. *Id.* § 9-103.1(c)(1).

10. *Id.* § 9-103.1(c)(2)(i).

11. *Id.* § 9-103.1(c)(2)(ii)-(iii).

12. This reading of the statute results from application of the canon, "*expressio unius est exclusio alterius*" ("the expression of the one is the exclusion of the other"). See BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

13. L. McLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL § 801.1 (1987).

14. *Id.* § 801.2.

15. *Id.* §§ 801.3-.4.

16. *Id.* § 801.5. See, e.g., *In re Cheryl H.*, 153 Cal. App. 3d 1098, 1127, 1131-32, 200 Cal. Rptr. 789, 807-08, 810-11 (1984) (victim's play with dolls was nonassertive conduct and nonhearsay; evidence of her belief that her father had sexually assaulted her was also nonhearsay in dependency hearing and supported denial of father's visitation rights). See generally Myers, *supra* note 1, at 779-814.

17. FED. R. EVID. 803(1)-(24), 804(b)(1)-(5).

18. See generally McLAIN, *supra* note 13, §§ 803(24).2, 804(5).2.

four of these exceptions are applicable regardless of whether the out-of-court declarant is available to testify at trial,<sup>19</sup> and five may be used only if the declarant is unavailable to testify due to death, illness, absence from the jurisdiction (not procured by the proponent of the statement), privilege, lack of memory, or refusal to testify despite an order of the court to do so.<sup>20</sup>

Maryland statutory and common law also recognizes dozens of hearsay exceptions, similarly divided.<sup>21</sup> Two general hearsay exceptions recognized under Maryland law have been used on occasion to admit out-of-court statements by alleged child abuse victims: (1) statements made to a physician for purposes of obtaining medical treatment, and (2) startled or excited utterances. Two other recognized exceptions would be available in appropriate cases:<sup>22</sup> (1) prompt complaints of rape, and (2) dying declarations. Each of these four exceptions, however, has its limitations.

---

19. See *id.* §§ 803.2-803(24).2. The proponent of the statement need not ordinarily prove the competency of the declarant. *Id.* § 803.2 & n.4. See *infra* note 72.

20. McLAIN, *supra* note 13, §§ 804.2-804(5).2.

21. See *generally id.*, §§ 803-804(5).

22. Maryland, unlike many other jurisdictions including the federal courts, has not codified a residual hearsay exception for hearsay not falling within specific exceptions but having comparable circumstantial guarantees of trustworthiness. Cases affirming the admission of out-of-court statements of child abuse victims under such catch-all exceptions include the following: *United States v. De Noyer*, 811 F.2d 436 (8th Cir. 1987) (statements that five-year-old boy, who testified at trial, had made to social workers were properly admitted under FED. R. EVID. 803(4) and 803(24)); *United States v. Dorian*, 803 F.2d 1439, 1443 (8th Cir. 1986) (when five-year-old girl testified at trial, but "because of her age and obvious fright," she did not testify meaningfully, her reliable out-of-court statement to her emergency foster mother, made during third interview on the subject, was properly admitted under FED. R. EVID. 803(24)); *Bertrang v. State*, 50 Wis.2d 702, 708, 184 N.W.2d 867, 870 (1971) (out-of-court statements by nine-year-old sexually abused girl to her mother; court considered "the age of the child, the nature of the assault, physical evidence of such assault, relationship of the child to the defendant, contemporaneity and spontaneity of the assertions in relation to the alleged assault, the reliability of the assertions themselves, and the reliability of the testifying witness") noted in Anderson, *Children's Out-of-Court Statements Under Rule 908.3 of the Wisconsin Rules of Evidence*, 47 WIS. B. BULL. 47 (Oct., 1974). See also *Oldsen v. People*, 732 P.2d 1132 (Colo. 1986) (trial court erred in admitting five-year-old's out-of-court statements to school psychologist, physician, and social worker under Rule 803(4), but majority of appellate court affirmed on ground that statements were admissible under Rule 803(24)) (Erickson, J., dissenting, found inadequate record to support admissibility under Rule 803(24)); *State v. McCafferty*, 356 N.W.2d 159, 161-65 (S.D. 1984) (remanded for determination whether statement which did not qualify as excited utterance or present sense impression fell within Rule 804(b)(5) when child took stand but could not testify meaningfully) noted in Note, *State v. McCafferty: The Conflict Between a Defendant's Right to Confrontation and the Need for Children's Hearsay Statements in Sexual Abuse Cases*, 30 S. DAK. L. REV. 663 (1985). But see *State v. Smith*, 315 N.C. 76, 90-99, 337 S.E.2d 833, 843-48 (1985) (error to admit child victims' statements to two Rape Task Force volunteers under Rule 803(24); record did not reflect support for finding of necessity required under rule). See *generally Myers, supra* note 1, at 893-906.

### A. Statements Made In Order to Obtain Medical Treatment

A patient's out-of-court statement to a treating physician is admissible in evidence to the extent that it relates facts relevant to treatment, regardless of whether the patient is available to testify.<sup>23</sup> The circumstantial guarantee of reliability is found in the patient's self-interest in obtaining proper treatment, which is thought likely to override any motive for insincerity. Therefore, if a child complains to a doctor that he has been injured in a particular way by a particular person, the doctor may testify at trial to the physical acts described by the child. The doctor ordinarily may not testify to the child's identification of the assailant, however, because that fact usually is not relevant to medical treatment.<sup>24</sup>

### B. Excited Utterances

A child's out-of-court statement will be admissible as an excited utterance if it was made spontaneously while the child remained under continuing stress from a startling event, regardless of whether the child is available to testify.<sup>25</sup> The theory of reliability of excited utterances is

23. *E.g.*, *Shirks Motor Express v. Oxenham*, 204 Md. 626, 635-36, 106 A.2d 46, 49-50 (1954). See generally *McLAIN*, *supra* note 13, § 803(4).1. This exception would be unavailable if the declarant was not seeking medical treatment. *W.C.L., Jr. v. People*, 685 P.2d 176, 181 (Colo. 1984) (*en banc*).

24. See *Cassidy v. State*, 74 Md. App. 1, 25-30, 39-50, 536 A.2d 666, 678-80, 684-90 (1988) (child's statements identifying alleged abuser held inadmissible even though made to treating physician, because child did not understand that purpose of physician's questions was to enable physician to make diagnosis); *cf.* *Moore v. State*, 26 Md. App. 556, 559-67, 338 A.2d 344, 345-50 (out-of-court statement by three-and-one-half-year-old child to physician, within hours after alleged beating, that "Daddy was mad, Daddy did it," was admissible, but under hearsay exception for excited utterances), *cert. denied*, 276 Md. 747 (1975).

Some courts outside Maryland have stretched this exception to admit the child's identification of the abuser as relevant to the physician's proposed course of treatment, particularly when the alleged abuser lives with the child. See *United States v. De Noyer*, 811 F.2d 436 (8th Cir. 1987) (statements that five-year-old boy, who testified at trial, had made to social workers were properly admitted under FED. R. EVID. 803(4), 803(24)); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833, (1985) (four and five-year-old girls' statements to grandmother properly admitted under medical treatment exception) noted in Note, *Evidence — North Carolina Allows Admission of the Unthinkable Hearsay Exceptions and Statements Made By Sexually Abused Children — State v. Smith*, 9 CAMPBELL L. REV. 437 (1987) [hereinafter Note, *Unthinkable Hearsay Exceptions*]; *Goldade v. State*, 674 P.2d 721 (Wyo. 1983) (over dissent), *cert. denied*, 467 U.S. 1253 (1984) noted in Note, *Evidence — Hearsay — Child Abuse and Neglect — A Child's Statements Naming an Abuser Are Admissible Under the Medical Diagnosis of Treatment Exception to the Hearsay Rule — Goldade v. State*, 53 U. CIN. L. REV. 1155 (1984); Ringland, *Child Sex Abuse Evidence Problems*, 12 U. DAYTON L. REV. 27, 35-38 (1986). These cases also illustrate that the courts extend the exception to non-physicians from whom the child would seek help. See also *Myers*, *supra* note 1, at 889-93.

25. *E.g.*, *Moore v. State*, 26 Md. App. 556, 562, 566, 338 A.2d 344, 347, 349 (1975), *cert. denied*, 276 Md. 747 (1975); *State v. Smith*, 315 N.C. 76, 86-90, 337 S.E.2d 833, 841-43 (1985). See generally *McLAIN*, *supra* note 13, § 803(2).1; *Myers*, *supra* note 1, at 859-75; Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1753-59 (1983) [hereinafter Note, *Com-*

that the continuing stress stills the declarant's ability to fabricate.<sup>26</sup> If, for example, a child escaped from his attacker and ran to a police officer and blurted out what had happened, the police officer could testify to the child's statement.<sup>27</sup>

Often, however, a child's reports of abuse are neither spontaneous (but instead are in response to questioning)<sup>28</sup> nor made while the child has remained under such continuing stress as to preclude his conscious thinking and functioning. The child may have been intimidated by his abuser not to tell anyone, may feel guilty, or may repress the experience.<sup>29</sup> For these reasons, he may not tell anyone until a parent, a teacher, or a doctor notices some change in his physical condition or his behavior and questions him about it — or until the threat of repeated abuse is imminent. In those situations, the child's statement regarding the earlier abuse will not qualify as an excited utterance.<sup>30</sup>

For example, in one Maryland case, the mother of the alleged child abuse victim testified that when the defendant, a neighbor, came over to the child's house and asked the mother to allow the child, a five-year-old, to visit him, the child told her about sexual abuse by that neighbor which had occurred eleven days earlier.<sup>31</sup> The defendant's conviction was re-

*prehensive Approach to Child Hearsay Statements*]; Note, *Unthinkable Hearsay Exceptions*, *supra* note 24, at 450-52.

Other possibly available hearsay exceptions include those for present sense impressions and the state of mind exception. See Myers, *supra* note 1, at 855-58, 887-89.

26. E.g., *Mouzone v. State*, 294 Md. 692, 697, 452 A.2d 661, 664 (1982).
27. See *Sears v. State*, 9 Md. App. 375, 383-84, 264 A.2d 485, 488-89 (police officer's testimony to statements within one-half hour of assault, made by eleven-year-old victim after she had fled to the police station, was properly admitted), *cert. denied*, 258 Md. 730 (1970); *Smith v. State*, 6 Md. App. 581, 252 A.2d 277 (four-year-old's out-of-court statement to her mother, four to five hours after rape but first words spoken by her during that time, was properly admitted), *cert. denied*, 256 Md. 748 (1969).
28. See *Cassidy*, 74 Md. App. at 16-23, 536 A.2d at 673-77 (child's statements made three days after alleged abuse and in response to physician's question, "Who did this?" held inadmissible under excitable utterance exception). Some simple questioning, such as asking the declarant "What happened?", may not preclude the admission of the responsive statement. *Johnson v. State*, 63 Md. App. 485, 494-95, 492 A.2d 1343, 1347-48, *cert. denied*, 304 Md. 298, 498 A.2d 1185 (1985); *Long v. State*, 3 Md. App. 638, 240 A.2d 620 (1968) (*per curiam*).
29. Note, *Comprehensive Approach to Child Hearsay Statements*, *supra* note 25, at 1756; Note, *Evidence — Sexual Abuse of Children: The Justification for a New Hearsay Exception*, 5 MISS. C.L. REV. 177, 180 (1985) [hereinafter *Justification for a New Hearsay Exception*]. The child also may not understand that the abuse is wrongful. Note, *Comprehensive Approach to Child Hearsay Statements*, *supra* note 25, at 1756; Note, *Justification for a New Hearsay Exception*, *supra* note 29, at 180.
30. E.g., *In re Cheryl H.*, 153 Cal. App. 3d 1098, 1130, 200 Cal. Rptr. 789, 809-10 (1984); *W.C.L., Jr. v. People*, 685 P.2d 176, 178-81 (Colo. 1984) (*en banc*) (statement was neither spontaneous nor prompt); *Deloso v. State*, 37 Md. App. 101, 102-07, 376 A.2d 873, 875-77 (1977) (reversible error to admit proof of five-year-old's apparently "quite casual" complaints of beatings by her father); *State v. Slider*, 38 Wash. App. 689, 690-94, 688 P.2d 538, 540-41 (1984).
31. *Harnish v. State*, 9 Md. App. 546, 548, 266 A.2d 364, 365 (1970).

versed by the court of special appeals on the ground that the child's statement to his mother was made too long after the event to be admissible as an excited utterance.<sup>32</sup>

### C. Prompt Reports of Rape

Maryland recognizes a hearsay exception for a victim's prompt report of rape. The report is admissible to corroborate the victim's testimony as long as the victim is present at trial and available for cross-examination.<sup>33</sup> If the child was raped, his or her prompt out-of-court statement to a third person might be admissible under this exception.<sup>34</sup> Again, however, children often may not make prompt reports. Moreover, the child victim frequently is not available for cross-examination at trial because the judge has found him or her incompetent to testify. In either event, the hearsay exception for complaints of rape would be inapplicable.

### D. Dying Declarations

A final hearsay exception which could be available under Maryland law in child abuse cases is the dying declaration exception. Under this

32. *Id.* at 551, 266 A.2d at 366.

