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Lynn McLain

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

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# CHILDREN ARE LOSING MARYLAND'S "TENDER YEARS" WAR

Lynn McLain†

Often times, the child is the only witness. Yet age may make the child incompetent to testify in court . . . . "[W]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without."<sup>1</sup>

## I. INTRODUCTION

What seems like Maryland's version of the Hundred Years War continues to be fought in the Maryland General Assembly regarding the "tender years exception," a limited hearsay exception for statements made by children under twelve years old regarding physical or sexual abuse against them.<sup>2</sup> Maryland's statute is much more re-

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† Professor of Law, University of Baltimore School of Law; J.D., Duke University Law School, 1974; B.A., University of Pennsylvania, 1971. The author thanks Michael A.B. Turner for his intrepid research and editorial assistance, as well as Elizabeth Rhodes, Esquire for her comments on a draft of this Article. The author also thanks Ellen Mugmon of the Maryland Governor's Council on Child Abuse and Neglect for her many years of devotion to the cause of protecting and nurturing children, and for her working and sharing information with the author over the last decade. Many others, including Chief Judge Joseph Murphy, Senator Walter Baker, State's Attorney Robert L. Dean, Deputy State's Attorney Sue Schenning, Assistant State's Attorney Julie Drake, former Assistant State's Attorney Scott Shellenberger, and Dorothy Lennig, Esquire of the House of Ruth, are also thanked for all their efforts on behalf of abused children.

1. *Morgan v. Foretich*, 846 F.2d 941, 943 (4th Cir. 1988) (quoting FED. R. EVID. art. VIII advisory committee's note).
2. Maryland's tender years statute, MD. ANN. CODE art. 27, § 775 (Supp. 1997), amended by S. 688 (Md. 1998) (effective October 1, 1998), is reprinted in the Appendix to this Article. The amendments are clearly noted. Senate Bill 688 is also available in <<http://mlis.state.md.us/1998rs/billfile/HB0590.htm>> (visited April 20, 1998).

Section 775 establishes a limited tender years exception for certain out-of-court statements made by victims of alleged child abuse that have been screened by the trial judge and found to be sufficiently reliable to be admissible in evidence. Some prosecutors have complained that some trial judges will not admit even very reliable hearsay under Section 775. *See* Letter from Rob-

strictive than those of other states.<sup>3</sup> Yet, year after year, attempts to liberalize it have been defeated in the Maryland House of Delegates Judiciary Committee, leaving Maryland's children significantly less protected from physical and sexual abuse than children living in other states.

Prior to the adoption of the current tender years statute, in *Deloso v. State*,<sup>4</sup> a five-year-old Maryland girl was repeatedly beaten.<sup>5</sup> Her father's conviction for child abuse was reversed on appeal because the trial judge admitted testimony that a young girl had told teachers and others that her father beat her and threw her against the wall.<sup>6</sup> If the child had run for help and was excited when she made the statement, it would have been admissible under the traditional hearsay exception for excited utterances.<sup>7</sup> However, the tradi-

ert L. Dean, State's Attorney for Montgomery County, to Sandra F. Haines, Reporter, Standing Committee on Rules of Practice and Procedure 1 (Nov. 17, 1997) (on file with author). If tender years hearsay is deemed essential to a prosecution, and the judge erroneously excludes it, the State has no recourse. See generally Md. Code Ann., Cts. & Jud. Proc. § 12-302 (1995) (denying a right to appeal of a final judgment unless expressly granted by law). Allowing interlocutory appeals by the State from adverse pretrial evidentiary rulings would do much to ameliorate this situation—at least if the trial judge rules (or is required to rule) before trial. See generally, e.g., N.C. GEN. STAT. § 15A-979(c) (1997); ORE. REV. STAT. 138.060(3) (1995).

3. See ALA. CODE § 15-25-32 (1995); ALASKA STAT. § 12.40.110 (Michie 1995); ARIZ. REV. STAT. ANN. § 13-1416 (West 1989); ARK. R. EVID. 803(25); CAL. EVID. CODE § 1228 (West 1995); COLO. R. EVID. § 13-25-129 (Supp. 1997); DEL. CODE ANN. tit. 11, § 3513(a) (1995); GA. CODE ANN. § 24-3-16 (1995); HAW. R. EVID. 804(b)(6); IDAHO CODE § 19-3024 (1997); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 1986 & Supp. 1997); IND. CODE ANN. § 35-37-4-6 (West Supp. 1994); IOWA CODE ANN. § 232.96 (West 1994); KAN. STAT. ANN. § 60-460(dd) (Supp. 1997); MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (1995); MASS. GEN. LAWS ANN. ch. 233, § 81 (West Supp. 1997); MICH. R. EVID. 803A; MINN. STAT. ANN. § 595.02 (West 1996); MISS. R. EVID. 803(25); MO. ANN. STAT. § 491.075 (West 1996); NEV. REV. STAT. § 51.385 (1996); N.H. REV. STAT. ANN. § 516:25-a (Supp. 1995); N.J. R. EVID. 803(27); N.Y. FAM. CT. ACT § 1046 (McKinney 1983); N.D. R. EVID. 803(24); OHIO R. EVID. 807; OKLA. STAT. ANN. tit. 12, § 2803.1 (West 1993 & Supp. 1998); 42 PA. CONS. STAT. ANN. § 5985.1 (West Supp. 1997); R.I. GEN. LAWS § 14-1-69 (1994); S.C. CODE ANN. § 19-1-180 (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995); TEX. CRIM. P. CODE ANN. § 38.072 (West Supp. 1998); UTAH CODE ANN. § 76-5-411 (1995); VT. R. EVID. 804a(a); VA. CODE ANN. § 63.1-248.13:2 (Michie 1995); WASH. REV. CODE ANN. § 9A.44.120 (West 1988 & Supp. 1998).
4. 37 Md. App. 101, 376 A.2d 873 (1977).
5. See *id.* at 102-03, 376 A.2d at 875.
6. See *id.* at 107, 376 A.2d at 877.
7. See generally MD. RULE 5-803(b)(2) (providing an excited utterance exception

tional common-law hearsay exceptions did not permit the trial judge to admit the statement, because the child's statement was quite casual.<sup>8</sup> Even if the judge found that the statement was extremely reliable, it would remain inadmissible under the common law.<sup>9</sup> Maryland's subsequently adopted tender years exception would permit a judge to admit this type of statement, if found reliable, but only if made to a teacher, a licensed physician, a licensed psychologist, or a licensed social worker.<sup>10</sup> A 1998 amendment, effective October 1, 1998, repeals the "licensed" requirement and extends the list of professionals to include nurses, principals, vice principals, and school counselors.<sup>11</sup>

Despite legislative efforts embodied in Section 775 of Article 27, Maryland's children continue to lack adequate protection. Under current law, for example, another act of injustice occurred in a case involving a five-year-old Maryland girl who contracted gonorrhea.<sup>12</sup> Her stepfather was tried and acquitted when the State was not permitted to prove that the child had described her stepfather having sexual intercourse with her.<sup>13</sup> The child made the statement to a police officer and not directly to a licensed physician, licensed psychologist, licensed social worker, or a teacher. Therefore, the statement could not be reviewed for reliability by the trial judge.<sup>14</sup> It was ruled inadmissible *per se* under Maryland's limited tender years exception.<sup>15</sup> If the same statement had been made to a teacher, licensed

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to the rule against hearsay).

8. *See Deloso*, 37 Md. App. at 107, 376 A.2d at 877.

9. *See id.*

10. *See* MD. ANN. CODE art. 27, § 775 (Supp. 1997) (amended 1998). Section 775, with amendments that become effective October 1, 1998, is reprinted in the Appendix to this Article.

11. *See* H.D. 590, sec. 1, § 775(b)(2)(i) (Md. 1988) (effective October 1, 1998), available in <<http://mlis.state.md.us/1998rs/billfile/HB0590.htm>> (visited April 20, 1998). Section 775, with amendments, is reprinted in the Appendix to this Article.

The term "school counselor" is defined as a "school counselor at a public or private preschool, elementary school, or secondary school." H.D. 590, sec. 1, § 775(b)(2)(i)(5).

12. *See* Jackie Powder, *Judge's Ban of Social Worker's Testimony in Child Abuse Case Upsets Investigators*, THE SUN (BALT.), August 9, 1992, at 6B.

13. *See id.*

14. *See id.* *See generally* § 775. The 1998 amendments, which extended this list and eliminated the "licensed" requirement, *see* H.D. 590, sec. 1, § 775(b)(2)(i), would not remedy this injustice. Section 775, with amendments, is reprinted in the Appendix to this Article.

15. *See* Powder, *supra* note 12, at 6B.

physician, psychologist, or social worker in a related civil proceeding for a protective order (or custody suit brought by the biological father), it would remain inadmissible under current Maryland law because the tender years exception applies only in criminal and juvenile cases.<sup>16</sup>

Repeated efforts to mainstream Maryland's tender years hearsay exception to parallel those of other states have been received with hostility bordering on hysteria. Excuses often cited for opposing mainstreaming include the following: (1) fears that many innocent people will be wrongly convicted of child abuse because "children lie," and (2) that wives will make false accusations against their children's fathers in an effort to gain the upper hand in divorce cases.<sup>17</sup> The hostility stems in part from the self-interests of both the Maryland State Teacher's Association (MSTA)—whose members do not want to be accused of child abuse—and the criminal defense bar—whose members do not want their clients to be convicted—as well as from simple gender bias against women.

The recurring arguments against mainstreaming Maryland's tender years exception are illogical. They are contemptuous of and degrading to women and children, and they are distrustful and disrespectful of both trial judges' ability to screen out unreliable hearsay and jurors' ability to assess the credibility of hearsay that is properly admitted into evidence.<sup>18</sup> The opponents of liberalizing Maryland's tender years statute have provided no support for their views, either under case law or with empirical data.

To the extent that these antagonistic views are based on reasonable fears of false accusations, they are clearly aimed at the wrong target. Rules of evidence cannot prevent false or erroneous accusations. Malicious accusations of child abuse, like malicious accusations of any criminal wrongdoing, are actionable as slander, libel, or malicious prosecution.<sup>19</sup>

This Article first discusses the rationale for the tender years hearsay exception<sup>20</sup> and the constitutional limits on admitting

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16. See § 775(b)(1); see also *supra* note 11 and accompanying text (noting that a 1998 amendment repealed the "licensed" requirement and added four more professionals to the list).

17. See *infra* Part V.A-C.

18. In the case of a bench trial, the judge's ability to decide the credibility of the hearsay is also questioned.

19. See MD. ANN. CODE art. 27, §§ 150-51, 435 (1996 & Supp. 1997); *Krashes v. White*, 275 Md. 549, 554, 341 A.2d 798, 801 (1975).