33. *E.g.*, *State v. Werner*, 302 Md. 550, 563, 489 A.2d 1119, 1125-26 (1985). See Mc-LAIN, *supra* note 13, § 801(2).1 & n.2.

34. See *In re Cheryl H.*, 153 Cal. App. 3d 1098, 1130, 200 Cal. Rptr. 789, 808-09 (1984) (statement did not qualify); *State v. Segerberg*, 131 Conn. 546, 549, 41 A.2d 101, 102-03 (1945) (complaint exception available only if victim testifies); *State v. Campbell*, 299 Or. 633, 705 P.2d 694 (1985) (applying OR. EVID. CODE 803 (18)(a)) *noted in Note, Can You Hear What I Hear? Direction and Limitation on Allowable Hearsay Testimony in Child Sexual Abuse Cases: State v. Campbell*, 22 WILLIAMETTE L.J. 421 (1986). See generally Myers, *supra* note 1, at 875-77; Note, *The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases*, 36 CATH. U.L. REV. 793, 804-05 (1987).

Some states have recognized a similar hearsay exception for statements by a child of "tender years" reporting sexual abuse. See *People v. Mikula*, 84 Mich. App. 108, 116-17, 269 N.W.2d 195, 199 (1978) (*per curiam*) ("Hearsay testimony concerning the details of a complaint of sexual assault is admissible where the complainant is of 'tender years' if her statement is shown to have been spontaneous and without indication of manufacture, and if any delay in making the complaint is excusable insofar as it is caused by fear or other equally effective circumstances. . . . Only the original account of the assault, however, may be related by a witness. It was improper for the trial court to permit subsequent accounts into evidence."); *Williams v. State*, 427 So.2d 100 (Miss. 1983) (eleven-year-old girl's statements to her mother and sister found admissible; court followed *Mikula*). See also *Bridges v. State*, 247 Wis. 350, 362-63, 19 N.W.2d 529, 534, *reh'g denied*, 247 Wis. 374, 19 N.W.2d 862 (1945) ("where the person ravished is very young, testimony as to the particulars of such statements by her is admissible") (now legislatively overruled); ILL. ANN. STAT. ch. 38, § 115-10 (1987); TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 1987). The common law Michigan "tender years" exception was eliminated when that state adopted the Michigan Rules of Evidence. Note, *Comprehensive Approach to Child Hearsay Statements*, *supra* note 25, at 1759-61. See also Note, *A Tender Years Doctrine for the Juvenile Courts: An Effective Way to Protect the Sexually Abused Child*, 61 U. DETROIT J. URB. LAW 249 (1984).



exception, the child victim's statement describing the attack and identifying the attacker would be admissible if the child made the statement under the belief that death was imminent and did in fact die.<sup>35</sup> This exception, however, is available only in homicide cases.<sup>36</sup>

### *E. Insufficiency of Other Exceptions*

The hearsay exceptions currently recognized in Maryland and used prior to the 1988 Act provide avenues for the admissibility of only a small percentage of a child abuse victim's reliable out-of-court statements. Such statements frequently are essential to the state's case, however, because a young child often will be found incompetent and thus unable to testify at trial due to a lack of present memory of the event.

This inability to recollect may be the negative result of a prolonged pretrial process. In fact, a common defense tactic is to seek to prolong the pretrial process as long as possible with the hope that the child will forget about the attack. On the other hand, the child's forgetting of sexual abuse may sometimes be the therapeutically positive result sought by psychotherapists working with young children.<sup>37</sup> Regardless of how this result is reached, the consequence is the same: if the child is unable to testify at trial and if the child's out-of-court statement identifying the defendant is found inadmissible, the prosecution will most likely have to be dropped.

Even if the child testifies at trial, it seems likely that, as in rape cases, the question that will be in the jurors' minds — even absent impeachment — is when did the child come up with this story? As in rape cases, the prosecution should be entitled to answer that question, which if left unanswered, might lead a jury to find that the state had not met its burden of proving guilt beyond a reasonable doubt. Reliability of the child's testimony may be bolstered by a prior consistent out-of-court statement made by the child, but under Maryland law prior to the 1988 Act, such a statement was inadmissible unless the child had been impeached in a particular way, such as by proof of the child's bias or prior inconsistent statement.<sup>38</sup>

---

35. See generally MCLAIN, *supra* note 13, § 804(2).1. The shouted statement of a fourteen-year-old girl, as she threw herself in front of a train, that "she was taking her life because of anguish over early morning sexual assaults by her father," was admitted as evidence in the father's Virginia trial for aggravated sexual battery. *Father Guilty of Molesting Virginia Teen-ager*, The Washington Post, Oct. 17, 1986, at C1, col. 6. The dying declaration exception apparently was the avenue by which the trial court admitted that statement.

36. MCLAIN, *supra* note 13, § 804(2).1 at 462. *E.g.*, Connor v. State, 225 Md. 543, 550-54, 171 A.2d 699, 703-05, *cert. denied*, 368 U.S. 906 (1961).

37. Telephone conversation with Gayle O'Callaghan, Psy. D., Director of Sexual Abuse Unit at Sinai Hospital, Baltimore, Md., Sept. 16, 1987 (such a result is sometimes desirable for children under eight years old, because they may not yet have the cognitive skills to understand the abuse; it may also be sought for particular children between the ages of eight and twelve).

38. See generally MCLAIN, *supra* note 13, § 613.2; Myers, *supra* note 1, at 801-09.

For these reasons, a new hearsay exception for reliable out-of-court statements by alleged child abuse victims merited legislative adoption in Maryland.<sup>39</sup>

### III. CONSTITUTIONALITY OF THE EXCEPTION

A hearsay exception for reliable out-of-court statements by alleged child abuse victims is constitutional,<sup>40</sup> despite arguments by opponents that it violates the accused's confrontation right. The sixth amendment to the United States Constitution, made applicable to the states through the fourteenth amendment due process clause,<sup>41</sup> provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." <sup>42</sup> Article 21 of the Maryland Declaration of Rights similarly provides: "[I]n all criminal prosecutions every man hath a right . . . to be confronted with the witnesses against him, . . .

---

39. *Accord* Dorf, *Child Abuse: The Second Victimization*, 17:1 U. BALT. L. FORUM 24 (1986); McGrath & Clemens, *The Child Victim as a Witness in Sexual Abuse Cases*, 46 MONT. L. REV. 229 (1985). See also Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MAR. L. REV. 1, 5-9, 40-42 (1984) (need for exception); Note, *Comprehensive Approach to Child Hearsay Statements*, *supra* note 25, at 1749-51.

The Court of Appeals of Maryland arguably was free to create such an exception judicially. See MCLAIN, *supra* note 13, §§ 803(24).1 and 804(5).1. See also *State v. Campbell*, 705 P.2d 694 (Or. 1985) (recognizing judicially created exception for statement of child abuse victim). This was unlikely to occur, however. The probability was very small that an appellate court would have the opportunity to decide whether to adopt an exception, because the prosecution's ability to appeal from an acquittal is constitutionally circumscribed. See *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy prohibition of fifth amendment to United States Constitution is enforceable against states through fourteenth amendment); MD. CTS. & JUD. PROC. CODE ANN. § 12-401(a) (1984) (state may appeal from final judgment of a criminal case if state alleges that trial judge failed to impose sentence specifically mandated by Code — implicitly may not appeal on other grounds). Also, in order for an appellate court to have this evidentiary issue before it on appeal by the defendant, the trial judge must have admitted evidence that is clearly inadmissible as hearsay. Therefore, the Maryland General Assembly was in a better position to act.

40. See *People v. Orduno*, 80 Cal. App. 3d 738, 145 Cal. Rptr. 806 (1978) (admission of excited utterance or prompt complaint by victim who is unavailable to testify, because too young, does not infringe defendant's confrontation right); Note, *Justification for a New Hearsay Exception*, *supra* note 29, at 178-79, 185; Note, *Minnesota's Hearsay Exception for Child Victims of Sexual Abuse*, 11 WM. MITCHELL L. REV. 799 (1985); Note, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 J. JUV. L. 59 (1984); Comment, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 CATH. U.L. REV. 1021 (1985); Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721, 745-46 (1985). But see Comment, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L. REV. 387 (1984) (arguing that the Washington statute's allowance of admission of out-of-court statements of children incompetent to testify is unconstitutional) [hereinafter Comment, *Unconstitutionality of the Sexual Abuse Hearsay Exception*].

41. *Pointer v. Texas*, 380 U.S. 400 (1965).

42. U.S. CONST., amend. VI.

[and] to examine the witnesses for and against him on oath. . . ."<sup>43</sup>

These confrontation clauses, on their face, seem to contemplate the witness's appearance at trial and availability for cross-examination by the accused. Thus, if the declarant whose out-of-court statement is admitted at trial also testifies at trial or is available to be cross-examined by the accused, no conflict with the confrontation right exists.<sup>44</sup>

The United States Supreme Court, in its 1980 decision in *Ohio v. Roberts*,<sup>45</sup> has also made clear that even if the declarant is unavailable to testify at trial, the admission of his out-of-court statement will not violate the defendant's confrontation right if the hearsay either (1) falls within well-established, historical hearsay exceptions or (2) is otherwise necessary and reliable, that is, it bears "particularized guarantees of trustworthiness."<sup>46</sup>

43. MD. DECL. OF RTS., art. 21. See, e.g., *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987) (discussing history of art. 21). See generally MCLAIN, *supra* note 13, § 801.1 at 270 n.4.

44. See *State v. Bellotti*, 383 N.W.2d 308, 313 (Minn. Ct. App. 1986) (victim testified at trial); McNeil, *The Admissibility of Child Victim Hearsay in Kansas: A Defense Perspective*, 23 WASHBURN L.J. 265, 276 (1984) (cross-examination of declarant at trial sufficient); Myers, *supra* note 1, at 828 (no confrontation right problem if victim testifies); Comment, *Unconstitutionality of the Sexual Abuse Hearsay Exception*, *supra* note 40, at 399 (*semble*); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 810, 817, 822, 826 (1985) (*semble*). See also Graham, *Indicia of Reliability and Face-to-Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 34-37, 45-47, 63-67 (1985) (arguing that a statute which does not require prosecution to call available victim to testify is unconstitutional). But see *State v. Thompson*, 379 N.W.2d 295, 297 (S.D. 1985) (if declarant is available, out-of-court statement must be even more reliable, in order to be admissible, than if declarant is unavailable).

45. 448 U.S. 56 (1980).

46. *Id.* at 65-66. See, e.g., *United States v. Dorian*, 803 F.2d 1439, 1446-47 (8th Cir. 1986) (no violation of accused's confrontation right to admit five-year-old victim's statement to her emergency foster mother, when child could not testify meaningfully at trial, so that she "was, for all practical purposes, 'unavailable'"; and other *Roberts* requirements were met) (over dissent of Bright, J.); *Ellison v. Sachs*, 583 F. Supp. 1241, 1245-46 (D. Md. 1984) (summarizing applicable case law), *aff'd*, 769 F.2d 955 (4th Cir. 1985); *State v. Burns*, 112 Wis. 2d 131, 332 N.W.2d 757 (1983) (admission of sexual assault victim's preliminary hearing testimony did not violate confrontation right when physician testified that victim was severely mentally ill and that, if victim were required to testify, a moderate to severe relapse would be highly probable). But see *People v. Stritzinger*, 34 Cal.3d 505, 514-20, 194 Cal. Rptr. 431, 438-41, 668 P.2d 738 (1983) (*en banc*) (insufficient evidence of victim's mental illness to show unavailability; admission of out-of-court statement violated defendant's confrontation right). See generally Myers, *supra* note 1, at 820-54; Skoler, *supra* note 39, at 14-18.

As to what constitutes the requisite unavailability, and whether, for example, a child's psychological unavailability due to fear would suffice, see *Warren v. United States*, 436 A.2d 821 (D.C. App. 1981); *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987) (unavailability is sufficiently established if testimony in open court will "'result in the child [witness] suffering serious emotional distress'") (quoting MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1984)); Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 652-54 (1985); Graham, *supra*

Hearsay exceptions for statements by child abuse victims that have been recognized in other states parallel the trustworthiness requirement established in *Roberts* and thus have been upheld as constitutional. The highest court of Kansas has upheld the Kansas statute;<sup>47</sup> the highest court of Oregon has upheld a similar judicially created exception;<sup>48</sup> the highest court of Washington has upheld its statute as facially constitutional;<sup>49</sup> and the Indiana Court of Appeals<sup>50</sup> and the Minnesota Court of Appeals have upheld their respective statutes.<sup>51</sup>

---

note 44, at 76-94; Myers, *supra* note 1, at 831-40; Skoler, *supra* note 39, at 16-17; Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 818-19 (1985). See also *infra* note 65.