20. See *infra* notes 26-111 and accompanying text.

tender years hearsay.<sup>21</sup> Next, it sets forth the history of Maryland's tender years statute.<sup>22</sup> This Article then addresses each of the arguments that have been made over the years by opponents of liberalizing the statute<sup>23</sup> and compares Maryland's tender years statute to those of other states.<sup>24</sup> Finally, this Article recommends specific amendments to Maryland's tender years statute and proposes its incorporation into the *Maryland Rules of Evidence*.<sup>25</sup>

## II. THE NEED FOR A TENDER YEARS HEARSAY EXCEPTION

The vast majority of states have created tender years hearsay exceptions, either by statute or through specific rules of evidence.<sup>26</sup> Several public policy reasons support the recognition of the tender years exception: (1) child abuse— physical, sexual, and emotional— is a serious, widespread problem in the United States;<sup>27</sup> (2) young children are particularly helpless, and they are unable to extricate themselves from seriously abusive homes or other environments without adult assistance; (3) effective remedial action cannot be taken without identifying the abuser, who is usually known only to the child and, sometimes, to someone who colludes with or covers up for the abuser;<sup>28</sup> (4) for reasons explained by developmental psychology, very young children are often ruled incompetent to testify at trial, although they may have made reliable, concrete out-of-court statements at an earlier time;<sup>29</sup> (5) even if permitted to testify at trial, young children are unlikely to be able to testify to an earlier event with the degree of memory that an adult could, and they are easily confused by a deft cross-examination;<sup>30</sup> and (6) pre-existing,

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21. See *infra* notes 112-166 and accompanying text.

22. See *infra* notes 169-245 and accompanying text.

23. See *infra* notes 254-97 and accompanying text.

24. See *infra* notes 298-349 and accompanying text.

25. See *infra* notes 351-401, 402 and accompanying text.

26. See generally sources cited *supra* note 3.

27. See *Successful Suits Don't Always Improve States' Care of Abused Children*, THE SUN (BALT.), Mar. 17, 1996, at 18A. See generally BILLIE WRIGHT DZIECH & JUDGE CHARLES B. SCHUDSON, ON TRIAL, AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN (2d ed. 1991).

28. See, e.g., Mary Maushard, *More Charges Possible in Death of 9-Year-Old*, THE SUN (BALT.), July 13, 1997, at 2B (describing the household of a child abuse victim that was likely to have had one actual abuser and two colluding adults).

29. See 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES §§ 3.1-3.8 (3d ed. 1997).

30. See *id.* §§ 1.2, 1.3-1.7, 1.29. See generally *id.* §§ 6.1-6.22 (providing a comprehensive explanation of children as witnesses).

"firmly rooted" hearsay exceptions have been inadequate to permit the admission of all reliable out-of-court statements made by children.<sup>31</sup>

A. *Serious Child Abuse and Neglect are Widespread*

As the United States Supreme Court has repeatedly recognized, "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"<sup>32</sup> The states, however, are having serious difficulty protecting children.<sup>33</sup> As of March 1996, at least twenty-one states were under court supervision as a result of having failed to provide proper care for abused or neglected children.<sup>34</sup> Physical abuse and sexual abuse are both widespread. A news article from March 1996 reported: "Surveys by the U.S. Department of Health and Human Services show the annual number of abused or neglected children has more than doubled in the past decade, to 2.9 million from 1.4 million. The number seriously injured by abuse . . . has quadrupled, to 572,000 from 143,000."<sup>35</sup>

A federal advisory panel concluded, after a two-and-one-half-year study, that the "vast majority of [physically] abused and neglected children are under four years old."<sup>36</sup> At least two thousand children are killed by abuse and neglect each year in the United States, "outstripping deaths caused by accidental falls, choking on food, suffocation, drowning or residential fires."<sup>37</sup>

In late 1995, a Gallup poll asked parents to report on their own disciplinary acts of physical abuse and their knowledge of any sexual

31. See *infra* Part III.B.1.

32. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 756-58 (1982) (citations omitted)); accord *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (recognizing that "a state's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one").

33. See *Successful Suits Don't Always Improve States' Care of Abused Children*, THE SUN (BALT.), Mar. 17, 1996, at 18A.

34. See *id.*

35. *Id.*; see also Andrea J. Sedlak, Ph.D. & Diane D. Broadhurst, M.L.A., *Executive Summary of U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (1996)*. Even intentional starvation has occurred. See Cheryl Lu-Lien Tan, *Principal Recalls Bruises on Child*, THE SUN (BALT.), July 14, 1997, at 1B.

36. *Child Abuse Has Reached Crisis Proportions in U.S., Advisory Board Finds*, THE SUN (BALT.), Apr. 26, 1995, at 24A.

37. *Id.*

abuse inflicted upon their children.<sup>38</sup> Physical abuse was defined as including punching, kicking, throwing the child down, and hitting the child with a hard object somewhere other than on the buttocks.<sup>39</sup> This definition was limited so as to not include spanking, slapping, shouting, cursing, or threatening to send the child away.<sup>40</sup> Based on those results, the Gallup organization estimated that more than three million American children are physically abused annually.<sup>41</sup> Generally, more mothers than fathers reported physically abusing their children.<sup>42</sup> The Gallup poll also suggested that 1.3 million American children are sexually abused.<sup>43</sup>

In 1996, Maryland had 29,778 reported cases of child abuse.<sup>44</sup> Prince George's County accounted for 3,043 of those cases; of that number, 546 cases involved sexual abuse.<sup>45</sup> In Baltimore City, there were 8,441 reported cases of abuse, including 824 investigations of sexual abuse.<sup>46</sup>

Abuse of children occurs most often in the family home.<sup>47</sup> The facts of various Maryland appellate cases, for example, describe a range of abuse-at-home scenarios, including a three-and-one-half-year-old child's lacerated internal organs, extensive bruising, and internal bleeding.<sup>48</sup> Because child abuse is such an unpleasant topic,

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38. See 2 Surveys Find Grim News for Children, THE SUN (BALT.), Dec. 7, 1995, at 4A.

39. See *id.*

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.*

44. See REPORT OF MARYLAND'S CHILD PROTECTIVE SERVICES (1996) (report on file with author).

45. See *id.*

46. See *id.*

47. See *United States v. Bahe*, 128 F.3d 1440, 1446 (10th Cir. 1997); Veronica Ser-rato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 158 (1988).

48. See *Moore v. State*, 26 Md. App. 556, 557-59, 338 A.2d 344, 345-46 (1975) (holding that a three-and-one-half-year-old child's statement in an emergency room that "Daddy [stepfather or mother's boyfriend] did it," made within hours after infliction of injuries, was properly admitted as an excited utterance); see also *Cassidy v. State*, 74 Md. App. 1, 6-7, 50, 536 A.2d 666, 668-69, 690 (1988) (finding that it was reversible error to admit a two-and-one-half-year-old child's responses, "Daddy [her mother's boyfriend]" did it, when asked by a physician examining extensive bruising on her arms, legs, and buttocks, and irritation to her genital area, "Who did this?" because they were neither excited utterances nor was it known whether the child believed she was making statements to assist in her medical treatment); *In re Rachel T.*, 77



people naturally tend to employ the defense mechanism of denial and think that it does not happen. However, studies show otherwise. "Most abusers reside in the child's home, most frequently the father (14%), stepfather (12%), boyfriend of the mother (13%), or other relative (older brother, uncle, grandfather) (14%)."<sup>49</sup>

When sexual abuse occurs, a young child may not know, or may know only on some intuitive level, that what is happening is wrong and uncomfortable. In either case, the child may feel unsure and hesitant about breaking a promise to the abuser by telling the "secret," or may be intimidated into remaining silent by the abuser's threats.<sup>50</sup> An older child who knows that the sexual activity should not be happening may have guilty feelings mixed with fear. As a result, the child is likely either not to report or to delay reporting the abuse.<sup>51</sup>

The clues to detecting abuse in children of any age are abnormal behavior on the part of the child, including "acting out,"<sup>52</sup> engaging in precocious sexual activity,<sup>53</sup> or withdrawing from a normal touch, such as a pat on the shoulder by a babysitter or a teacher.<sup>54</sup> In some cases, there may be physical evidence of abuse that a caretaker might notice (for example, at bath time).<sup>55</sup> However, the physical evidence of abuse might not be discovered until a medical examination is performed.<sup>56</sup> Additionally, sexually abused children are

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Md. App. 20, 34-37, 549 A.2d 27, 34-36 (1988) (finding that a four-and-one-half-year-old child's statements to a social worker, who was member of a pediatric gynecology specialist's treatment team, when the child had been bleeding from her vagina and rectum and knew that her statements would be used to provide treatment, were properly admitted in a Child in Need of Assistance (CINA) hearing under the hearsay exception for statements made for the purpose of obtaining medical treatment; the child said that she had a "secret with her Dad" and that her father said "she was going to cry a lot if she told"; the child depicted intercourse between a girl doll and a "Daddy" doll, calling the doll's penis a "tutor").

49. Theodore P. Cross et al., *Criminal Justice Outcomes of Prosecution of Child Sexual Abuse: A Case Flow Analysis*, 19 CHILD ABUSE AND NEGLECT 1432, 1441-42 (1995).

50. See Serrato, *supra* note 47, at 157-61.

51. See *id.* at 158-61; Ann Marie Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 359 & n.30 (1991).

52. See MYERS, *supra* note 29, § 5.3, at 421.

53. See *id.* at § 5.3, at 422-23; see also, e.g., *Doe v. United States*, 976 F.2d 1071, 1086 (7th Cir. 1992).

54. See MYERS, *supra* note 29, § 5.3, at 422.

55. See *id.* § 4.5.

56. See *id.*

often aware of bodily functions they should not be aware of and use inappropriate language when describing their experiences.<sup>57</sup>

Child abuse exacts a high price on our children and our society in many ways.<sup>58</sup> The long term effects on maltreated children include "delinquency, pregnancy, alcohol and drug abuse, school failure, and emotional and mental health problems."<sup>59</sup>

### B. *Difficulty in Identifying the Abuser*

"Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except for the victim."<sup>60</sup> The child's out-of-court statement is often essential to identifying the abuser. Without convincing proof of who committed the abuse, the State is helpless to protect the child and prosecute the child's abuser.<sup>61</sup> Unless either the abused child or the abuser is removed, the abuse may continue with impunity. The theory behind the tender years hearsay exception is that young children's out-of-court statements regarding child abuse that contain sufficient indicia of reliability ought to be admitted into evidence and considered by the fact finder, even if they do not fall within the firmly rooted, common-law hearsay exceptions.<sup>62</sup>

### C. *Inadequacy of Other Hearsay Exceptions*

The firmly rooted, common-law hearsay exceptions that were recognized in Maryland when the first tender years statute was adopted in 1988, and the additional exceptions codified in the *Maryland Rules of Evidence*, effective July 1, 1994, are inadequate to address the problem that the tender years exception was intended to combat.<sup>63</sup>

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57. *See id.* § 1.17.

58. *See, e.g., id.* § 4.1, at 294-96, §§ 5.2-5.3, at 413-17.

59. Barbara Tatem Kelley et al., *In the Wake of Childhood Maltreatment*, JUV. JUST. BULL., Aug. 1997, at 2; *see also*, *Sexually Abused Teen-Agers Face Tougher Road*, THE SUN (BALT.), Oct. 1, 1997, at 5A; *Youth Offenders Sent Away, Only to Return*, THE SUN (BALT.), Sept. 29, 1997, at 1A.

60. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (plurality opinion).

61. *See Powder*, *supra* note 12, at 6B.

62. *See* MD. ANN. CODE art. 27, § 775 (Supp. 1997) (amended 1998). Section 775 is reprinted in the Appendix to this Article.

63. *See infra* notes 64-94 and accompanying text.

## 1. The Common-Law Hearsay Exceptions Now Codified in the *Maryland Rules of Evidence*

The following four common-law hearsay exceptions are codified in the *Maryland Rules of Evidence*.

### a. *Statements Made in Order to Obtain Medical Treatment*

A patient's out-of-court statements to a treating physician (or another person from whom one seeks medical treatment) are admissible in evidence to the extent that they relate to facts relevant to treatment, regardless whether the patient is available to testify.<sup>64</sup> The out-of-court statements are admissible whether or not the patient testifies at the trial.<sup>65</sup>

The circumstantial guarantee of reliability is found in the patient's self-interest in obtaining proper treatment.<sup>66</sup> This self-interest is thought to override any motive for insincerity.<sup>67</sup> If a child, seeking treatment, complains to a doctor or nurse 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.<sup>68</sup> The child need not be found competent to testify at trial.<sup>69</sup>

However, Maryland case law is unsettled regarding whether the doctor may testify to the child's identification of the assailant.<sup>70</sup> The

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64. See MD. RULE 5-803(b)(4); JOSEPH F. MURPHY, JR., *MARYLAND EVIDENCE HANDBOOK* § 803(E)(2) (2d ed. 1993); see also, e.g., *Shirks Motor Express v. Oxenham*, 204 Md. 626, 635-36, 106 A.2d 46, 49-50 (1954).

65. See MD. RULE 5-803(b)(4).

66. See *Yellow Cab Co. v. Henderson*, 183 Md. 546, 551-54, 39 A.2d 546, 550-51 (1944) (admitting a statement where the declarant was the mother of the three-year-old patient). Thus, "[t]he Maryland cases recognize that there is an equal circumstantial guarantee of sincerity when one seeks treatment for oneself or for a loved one." LYNN MCLAIN, *MARYLAND RULES OF EVIDENCE* 255 (1994); see, e.g., *Cassidy v. State*, 74 Md. App. 1, 29-30, 536 A.2d 666, 675 (1988) (finding the sincerity motive to be lacking).

67. See *supra* note 66.

68. See FED. R. EVID. 803(4). The advisory committee note provides: "Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." *Id.* advisory committee's note, at n.4.

69. See *infra* notes 120-64 and accompanying text.

70. Compare *Cassidy*, 74 Md. App. at 30, 536 A.2d at 680 (stating that the identity of the person who inflicted the bruises is not ordinarily of medical importance), with *In re Rachel T.*, 77 Md. App. 20, 36, 549 A.2d 27, 35 (1988) (stating that the child's statements implicating her father as her abuser were admissible under the treating physician exception). See generally 6 LYNN MCLAIN, *MARYLAND EVIDENCE: STATE AND FEDERAL* § 803.1(4) & nn.4-6 (1987 & Supp.

disagreement centers around the relevance of the child's identification of the assailant to the medical treatment.<sup>71</sup> Courts in some other jurisdictions have admitted 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.<sup>72</sup> Maryland's current tender years exception would allow such statements if found to be reliable, but only if made to a physician, psychologist, nurse, social worker, teacher, principal, vice principal, or school counselor.<sup>73</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 whether the child is available to testify.<sup>74</sup> It does not matter whether the child testifies or whether the child is available to testify.<sup>75</sup> Additionally, the child does not have to be competent to testify at trial in order for the statement to be admitted.<sup>76</sup>

The theory of the reliability of an excited utterance is that the continuing stress of the event stills the declarant's ability to fabricate.<sup>77</sup> If, for example, a child escaped from his attacker and ran to a police officer on the corner and blurted out what had happened, the police officer could testify to the child's statement.<sup>78</sup>

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1995). For federal cases, see *id.* § 803.2(4) & n.6. See also *Moore v. State*, 26 Md. App. 556, 559-67, 338 A.2d 344, 345-50 (1975) (admitting an out-of-court statement by a three-and-one-half-year-old child to a physician, made within hours after the alleged beating, that "Daddy was mad, Daddy did it," but admitting it under the hearsay exception for excited utterances).

71. See *supra* note 70.

72. See, e.g., *United States v. DeNoyer*, 811 F.2d 436, 438 (8th Cir. 1987) (finding statements that a five-year-old boy, who testified at trial, had made to social workers were properly admitted under both FED. R. EVID. 803(4) and FED. R. EVID. 803(24)); *State v. Smith*, 337 S.E.2d 833, 839-40 (N.C. 1985) (finding four- and five-year-old girls' statements to their grandmother, resulting in their getting subsequent medical treatment, were properly admitted under the medical treatment exception).

73. See MD. ANN. CODE art. 27, § 775 (Supp. 1997) (amended 1998). Section 775, with amendments, is reprinted in the Appendix to this Article.

74. See MD. RULE 5-803(b)(2); see also MURPHY, *supra* note 64, § 803(C).

75. See, e.g., *Moore*, 26 Md. App. at 562, 338 A.2d at 347.

76. See *infra* notes 120-64 and accompanying text.

77. See, e.g., *Mouzone v. State*, 294 Md. 692, 697, 452 A.2d 661, 664 (1982).

78. See *Sears v. State*, 9 Md. App. 375, 383-84, 264 A.2d 485, 488-89 (1970) (finding a police officer's testimony to statements within one-half hour of assault, made

This exception, however, does not apply when a child's reports of abuse are not spontaneous, but instead are in response to questioning.<sup>79</sup> An excited utterance must be made while the child is under such continuing stress as to preclude his conscious thinking and functioning.<sup>80</sup> However, in many cases the child may have been intimidated by his abuser not to tell anyone, may feel guilty about revealing the identity of the abuser, or may repress the experience.<sup>81</sup> For these reasons, the child may not tell anyone until someone notices a change in the child's physical condition or behavior and questions the child about it, or until the threat of repeated abuse is imminent.<sup>82</sup> In these situations, the child's statement regarding the earlier abuse will not qualify as an excited utterance.<sup>83</sup>

For example, in *Harnish v. State*,<sup>84</sup> 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 five-year-old child to visit him, the child told her about sexual abuse by the neighbor that had occurred eleven days earlier.<sup>85</sup> The neighbor's conviction was reversed by the Court of Special Appeals of Maryland on the ground that the child's statement to his mother was inadmissible as an excited utterance.<sup>86</sup> Even under Maryland's current tender years exception, the mother would be unable to testify to her child's statement. This case demonstrates that Maryland cannot fulfill its compelling interest in protecting children under the present state of the law.<sup>87</sup>

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by an eleven-year-old victim after she fled to the police station, was properly admitted); see also *Smith v. State*, 6 Md. App. 581, 588, 252 A.2d 277, 281 (1969) (finding a four-year-old girl's out-of-court statement to her mother, four to five hours after rape, but her first words spoken during that time, was properly admitted).

79. See, e.g., *Idaho v. Wright*, 497 U.S. 805, 826 (1990); *Cassidy v. State*, 74 Md. App. 1, 22, 536 A.2d 666, 676 (1988).

80. See MD. RULE 5-803(b)(2); *Mouzone*, 294 Md. at 697, 452 A.2d at 664.

81. See Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1756-57 (1983); Darren J. LaMarca, Note, *Evidence — Sexual Abuse of Children: The Justification for a New Hearsay Exception*, 5 MISS. C. L. REV. 177, 180 (1985).

82. See Yun, *supra* note 81, at 180; *supra* notes 50-57 and accompanying text.

83. See *Deloso v. State*, 37 Md. App. 101, 102-07, 376 A.2d 873, 875-77 (1977) (finding it reversible error to admit proof of a five-year-old girl's "quite casual" complaints of beatings by her father).

84. 9 Md. App. 546, 266 A.2d 364 (1970).

85. See *id.* at 548, 266 A.2d at 364.

86. See *id.* at 551-52, 266 A.2d at 366-67.

87. See generally *Osborne v. Ohio*, 495 U.S. 103, 109 (1990).

c. *Prompt Reports of Sexual Assault*

Maryland recognizes a hearsay exception for a victim's *prompt* report of rape or other sexual assault.<sup>88</sup> 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>89</sup> For a variety of reasons, however, children often may not make prompt reports.<sup>90</sup> Moreover, a very young victim frequently is not available for cross-examination at trial because the judge has found the child incompetent to testify.<sup>91</sup> In either event, this hearsay exception would be inapplicable and highlights the need for a tender years exception that more fully protects children.

d. *Dying Declarations*

The statement of a fourteen-year-old girl, as she threw herself in front of a train, shouting that "she was taking her life because of anguish over early morning sexual assaults by her father," was admitted as evidence in a Virginia trial of the girl's father for aggravated sexual battery.<sup>92</sup> Under Maryland's common-law hearsay excep-

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88. See MD. RULE 5-802.1(d); see also MURPHY, *supra* note 64, § 801(D).

89. See, e.g., *State v. Werner*, 302 Md. 550, 563, 489 A.2d 1119, 1125-26 (1985).

90. See, e.g., *Harnish*, 9 Md. App. at 551, 266 A.2d at 366 (stating that the child disclosed the incident of abuse to his mother eleven days after it happened); see also *Cole v. State*, 83 Md. App. 279, 302, 305, 574 A.2d 326, 337, 339 (1990) (finding it reversible error to admit, in the State's rebuttal, evidence of a ten-year-old victim's complaints to her babysitter and to a police officer that did not qualify under the common-law exceptions as either timely complaints of sexual attack or as prior consistent statements admissible to rehabilitate the witness's credibility; nor did the statements qualify under MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (Supp. 1989) (current version at MD. ANN. CODE, art. 27, § 775 (Supp. 1997) (amended 1998)), because they were not made to a licensed physician, a licensed psychologist, a licensed social worker, or a teacher).

91. For example, a child sexual abuse prosecution against Jamal Craig, the teenage 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. See Michael J. Clark, *Craig Witness Said to Identify Other Abusers*, THE SUN (BALT.), Aug. 25, 1987, at 2D; Michael J. Clark, *Howard Prosecutors Drop One Abuse Case Against Craig Youth; Other Cases Remain*, THE SUN (BALT.), July 29, 1987, at 1D.

92. John F. Harris, *Father Guilty of Molesting Va. Teen-Ager*, THE WASH. POST, Oct. 17, 1986, at C1. Either the dying declaration exception or the excited utterance exception may have been the avenue by which the trial court admitted that statement. See generally *Hall v. Commonwealth*, 403 S.E.2d 362, 366 (Va. 1991)

tion for dying declarations, a child victim's statement describing a life-threatening attack and identifying the attacker would be admissible if the child made the statement under the belief that death was imminent.<sup>93</sup> This exception, however, is available only if the child is unavailable to testify, and it is limited to civil cases and to criminal cases of homicide, attempted homicide, and assault with intent to commit homicide.<sup>94</sup> Therefore, the statements made by the sexually abused daughter in the Virginia case would be inadmissible in Maryland under the dying declarations hearsay exception.<sup>95</sup>

These four firmly rooted, common-law hearsay exceptions are inadequate to provide the blanket protection that the proposed tender years exception affords. Although there are alternative avenues to pursue when attempting to admit hearsay statements, the explanations below demonstrate that they are equally inadequate.