47. *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985). Accord *State v. Pendelton*, 10 Kan. App. 2d 26, 690 P.2d 959 (1984) (statement admitted under Kansas child victim statute probably also could have been admitted as excited utterance). But see McNeil, *supra* note 44, at 278, 282 (criticizing defense counsel's inability to have admitted exculpatory statements by non-victim children, and arguing that each party should have equal opportunity to examine the child victim, "preferably through independent testifying").
48. *State v. Campbell*, 299 Or. 633, 705 P.2d 694 (1985) (if trial court holds competency hearing and finds alleged victim of child abuse incompetent to testify, child's out-of-court statements may be admitted under hearsay exception for complaints of sexual misconduct).
49. *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984) (but conviction was reversed because statute had not been complied with). Accord *State v. Fisher*, 43 Wash. App. 75, 715 P.2d 530, 533 (1986); *State v. Slider*, 38 Wash. App. 689, 688 P.2d 538, 541 (1984) (trial court erroneously admitted statement as excited utterance, but judgment affirmed because statement fell within child victim statute, which is constitutional).
50. *Hopper v. State*, 489 N.E.2d 1209 (Ind. App.), cert. denied, 107 S. Ct. 592 (1986) (no violation of confrontation right; statement also qualified as excited utterance; child was unavailable to testify; state presented corroborating evidence of two eyewitnesses).
51. *State v. Bellotti*, 383 N.W.2d 308 (Minn. Ct. App. 1986) (statute was both facially constitutional and constitutional as applied).

Judge Moylan, in his opinion for the Court of Special Appeals of Maryland in *Cassidy v. State*, 74 Md. App. 1, 536 A.2d 666 (1988), stated that whether to create such a "Tender Years" exception . . . would be quintessentially a legislative determination." 74 Md. App. at 31, 536 A.2d at 680. He proceeded to criticize such an exception, even if legislatively created, on three bases: (1) he questioned whether children were more likely to be truthful than adults; (2) if they were, he saw no reason to restrict the hearsay exception to child abuse cases; and (3) he noted:

If the theory is that we should tolerate lesser reliability in cases of greater necessity, that might explain the application of the exception to child abuse cases as a class. It would not explain, however, the automatic application of the exception to a particular child abuse case where there is an *ad hoc* determination that the hearsay is not indispensable; nor would it explain the refusal to apply the exception to a particular burglary case where there is an *ad hoc* determination that the hearsay is indispensable.

*Id.* at 32-33, 536 A.2d at 681-82.

Child abuse hearsay exception statutes like the 1988 Act, however, do require a searching *ad hoc* inquiry by the trial judge into the reliability of each statement by each child. See S. 66, § 9-103.1(d). Under the 1988 Act, the court is even asked to consider the credibility of the witness. *Id.* § 9-103.1(d)(12).

Also, the question of necessity historically has been decided with regard to a class of statements (that is, whether to recognize a hearsay exception for such a

Of course, the defendant would have a right to appeal the admission of hearsay on the basis of its trustworthiness. If the appellate court should find that the record did not support the trial court's finding that the particular hearsay admitted was reliable, its admission would be deemed unconstitutional.<sup>52</sup>

For example, in *Ellison v. Sachs*,<sup>53</sup> the United States Court of Appeals for the Fourth Circuit affirmed the holding of the United States District Court for the District of Maryland that the defendant's confrontation right was violated by the admission in state court of evidence of unreliable prior identifications of the defendant by the five-year-old alleged child abuse victim. The victim was found to be incompetent to testify at trial because she could not recall any events which occurred during the month of the alleged assault.<sup>54</sup> The federal courts' analyses in *Ellison* are instructive.

Judge Miller of the district court expressed general wariness concerning the admission of another's testimony to a young child's out-of-court statements.<sup>55</sup> He stressed, however, that "most importantly, numerous critical statements of identification made by the declarant [in *Ellison*, at a date later than the date of statements testified to] were in direct contradiction to earlier statements made by her."<sup>56</sup> Judge Miller concluded, "Without indicia of a *high degree of trustworthiness* under all the circumstances, the reception of the hearsay evidence was error of a constitutional dimension."<sup>57</sup>

A Fourth Circuit panel,<sup>58</sup> affirming in an opinion by Judge Murnaghan, held that although the child victim had been "subject to limited cross-examination" at a preliminary suppression hearing, the hearing transcript was inadmissible.<sup>59</sup> Judge Murnaghan stated:

[W]here the declarant is unavailable to testify at trial, her state-

class) rather than on a case-by-case basis. For example, hearsay exceptions applicable only when the declarant is unavailable to testify were created because of the greater need in general for the evidence. See MCLAIN, *supra* note 13, § 804.1. The courts do not look at the need for the evidence in a particular case.

Finally, although most hearsay exceptions are not restricted to certain types of cases, there is one exception. Dying declarations are admissible only in prosecutions for the homicide of the declarant. See *id.* § 804(2).1.

52. *E.g.*, *Fuller v. State*, 64 Md. App. 339, 351-53 & n.13, 495 A.2d 366, 372-73 & n.13 (1981). For a similar conclusion as to the Washington statute, see Comment, *Sexual Abuse of Children — Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 828-29 (1983).

53. 769 F.2d 955 (4th Cir. 1985), *aff'g* 583 F.Supp. 1241 (D. Md. 1984).

54. *Id.* at 957.

55. *Ellison v. Sachs*, 583 F. Supp. 1241, 1249 (D. Md. 1984) ("The circumstance of the very tender age of the victim declarant . . . rather than excusing the inconsistencies [in her out-of-court statements], strongly decreases the degree to which one can reasonably rely on such extrajudicial statements.").

56. *Id.*

57. *Id.* (emphasis supplied).

58. Judge Sneed concurred specially. *Ellison*, 769 F.2d at 957.

59. *Id.* at 956.

ment is admissible only if there are adequate 'indicia of reliability' to justify submitting the hearsay to the jury . . . . Thus, although the Sixth Amendment preserves the right of face to face confrontation, *Ohio v. Roberts* teaches that, where there are circumstances assuring the accuracy of hearsay, cross-examination is not talismanic of constitutional guarantees.

Here, however, . . . there are serious discrepancies which indicate that the victim's out-of-court statements and identification of Ellison were *not at all reliable*. The obvious limitations in observation, expression and understanding of a five year old help explain the various discrepancies in her descriptions. But they also underscore the *care with which courts must approach the question of introducing such hearsay*, particularly when largely untested by cross-examination.<sup>60</sup>

Judge Murnaghan carefully differentiated between the victim's uncorroborated out-of-court statements of identification, which "contained no sufficient assurance of accuracy," and her out-of-court statement, corroborated by physical evidence, that she was sexually assaulted.<sup>61</sup>

Perhaps one of the most important aspects of the *Ellison* decision is that it does not indicate that the Fourth Circuit would find unconstitutional a statute making reliable out-of-court statements admissible. On the contrary, Judge Murnaghan cited statutes of six states as "legislative solutions" to the "reliability problem inherent in child-victim testimony in sexual abuse cases."<sup>62</sup> He also underscored the point that "[a] determination of the reliability and trustworthiness of hearsay statements for constitutional purposes must, of course, proceed on a case by case basis."<sup>63</sup>

---

60. *Id.* at 956-57 (emphasis supplied).

61. *Id.* at 957.

In contrast to the identification itself we find no 'inherent unreliability' in the victim's out-of-court statement, corroborated by physical evidence, that a sexual assault occurred. Indeed, several courts and commentators have observed that a young child's description of a sexual assault may, in particular circumstances, contain its own inherent verity. . . . Here, we have no occasion to chart the instances where such hearsay might contain its own particular guarantee of trustworthiness. It is controlling, however, to note in the present case that, where her identification was the sole evidence of the perpetrator's identity, the victim's testimony contained no sufficient assurance of accuracy.

*Id.*

Judge Sneed, concurring specially, was concerned by the majority's references to corroboration and lack of corroboration. He wrote: "We do not need to reach the issue of whether there must be corroborating evidence of a hearsay identification of the perpetrator by a child witness. It is not my wish to join in language which could be interpreted to require such corroboration in future cases not before me." *Id.* at 957-58.

62. *Id.* at 957 (citing Arizona, Colorado, Kansas, Minnesota, Utah, and Washington statutes).

63. *Id.* Accord *State v. Superior Court*, 149 Ariz. 397, 405, 719 P.2d 283, 291 (1986). See, e.g., *State v. Bellotti*, 383 N.W.2d 308 (Minn. Ct. App. 1986) (reliability of

Thus, a state statute which incorporates the requirements of *Ohio v. Roberts* is constitutional on its face. Its application in any particular case will be subject to appellate review to ensure that the admission of out-of-court statements passed constitutional muster.

#### IV. FORMS OF THE HEARSAY EXCEPTION RECOGNIZED OR PROPOSED BY OTHER JURISDICTIONS

Prior to the passage of Maryland's 1988 Act, many states had passed statutes adopting a hearsay exception for reliable statements by child abuse victims.<sup>64</sup> These statutes constitute several models for the Maryland General Assembly to consider in amending the 1988 Act. One type, of which the Kansas statute is an example, requires that the child

---

victim's statements was amply demonstrated); *State v. Frey*, 43 Wash. App. 605, 718 P.2d 846, 849-50 (1986) (statement was reliable); *State v. Jackson*, 42 Wash. App. 393, 711 P.2d 1086, 1089 (1985) (*semble*); *State v. Gitchel*, 41 Wash. App. 820, 706 P.2d 1091, 1095-96 (1985) (*semble*).

64. ALASKA STAT. § 12.40.110 (Supp. 1987) (before grand jury only); ARIZ. REV. STAT. ANN. § 13-1416 (Supp. 1987) (criminal and civil proceedings); ARK. R. EVID. 803(25)(A) (1988) (criminal); CAL. EVID. CODE § 1228 (West 1987) (enumerated crimes; statement must have been memorialized in writing by law enforcement official and comes in only out of presence of jury and to corroborate confession, so as to make it admissible); COLO. REV. STAT. § 13-25-129 (Supp. 1986) (criminal, delinquency, or civil proceedings) (*see also id.* § 18-3-411(3) (criminal)); FLA. STAT. ANN. § 90.803(23) (Supp. 1987) (civil or criminal); ILL. ANN. STAT. ch. 37, § 704-6(4)(c) (Smith-Hurd Supp. 1987) (civil and juvenile); ILL. ANN. STAT. ch. 38, § 115-10 (Smith-Hurd Supp. 1987) (criminal); IND. CODE ANN. § 35-37-4-6 (Burns 1985 & Supp. 1987) (enumerated crimes); IOWA CODE ANN. § 232.96(6) (West 1985) (written or taped statement, made by certain social services, hospital, or law enforcement personnel, relating to a child alleged to be in need of assistance); KAN. STAT. ANN. § 60-460(dd) (1983 & Supp. 1987) (criminal, juvenile, or child-in-need-of-care proceeding); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1987) (criminal; statement was made under oath, in presence of judge or justice, and recorded); MINN. STAT. ANN. § 260.156 (West Supp. 1987) (dependency or neglect proceeding or proceeding regarding termination of parental rights); MINN. STAT. ANN. § 595.02, subd. 3 (West Supp. 1987) (including mentally impaired individuals); MISS. CODE ANN. § 13-1-403 (Supp. 1987) (statement made in order to prevent recurrence of abuse or obtain advice about psychological, social or familial consequences); MO. ANN. STAT. § 491.075 (Vernon Supp. 1987); NEV. REV. STAT. § 51.385 (1985) (criminal); N.J. STAT. ANN. § 9:6-8.46 (West Supp. 1987) (abuse or neglect proceeding); N.Y. JUD.-FAM. CT. LAW § 1046(a)(vi) (McKinney Supp. 1987) (child protective proceedings); OKLA. STAT. ANN. tit. 12, § 2803.1 (West Supp. 1987) (criminal and juvenile proceedings); PA. CONS. STAT. ANN. § 5986 (Purdon Supp. 1987) (dependency proceedings); R.I. GEN. LAWS § 14-1-69 (Supp. 1987) (spontaneous statement; custody or termination trial); S.D. CODIFIED LAWS ANN. § 19-16-38 (1987) (criminal or dependency, neglect, or delinquency proceedings); TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 1987) (enumerated crimes; first statement only, made to an adult); TEX. FAM. CODE ANN. § 54.031 (Vernon 1986) (juvenile delinquency); UTAH CODE ANN. § 76-5-411 (Supp. 1987) (criminal); VT. R. EVID. 804a (Supp. 1987) (enumerated crimes or juvenile proceeding; statement not taken in preparation for a legal proceeding and must be made prior to defendant's initial appearance before judicial officer); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987) (criminal or juvenile proceedings).

be unavailable to testify.<sup>65</sup> Another, exemplified by the Washington statute, allows any reliable out-of-court statement of the child to be admit-

65. The California and Maine statutes contain the same requirement. See CAL. EVID. CODE § 1228 (West 1987); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1987). The Kansas statute provides:

Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:

(dd) *Actions involving children.* In a criminal proceeding or a proceeding pursuant to the Kansas juvenile offender's code or in a proceeding to determine if a child is a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that a child is a juvenile offender or a child in need of care, if:

(1) The child is alleged to be a victim of the crime or offense or a child in need of care; and

(2) the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.

KAN. STAT. ANN. § 60-460(dd) (Supp. 1987).