## 2. Other Exceptions Codified in the *Maryland Rules of Evidence*

The following four additional hearsay exceptions, codified in the *Maryland Rules of Evidence*, could apply to some out-of-court statements made by abused children.

### a. *If the Child Testifies at Trial and is Subject to Cross-Examination Concerning the Statement*

Under Maryland Rule 5-802.1, if a young child testifies at trial and is subject to cross-examination concerning his out-of-court statements, the child's out-of-court statements could be admissible as substantive evidence if they fall within one of the following three categories:<sup>96</sup> (1) prior inconsistent statements of a recanting witness,<sup>97</sup> but only if the statements were recorded electronically; or were made at a grand jury proceeding, deposition, or other trial; or are in writing and signed by the child;<sup>98</sup> (2) prior statements consistent with the child's trial testimony, if the child has been impeached by the suggestion of improper influence, motive, or fabrication, but only if the prior statements predate the suggested

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(dying declaration); *Braxton v. Commonwealth*, 493 S.E.2d 688, 691 (Va. 1997) (excited utterance).

93. See MD. RULE 5-804(b)(2); MURPHY, *supra* note 64, § 802(C).

94. See MD. RULE 5-804(b)(2).

95. See *id.*

96. See MCLAIN, *supra* note 66, § 2.802.1(4)(a).

97. See Serrato, *supra* note 47, at 162 (discussing reasons why child witnesses recant their allegations of abuse).

98. See MD. RULE 5-802.1(a); MCLAIN, *supra* note 66, at 414-15.

improper motive or alleged fabrication;<sup>99</sup> and (3) a prior identification of a person after perceiving the person (for example, in a lineup).<sup>100</sup>

*b. The Residual Exceptions*

In addition to the above three exceptions, if the child is unavailable to testify at the trial, Maryland Rule 5-804(b)(5) recognizes a "catch-all," residual hearsay exception.<sup>101</sup> However, the residual hearsay exception will only apply "[u]nder exceptional circumstances" when the statements involved have "circumstantial guarantees of trustworthiness,"<sup>102</sup> equivalent to the specific hearsay exceptions in Maryland Rule 5-804(b).<sup>103</sup> Maryland Rule 5-803(b)(24) similarly provides a residual exception for sufficiently reliable hearsay, whether or not the child is available to testify.<sup>104</sup>

A number of other state<sup>105</sup> and federal courts<sup>106</sup> have relied on

99. See MD. RULE 5-802.1(b); see also *Tome v. United States*, 513 U.S. 150, 167 (1995) (holding that the statements of the alleged child abuse victim were inadmissible).

100. See MD. RULE 5-802.1(c); MCLAIN, *supra* note 66, § 2.802.1(4)(e).

101. See MD. RULE 5-804(b)(5).

102. *Id.*

103. See MD. RULE 5-804(b).

104. See MD. RULE 5-803(b)(24).

105. See, e.g., *Bertrang v. State*, 184 N.W.2d 867, 870 (Wis. 1971) (holding that the out-of-court statements made by a nine-year-old, sexually abused girl to her mother were admissible; the court looked at "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, reliability of the assertions themselves, and the reliability of the testifying witness"); see also *Oldsen v. People*, 732 P.2d 1132, 1135-37 (Colo. 1986) (holding that the lower court erred in admitting a five-year-old child's out-of-court statements to a school psychologist, physician, and social worker under COLO. R. EVID. 803(4) (medical diagnosis or treatment exception), but the majority of the appellate court affirmed on the ground that the statements were admissible under COLO. R. EVID. 803(24) (residual exception)). The dissenting opinion found an inadequate record to support admissibility under COLO. R. EVID. 803(24). See *id.* at 1139; see also *State v. McCafferty*, 356 N.W.2d 159, 161-65 (S.D. 1984) (remanding for the determination of whether a statement that did not qualify as an excited utterance or a present sense impression fell within South Dakota's residual exception when a child took the stand but could not testify meaningfully).

106. See, e.g., *United States v. DeNoyer*, 811 F.2d 436, 438 (8th Cir. 1987) (finding statements that a five-year-old boy, who testified at trial, made to social workers were properly admitted under FED. R. EVID. 803(4) (medical diagnosis or treatment exception) and FED. R. EVID. 803(24) (residual exception)); *United*



similar residual exceptions to admit tender years statements. However, in *State v. Walker*,<sup>107</sup> the Court of Appeals of Maryland narrowly construed Maryland's residual hearsay exceptions, opining that it would apply them only in unprecedented situations.<sup>108</sup> Judge Wilner, writing for the majority, stated that the proponent of the hearsay "must show an exceptional circumstance, not anticipated when the rule was adopted."<sup>109</sup>

Tender years statements and Maryland's statute were well known when the catch-all rules were adopted in 1994.<sup>110</sup> The *Walker* court strongly suggested that the specific tender years statute is likely to be read by the court of appeals as establishing the limits for the admissibility of reliable tender years hearsay and precluding the trial court's admission of other reliable tender years hearsay under a catch-all exception.<sup>111</sup> In any event, a specific tender years exception, rather than reliance on the catch-all, has the advantage of giving more detailed guidance to trial courts than do the residual exceptions.

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States v. Dorian, 803 F.2d 1439, 1443-44 (8th Cir. 1986) (finding that when a 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, that was made during a third interview on the subject, was properly admitted under FED. R. EVID. 803(24)).

107. 345 Md. 293, 691 A.2d 1341 (1997) (Chasanow, J., dissenting).

108. *See id.* at 329, 691 A.2d at 1359.

109. *Id.*

110. The General Assembly has the power to enact statutes allowing for the admission of hearsay. *See* MD. RULE 5-802 ("Except as otherwise provided by these rules or permitted by applicable constitutional provisions *or statutes*, hearsay is not admissible." (emphasis added)).

Proposed MD. RULE 5-802.2 would have specifically incorporated the tender years statute by reference. At a hearing held by the court of appeals on the Proposed Rules, in response to questioning by the court, this author testified that there was no need to single out one statute for specific incorporation into the rules because MD. RULE 5-802 covered the situation; Proposed MD. RULE 5-802.2 could be read as intending a different effect as to other hearsay statutes, and it could necessitate amending the rules when the Maryland General Assembly amended the tender years statute (as it subsequently has done). Thus, the court's non-adoption of Proposed MD. RULE 5-802.2 ought not be seen as evidencing any disapproval of the tender years exception.

111. *See generally* *State v. Walker*, 345 Md. 293, 691 A.2d 1341 (1997) (Chasanow, J., dissenting).

### III. SUPREME COURT CASE LAW ON THE CONFRONTATION CLAUSE

The federal<sup>112</sup> and Maryland<sup>113</sup> confrontation clauses—the right of the accused to be confronted with opposing witnesses—apply only in criminal cases.<sup>114</sup> The due process clauses<sup>115</sup> reflect the same concern by precluding the reliance on unreliable hearsay in civil cases.<sup>116</sup> This section of the Article will address the limits, as established by Supreme Court case law, that an accused's confrontation right places upon admitting hearsay statements.

#### *A. If the Out-of-Court Declarant Testifies at Trial and is Subject to Cross-Examination*

No conflict with an accused's confrontation right arises if the out-of-court statement of a witness who testifies at trial is admitted against the accused, as long as the accused has the opportunity to cross-examine the witness concerning the statement.<sup>117</sup> Therefore,

112. See U.S. CONST. amend. VI.

113. See MD. CONST. art. 21.

114. See 1 MYERS, *supra* note 29, § 7.63.

115. See U.S. CONST. amend. VI; *Wolff v. McDonnell*, 418 U.S. 539, 567-69 (1974); MYERS, *supra* note 29, § 7.63; see also MD. CONST. art. 21; *cf.* *United States v. Baker*, 45 F.3d 837, 847 (4th Cir. 1995) (holding that a video conference procedure for a civil commitment hearing does not violate due process).

116. See *Kade v. Charles H. Hickey Sch.*, 80 Md. App. 721, 728, 566 A.2d 148, 152 (1989) (reversing an administrative agency's decision that was based on unreliable hearsay).

117. See *United States v. Owens*, 484 U.S. 554, 556 (1988) (finding no error in admitting prior identification by victim witness, who, because of memory loss, could not explain the basis for the identification); *California v. Green*, 399 U.S. 149, 153 (1970) (finding no error in admitting prior testimony of a prosecution witness who was subject to full cross-examination at trial); *United States v. Grooms*, 978 F.2d 425, 426-28 (8th Cir. 1992) (finding that the trial court properly admitted, under FED. R. EVID. 803(24) (residual exception), child victims' out-of-court statements made to F.B.I. agents that were more detailed than victims' in-court testimony; no violation of the Confrontation Clause occurred because the children were subject to extensive cross-examination, albeit limited by their lack of memory); *cf.* *Maryland v. Craig*, 497 U.S. 836, 860 (1990) (upholding the constitutionality of MD. CODE ANN., CTS. & JUD. PROC. § 9-102 (1989) (current version at MD. ANN. CODE art. 27, § 774 (Supp. 1997))), that permits child witnesses for the prosecution to testify over closed-circuit television at trial if the court finds that testifying in the presence of the accused child abuser would cause a child witness "serious emotional distress such that the child cannot reasonably communicate"), *on remand sub nom.*, *Craig v. State*, 322 Md. 418, 428-34, 588 A.2d 328, 333-36 (1991) (reversing the conviction on statutory grounds for an inadequate finding of necessity to use

the confrontation clauses are not offended when tender years hearsay of a child who testifies at trial is admitted.

However, as Judge Murnaghan of the United States Court of Appeals for the Fourth Circuit explained, the United States Supreme Court's case law "teaches that, where there are circumstances assuring the accuracy of hearsay, cross-examination is not [required or] talismanic of constitutional guarantees."<sup>118</sup> Reliable hearsay, therefore, may be admitted if the out-of-court declarant is either unable to testify at trial or is available to testify, but does not do so.<sup>119</sup>

*B. Hearsay Admissible Even When the Declarant Does Not Testify at Trial*

The Supreme Court, in its 1980 decision in *Ohio v. Roberts*,<sup>120</sup> made clear that even if declarants are unavailable to testify at trial, the admission of their out-of-court statements will not violate the defendant's confrontation right if the hearsay statements either (1) fall within well-established, historical hearsay exceptions, or (2) are otherwise necessary and reliable—that is, they bear "particularized guarantees of trustworthiness."<sup>121</sup> In *Roberts*, the Court upheld the constitutionality of admitting evidence against the accused under the firmly rooted hearsay exception for prior testimony of a witness unavailable at trial.<sup>122</sup>

1. The Rule Against Hearsay Has "Firmly Rooted" Exceptions

Subsequent to the *Roberts* decision, the Supreme Court has upheld the constitutionality of admitting hearsay evidence against the accused that fell within the firmly rooted exceptions: (1) statements by a co-conspirator during and in furtherance of the conspiracy,<sup>123</sup>

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a closed-circuit because the trial judge failed to look into the possibility of a two-way, rather than a one-way, closed-circuit television).

118. *Ellison v. Sachs*, 769 F.2d 955, 957 (4th Cir. 1985).