As to what constitutes unavailability, see *supra* notes 40 and 46 and *infra* note 66. For a suggested definition of unavailability, see the following model statute (which does not condition admissibility of the hearsay on the child's unavailability) from Eatman & Bulkley, PROTECTING CHILD VICTIM WITNESSES: SAMPLE LAWS AND MATERIALS, at 5-6, ABA Nat'l Legal Resource Center on Child Advocacy and Protection (1986):

(A) An out-of-court statement made by a child under [eleven] years of age at the time of the proceeding concerning an act that is a material element of the offense[s] of [sexual abuse], [physical abuse or battery], [other specified offenses] that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of sections B through F are met.

(B) An out-of-court statement may be admitted as provided in section A if:

(1) the child testifies at the proceeding, or testifies by means of video-taped deposition (in accordance with [\_\_\_\_]) or closed-circuit television (in accordance with [\_\_\_\_]), and at the time of such testimony is subject to cross-examination about the out-of-court statement; or

(2) (a) the child is found by the court to be unavailable to testify on any of these grounds:

- i) the child's death;
- ii) the child's absence from the jurisdiction;
- iii) the child's total failure of memory;
- iv) the child's persistent refusal to testify despite judicial requests to do so;
- v) the child's physical or mental disability;
- vi) the existence of a privilege involving the child;
- vii) the child's incompetency, including the child's inability



ted, regardless of whether the child testifies or is unavailable to testify.<sup>66</sup>

---

to communicate about the offense because of fear or a similar reason; or

- viii) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television;

and

- (b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.
- (C) A finding of unavailability under section B(2)(a)(viii) must be supported by expert testimony.
- (D) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.
- (E) In determining whether a statement possesses particularized guarantees of trustworthiness under section B(2), the court may consider, but is not limited to, the following factors:
  - (1) the child's personal knowledge of the event;
  - (2) the age and maturity of the child;
  - (3) certainty that the statement was made, including the credibility of the person testifying about the statement;
  - (4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
  - (5) the timing of the child's statement;
  - (6) whether more than one person heard the statement;
  - (7) whether the child was suffering pain or distress when making the statement;
  - (8) the nature and duration of any alleged abuse;
  - (9) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
  - (10) whether the statement has a "ring of verity," has internal consistency or coherence, and uses terminology appropriate to the child's age;
  - (11) whether the statement is spontaneous or directly responsive to questions;
  - (12) whether the statement is suggestive due to improperly leading questions;
  - (13) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.
- (F) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

66. WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987) provides:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:

The statutes adopted and other proposals which have been made also take varying approaches with regard to the factors to be considered in assessing the reliability of the statement, the need for corroborative evidence, the discoverability of the statement by the defense, and other procedural matters. A third type of statute provides for the admission of only videotaped statements.<sup>67</sup>

*A. Admissibility Dependent on Declarant's Unavailability or Regardless of Declarant's Ability to Testify*

Most statutes adopted by other states follow the pattern of the Washington statute and do not condition admissibility of out-of-court statements by child abuse victims on the child's unavailability to testify. The Kansas statute differs in that it creates a hearsay exception for reliable out-of-court statements by the child victim only if the child cannot testify at trial. This differentiation is due in part perhaps to the peculiarity of Kansas law, under which all reliable hearsay is admissible in civil cases if the declarant is available to testify at trial.<sup>68</sup>

The Washington statute admits statements preliminarily determined by the judge, outside the hearing of the jury, to be reliable, even if the

---

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

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

The Arizona, Arkansas, Colorado, Florida, Indiana, Minnesota, Mississippi, Missouri, Nevada, Oklahoma, South Dakota, and Utah statutes take this approach. See statutes cited *supra* note 64. The Florida statute defines unavailability. See FLA. STAT. ANN. § 90.804(1) (1986). Section 595.02, subdivision 3 of the Minnesota Statutes provides, "[A]n unavailable witness includes an incompetent witness." MINN. STAT. ANN. § 595.02, subd. 3 (West Supp. 1987). See also *State v. Gitchel*, 41 Wash. App. 820, 825-26, 706 P.2d 1091, 1095 (1985) (three-year-old's incompetency, in that "nothing of substance could be obtained from her in the way of testimony," was "the equivalent of unavailability") and *supra* note 65.

On the other hand, the Illinois criminal statute requires the child to testify. ILL. ANN. STAT. ch. 38, § 115-10 (Smith-Hurd Supp. 1987). The Alaska statute requires that the child be available at trial. ALASKA STAT. § 12.40.110 (Supp. 1987). The Vermont rule also requires the child to be available, and on motion of either party, to testify for the state. VT. R. EVID. 804a (Supp. 1987). The Texas statutes require the child to testify or to be available to testify. TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon Supp. 1987); TEX. FAM. CODE ANN. § 54.031 (Vernon 1986).

67. See *infra* text accompanying notes 86-89 (also addressing statutes providing for admissibility of videotaped testimony and live testimony over closed-circuit television).

68. Section 60-460(a) of the Kansas Statutes Annotated permits the admission of "[a] statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness."

child is also testifying to his present recollection at trial.<sup>69</sup> This approach is preferable because the jury will have the benefit of reliable out-of-court statements by the child when the child's memory was fresher. These out-of-court statements may well be more probative than the child's trial testimony.<sup>70</sup> Also, the admission of such statements in child abuse cases, as in rape cases, could forestall questions in the jurors' minds about whether the victim's testimony was the result of prodding or suggestion by others, such as social workers, police, and prosecutors.<sup>71</sup>

Most of the hearsay exceptions, besides the 1988 Act, that are recognized in Maryland (and twenty-four of the twenty-nine recognized in federal court) apply regardless of whether the person who made the out-of-court statement is available or unavailable to testify. Finally, it may be easier to imagine that a child who is ruled competent at trial has also uttered a reliable out-of-court statement than it is to imagine that an "incompetent" child has made a prior reliable statement.<sup>72</sup>

69. WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987). See also Graham, *supra* note 44, at 48-49 (proposing specific language for hearsay exception applicable if victim is either available or unavailable).

70. See *State v. Myatt*, 237 Kan. 17, 21-22, 697 P.2d 836, 841 (1985) (child's out-of-court statements have potentially superior trustworthiness to a child's in-court testimony); Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOCIAL ISSUES 125, 133 (1984); Goodman & Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 203-04; Skoler, *supra* note 39, at 6, 37-38, 46; Note, *Comprehensive Approach to Child Hearsay Statements*, *supra* note 25, at 1750-52; Note, *Justification for a New Hearsay Exception*, *supra* note 29, at 181 & nn. 47-49; Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807, 817 n. 80 (1980); Note, *Unthinkable Hearsay Exceptions*, *supra* note 24, at 439 & nn. 8 & 10. Cf. 3 J. WIGMORE, WIGMORE ON EVIDENCE § 738, at 91 (1970) (no failure of witness' present recollection need be shown in order for writing to be admitted under hearsay exception for past recollection recorded, "because, for every moment of time which elapses between the act of recording and the occasion of testifying, the actual recollection must be inferior . . .").

71. See Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers*, 65 MINN. L. REV. 423, 441 (1981) (arguing that out-of-court statement by child sexual abuse victim in *Bridges v. State*, 247 Wis. 350, 19 N.W.2d 529 (1945), describing defendant's home, should have been admitted under principle applicable to prompt reports of rape).

72. Of course, it is possible — though not by any means inevitable — that a child who is found incompetent to testify at trial may have made a reliable statement before trial. See *State v. Bellotti*, 383 N.W.2d 308, 314 (Minn. Ct. App. 1986) (out-of-court statements by victim who was later found incompetent were reliable). Explanations for this result include the child's failure to appreciate the trial process or the meaning of the oath or the child's failure to remember. In fact, for therapeutic reasons, repression is often sought by psychotherapists treating young child sexual abuse victims. See *supra* note 37.

Under the current law, statements of children who are incompetent to testify at trial may come in if they fit within, for example, the hearsay exception for excited utterances. McLAIN, *supra* note 13, § 803.1, at 341 and nn. 9, 10. See *People v. Orduno*, 80 Cal. App. 3d 738, 145 Cal. Rptr. 806 (1978). But see *State v. Segerburg*, 131 Conn. 546, 41 A.2d 101 (1945) (reversible error to admit out-of-court statement of child too immature to testify; state failed to present even corroborative physical evidence). See generally Myers, *supra* note 1, at 911-14.

*B. Requirement of and Criteria for Establishing Reliability of Statements*

In order to ensure the constitutionality of statutes establishing hearsay exceptions for statements of child abuse victims, most of the statutes adopted and proposed explicitly condition admissibility on the trial court's finding that a proffered statement is reliable.<sup>73</sup> Some simply incorporate a general requirement of reliability; others list factors to be considered by the trial court in determining whether that requirement is met.<sup>74</sup>

- 
73. The Alaska, Arizona, Arkansas, California, Colorado, Florida, Indiana, Kansas, Minnesota, Mississippi, Missouri, Nevada, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Vermont, and Washington statutes, cited *supra* note 64, so provide. See generally Bulkley, *supra* note 46, at 654-55; Goodman & Helgeson, *supra* note 70, at 181-201 (suggesting how best to interview victims); MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135, 154-61 (1985) (*semble*); Note, *Comprehensive Approach to Child Hearsay Statements*, *supra* note 25, at 1745, 1751-53.

One commentator suggests that a statement should be excluded if there is "any suggestion of bias, selective reinforcement or 'programming,' disposition to color or stray from the truth, disability of perception [or] tendency to fantasize or exaggerate . . . ." McNeil, *supra* note 44, at 281 (footnotes omitted).

74. When compiled, the criteria suggested by various legislatures, courts, commentators, and organizations include the following:
- (a) The declarant's personal knowledge of the event;
  - (b) remoteness of the possibility of declarant's faulty recollection;
  - (c) certainty that the statement was made, including the credibility of the person testifying about the statement;
  - (d) any apparent motive to lie or partiality by the declarant, including interest, bias, corruption, or coercion;
  - (e) the general character or credibility of the declarant;
  - (f) whether more than one person heard the statement;
  - (g) whether the statement is spontaneous or directly responsive to questions;
  - (h) the timing of the statement;
  - (i) the relationship between the witness and the declarant;
  - (j) if the statement represents a graphic, detailed account of sexual behavior, whether the child's age, knowledge, and experience make it unlikely that the child fabricated;
  - (k) the nature and duration of the abuse;
  - (l) the relationship of the declarant and defendant;
  - (m) whether the statement has a "ring of verity," inner consistency and coherence, and contains terminology appropriate to the child's age;
  - (n) whether the child was suffering pain or distress when making the statement;
  - (o) whether extrinsic evidence exists to show that the abusive act occurred and that the defendant had the opportunity to commit the act;
  - (p) whether leading questions or other suggestive techniques were used in eliciting the statement;
  - (q) the age and maturity of the child; and
  - (r) whether the witness to whom the statement was made had received training in interviewing child victims.

See, e.g., ARK. R. EVID. 803(25)(A)(1) (1988); *State v. McCafferty*, 356 N.W.2d 159, 164 (S.D. 1984); ABA Nat'l Legal Resource Center for Child Advocacy and Protection, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN IN-

### C. Corroboration Requirement

A statute creating a hearsay exception addresses only the admissibility of one piece of evidence in the state's case. It does not address the sufficiency of all of the evidence in a particular case to withstand a motion for acquittal or to support a conviction.<sup>75</sup> That evidence would probably include expert and parental testimony regarding the child's physical and emotional trauma. It seems highly unlikely that a prosecutor would proceed to trial only on the basis of an uncorroborated out-of-court statement of a child victim.<sup>76</sup>

Nonetheless, because of the legislators' desire to preclude an accused's conviction based only on the out-of-court statement of a victim who is unavailable to testify at trial (which would likely be found to have deprived the accused of due process),<sup>77</sup> some other states' statutes explic-

---

TRAFAMILY CHILD SEXUAL ABUSE CASES at 34 (J. Bulkley ed. 1982) [hereinafter RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES]

A child victim's out-of-court statement of sexual abuse should be admissible into evidence where it does not qualify under an existing hearsay exception, as long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge should determine whether the general purposes of the evidence rules and interests of justice will best be served by admission of the statement into evidence. In addition, the court should consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness in deciding whether to admit such a statement.

Eatman & Bulkley, model statute, *supra* note 65; Bulkley, *supra* note 46, at 655; Myers, *supra* note 1, at 896-905.

The best approach is to encourage the court, in assessing the reliability of proffered hearsay, to consider all relevant circumstances, including, but not limited to, those listed above. See Eatman & Bulkley, *supra* note 65, model statute at subsection E. See also, e.g., *United States v. Dorian*, 803 F.2d 1439, 1444-45 (8th Cir. 1986) ("[I]n assessing the trustworthiness of an out-of-court statement, we must examine the reliability of the declaration 'in light of the circumstances at the time of the declaration and the credibility of the declarant.'" (citing *United States v. Renville*, 779 F.2d 430 (1985))). The panel majority found no abuse of discretion in the trial court's admission of the five-year-old victim's statement to her emergency foster mother, despite the fact that the child had made prior inconsistent statements, when it was unlikely that the child could have fabricated the story, the child's interviewers had received training in interviewing children and in the use of anatomically correct dolls, they testified that they had been careful not to lead the child, and defense counsel questioned them about the prior statements). See also *supra* note 63.

75. See generally *MCLAIN*, *supra* note 13, § 300.4.

76. See Note, *The Effects of the Abolition of the Corroboration Requirement in Child Sexual Assault Cases*, 36 CATH. U.L. REV. 793, 794 (1987) ("Despite formal abolition [in the District of Columbia], corroboration remains an essential element in the successful prosecution of child sexual abuse cases because of the nature of the offense.").

77. Eatman & Bulkley, *supra* note 65, at 9; McNeil, *supra* note 44, at 282-83; Skoler, *supra* note 39, at 9-10, 30-31. See also *State v. Segerburg*, 131 Conn. 546, 41 A.2d 101 (1945); Myers, *supra* note 1, at 814-18.

itly require corroborative evidence.<sup>78</sup> For example, the Washington statute requires corroborative evidence of the abusive act in order for an out-of-court statement of an unavailable declarant to be admissible.<sup>79</sup>

Because it is unnecessary and unduly restrictive to condition admissibility of the hearsay on the existence of corroborative evidence, a state wishing to provide such protection to a defendant should provide explicitly instead that there may be no conviction absent the desired corroboration.<sup>80</sup>

---

78. The Arizona, Colorado, Florida, Indiana, Minnesota (§ 595.02, subd. 3(b)(II)), Mississippi, Oklahoma, South Dakota, Utah, and Washington statutes so provide. See statutes cited *supra* note 64. The Alaska statute also conditions admissibility on the existence of corroborative evidence. ALASKA STAT. § 12.40.110 (Supp. 1987). Under the Illinois civil statute, uncorroborated hearsay will not support a finding of abuse and neglect. ILL. ANN. STAT. ch. 38, § 115-10 (Smith-Hurd Supp. 1987). The New Jersey and New York civil statutes include similar provisions. See N.J. STAT. ANN. § 9:6-8.46 (West Supp. 1987); N.Y. JUD.-FAM. CT. LAW § 1046(a)(vi) (McKinney Supp. 1987). See generally Bulkley, *Introduction: Background and Overview of Child Sexual Abuse: Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5, 12 (1985); Graham, *supra* note 44, at 58-61; Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 PAC. L.J. 801, 853-57 (1987).

79. WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987). The same position is taken in New York's Family Court Act. N.Y. JUD.-FAM. CT. LAW § 1046(a)(vi) (McKinney Supp. 1987). It is also endorsed by a research group, which urges that there be no requirement of corroborative evidence if the victim testifies, and points out that such a requirement, almost universally abandoned by American jurisdictions today, was based on several misconceptions. RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES, *supra* note 74, at 32-33. The same group recommends that, if the victim does not testify, "corroborative evidence of the abuse" should be required. *Id.* at 34.

Such corroborative evidence could include evidence of physical trauma or venereal disease. Note, *Comprehensive Approach to Child Hearsay Statements*, *supra* note 25, at 1766 n.188 (1983). See *State v. Gitchel*, 41 Wash. App. 820, 706 P.2d 1091, 1096 (1985) (physical evidence of penetration, child's inappropriate behavior during medical examination, and nightmares). It has been suggested that corroborative evidence could also include expert psychological testimony that the child was abused. Myers, *supra* note 1, at 911. See also *State v. Spronk*, 379 N.W.2d 312 (S.D. 1985) (physical examinations, by mother and grandmother, and psychological assessments and profiles of child by social worker).

If corroboration of the identity of the abuser is required as well, it might be provided by "eyewitness testimony, a confession, evidence that the alleged assailant had the opportunity to commit the offense, or verification of the child's description of the assailant's clothing or possessions at the scene of the offense." Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 821 (1985); see also *supra* note 61.

One commentator urges a requirement of corroborative evidence, even if the child victim is available to testify, that the child's physical condition was consistent with the truth of the child's out-of-court statement and that the defendant had the opportunity to commit the alleged abuse and, if the child is unavailable to testify, that the abuse occurred and that the defendant was the only person who had opportunity to commit it. Comment, *Sexual Abuse of Children — Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 827-28 (1983).

80. Bulkley, *supra* note 46, at 650-51.

*D. Discoverability of the Statement and Other Procedural Matters*

Statutes adopted in several other states require that the reliability of the child's out-of-court statement be determined by the trial judge outside the presence of the jury.<sup>81</sup> Considerations of judicial economy dictate that such a determination be made at a pretrial hearing, because the prosecution may have to drop the charges if the statement is ruled inadmissible. Requirements of fairness and practicality would mandate that if such an approach is followed, as in the state of Washington, the defense must be given "the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to meet the statement."<sup>82</sup>

If the court decides that the statement is reliable and admits it into evidence at trial, the witness to whom the child made the statement (and the child, if available to testify), may be cross-examined as to all the circumstances under which the statement was made.<sup>83</sup> Even if the child does not testify, he may be impeached.<sup>84</sup> In either event, the defense can then argue to the jury that, although the statement has been admitted into evidence, it is entitled to little or no weight.

The jury may be instructed that it must consider all relevant circumstances in assessing what weight, if any, to give to the out-of-court statement. The Kansas statute's requirement of a specific jury instruction has been justly criticized as too inflexible and potentially confusing, however, because it lists details which may or may not be relevant to a particular

81. The Arizona, Arkansas, California, Colorado, Florida, Indiana, Minnesota (§ 595.02, subd. 3), Mississippi, Missouri, Nevada, Oklahoma, South Dakota, Texas, and Washington statutes so provide. See statutes cited *supra* note 64. The Indiana statute requires the child to attend the hearing. IND. CODE ANN. § 35-37-4-6 (Burns 1985 & Supp. 1987).

82. WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1987). The Arizona, Arkansas, California, Colorado, Florida, Indiana, Minnesota, Mississippi, Missouri, Nevada (if the child is unable or unavailable to testify), Oklahoma, South Dakota, Texas, and Utah statutes similarly provide. See statutes cited *supra* note 64. Some set a fixed time period of ten days' notice. See also *State v. McCafferty*, 356 N.W.2d 159, 164 (S.D. 1984); RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES, *supra* note 74, at 34 ("A statement may only be admitted under this exception if 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, his intention to offer the statement and the particulars of it."). Uniform Rule of Evidence 807 merely provides for all parties to have an opportunity to view the (audiovisually recorded) statement and be given a transcript of it before it is offered into evidence. See UNIF. R. EVID. 807(d), 13A U.L.A. 64 (1986).

It should be pointed out, too, that the United States Supreme Court has stated that the confrontation clause is not "a constitutionally-compelled rule of pretrial discovery." *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 999 (1987) (plurality) (defendant is entitled only to *in camera* review by trial court of state agency's confidential investigatory child abuse files, not to have defense counsel have access to files).

83. The procedure is analogous to that followed with regard to the determination of voluntariness of confessions in criminal cases. See generally *McLAIN*, *supra* note 13, § 104.2 at 72 & n.7.

84. See *id.* § 806.1; *Myers*, *supra* note 78, at 941.

case.<sup>85</sup>

*E. Videotaped Statements, Videotaped Depositions, and Live Testimony Over Closed-Circuit Television*

A number of states have passed statutes providing for the admissibility of only videotaped *ex parte* statements or interviews of child victims.<sup>86</sup> Several have adopted hearsay exceptions for videotaped testimony of the child, during which the defense has had the opportunity

85. McNeil, *supra* note 44, at 283-84. The following language of the Arkansas statute, virtually identical to the Colorado statute is preferable:

If a statement is admitted pursuant to this Section the Court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

ARK. R. EVID. 803(25)(A) (1988).

86. ARIZ. REV. STAT. ANN. § 13-4252 (Supp. 1987); HAWAII R. EVID. 616; KAN. STAT. ANN. §§ 22-3433, 38-1557, 38-1657 (Supp. 1987); KY. REV. STAT. § 421.350(2) (Baldwin Supp. 1987); LA. REV. STAT. ANN. §§ 440.1 to 440.5 (West Supp. 1987), *construed in*, State v. Feazell, 486 So.2d 327 (La. App. 1986), *cert. denied*, 491 So.2d 20 (1986); MO. ANN. STAT. § 492.304 (Vernon Supp. 1987); N.Y. CRIM. PROC. LAW §§ 190.30.4, 190.32 (McKinney Supp. 1988) (grand jury); R.I. GEN. LAWS §§ 14-1-68, 40-11-7.2 (Supp. 1987); TENN. CODE ANN. § 24-7-116(c) (Supp. 1986); TEX. CRIM. PROC. CODE ANN. § 38.071(2) (Vernon Supp. 1987); UTAH CODE ANN. § 77-35-15.5 (Supp. 1987); WIS. R. EVID. 908.08 (Supp. 1987). Compare Long v. State, 694 S.W.2d 185 (Tex. App. 5th Dist. 1985) (right to call child victim at trial and cross-examine her insufficient to rectify violation of defendant's confrontation right by admission of videotaped interview at which neither defendant nor defense counsel could be present) with Alexander v. State, 692 S.W.2d 563 (Tex. App. 11th Dist. 1985) (Texas statute does not violate accused's confrontation or due process rights) and Jolly v. State, 681 S.W.2d 689, 695 (Tex. App. 14th Dist. 1984) (no violation of confrontation right when accused chose not to call available victim to cross-examine her). See generally Bulkley, *supra* note 78, at 9; Eatman, *Videotaping Interviews with Child Sex Offense Victims*, 7 CHILDREN'S LEGAL RIGHTS J. at 13 (1986); Graham, *supra* note 44, at 67 (videotaped interview made in anticipation of litigation is unreliable); MacFarlane, *supra* note 73, at 143-46 (arguing that videotaped interviews cannot be used at trial as substantive evidence, except perhaps for corroboration of interviewer's testimony or to show trauma requiring special protection); Note, *Videotaping the Testimony of an Abused Child: Necessary Protection for the Child or Unwarranted Compromise of the Defendant's Constitutional Rights?*, 3 UTAH L. REV. 461 (1986).

Subsection (a) of Uniform Rule of Evidence 807 sets forth a conservative hearsay exception, under which a child's trustworthy statements recorded audio-visually may be admitted at trial if particular requirements are met. These include the court's finding that the child would suffer "severe emotional or psychological harm if required to testify in open court." Subsection (b) provides, nevertheless, that at the defendant's request the child shall be subject to further questioning "in such manner as the court may direct" and, failing that, the audio-visual statement will be inadmissible. Subsection (c) further provides that any party may call the child as a witness "if the interests of justice so require." Subsection (d), somewhat analogous to MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1987), gives the judge the option to allow the child's testimony to be given over closed-circuit television or by deposition recorded audio-visually. The Uniform Rule, proposed in 1986 by the Uniform Law Commissioners, provides:



to cross-examine.<sup>87</sup> Some states provide for the admissibility of the

(a) A hearsay statement made by a minor who is under the age of [12] years at the time of trial describing an act of sexual conduct or physical violence performed by or with another on or with that minor or any [other person] [parent, sibling or member of the familial household of the minor] is not excluded by the hearsay rule if, on motion of a party, the minor, or the court and following a hearing [*in camera*], the court finds that (i) there is a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court; (ii) the time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; (iii) the statement was accurately recorded by audio-visual means; (iv) the audio-visual record discloses the identity and at all times includes the images and voices of all persons present during the interview of the minor; (v) the statement was not made in response to questioning calculated to lead the minor to make a particular statement or is clearly shown to be the minor's statement and not the product of improper suggestion; (vi) the person conducting the interview of the minor is available at trial for examination or cross-examination by any party; and (vii) before the recording is offered into evidence, all parties are afforded an opportunity to view it and are furnished a copy of a written transcript of it.

(b) Before a statement may be admitted in evidence pursuant to subsection (a) in a criminal case, the court shall, at the request of the defendant, provide for further questioning of the minor in such manner as the court may direct. If the minor refuses to respond to further questioning or is otherwise unavailable, the statement made pursuant to subsection (a) is not admissible under this rule.

(c) The admission in evidence of a statement of a minor pursuant to subsection (a) does not preclude the court from permitting any party to call the minor as a witness if the interests of justice so require.

(d) In any proceeding in which a minor under the age of [12] years may be called as a witness to testify concerning an act of sexual conduct or physical violence performed by or with another on or with that minor or any [other person] [parent, sibling or member of the familial household of the minor], if the court finds that there is a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court, the court may, on motion of a party, the minor or the court, order that the testimony of the minor be taken by deposition recorded by audio-visual means or by contemporaneous examination and cross-examination in another place under the supervision of the trial judge and communicated to the courtroom by closed-circuit television. Only the judge, the attorneys for the parties, the parties, persons necessary to operate the equipment and any person the court finds would contribute to the welfare and well-being of the minor may be present during the minor's testimony. If the court finds that placing the minor and one or more of the parties in the same room during the testimony of the minor would contribute to the likelihood that the minor will suffer severe emotional or psychological harm, the court shall order that the parties be situated so that they may observe and hear the testimony of the minor and may consult with their attorneys, but the court shall ensure that the minor cannot see or hear them, except, within the discretion of the court, for purposes of identification.

UNIF. R. EVID. 807, 13A U.L.A. 64, 65 (1986).