119. *See generally id.*

120. 448 U.S. 56 (1980).

121. *Id.* at 66 ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of *particularized guarantees of trustworthiness.*" (emphasis added)).

122. *See id.* at 77; *see also* *Mattox v. United States*, 156 U.S. 237 (1895).

123. *See Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987) (finding no error in admitting a statement when the declarant was unavailable to testify); *United States v. Inadi*, 475 U.S. 387 (1986) (holding that a showing that the declarant is unavailable to testify is not required); *see also* MCCORMICK ON EVIDENCE § 259 (John William Strong et al., eds., 4th ed. 1992) (explaining the significance of representative admissions and co-conspirator statements).

(2) excited utterances,<sup>124</sup> and (3) statements made to a physician for purposes of obtaining proper medical treatment.<sup>125</sup>

As to each of these three categories, the Supreme Court has held that the foundation supporting the finding that the firmly rooted hearsay exception applies is sufficient to show the degree of reliability mandated by the Confrontation Clause.<sup>126</sup>

The Court has suggested that because the out-of-court statement may be more reliable than the declarant's in-court testimony would be, the circumstances supporting the reliability of the out-of-court statements—the furtherance of the conspiracy, the stress of the event, or the need for medical treatment—cannot be duplicated in court.<sup>127</sup>

## 2. The Constitution Does Not Require the Child's Testimony at Trial or a Showing of Unavailability When the Out-of-Court Statement is Sufficiently Reliable

Of the Supreme Court hearsay cases to date, only two have involved child abuse. In *White v. Illinois*,<sup>128</sup> the Court upheld the constitutionality of the admission of a four-year-old child's out-of-court statements regarding sexual assault, choking, and threatening by her mother's friend in the child's bedroom.<sup>129</sup> At trial, the child-victim was brought to the witness stand several times, but she was too upset to testify.<sup>130</sup> There was no showing made that she would

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124. See *White v. Illinois*, 502 U.S. 346, 356-57 (1992). Unavailability of the declarant to testify need not be shown, nor need the declarant be produced at trial. See *id.*

125. See *id.*; *Morgan v. Foretich*, 846 F.2d 941, 946-47 n.9, 949-50 (4th Cir. 1988). Unavailability of the declarant to testify need not be shown, nor need the declarant be produced at trial. See *White*, 502 U.S. at 356-57.

126. See *White*, 502 U.S. at 356.

127. See *id.* at 354-56 ("[T]he evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony.").

128. 502 U.S. 346 (1992).

129. See *id.* at 358.

130. See *id.* at 349. The Supreme Court's opinion states:

S.G. [the victim] never testified at petitioner's trial. The State attempted on two occasions to call her as a witness, but she apparently experienced emotional difficulty on being brought to the courtroom and in each instance left without testifying. App. 14. The defense made no attempt to call S.G. as a witness, and the trial court neither

have been competent to testify. The trial court admitted the testimony of five witnesses.<sup>131</sup> The first group consisted of the child's baby-sitter, the child's mother, and a police officer; the second group was an emergency room nurse and a physician.<sup>132</sup> The Court considered the child's out-of-court statements to the first group under the spontaneous declaration hearsay exception and those spoken to the second group under the medical examination hearsay exception.<sup>133</sup>

The Supreme Court unanimously held that the defendant's conviction was constitutionally obtained.<sup>134</sup> The Court found that the out-of-court statements were sufficiently reliable; therefore, the defendant's confrontation right had not been violated.<sup>135</sup> The Court explained that the unavailability of the declarant to testify at trial did not have to be shown, nor did the declarant have to be produced at trial.<sup>136</sup> The Chief Justice, writing for the Court, stated:

We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant later testifying in court. To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the "integrity of the factfinding process."<sup>137</sup>

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made, nor was asked to make, a finding that S.G. was unavailable to testify.

*Id.* at 350.

131. *See id.* at 350-51.

132. *See id.*

133. *See id.*

134. *See id.* at 356-57.

135. *See id.*

136. *See id.*

137. *Id.* (quoting *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987))); *see also* *Larson v. Nutt*, 34 F.3d 647 (8th Cir. 1994) (per curiam) (finding that three-year-old declarant's availability and ability to testify at trial was irrelevant for purposes of Confrontation Clause analysis; admission of declarant's out-of-court statement was found to have particular guarantees of trustworthiness and, thus, did not violate the defendant's confrontation right); *McCafferty v. Leapley*, 944 F.2d 445, 454 (8th Cir. 1991) (finding that there was no denial of the defendant's confrontation right when the court admitted the sexually abused child's hearsay statements).

### 3. Sufficiently Reliable Hearsay That Does Not Fall Within A "Firmly Rooted" Hearsay Exception

The Constitution does not require that the out-of-court declarant is competent to testify at trial, but precludes the consideration of corroborative evidence to show reliability.<sup>138</sup> When, as under a tender years exception, the hearsay admitted against an accused does not fall within a firmly rooted exception, the Supreme Court has held that particularized guarantees of trustworthiness must be shown.<sup>139</sup> In *Idaho v. Wright*,<sup>140</sup> a child's out-of-court statement was admitted under a residual hearsay exception.<sup>141</sup> The residual exception is a general catch-all for other sufficiently reliable hearsay; whether particular evidence meets its criteria must be determined on a case-by-case basis.

In an opinion authored by Justice O'Connor, the *Wright* Court held that the requisite " 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances."<sup>142</sup> However, in a five-to-four decision on this issue, the Court forbade the consideration of corroborating evidence, including the older sister's testimony.<sup>143</sup> In doing so, the majority stated that "we think the relevant circumstances include only those that surround the making of

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138. See *Idaho v. Wright*, 497 U.S. 805, 824 (1990).

139. See *Ohio v. Roberts*, 448 U.S. 56, 57 (1980).

140. 497 U.S. 805 (1990).

141. See *id.* at 817 (admitting an out-of-court statement under Idaho's residual hearsay exception (similar to MD. RULE 5-803(b)(24))). Justice O'Connor, writing for the Court, explained:

In *Roberts*, we suggested that the "indicia of reliability" requirement could be met in either of two circumstances: where the hearsay statement "falls within a firmly rooted hearsay exception," or where it is supported by "a showing of particularized guarantees of trustworthiness." 448 U.S., at 66; see also *Bourjaily*, [483 U.S.] at 183 ("[T]he co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements"); *Lee v. Illinois*, 476 U.S. 530, 543 (1986) ("[E]ven if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness'") (footnote and citation omitted).

*Wright*, 497 U.S. at 816-17 (alterations in original).

142. See *Wright*, 497 U.S. at 816-17.

143. See *id.*

the statement and that render the declarant particularly worthy of belief."<sup>144</sup>

In *Wright*, a divorced mother and her live-in boyfriend (whom her children called "Daddy") were both convicted of sexual abuse of the woman's daughters, who were two-and-one-half and five-and-one-half-years old at the time the crimes were charged.<sup>145</sup> The allegations surfaced when the older daughter told her father's girlfriend that the girls' mother had held her down and covered her mouth while the boyfriend had sexual intercourse with her, and that she had seen them do the same thing to the younger sister.<sup>146</sup>

The father's girlfriend called the police and took the older girl to the hospital, where an examination revealed evidence of sexual abuse.<sup>147</sup> The next day, an examination of the younger girl revealed "conditions 'strongly suggestive of . . . vaginal contact,' occurring approximately two to three days" earlier.<sup>148</sup>

At trial, the examining physician testified to the younger daughter's statements that were made to him during the examination, identifying the mother's boyfriend as the abuser.<sup>149</sup> Both the mother and the boyfriend were convicted of lewd conduct with a minor under sixteen.<sup>150</sup> Only the mother appealed on the Confrontation Clause ground, and she appealed only from the conviction regarding the younger daughter.<sup>151</sup>

The Court assumed that the two-and-one-half-year-old daughter

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144. *Id.* Justice Kennedy, dissenting, joined by Chief Justice Rehnquist and Justices White and Blackmun, found that circumscription is "as unworkable as it is illogical." *Id.* at 833-34 (Rehnquist, C.J., & White, Blackmun, Kennedy, JJ., dissenting); see also *Ellison v. Sachs*, 769 F.2d 955, 959 (4th Cir. 1985) (differentiating carefully 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); Serrato, *supra* note 47, at 162 (citing to studies and cases indicating that only a small percentage of abuse victims fabricate their allegations); cf. *Williamson v. United States*, 512 U.S. 594, 604-05 (1994) (evaluating a statement offered under the hearsay exception for declarations against penal interest, under all the relevant circumstances, to determine whether each part of it was sufficiently deserving to be reliable).

145. See *Wright*, 497 U.S. at 808.

146. See *id.* at 809.

147. See *id.*

148. *Id.*

149. See *id.* at 809-11.

150. See *id.* at 812.

151. See *id.* at 813.

was unavailable to testify at the trial.<sup>152</sup> It then "reject[ed] [the mother's] contention that the younger daughter's out-of-court statements in this case [were] *per se* unreliable, or at least presumptively unreliable, on the ground that the trial court found the younger daughter incompetent to testify at trial."<sup>153</sup> Rather than equating incompetency with unreliability, the Court held that a case-by-case inquiry as to the reliability of the out-of-court statement is required:

[T]he Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. Although such inability might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness, a *per se* rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own "enlightened development in the law of evidence."<sup>154</sup>

In its discussion, the *Wright* Court approved the state courts' use of factors, such as those set forth in Article 27, Section 775(d) of the Annotated Code of Maryland,<sup>155</sup> in determining "whether the child declarant was particularly likely to be telling the truth when the [out-of-court] statement was made."<sup>156</sup> It also rejected the imposition of a constitutional requirement that the out-of-court statements be videotaped. For the majority, Justice O'Connor wrote: "The state and federal courts have identified a number of factors

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152. *See id.* at 815-16.

153. *Id.* at 824. The Court continued:

First, respondent's contention rests upon a questionable reading of the record in this case. The trial court found only that the younger daughter was "not capable of communicating to the jury." App. 39. Although Idaho law provides that a child witness may not testify if he "appear[s] incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," Idaho Code § 9-202 (Supp. 1989); Idaho Rule Evid. 601(a), the trial court in this case made no such findings. Indeed, the more reasonable inference is that, by ruling that the statements were admissible under Idaho's residual hearsay exception, the trial court implicitly found that the younger daughter, at the time she made the statements, was capable of receiving just impressions of the facts and of relating them truly. See App. 115.

*Wright*, 497 U.S. at 824-25 (alteration in original).

154. *Wright*, 497 U.S. at 825 (citations omitted).