87. These include ALASKA STAT. § 12.45.047 (1984); CAL. PENAL CODE § 1346 (West 1985); COLO. REV. STAT. § 18-3-413 (1986); KAN. STAT. ANN. §§ 22-3434, 38-1558, 38-1658 (Supp. 1987); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1987); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1987); MINN. STAT.

child's live testimony at trial over closed-circuit television.<sup>88</sup>

Maryland, in section 9-102 of the Courts and Judicial Proceedings article of its annotated code, previously has made provision for limited use of closed-circuit television.<sup>89</sup> That statute, however, is different in

ANN. § 595.02, subd. 4 (West Supp. 1987); MISS. CODE ANN. § 13-1-407 (Supp. 1986); MONT. CODE ANN. § 46-15-401 to 403 (1987); N.M. STAT. ANN. § 30-9-17 (1987); N.M.R. CRIM. P. DIST. CTS. 5-504 (1986); OHIO REV. CODE ANN. § 2151.35.11 (Supp. 1987); *id.* §§ 2907.41, 2937.11, 2945.49 (1987); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1987); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1987); TENN. CODE ANN. § 24-7-116(d)-(f) (Supp. 1987); TEX. CRIM. PROC. CODE ANN. § 38-071 (Vernon Supp. 1987); VT. R. EVID. 807(d) (Supp. 1987); WIS. STAT. ANN. § 967.04(7) (West Supp. 1987). *See also* UNIF. R. EVID. 807(d), *supra* note 86. *See generally* Eatman & Bulkley, *supra* note 65, at 1, 17-36; Bulkley, *supra* note 46, at 655-64; Graham, *supra* note 44, at 62-76, 91-93; Mylniec & Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115 (1985); Skoler, *supra* note 39, at 10-14, 18-22, 24-27; Thompson, *The Use of Modern Technology to Present Evidence in Child Sex Abuse Prosecutions: A Sixth Amendment Analysis and Perspective*, 18 U. WEST L.A. L. REV. 1 (1987); *Symposium on Family and Children*, 3 UTAH L. REV. 439 (1986) (including Note, *Videotaping the Testimony of an Abused Child: Necessary Protection for the Child or Unwarranted Compromise of the Defendant's Constitutional Rights?*, *supra* note 86, at 461); Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809 (1987); Comment, *Children's Testimony in Sexual Abuse Cases: Ohio's Proposed Legislation*, 19 AKRON L. REV. 441 (1986); Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721 (1985); Note, *Videotaped Testimony in Child Sexual Abuse Cases: United States v. Binder*, 23 WILLAMETTE L. REV. 193 (1987).

88. *See* the Kansas, Kentucky, Massachusetts, Minnesota, Ohio, Rhode Island, Texas, Utah, and Vermont statutes, cited *supra* note 87, and UNIF. R. EVID. 807(d), 13A U.L.A. 64, 65 (1986). Statutes providing only for closed-circuit television include ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1987); CONN. GEN. STAT. § 54-86g (1986); LA. REV. STAT. ANN. § 15:283 (West Supp. 1987); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1987); MISS. CODE ANN. § 13-1-405 (Supp. 1987); and N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney Supp. 1988). *See generally*, Comment, *Closed Circuit Television Testimony for Sexually Abused Children: The Right to Avoid Confrontation?*, 27 SANTA CLARA L. REV. 117 (1987).

89. Section 9-102 of the Courts and Judicial Proceedings article of the Maryland Annotated Code provides:

- (a)(1) In a case of abuse of a child as defined in § 5-901 of the Family Law article or article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
  - (i) The testimony is taken during the proceeding; and
  - (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
- (2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.
- (3) The operators of the closed circuit television shall make every effort to be unobtrusive.
- (b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:
  - (i) The prosecuting attorney;
  - (ii) The attorney for the defendant;
  - (iii) The operators of the closed circuit television equipment; and

kind from the 1988 Act, because section 9-102 does not address the admissibility of the child's pretrial statement.

Videotaped *ex parte* statements are subject to several criticisms. First, the videotaped statement is unlikely to be the child's first statement regarding the abuse and may not be the most reliable. Second, videotaping equipment and expertise may be unavailable in many areas. Third, although proponents of a videotaping requirement argue that videotaping will provide a better record that will disclose, for example, improper questioning of the child by an interviewer, videotaping will not preclude "rehearsal" prior to "show time."

Statutes providing for the admissibility of videotaped testimony, such as deposition testimony, are generally passed with the apparent objective of saving the child victim from being traumatized again by examination at trial. If the child is available to testify at trial, however, denial of the defendant's right to cross-examine the child at trial — even though the defense had the opportunity to cross-examine at deposition — would likely violate the confrontation clause. If the child is unavailable to testify at trial, a restriction on admissibility of the child's out-of-court statements such that only the child's videotaped testimony is admissible would be far stricter than the Constitution requires.

## V. MARYLAND'S NEW EXCEPTION

In its 1988 session, the Maryland General Assembly adopted a hearsay exception for certain reliable out-of-court statements of child abuse victims, to be codified as section 9-103.1 of the Courts and Judicial Pro-

- 
- (iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.
  - (2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.
  - (3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.
  - (c) The provisions of this section do not apply if the defendant is an attorney pro se.
  - (d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1987). See *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987) (upholding statute as constitutional, but remanding one case because record did not support finding that victim's testifying in open court would "result in the child suffering serious emotional distress such that the child cannot reasonably communicate"). Cf. *Kentucky v. Stincer*, 107 S.Ct. 2658 (1987) (accused's confrontation right was not violated by state's barring him, but not his counsel, from pretrial hearing on whether child sexual abuse victims were competent to testify at trial). See generally *McLAIN*, *supra* note 13, § 803(26).1; *Cleveland, Closed Circuit Television for Victims of Child Abuse*, 16 U. BALT. L. FORUM 18 (Spring 1986).

ceedings article of the Maryland Annotated Code.<sup>90</sup> This new exception is not restricted to videotaped statements<sup>91</sup> and, like the Washington state statute,<sup>92</sup> applies even when the child is available to testify. The 1988 Act has many good features and is a positive step.

The 1988 Act is, however, underinclusive. The statute exhibits a conservative legislative approach both to the kinds of proceedings to which the exception applies and to the types of professions in which a witness who testifies to a child's out-of-court statement must be engaged. Finally, the hearsay exception does not apply when the child is incompetent to testify.

This section of this article will review the statute's provisions regarding (1) the types of proceedings to which it applies; (2) its restriction to statements of child victims under the age of twelve; (3) its definition of the term "statement;" (4) its requirement that the statement be offered to prove the truth of the matter asserted therein; (5) the types of persons to whom the statement must have been made; (6) the fact that the statement must not be admissible under any other hearsay exception; (7) the requirement of corroborative evidence; (8) the requirement that the statement must be reliable; (9) the statement's admissibility if the child is available or unavailable to testify at trial; (10) notice and discovery; and (11) the fact that the statute does not limit admissibility under other rules of evidence.

#### A. *Types of Proceedings*

The new exception will be available only in a "criminal proceeding" and only for a statement "concerning an alleged offense against the child [who made the statement] of child abuse, as defined under article 27, § 35A of the Code."<sup>93</sup> Thus, the hearsay statement will be inadmissible with regard to any other charged crime, such as a sexual offense under article 27, section 464B or section 464C of the Maryland Annotated Code<sup>94</sup> or a crime of violence as defined in article 27, section 643B of the Maryland Annotated Code.<sup>95</sup>

This restriction may discourage prosecutors from seeking indictments under these other provisions in addition to section 35A when an indictment under that section is available and the prosecution intends to offer a statement under the new exception.<sup>96</sup> There is no self-evident rea-

---

90. S. 66, 1988 Md. Laws 548, and H.D. 1018, 1988 Md. Laws 549 (as amended).

91. See *supra* notes 86-87 and accompanying text, and text following note 89.

92. See *supra* note 69.

93. S. 66 § 9-103.1(b)(1). Article 27, section 35A(a)(2) of the Maryland Annotated Code defines the term "abuse" for purposes of the crime of causing abuse to a child under the age of eighteen. MD. ANN. CODE art. 27, § 35A(a)(2) (1987).

94. MD. ANN. CODE art. 27, §§ 464B, 464C (1987).

95. MD. ANN. CODE art. 27, § 643B(a) (1987). Senate Bill 66, in the form in which it passed the Senate, extended to both section 35A crimes and section 643B crimes. The Senate acceded to the House position in conference.

96. A trial court might find that a limiting instruction would be insufficient to protect

son to exclude prosecutions under the other sections. Apparently the legislators believed that all child abuse cases can be prosecuted under section 35A.

The hearsay statement also will be inadmissible in noncriminal proceedings, such as child custody suits, civil suits for damages resulting from child abuse, and juvenile proceedings.<sup>97</sup> Although several other states restrict their comparable hearsay exceptions to criminal proceedings, many do not.<sup>98</sup> Even Maryland's own statute providing for a child's testimony by closed-circuit television applies to custody and visitation proceedings in which child abuse is alleged.<sup>99</sup> The new hearsay exception should be at least as broad.<sup>100</sup> The need for the evidence is strong in custody and visitation proceedings, because these proceedings concern the safety of the child. For the same reason, the exception also should be available in appropriate juvenile proceedings.

### *B. Restriction to Child Victims Under Twelve*

The new exception under the 1988 Act applies to statements made by child victims under the age of twelve. Thus, the child must have been eleven years old or younger at the time he made the statement. This is a reasonable line to draw,<sup>101</sup> because children in this age range are more susceptible to an inability to remember or understand the abuse and thus are more likely to be declared incompetent to testify at trial.<sup>102</sup>

It is also reasonable to restrict the declarants to child victims, as opposed to all child witnesses. The need for the evidence, one of the *Ohio*

---

against the jury's use of the statement in its deliberations as to the non-section 35A crime and that separate trials would be required. See generally MCLAIN, *supra* note 13, § 105.1.

97. Juvenile proceedings generally are not considered criminal proceedings. Adjudications of delinquency are not criminal convictions. MD. CTS. & JUD. PROC. CODE ANN. § 3-824(a)(1) (Supp. 1987).

98. See *supra* note 64.

99. See *supra* note 89.

100. Like the closed-circuit television statute, Senate Bill 66, in the form in which it passed the Senate, would have extended to cases of child abuse as defined in section 5-701 of the Family Law article of the Maryland Annotated Code. Section 5-901 of the Family Law article of the Maryland Annotated Code defines physical and sexual abuse, for purposes of that article, with regard to denial of custody or visitation under section 9-101. MD. FAM. LAW CODE ANN. § 5-901 (Supp. 1987). In conference, the Senate acceded to the House position.

101. Of the statutes cited *supra* note 64, the Illinois (criminal), Oklahoma, Rhode Island, and Texas statutes apply to children under thirteen years of age (twelve years or younger); the California, Mississippi, Missouri, and Utah statutes set an age limit of under twelve; Florida and Vermont, under eleven (Florida provides for a "physical, mental, emotional or developmental age of 11 or less"); Alaska, Arizona, Arkansas, Indiana, Minnesota, Nevada, Oklahoma, South Dakota, and Washington, under ten (under Minnesota law, the child may be over ten if mentally impaired); Maine, under fourteen; the Illinois civil statute, under eighteen; and the applicable age limit under the Colorado statute varies with the offense charged. See also Skoler, *supra* note 39, at 45-46 (suggesting age limit of under ten or eleven).

102. See *supra* note 37 and accompanying text.

v. *Roberts* criteria,<sup>103</sup> is most compelling with respect to the victim's statement. If other children have made out-of-court statements exculpating the defendant, they may testify to their knowledge at trial. If they change their testimony at trial, they may be impeached by their prior statements; or, if they do not testify at trial, the court may consider their statements in its hearing on the trustworthiness of an out-of-court statement by the child victim.

### C. *Definition of Statement*

The new exception defines the term "statement" as including three categories, all of which fall under the traditional definition of the term "statement" for hearsay purposes. First, the statement may be an oral assertion,<sup>104</sup> such as the child's oral statement to his teacher, "Daddy hurt me." Second, the statement may be a written verbal assertion,<sup>105</sup> such as the child's handwritten note to the same effect. Third, the statement may be nonverbal conduct if such conduct is intended as an assertion, which conduct includes sounds, gestures, demonstrations, drawings, or similar actions.<sup>106</sup> For example, nodding one's head affirmatively or negatively — or pointing — in response to a question is such conduct.<sup>107</sup> The statute would apply to evidence that the child, when asked where he had been hurt, had pointed to that particular part of his body. Similarly, when a child who is asked to show with dolls how Daddy hurt her responds by manipulating the dolls,<sup>108</sup> that action is a statement.

The statute, however, will never apply to nonverbal nonassertive conduct,<sup>109</sup> that is, conduct which the actor does not engage in as a substitute for words. It would not apply, for example, to evidence that a witness saw the victim running from the defendant's house, crying.

### D. *Statement Must Be Offered to Prove the Truth of the Matter Asserted*

The 1988 Act makes clear that it will apply only to a statement offered to prove the truth of the matter asserted in that statement. Like

---

103. See *supra* notes 45-46 and accompanying text.

104. S. 66 § 9-103.1(a)(1).

105. *Id.*

106. *Id.* § 9-103.1(a)(2).

107. See McLAIN, *supra* note 13, at § 801.3.

108. See, e.g., *State v. Bellotti*, 383 N.W.2d 308, 310 (Minn. Ct. App. 1986).

109. The statute differs in this way from Maryland common law, under which, in the rare instance in which nonverbal nonassertive conduct is offered as an implied assertion on the part of the actor, such conduct is considered a statement for hearsay purposes. See McLAIN, *supra* note 13, § 801.4. Instead, the statute follows the model of FED. R. EVID. 801 on this point. See McLAIN, *supra* note 13, § 801.13 at 286-87. FED. R. EVID. 801(a) provides: "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

other hearsay exceptions, the 1988 Act does not apply to statements which are offered for nonhearsay purposes.

Under certain circumstances, a child victim's out-of-court statement is admissible for nonhearsay purposes. For example, if the child testifies at trial, her testimony may be impeached by proof of her prior inconsistent statement.<sup>110</sup> That out-of-court statement would be admissible only to discredit the child's trial testimony, not as substantive proof of the truth of the fact asserted out of court. Thus, if the victim testifies at trial that her abuser had brown eyes (as does the defendant), the defense may impeach her testimony by asking her about her pretrial statement that the abuser had blue eyes. As long as the defense is not offering the pretrial statement to prove that the abuser in fact had blue eyes, the 1988 Act does not apply.

Similarly, if the child's testimony has been impeached by proof of her prior inconsistent statement, the prosecution may rehabilitate her credibility by proof of her prior consistent statement.<sup>111</sup> Thus, in the above example, on redirect examination the prosecutor could ask the child about another pretrial statement, made before the "blue eyes" statement, that her abuser had brown eyes. Again, the prior consistent statement would be admissible for nonhearsay purposes rather than for the purpose of proving that the abuser in fact had brown eyes. Compliance with the 1988 Act would not be necessary.

*E. Statement Must Have Been Made to a Physician, Psychologist, Social Worker, or Teacher*

The hearsay exception provided by the 1988 Act is available only if the child's out-of-court statement was made to, and is testified to by, a teacher or a licensed physician, psychologist, or social worker.<sup>112</sup> That individual also must have been acting in the course of his profession when the child made the statement.<sup>113</sup>

---

110. See generally McLAIN, *supra* note 13, § 613.1. Even if the child does not testify at trial, but the trial court admits her out-of-court statement under the 1988 Act or another hearsay exception, that evidence may be impeached (and rehabilitated) just as if she had testified in person at trial. See *id.* § 806.1.

111. See generally *id.* § 613.2.

112. Section 9-103.1(b)(2) of the 1988 Act provides:

- (i) An out of court statement may be admissible under this section only if the statement was made to and is offered by:
  - 1. A licensed physician, as defined under § 14-101 of the Health Occupations article;
  - 2. A licensed psychologist, as defined under § 16-101 of the Health Occupations article;
  - 3. A licensed social worker, as defined under § 18-101 of the Health Occupations article; or
  - 4. A teacher; and
- (ii) The individual described under item (i) of this paragraph was acting in the course of the individual's profession when the statement was made.

113. *Id.*

Thus, the 1988 Act — unlike most other states' similar statutes<sup>114</sup> — very strictly limits the prosecution's options. A spontaneous statement made by a child to his parent or friend, for example, will not be admissible. If the child's first report of the alleged abuse is to someone other than a person in one of the four listed professions, then in order for the prosecution to invoke the hearsay exception, the child must be taken to see a physician, psychologist, or social worker. If in the presence of one of these persons the child again complains of abuse, the prosecution may attempt to offer that person as a witness at trial for the purpose of tefifying to the child's statement made in that person's presence.

The 1988 Act incorporates by reference specific definitions of the terms "licensed physician," "psychologist," and "social worker."<sup>115</sup> The statute provides no definition of the term "teacher." This category of individuals also is the only one of the statute's four categories which omits the restrictive adjective, "licensed." Apparently, then, this category includes both licensed and unlicensed teachers employed in both public and private schools. It probably also should be read to include a teacher's assistant, whom the child would think of as a teacher, a religious education teacher,<sup>116</sup> and a piano teacher who gives lessons in his own or the child's home.

*F. Statement Must Not Be Admissible Under Any Other Hearsay Exception*

The 1988 Act provides for admissibility only if the statement "is not admissible under any other hearsay exception."<sup>117</sup> Presumably, the court must so find — at least preliminarily — in its hearing on the admissibility of the statement conducted outside the presence of the jury.<sup>118</sup> If the court cannot so find, the hearing need not be continued. Of course, a pretrial finding of inadmissibility under other hearsay exceptions may be reversed at trial, if appropriate.

---

114. See *supra* note 64 for restrictions in some other states.

115. See *supra* note 112. These three categories were included in the House bill. Senate Bill 66, in the form in which it passed the Senate, did not limit the categories of persons to whom an admissible statement could have been made. The Senate bill would have given the prosecution the opportunity to demonstrate that a particular statement, such as the statement in *Harnish v. State*, 9 Md. App. 546, 266 A.2d 364 (1970) (discussed *supra* notes 31-32 and accompanying text), was reliable under all the circumstances.

116. The requirement that the teacher be acting in the course of his "profession" could be read, however, to exclude nonprofessional teachers. This requirement, however, was included in the House bill and thus preceded the insertion of the fourth category, "a teacher," in conference. The legislators' motivation for including this requirement appears to have been to close a perceived loophole that otherwise would have been available if the child's parent or friend happened to be a physician, psychologist, or social worker.

117. S. 66 § 9-103.1(c)(2)(ii).

118. See *infra* note 126 and accompanying text.



### G. Requirement of Corroborative Evidence

The 1988 Act conditions admissibility of an out-of-court statement that is otherwise qualified under that statute on the existence of "corroborative evidence."<sup>119</sup> The statute does not define that phrase.<sup>120</sup> Other states' statutes which condition admissibility on corroborative evidence<sup>121</sup> generally require corroborative evidence "of the [alleged abusive] act."<sup>122</sup> Thus, an out-of-court statement such as "Daddy hurt me" will be corroborated sufficiently by evidence of the harm, and corroboration of the alleged abuser's identity would not be required.

The Maryland General Assembly's omission from the 1988 Act of a definition of, or any restrictive phrase modifying, the phrase "corroborative evidence" permits a court to construe the provision broadly so as to require corroborative evidence of both the alleged abusive act and the alleged abuser's identity. At the other extreme, the absence of a definition arguably leaves a court with an illusory prerequisite to admissibility of the out-of-court statement, because a court may construe the provision so as not to require corroborative evidence specifically of either the alleged abusive act or the alleged abuser's identity.

### H. Statement Must Be Reliable

The 1988 Act permits the admission of reliable statements only and establishes several safeguards to prevent the admission of unreliable statements. Using the language of *Ohio v. Roberts*,<sup>123</sup> the statute provides that "[a]n out of court statement may be admissible under this section only if the statement possesses particularized guarantees of trustworthiness."<sup>124</sup> This requirement must be met regardless of whether the child testifies at trial.<sup>125</sup>

In making its determination as to admissibility, the trial court must conduct a hearing outside the presence of the jury.<sup>126</sup> This will ensure that the jury not hear of and be prejudiced by a statement that the trial

---

119. S. 66 § 9-103.1(c)(2)(iii).

120. The Senate bill had required "corroborative evidence of the alleged offense;" the House bill did not employ the prepositional phrase, and in conference the Senate acceded to the House position.

121. See *supra* notes 75-80 and accompanying text.

122. See, e.g., the Colorado, Indiana, Oklahoma, South Dakota, and Washington statutes, cited *supra* note 64. The Florida and Mississippi statutes, *supra* note 64, require corroborative evidence "of the abuse or the offense;" the Utah statute, *supra* note 64, requires corroborative evidence "of the abuse." The Alaska and Arizona statutes, *supra* note 64, require evidence corroborating "the statement."

123. 448 U.S. 56 (1980). See *supra* notes 45-46 and accompanying text.

124. S. 66 § 9-103.1(b)(3).

125. In this respect the Maryland statute follows the Washington statute, *supra* note 66, rather than the ABA model statute, *supra* note 65. The ABA model statute would require a finding of reliability only if the child were unavailable to testify at trial. Imposing this requirement regardless of the child's availability is desirable, because it protects against the admission of unreliable statements as substantive proof.

126. S. 66 § 9-103.1(e) provides:

court finds is not sufficiently reliable to be admitted.<sup>127</sup> Although the 1988 Act gives the courts flexibility by permitting them to conduct the hearing during trial, practical considerations usually will dictate that such a hearing be held before trial.

In making its determination as to reliability, the trial court shall consider, but is not limited to, the following factors:

- (1) The child's personal knowledge of the event;
- (2) The certainty that the statement was made;
- (3) Any apparent motive to fabricate or exhibit partiality by the child, including interest, bias, corruption, or coercion;
- (4) Whether the statement was spontaneous or directly responsive to questions;
- (5) The timing of the statement;
- (6) Whether the child's young age makes it unlikely that the child fabricated the statement that represents a graphic, detailed account beyond the child's knowledge and experience and the appropriateness of the terminology to the child's age;
- (7) The nature and duration of the abuse;
- (8) The inner consistency and coherence of the statement;
- (9) Whether the child was suffering pain or distress when making the statement;
- (10) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;
- (11) Whether the statement is suggestive due to the use of leading questions; and
- (12) The credibility of the person testifying about the statement.<sup>128</sup>

Because this list of factors is expressly not exhaustive, the trial court also may consider other relevant circumstances.

The specific considerations listed in the 1988 Act are those generally found in pre-existing models and other states' statutes.<sup>129</sup> Such a listing

The court, in determining whether a statement is admissible under this section, in a hearing outside the presence of the jury, shall:

- (1) Make a finding on the record as to the specific guarantees of trustworthiness that are present in the statement; and
- (2) Determine the admissibility of the statement.

127. Some other states' statutes, such as Washington's, which has been upheld as constitutional, contain similar provisions. *See supra* notes 49, 81 and accompanying text.

128. S. 66 § 9-103.1(d). If the child's statement was not his first statement reporting the abuse, some inquiry into the circumstances surrounding the later statement would be appropriate.

129. *See supra* note 74 and accompanying text. Of the criteria listed in note 74, Maryland's statute contains the equivalent of all but items (b), (e), (f), (i), (l), (o), (q), and (r).

A few minor changes were made to the Maryland bill in conference. For example, in the sixth factor, the phrase "fabricated the statement" was substituted in place of the phrase "fabricated a statement." The twelfth factor originally was in-

is not necessary to ensure constitutionality but should give the courts guidance in making detailed findings as to reliability.

The conference committee deleted from this list a factor included in the Senate bill, namely: "whether the statement was audiotaped or videotaped, if taping would have been reasonably feasible."<sup>130</sup> This deletion warrants the inference that the absence of taping should not be considered a negative factor. Nothing indicates that the legislators intended to discourage taping, however, and taping would be particularly helpful in establishing certainty that the statement was made.

The 1988 Act requires the trial judge to "make a finding on the record as to the specific guarantees of trustworthiness that are present in the statement"<sup>131</sup> and to rule on the statement's admissibility.<sup>132</sup> The detailed finding on the record will facilitate review on appeal.<sup>133</sup>

Only if the judge finds the statement to have sufficient particularized guarantees of trustworthiness may the prosecution prove the statement at trial. Of course, the defense then may cross-examine the witness who testifies to the statement and may impeach the statement in any proper way, such as by proving prior inconsistent statements made by the child.<sup>134</sup> In closing argument, defense counsel may point out to the jury any weaknesses in the statement and urge the jury to reject it. Defense counsel also may request the court to instruct the jury to consider carefully all facts relevant to the credibility of the statement.<sup>135</sup>

If the jury returns a guilty verdict, the defendant may appeal. The appellate court, on request, will review the trial court's decision as to the reliability of the statement and will reverse if the record is insufficient to support a finding of reliability.<sup>136</sup>

These safeguards against admitting an unreliable statement adequately protect the defendant. The statute's additional limitation on the categories of persons to whom the statement must have been made<sup>137</sup> is unnecessary and will compel the exclusion of other reliable — perhaps even more reliable<sup>138</sup> — statements.

---

cluded under the second factor. The Senate acceded in conference to the use of the phrase, "is suggestive due to" in the eleventh factor in place of the clearer phrase, "was suggested by."

130. See S. 66 § 9-103.1(d)(12) (pre-amendment).

131. S. 66 § 9-103.1(e)(1).

132. *Id.* § 9-103.1(e)(2).

133. The Florida, Mississippi, and Vermont statutes, cited *supra* note 64, contain like provisions. The federal courts have established such a requirement with regard to the trial court's ruling as to whether to permit, under FED. R. EVID. 609(a)(1), impeachment of an accused by certain types of prior convictions. See MCLAIN, *supra* note 13, § 609.6.