155. For the full text of § 775, with amendments, see the Appendix to this Article.

156. *Wright*, 497 U.S. at 822.



that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable."<sup>157</sup> In developing a test for Confrontation Clause challenges, Justice O'Connor stated:

Although the procedural guidelines propounded by the court below may well enhance the reliability of out-of-court statements of children regarding sexual abuse, we decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant."<sup>158</sup>

Nonetheless, the majority found the particular statement at issue in *Wright* to be insufficiently reliable under the totality of the circumstances, thus failing to satisfy the requirements of the Confrontation Clause.<sup>159</sup> The child had not volunteered the information when asked general questions, and she gave pertinent responses only when asked detailed leading questions.<sup>160</sup> Therefore, the admission of the doctor's testimony as to the child's statements was reversible error in light of the record as a whole.<sup>161</sup>

An example of the application of *Wright's* test for evaluating the reliability of children's out-of-court statements admitted under a non-firmly rooted hearsay exception is found in *Doe v. United States*.<sup>162</sup> In *Doe*, the statements were made by a three-year-old girl and a three-year-old boy, who were from two different families, to their respective parents.<sup>163</sup> The detail, language, and other factors of the statements were held to provide sufficient indicia of reliability, and their admission at trial was upheld on appeal.<sup>164</sup>

### *C. Maryland Case Law on the Constitutionality of the Tender Years Statute*

Maryland's high court follows the Supreme Court case law on the confrontation right, because it construes the Maryland and fed-

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157. *Id.* at 821.

158. *Id.* at 819.

159. *See id.* at 818-21.

160. *See id.* at 810-11.

161. *See id.* at 827.

162. 976 F.2d 1071 (7th Cir. 1992).

163. *See id.* at 1073-74.

164. *See id.* at 1077-79 (detailing the statements); *see also id.* at 1079-82 (analyzing the reliability of the statements).

eral clauses in *pari materia*.<sup>165</sup> Maryland's tender years statute, as initially adopted in 1988, was upheld as facially constitutional by the Court of Special Appeals of Maryland in an unreported opinion.<sup>166</sup>

#### IV. LEGISLATIVE HISTORY OF THE TENDER YEARS STATUTE: CHRONICLING THE "TENDER YEARS" WAR

##### A. *The 1988 Statute*

The tender years statute is a perennial issue before the Maryland General Assembly. Since 1988, when the Maryland General Assembly first enacted Section 9-103.1 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code<sup>167</sup> (1988 Statute), bills proposing changes to the statute have been introduced every year. Some liberalization has been accomplished; however, attempts to both extend the statute and to retrench it failed in the 1997 legislative sessions. Most recently, the statute was mildly extended in the 1998 session.<sup>168</sup>

##### 1. Types of Proceedings in Which the Hearsay Exception Was Available

The 1988 Statute applied only to the possible admissibility of statements of child-victims under the age of twelve in criminal proceedings "concerning an alleged offense against the child [who made the statement] of . . . [c]hild abuse, as defined under Article 27, § 35A of the Code."<sup>169</sup> Thus, the 1988 Statute did not apply in non-criminal proceedings, such as suits involving child custody, visitation, and protective orders; suits for damages resulting from child abuse; and juvenile proceedings, whether delinquency or Child in

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165. See 6 MCLAIN, *supra* note 70, § 801.1 n.4.

166. See *Bethea v. State*, Nos. 1546 & 1550 (Md. App. June 19, 1990) (per curiam).

167. See S. 66, 1988 Md. Laws ch. 548 (codified at MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (Supp. 1988) (current version at MD. ANN. CODE art. 27, § 775 (1997) (amended 1998))). Because citation to superseded versions of the tender years statute, codified in § 9-103.1, would not provide the easiest means to locate this source, citations are made to the enacted bills found in the volumes of *Laws of the State of Maryland*. Likewise, citations are made to either the Senate or House bill, which both contain the enacted version (with deletions and additions reflecting amendments), when no comparison is necessary.

168. See H.D. 590 (Md. 1988) (effective October 1, 1998), available in <<http://mlis.state.md.us/1998rs/billfile/HB0590.htm>> (visited April 20, 1998); see also *supra* note 11, 246 and accompanying text (detailing 1998 amendments). Section 777, with amendments, is reprinted in the Appendix to this Article.

169. S. 66, sec. 1, § 9-103.1(b)(1).

Need of Assistance (CINA) proceedings.<sup>170</sup>

The 1988 Statute was also inapplicable in criminal proceedings with regard to any other charged crime, such as a sexual offense under Article 27, Sections 464B and 464C of the Maryland Annotated Code, and a crime of violence under Article 27, Section 643B of the Maryland Annotated Code.<sup>171</sup> Senate Bill 66, in the form in which it first passed the Maryland Senate, would have extended the 1988 Statute to Sections 35A and 643B crimes; however, in conference, the Senate acceded to the Maryland House of Delegates' version, which had no such extension.<sup>172</sup>

## 2. The Introduction of the Restrictive "Categories" of Possible Witnesses

Senate Bill 66 would have given the prosecution the opportunity to demonstrate that a particular statement was reliable without restrictions regarding to whom the statement was made.<sup>173</sup> However, the House Judiciary Committee severely limited the statute to apply only to statements made and testified to by a licensed physician, licensed psychologist, or licensed social worker who was acting in the course of his profession when the child made the statement.<sup>174</sup> In conference, the Senate added "a teacher" to the list of potential fact witnesses to the child's statement.<sup>175</sup>

Under the 1988 Statute and its current version, if the child's first report of the alleged abuse was to someone other than a person in one of the listed professions, then in order for the prosecution to invoke the hearsay exception, the child must be taken to see a teacher, physician, psychologist, social worker, etc. If the child again complains of abuse in the presence of one of these persons,

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170. *See id.*

171. *See id.*

172. *See id.* (striking provisions which would have extended the 1988 Statute); H.D. 1018, 1988 Md. Laws ch. 549 (omitting provisions).

173. *See S. 66. See generally* Harnish v. State, 9 Md. App. 546, 549-51, 266 A.2d 364, 365-66 (1970) (focusing on the reliability of the statement itself and not emphasizing to whom it was made).

174. *See* H.D. 1018, sec. 1, § 9-103.1(b)(2).

175. *See S. 66, sec. 1, § 9-103.1(b)(2)(i)(4).* The 1988 Statute incorporated specific definitions of the terms "licensed physician," "licensed psychologist," and "licensed social worker." *See id.* § 9-103.1(b)(2)(i)(1)-(3). However, the 1988 Statute provided no definition of the term "teacher." *See id.* § 9-103.1(b)(2)(i)(4). The current version also does not define "teacher." *See* MD. ANN. CODE art. 27, § 775(b)(2)(i)(4) (Supp. 1997) (amended 1998).

the prosecution could offer that person as a witness for the purpose of testifying to the child's statement made to them.

### 3. Pre-trial Notice and Judicial Determination as to Reliability

The 1988 Statute required the State to provide pre-trial notice of its intention to offer testimony under the tender years exception and of the contents of the statement.<sup>176</sup> After pre-trial notice, the trial court must conduct a hearing outside the presence of the jury to "make a finding on the record as to the specific guarantees of trustworthiness that are present in the statement,"<sup>177</sup> and the court must thereafter rule on the statement's admissibility.<sup>178</sup> The twelve specific guarantees and considerations listed in the 1988 Statute were those generally found in pre-existing models and other states' statutes.<sup>179</sup> The conference committee deleted from the list a factor included in Senate Bill 66—"whether the statement was audiotaped or videotaped, if taping would have been reasonably feasible."<sup>180</sup>

### 4. Corroboration Requirement

When the child-victim was unavailable to testify, the 1988 Statute further conditioned admissibility of an out-of-court statement that was otherwise qualified on the existence of corroborative evidence.<sup>181</sup> The statute left that phrase undefined.<sup>182</sup> The Senate bill had required "corroborative evidence of the alleged offense."<sup>183</sup> The House bill did not employ the prepositional phrase "of the alleged offense."<sup>184</sup> In conference, the Senate acceded to the House version.<sup>185</sup>

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176. See S. 66, sec. 1, § 9-103.1(c)(3); see also § 775(c)(3); Bruce v. State, 96 Md. App. 510, 524-25, 625 A.2d 416, 423 (1993).

177. S. 66, sec. 1, § 9-103.1(e)(1); accord § 775(e)(1).

178. See S. 66, sec. 1, § 9-103.1(e)(2); see also § 775(e)(2).

179. Compare Lynn McLain, *Maryland's Statutory Hearsay Exception for Reliable Statements by Alleged Child Abuse Victims: A Hesitant Step Forward*, 17 U. BALT. L. REV. 1, 19 n.74 (1987) (compiling 18 considerations suggested or adopted by courts, commentators, legislatures, and organizations), with S. 66, sec. 1, § 9-103.1(d)(1)-(12) (codifying 12 of the 18 considerations).

180. S. 66. This deletion warrants the inference that the absence of taping should not be considered a negative factor.

181. See *id.* § 9-103.1(c)(2)(iii).

182. See *id.*

183. *Id.*

184. See H.D. 1018, 1988 Md. Laws ch. 549.

185. See S. 66.

## 5. Restrictions as to Child's Testifying or Being Unavailable to Testify

Under the 1988 Statute, an out-of-court statement that the trial judge found reliable was admissible if the child either testified at trial or if the child was unavailable to testify for certain reasons.<sup>186</sup> First, the statement was 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>187</sup>

Second, the statement was admissible if the child was unavailable to testify due to one of four following reasons:

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>188</sup>

The first three grounds for establishing unavailability were well established.<sup>189</sup> The fourth ground was similar to Maryland's statutory prerequisite for allowing a child to testify over closed-circuit television,<sup>190</sup> but for purposes of the 1988 Act, the child's inability to communicate would have to have been so extreme as to preclude even televised testimony.

Without explanation, the 1988 Statute omitted other recognized bases for unavailability, including the child's complete failure of memory; persistent refusal to testify, despite judicial requests; mental disability; privilege; and incompetency at the time of trial.<sup>191</sup> In particular, the exclusion of incompetency as a basis for unavailability has severely undercut the usefulness of the tender years hearsay exception, because a court's ruling that a young child is incom-

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186. *See id.* sec. 1, § 9-103.1(c)(1)-(2).

187. *Id.* § 9-103.1(c)(1).

188. *Id.* § 9-103.1(c)(1)(i).

189. *See McLain, supra* note 179, at 35 & n.142 (noting these three grounds were taken from the rules governing use of depositions at trial, and citing MD. RULE 2-419(a)(3), 4-261(h)(1)).

190. *See MD. CODE ANN., CTS. & JUD. PROC.* § 9-102 (Supp. 1987) (permitting closed-circuit testimony if "[t]he 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") (current version at MD. ANN. CODE art. 27, § 774(2) (Supp. 1997)).

191. *Compare* FED. R. EVID. 804(a)(1)-(4), with S. 66.

petent to testify frequently results in the State dropping its charges.<sup>192</sup>

In 1988, although the Maryland General Assembly had before it several bills that would have provided that all children who were victims of child abuse or of particular sexual offenses were competent to testify, those bills were defeated in the House Judiciary Committee.<sup>193</sup> If any of those bills had passed, excluding incompetency as a factor in determining unavailability would have been understandable. In the long run, however, such a law would not have been advisable because a conclusive (rather than a rebuttable) presumption of competency<sup>194</sup> would likely violate due process.<sup>195</sup>

#### 6. Accused's Right to Take Deposition

A novel and unique provision in the 1988 Statute gave the defendant the right to depose the witness offered by the State to

192. *See generally* Morgan v. Foretich, 846 F.2d 941, 943 (4th Cir. 1988) ("Often, the child is the only witness. Yet age may make the child incompetent to testify in court . . . . '[[W]]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without.' " (quoting FED. R. EVID. art. VIII advisory committee's note)).

193. *See* S. 280, MARYLAND SENATE JOURNAL 331-32 (1988) (full text of bill on file with author); H.D. 378, MARYLAND HOUSE JOURNAL 379-80 (1988) (full text of bill on file with author).

194. *See* S. 280. Senate Bill 280 passed the Maryland Senate by a 45-to-1 vote, *see* MARYLAND SENATE JOURNAL 1417 (1988), but received an unfavorable report in the House Judiciary Committee, *see generally* MARYLAND HOUSE JOURNAL 199 (1988) (index) (containing only one reference to H.D. 378, which referred the bill to the House Judiciary Committee). It would have repealed MD. CODE ANN. CTS. & JUD. PROC., § 9-103 (Supp. 1987) ("In a criminal trial, the age of a child may not be the reason for precluding a child from testifying."), and amended *id.* § 9-101, 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."

S. 280.

195. *See* 5 MCLAIN, *supra* note 70, § 301.5.

testify as to the child's statement.<sup>196</sup> In other criminal cases, there is no such right.

### *B. Subsequent Amendments*

Numerous amendments have been made to Section 9-103.1 since its enactment in 1988.

#### 1. Types of Proceedings in which the Tender Years Exception is Applicable

A 1991 amendment extended Section 9-103.1 to apply in CINA proceedings concerning an alleged offense against the child of abuse or neglect.<sup>197</sup> Effective October 1, 1992, Section 9-103.1 was made applicable to alleged offenses of rape or sexual offense<sup>198</sup> and assault with intent to commit rape or sexual offense.<sup>199</sup> Effective October 1, 1994, the Section 9-103.1 hearsay exception was extended to apply in juvenile court proceedings.<sup>200</sup> Finally, a 1996 Act inexplicably transferred the tender years statute to Section 775 of Article 27, despite the fact that it applies in CINA and juvenile delinquency proceedings.<sup>201</sup>

#### 2. What Constituted Unavailability to Testify

There are difficulties in finding satisfactory language to extend the definition of unavailability to include a young child who is declared incompetent to testify at trial. Therefore, Section 9-103.1 was ultimately changed in 1994 to make the tender years exception available regardless whether the child testifies or is available to testify.<sup>202</sup> Thus, a child's out-of-court statement that otherwise qualifies may be reviewed for reliability, whether the court finds that child unavailable or not.

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196. See S. 66, sec. 1, § 9-103.1(c)(4)(i).

197. See H.D. 765, sec. 1, § 9-103.1(b)(1), 1991 Md. Laws ch. 399.

198. See S. 429, sec. 1, § 9-103.1(b)(1)(ii), 1992 Md. Laws ch. 253.

199. See *id.* § 9-103.1(b)(1)(iii).

200. See S. 340, sec. 1, § 9-103.1(b)(1)(iv), 1994 Md. Laws ch. 169.

201. See 1996 Md. Laws ch. 585, § 5. The provision regarding closed-circuit testimony was likewise transferred to Section 774, but, unlike Section 775, it applies only in criminal cases. See *id.* Further, in 1996, the reference to Article 27, Section 35(a) was changed to Section 35(c). See 1996 Md. Laws ch. 10. This effected no substantive change.

202. See S. 340, sec. 1, § 9-103.1(c)(ii).

a. *Bills Regarding Young Children Who Are Incompetent to Testify at Trial*

For several years, the Maryland General Assembly considered bills that attempted to redress the 1988 Statute's *per se* inapplicability, because of its *sui generis* definition of unavailability, when a young child was found incompetent to testify at trial.

i. Language of the Bills

Senate Bill 498, proposed in the 1993 session, would have added, as a ground for unavailability, a child victim's "inability to testify due to . . . incompetence."<sup>203</sup> This would have directly addressed the problem.<sup>204</sup> Several other states explicitly permit the potential admission of out-of-court statements by children found "incompetent" or "disqualified" to testify.<sup>205</sup> Senate Bill 498 was amended, however, to refer more narrowly to a child's "incompetency to testify due to age."<sup>206</sup> A serious problem arose, because in 1985 the General Assembly had passed Section 9-103 of the Courts and Judicial Proceedings Article,<sup>207</sup> which provides that, "[i]n a criminal trial, the age of a child may not be the reason for precluding a child from testifying."<sup>208</sup> Thus, Senate Bill 498 referred to a null class: no child could legally be found incompetent due to age.

In order to circumvent the uselessness of Senate Bill 498, Senate Bill 340 was proposed in the 1994 legislative session.<sup>209</sup> It proposed to amend Section 9-103.1 to provide:

(c)(2)(i) The child is unavailable to testify at the criminal proceeding or CINA proceeding due to the child's:

203. S. 498, sec. 1, § 9-103.1(c)(2)(i)(5), MARYLAND SENATE JOURNAL 430 (1993) (full text of bill on file with author).

204. See generally *supra* notes 191-192 and accompanying text.

205. See ALA. CODE § 15-25-32 (1995); DEL. CODE ANN. tit. 11, § 3513(a) (1995); KAN. STAT. ANN. § 60-460(dd) (Supp. 1997); MASS. GEN. LAWS ANN. ch. 233, § 81(b) (West 1997); OR. R. EVID. 803(18a)(b); R.I. GEN. LAWS § 14-1-69 (1995); S.C. CODE ANN. § 19-1-180 (West Supp. 1997); VA. CODE ANN. § 63.1-248.13:2 (Michie 1995 & Supp. 1997).

206. S. 498, sec. 1, § 9-103.1(c)(2)(i)(5).

207. See 1985 Md. Laws ch. 498 (codified as amended at MD. CODE ANN., CTS. & JUD. PROC. § 9-103 (1995)).

208. § 9-103. Section 9-103 merely codified the common-law rule that extreme youth is not a *per se* bar to a child's testimony; rather, the trial judge must individually examine children as to their ability to give competent testimony. See MURPHY, *supra* note 64, § 602(A) ("[A]ge alone ha[s] never been the test for incompetency [in Maryland].").

209. See S. 340, 1994 Md. Laws ch. 169 (containing bill as enacted and deleted provisions).



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5. Level of cognitive development, including ability to understand abstract concepts, capacity for long-term memory, and ability to articulate upon demand.<sup>210</sup>

This proposed provision ("incompetency exception") was explained in a fact sheet submitted by Ellen Mugmon, a member of the Governor's Council on Child Abuse and Neglect:

The reasons for this provision include: (1) [children's] inability to understand the abstract concept of an oath; (2) fading of their memories during the delay between the crime and the court appearance; and (3) their inability to articulate upon demand because of anxiety and fear of the proceedings, or because they are too young to come up with a command performance at a specific time.<sup>211</sup>

The incompetency exception avoided conflict with Section 9-103 because these factors, although related to age, do not refer to chronological age.

Explaining the *whys* and *wherefores* of this language to the legislators proved problematic. First, legislators had difficulty understanding how a child who could be physically present at trial could be considered "unavailable to testify." Second, they struggled with the counter-intuitive concept that a child might be incompetent to testify, but still could have made a reliable out-of-court statement before trial.

#### ii. How Can a Physically Available Child Be Unavailable as a Witness?

Some opponents of the incompetency exception have argued that it is nonsensical to say that a child who is physically available to be brought into the courtroom at trial is nonetheless unavailable. The answer to this is that "unavailable to testify" simply means that the witness is unable to be cross-examined at the trial or proceeding. Physical inability to come to court or the parties' inability to serve a person with process are only two examples of unavailability.<sup>212</sup>

210. *Id.* sec. 1, § 9-103.1(c)(2)(i) (deleted from enacted bill).

211. Memorandum from Ellen Mugmon, Member, Governor's Council on Child Abuse and Neglect, to the Maryland House of Delegates Judiciary Committee (April 3, 1994) (on file with author). *See generally* 1 MYERS, *supra* note 29, §§ 3.1 to -24.

212. *See* MD. RULE 5-804.

Unavailable witnesses also include those who can be present or are present in the courtroom, but who refuse to testify despite the court's order to do so.<sup>213</sup> In addition, unavailability encompasses witnesses whom the court rules protect by a privilege against testifying,<sup>214</sup> or because of their mental incapacity.<sup>215</sup> The defense cannot cross-examine a child whom the court has declared unable to testify. Therefore, when the court determines that a child is incompetent to testify, while that child may be physically able to testify, he is unavailable to testify under Maryland law.

iii. How Can a Child Who is Found Incompetent to Testify at Trial Have Possibly Made a Reliable Out-of-Court Statement?

In the past, opponents of the incompetency exception have questioned how a witness who is unqualified to testify at trial could possibly have made a reliable out-of-court statement. First, it is important to stress the word "possibly," within the context of Maryland's tender years statute. The incompetency exception only opens the door to consideration by the court as to whether a particular statement is reliable. It in no way directs that all statements will have sufficient indicia of reliability; it simply provides that some statements might, and statements should be looked at on a case-by-case basis. The incompetency exception dismantles the *per se* ban against admissibility. This type of reasoning is in accord with the jurisprudence of other states<sup>216</sup> and the Supreme Court.<sup>217</sup>

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213. *See id.* 5-804(a)(2).

214. *See id.* 5-804(a)(1).

215. *See id.* 5-804(a)(4); *see also id.* 2-418(a)(3)(C), 4-261(h)(1)(B); *Brown v. State*, 317 Md. 417, 420-21, 564 A.2d 772, 774 (1989); *People v. District Court of El Paso County*, 776 P.2d 1083, 1087 (Colo. 1989) ("In Colorado, a child who is not competent to testify is unavailable within the meaning of section 13-25-129(1)(b)(II). This rule reflects a common-sense understanding that when a party is prohibited by a court from testifying, neither the prosecution nor defense is able to call the party to testify." (citations omitted)).

216. *See El Paso County*, 776 P.2d at 1087 ("[W]e promote the rule that a child's out-of-court declaration is not automatically rendered inadmissible merely because the child was found to be not competent at the competency hearing . . . . A child's reliable out-of-court statement that accurately relates an incident of abuse will not be barred . . . ."); *Perez v. State*, 536 So. 2d 206, 211 (Fla. 1989) ("The fact that a child is incompetent to testify at trial . . . does not necessarily mean that the child is unable to state the truth. The requirement that the trial court find that the time, content, and circumstances of the statement provide sufficient safeguards of reliability furnishes a sufficient guarantee of trustworthiness of the hearsay statement, obviating the necessity that the child understand the duty of a witness to tell the truth."); *People v.*

Secondly, it is well established under Maryland law that one need not qualify as a competent witness at trial in order to have the ability to have made out-of-court statements that qualify as admissible hearsay.<sup>218</sup>

Maryland courts have admitted out-of-court statements of adult witnesses that qualify under exceptions to the hearsay rule without considering whether the out-of-court declarants would have been competent to testify at trial.<sup>219</sup> Additionally, Maryland courts have admitted hearsay when the out-of-court declarant was capable of making cogent, reliable statements in the past, but was not capable of doing so at trial.<sup>220</sup>

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Rocha, 547 N.E.2d 1335, 1341 (Ill. Ct. App. 1989) (stating that incompetency to testify due to either an inability to communicate or tender years does not necessarily render the out-of-court statement unreliable); State v. Gribble, 804 P.2d 634, 639 (Wash. Ct. App. 1991) (“[A] finding of reliability through use of [particularized] factors is a sufficient assurance of trustworthiness to make unnecessary an inquiry into testimonial competence at the time the hearsay statements are made.”); 1 MYERS, *supra* note 28, § 1.38; *see also* Miller v. State, 517 N.E.2d 64, 72 n.7 (Ind. 1987) (upholding the constitutionality of a state statute that required a child victim to be incompetent before her videotaped testimony could be admitted).