134. See *supra* notes 83-84 and accompanying text.

135. See *supra* note 85 and accompanying text.

136. See *supra* notes 52-63 and accompanying text.

137. See *supra* notes 112-116 and accompanying text.

138. See *supra* notes 37-38 and accompanying text.

*I. Statement May Be Admissible If Child Either Testifies at Trial or Is Unavailable to Testify for Certain Reasons*

Under the 1988 Act an out-of-court statement found reliable by the trial judge is admissible either if the child testifies at trial or if she is unavailable to testify for certain reasons. First, the statement is admissible "if the child is subject to cross-examination about the out of court statement and testifies: (i) at the criminal proceeding; or (ii) by closed-circuit television."<sup>139</sup> This is a key provision, because it permits qualifying prior statements to be admitted as substantive evidence even if the child testifies at trial.<sup>140</sup>

Second, the statement is admissible if the child is unavailable to testify due to one of four causes:

1. Death;
2. Absence from the jurisdiction, for good cause shown, and the state has been unable to procure the child's presence by subpoena or other reasonable means;
3. Serious physical disability; or
4. Inability to communicate about the alleged offense due to serious emotional distress.<sup>141</sup>

The first three grounds for establishing unavailability are also set forth in the Maryland Rules regarding the use of depositions<sup>142</sup> and are noncontroversial. The fourth ground is similar to the Maryland statutory prerequisite for allowing a child to testify over closed-circuit television,<sup>143</sup> but for purposes of the 1988 Act the child's inability to communicate apparently would be so extreme as to preclude even televised testimony. A showing of this type of unavailability, therefore, would have to be at least as specific and convincing as that required in closed circuit television cases.<sup>144</sup>

Without explanation, the 1988 Act omits other bases for unavaila-

---

139. S. 66 § 9-103.1(c)(1). With regard to Maryland's closed-circuit television statute, see *supra* note 89 and accompanying text. The Court of Appeals of Maryland has held that a finding that permits a child to testify over closed-circuit television because of "serious emotional distress" as a condition under which "the child cannot reasonably communicate" is "tantamount to a finding of unavailability in the [Ohio v.] *Roberts* sense. . . ." *Wildermuth v. State*, 310 Md. 496, 519, 530 A.2d 275, 286 (1987).

140. See *supra* notes 66, 69-72 and accompanying text.

141. S. 66 § 9-103.1(c)(2)(i).

142. Md. R. 2-419(a)(3), 4-261(h)(1).

143. See *supra* note 139.

144. See *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987) (prosecution's showing was insufficient to support finding that child would suffer such serious emotional distress, from testifying in open court, as to justify use of closed-circuit television. "[O]rdinarily the judge should observe and question the child. Additionally, testimony about the likely impact on the particular child must be specific and must show much more than mere nervousness or excitement or some reluctance to testify." 310 Md. at 524, 530 A.2d at 289) (footnote omitted). See also *supra* note 46 and the Florida statute, *supra* note 64.

bility, recognized elsewhere, including the child's complete failure of memory; persistent refusal to testify, despite judicial requests; mental disability; privilege; and incompetency.<sup>145</sup> Indeed, the statute is unique in its exclusion of incompetency as a basis for unavailability.<sup>146</sup> An incompetent witness is one who either does not understand the duty to tell the truth in court or who displays insufficient cognitive ability to testify meaningfully at trial.<sup>147</sup> Because it is the trial court's ruling that a child is incompetent to testify which so frequently results in the dropping of prosecutions under current law,<sup>148</sup> the exclusion of incompetency as a basis for unavailability will undercut severely the usefulness of the new hearsay exception.

Although the General Assembly had before it several bills which would provide that all children who were victims of child abuse or of particular sexual offenses were competent to testify,<sup>149</sup> those bills were defeated in the House Judiciary Committee.<sup>150</sup> If any of such bills had

145. See *supra* note 65 (ABA model statute). See also FED. R. EVID. 804(a)(1)-(4) (including ruling of exemption on ground of privilege; refusal to testify despite an order of the court; testimony to lack of memory; and physical or mental illness); MD. R. 4-261(h)(1) (regarding use of depositions in criminal cases, when, *inter alia*, witness is mentally incapacitated or "is present but refuses to testify and cannot be compelled to testify").

146. See *supra* notes 40, 48, 66 and 72.

147. See McLAIN, *supra* note 13, §§ 601.1, 601.3. "Cognitive ability" encompasses memory, intelligence, ability to observe, and ability to relate. *Id.*

148. See *supra* note 1 and accompanying text. See also McLAIN, *supra* note 13, § 601.3.

149. See generally Bulkley, *Introduction: Background and Overview of Child Sexual Abuse: Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5, 12-13 (1985); Eatman & Bulkley, *supra* note 65, at 37-46 (rebuttable presumption of competency); Comment, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245 (1985); Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721, 723-26 (1985).

Proponents of across-the-board competency point out that Rule 601 of the Federal Rules of Evidence (FRE) provides that "Every person is competent to be a witness except as otherwise provided in these rules." The federal rules specifically address only the competence of the sitting judge and the jurors hearing a case. FED. R. EVID. 605-606. But FRE 603 requires that a witness swear or otherwise affirm that he or she will testify truthfully, and the federal courts will rely on that rule to exclude the testimony of a person who will not do so. FRE 602 requires that a party offering a witness' testimony introduce evidence sufficient to support a finding that the witness has first-hand knowledge of the facts to which he or she will testify. McLAIN, *supra* note 13, § 602.2 at 24. The federal courts may also use FRE 401 and 403 to exclude, as irrelevant or unduly prejudicial and a waste of time, the evidence of a person who has insufficient capacity to observe, remember, or communicate to make his or her testimony probative. See *id.* §§ 401.5, 403.9. Thus, FRE 601 does not deprive the trial court of all discretion to exclude testimony of incompetent witnesses. This is a wise result, and such a safety valve is desirable not only for reasons of judicial economy, but also to ensure the litigants due process. Cf. ILL. REV. STAT. ch. 37, § 704-6(4)(d) (Supp. 1987) (establishing rebuttable presumption of competency).

150. Senate Bills 20 and 21 were withdrawn by the Senate Judicial Proceedings Committee. Senate Bill 280, which passed the Senate by a 45-to-1 vote but which received an unfavorable report in the House Judiciary Committee, would have amended sec-

passed, the exclusion of incompetency as a basis for unavailability from the 1988 Act would have been understandable. In the long run, however, passage of such a bill would not have been helpful, because a conclusive presumption of competency would violate due process. A provision that a child witness, like an adult, enjoys a rebuttable presumption of competency<sup>151</sup> would be constitutional and might encourage courts to allow more children to testify.

The best alternative, however, would be the addition of incompetency as a basis for unavailability under the 1988 Act. If the child is incompetent, he cannot testify, and there is great need for his out-of-court statement if that statement is reliable.<sup>152</sup> If the prosecution can show that the statement is trustworthy, and if the trial judge articulates his reasons on the record for so finding,<sup>153</sup> then the statement should be admitted. The 1988 Act should be amended to permit this result.

### *J. Notice and Discovery*

The 1988 Act provides that if the prosecution intends to offer a statement under the statute, it must give advance notice to the defense as follows:

(3) In order to provide the defendant with an opportunity to prepare a response to the statement, the prosecutor shall give to the defendant and the defendant's attorney, at least 20 days before the criminal proceeding in which the statement is to be offered into evidence, notice of:

- (i) the prosecutor's intention to introduce the statement; and
- (ii) the content of the statement.<sup>154</sup>

---

tion 9-101 of the Courts and Judicial Proceedings article of the Maryland Annotated Code by adding the following provision:

- (b)(1) Notwithstanding any other provision of law or rule of evidence, a child victim under the age of 12 is a competent witness and shall be allowed to testify without prior qualification in the following cases:
- (i) Child abuse, as defined in § 5-701 of the family law article or article 27, § 35A of the Code;
  - (ii) A sexual offense, as defined in article 27, § 464, § 464A, § 464B, or 464C of the Code; or
  - (iii) Rape, as defined in article 27, § 462 or § 463 of the Code.
- (2) The trier of fact shall determine the weight and credibility to be given to the child victim's testimony.

Its companion bill, House Bill 378, received an unfavorable report in the House Judiciary Committee.

151. The court still could exclude testimony of a child victim who was shown to be incompetent. *See* ILL. REV. STAT. ch. 37, § 704-6(4)(d) (Supp. 1987) (providing in part, "There shall be a rebuttable presumption that a minor is competent to testify in abuse or neglect proceedings.").

152. *See supra* note 72.

153. The 1988 Act requires such a finding on the record in any event. *See* S. 66 § 9-103.1(e)(1).

154. *Id.* § 9-103.1(c)(3).

This provision is similar to that of several other states' statutes which provide for notice, except that some of those statutes only require notice sufficiently in advance of the proceedings to give the defendant a "fair opportunity to meet" the statement, and others require ten days' notice.<sup>155</sup> Twenty days' notice, the apparently reasonable amount of time chosen by the Maryland legislature, is presumptively fair.<sup>156</sup>

The statutes of some other states only require notice of the intention to offer the statement.<sup>157</sup> Other states' statutes, like Maryland's, extend the notice requirement to the "content" or the "particulars" of the statement.<sup>158</sup> If the statement was written, audiotaped, or videotaped, the best course of action would be for the state to provide the defense with a copy of the statement.

A novel provision in the 1988 Act gives the defendant the right to depose the witness by whom the state intends to prove the child's statement.<sup>159</sup> Specifically, the statute provides that "[t]he defendant shall have the right to take the deposition of a witness *who will testify under this section*. . . ."<sup>160</sup> This language could be interpreted to mean that the witness cannot be deposed until the trial judge has ruled that the witness will be permitted to give substantive testimony at trial. The apparent purpose of allowing the deposition, however, is to aid the defense in pre-

155. See *supra* note 82 and accompanying text.

156. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971).

157. The California and Nevada statutes, *supra* note 64, so provide. Nevada's statute requires notice only if the child is unable or unavailable to testify at trial.

158. The Indiana statute, *supra* note 64, requires notice of the statement's "content." The Arizona, Arkansas, Colorado, Minnesota, Missouri, and Oklahoma statutes, *supra* note 64, require notice of the "particulars" of the statement. The Utah statute, *supra* note 64, requires that the statement be made available to the defendant.

The South Dakota statute, *supra* note 64, requires disclosure of the "particulars of [the statement], including the name and address of the declarant." The Texas statutes, *supra* note 64, require disclosure of the "name of the witness through whom [the proponent] intends to offer the statement" and a "written summary of the statement."

The Mississippi and Florida notice provisions, *supra* note 64, which are nearly identical to each other, are the most liberal. The Mississippi statute provides:

The notice shall include a written statement of the content of the child's statement, the time the statement was made, the circumstances surrounding the statement which indicate its reliability and such other particulars as necessary to provide full disclosure of the statement.

MISS. CODE ANN. § 13-1-403(2) (Supp. 1987).

159. S. 66 § 9-103.1(c)(4) provides:

(i) The defendant shall have the right to take the deposition of a witness who will testify under this section;

(ii) Unless the state and the defendant agree, or the court orders otherwise, the defendant shall file a notice of deposition at least 5 days before the date of the deposition; and

(iii) Except where inconsistent with this paragraph, the provisions of Maryland Rule 4-261 shall apply to a deposition taken under this paragraph.

By implication, the state also must provide the defense with the name and address of the prosecution's witness.

160. *Id.* § 9-103.1(c)(4)(i) (emphasis supplied).

paring to attack the admissibility of the child's out-of-court statement. Therefore, the deposition most likely is intended to precede the trial court's hearing on that preliminary question, at which the witness would also testify.

*K. No Limitation on Other Rules of Evidence*

Finally, the 1988 Act explicitly states that it "may not be construed to limit the admissibility of a statement under any other applicable hearsay exception or rule of evidence."<sup>161</sup> Thus, the stringent requirements of the 1988 Act do not apply if a child's out-of-court statement is admissible either as nonhearsay<sup>162</sup> or as substantive proof under another hearsay exception.<sup>163</sup>

## VI. CONCLUSION

Many child abuse prosecutions in Maryland previously could not be pursued, because under the pre-1988 law the state was unable to present sufficient evidence of the perpetrator's identity without the live testimony at trial of the child victim. The Maryland General Assembly should be applauded for passing a bill that creates a hearsay exception for reliable out-of-court statements made by alleged child abuse victims to physicians, psychologists, social workers, and teachers. The legislature acted cautiously, however, and took only a hesitant step forward. As a result, Maryland has a hearsay exception which will be of some help when the child can testify at trial, but will be useless when the child is incompetent to testify. Thus, the state must continue to cope with the problem that when the child is found to be incompetent, the state must drop the prosecution entirely.

Hopefully, once the courts have had occasion to construe this new hearsay exception statute, the legislature will realize that the exception is more than fair to defendants. The legislature should extend the exception to other appropriate criminal and appropriate civil proceedings, should make it available when the child is incompetent to testify, and should permit its use regardless of the status of the person to whom the child made a reliable statement.

---

161. See ARK. R. EVID. 803(25)(A)(4) (1988); MO. ANN. STAT. § 491.075.4 (Vernon Supp. 1987).

162. See *supra* notes 110-11 and accompanying text.

163. See *supra* notes 21-36 and accompanying text.