217. White v. Illinois, 502 U.S. 346, 356-57 (1992) (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988) (quoting Kentucky v. Sincer, 482 U.S. 730, 736 (1987))); *see also* Idaho v. Wright, 497 U.S. 805, 825 (1990) (“[T]he Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. Although such inability might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness, a *per se* rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own ‘enlightened development in the law of evidence.’ ” (citations omitted)); *see supra* note 137 and accompanying text.
218. *See, e.g.*, Embrey v. Holly, 48 Md. App. 571, 597-601, 429 A.2d 251, 268-69 (1981) (holding that the identity of anonymous phone callers, which would be necessary to determine their competency, was not necessary to admit their out-of-court statements under the state of mind exception to the hearsay rule; the only requirement was that the statement was made with apparent sincerity), *aff’d in part and rev’d in part on other grounds*, 293 Md. 128, 442 A.2d 966 (1982).
219. *See id.*
220. *See, e.g.*, Contee v. State, 229 Md. 486, 490-92, 184 A.2d 823, 825-26 (1962) (finding that prior testimony was admissible upon the testimony of the director of a mental hospital that the declarant had been declared insane, permanently committed subsequent to her original testimony, and incapable of testifying at the time of trial); Johnson v. State, 63 Md. App. 485, 490-94, 494 A.2d 1343, 1347-48 (1985) (holding admissible an excited utterance of a victim who

In this respect, the courts have treated children's statements the same way as they have treated adults. Maryland cases have held admissible out-of-court statements of children, qualifying under established exceptions to the hearsay rule, even though the children were too young to testify at trial.<sup>221</sup> Maryland case law is in accord with that of the federal courts<sup>222</sup> and other jurisdictions on this point.<sup>223</sup>

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was incompetent at trial, but who had been "apparently capable of maintaining herself in her own apartment" at the time of the statement). Notably, these cases do not distinguish between incompetency due to youth and incompetency due to mental illness or insanity; Senate Bill 340 would have included the former but not the latter in the definition of "unavailable." See S. 340, sec. 1, § 9-103.1(c)(2)(i)(5), 1994 Md. Laws ch. 169 (deleted from enacted bill).

221. See *Jackson v. State*, 31 Md. App. 332, 336, 343, 356 A.2d 299, 301, 304 (1976); *Moore v. State*, 26 Md. App. 556, 561, 338 A.2d 344, 346-47 (1975) (holding that the out-of-court statements made by a three-and-one-half-year-old victim of physical abuse to a physician in the emergency room were properly admitted; relying on *Dean Wigmore* and *McCormick*, the Court stated that the issue of testimonial competence of the child was "irrelevant since the testimonial qualifications do not apply to spontaneous declarations."); *Smith v. State*, 6 Md. App. 581, 587, 252 A.2d 277, 281 (1969) (finding that an excited utterance of child who was incompetent to testify at trial was properly admitted).
222. See *supra* note 98 and accompanying text.
223. See, e.g., *Ring v. Erickson*, 983 F.2d 818, 820 n.2 (8th Cir. 1992) (finding that although the child interviewed on videotape by a doctor was not competent to testify, others could have testified to provide the proper foundation for admitting the child's out-of-court statements under FED. R. EVID. 803(4), and that the treating doctor's role was explained to the child and that she understood it); *Doe v. United States*, 976 F.2d 1071, 1082 (7th Cir. 1992) (finding no abuse of discretion in admitting children's hearsay statements under the catch-all hearsay exception, even though the district court conducted no inquiry to determine the competency of the three-year-old declarants); *Myatt v. Hannigan*, 910 F.2d 680, 682, 685 (10th Cir. 1990) (holding that Kansas's child hearsay statute did not violate the Confrontation Clause, nor did the admission of an "unqualified" child's reliable out-of-court statements to a social worker and a police officer); *Morgan v. Foretich*, 846 F.2d 941, 946-47 & n.9, 949-50 (4th Cir. 1988) (finding it reversible error to exclude a young child's spontaneous declarations made from the time she was two-and-one-half until she was three-and-one-half, that were excited utterances to her mother and statements made to a child psychologist for purposes of medical treatment, even if declarant was incompetent to testify at trial); *United States v. Dorian*, 803 F.2d 1439, 1442-44 (8th Cir. 1986) (finding that when a 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 the third interview on the subject, was properly admitted under FED. R. EVID. 803(24)).

iv. Ultimate Resolution by Finessing the Issue: *In Camera* Examination and Corroboration Requirements

Difficulty in coming up with a saleable and pragmatic definition of "incompetency to testify" led to a jettisoning of the attempt to do so. Instead, Senate Bill 340 was amended in 1994 so that the tender years exception is potentially applicable "regardless of whether the child testifies."<sup>224</sup> Thus, the statement of a child who is incompetent to testify can be evaluated for reliability by the court because an incompetent child may be either available or unavailable to testify.

(a) *In Camera* Examination of Child

In determining the admissibility of a child's statement, Maryland's tender years statute requires an *in camera* examination, except "where the child (i) [h]as died, or (ii) [i]s absent from the jurisdiction for good cause shown, or the State has been unable to procure the child's presence by subpoena or other reasonable means."<sup>225</sup> The court must conduct such examination of a child in the presence of the defense attorney and the prosecutor, but "may not permit" the presence of the defendant.<sup>226</sup>

(b) Corroboration Requirement

Furthermore, under the 1994 amendment:

[i]f the child does not testify, the child's out of court statement will be admissible only if there is corroborative evidence that: (i) [t]he defendant in a criminal proceeding had the opportunity to commit the alleged offense; or (ii) the alleged offender in a juvenile court proceeding had the opportunity to commit the alleged abuse or neglect.<sup>227</sup>

In *Idaho v. Wright*,<sup>228</sup> the United States Supreme Court decided that corroborative evidence cannot be used to support a finding of sufficient reliability of an out-of-court statement.<sup>229</sup> However, this decision does not preclude a state from adding a corroboration re-

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224. S. 340, sec. 1, § 9-103.1(c)(1)(ii); accord MD. ANN. CODE art. 27, § 775(c)(1)(ii) (Supp. 1997) (amended 1998).

225. See § 775(f)(1). Section 775, with amendments, is reprinted in the Appendix to this Article.

226. *Id.* § 775(f)(2)(ii)(2).

227. *Id.* § 775(c)(2).

228. 497 U.S. 805 (1990).

229. See *id.* at 823.

quirement as a second hurdle to admissibility. The 1994 Maryland amendment adds this requirement when the child does not testify at trial.<sup>230</sup>

*b. MSTA's Proposed Amendments*

In 1997, the Maryland State Teachers' Association (MSTA) lobbied strenuously against any extension of the tender years exception. MSTA also submitted several retrenching amendments, including one that would return Maryland to pre-1994 law as to children who are incompetent to testify at trial "because of age."<sup>231</sup> Under this proposed amendment, a judge could not consider admitting these children's statements because they would neither testify nor be unavailable. A fundamental purpose of the statute in the first place—admitting reliable evidence when the child is too young to testify<sup>232</sup>—would be frustrated by this proposed amendment.

The MSTA's amendment would require that:

the child testifies at the trial; or is found by the court to be unavailable as a witness for one (1) of the following reasons:

1. From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the child's testifying in the physical presence of the defendant will cause the child to suffer serious emotional distress such that the child cannot reasonably communicate; or
2. is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
3. is not subject to the jurisdiction of the court.<sup>233</sup>

Subsection 1 of MSTA's amendment would add a requirement of expert testimony—and hence cost—that does not exist in the current statute. Additionally, subsection 3 is arguably unconstitutional as applied in criminal cases. The Constitution requires that the State make reasonable efforts to obtain the attendance or testimony of a witness, even one who is beyond the court's jurisdiction.<sup>234</sup>

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230. See § 775(c)(2).

231. See MSTA, *House Bill 98 — List of MSTA Proposed Amendments* ¶ 4 (Jan. 8, 1997) (on file with author). See generally H.D. 98, MARYLAND HOUSE JOURNAL 77 (1997) (full text of bill on file with author); *supra* Part IV.B.2.a.i.

232. See *supra* note 192 and accompanying text.

233. MSTA, *supra* note 231, ¶ 4.

234. See *Barber v. Page*, 390 U.S. 719, 721 (1968) (stating that merely being out of the jurisdiction is insufficient—the State must make a good faith attempt at

### 3. The Deposition Provision

Several bills, including Senate Bill 658<sup>235</sup> in the 1997 session, have proposed the elimination of the deposition provision. Two sound rationales support this change: (1) because no justification has been made to single out this kind of hearsay witness from any other, and (2) because of the deterrent cost the provision imposes on the State. To date, no amendments effecting this change have been adopted.

### 4. "Categories" of Walks of Life of Witnesses who Heard Child's Statement

Probably the most illogical provision of Maryland's tender years statute is its restrictive list as to the professions that a witness, who has heard a child's out-of-court statement, must hold, in order for a court to look at the child's statement and screen it for reliability. Repeated sessions have seen bills that would have amended this provision, either by modestly expanding the list of professions, or by simply doing away with the list altogether. In 1998, the Maryland General Assembly passed an amendment that modestly expanded and liberalized this provision.<sup>236</sup>

#### a. *Modest Proposals*

Numerous proponents have pointed out the illogic of restricting physicians, psychologists, and social workers to such "licensed" professionals, when, for example, interns practicing in Maryland and staffing the emergency rooms are often not licensed in Maryland, and jurisdictions such as Baltimore City do not have "licensed" social workers. These limitations frustrate the state's interest in protecting children.<sup>237</sup>

For example, Delegate Ulysses Currie from Prince George's County, wrote in a letter to the editor in 1993:

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obtaining, through all reasonable means, the presence of a witness who is outside of the jurisdiction); *State v. Breeden*, 333 Md. 212, 227 n.5, 634 A.2d 464, 471 n.5 (1993); *Cordovi v. State*, 63 Md. App. 455, 462-63, 492 A.2d 1328, 1331-32 (1985).

235. S. 658, MARYLAND HOUSE JOURNAL 1739-40 (1997) (full text of bill on file with author).

236. See *infra* note 246 and accompanying text; *supra* note 11 and accompanying text. Section 775, with amendments, is contained in the Appendix to this Article.

237. See, e.g., Jessica Collins, Statement to the Maryland House of Delegates, Judiciary Committee (1993) (on file with author).

During the 1992 session of the General Assembly, the state Department of Human Resources pushed for passage of legislation to allow unlicensed social workers to present such testimony. Unlicensed social workers make up almost one-third of the state's child protective services staff—170 out of 550 workers— because the agency cannot afford a 100 percent licensed staff. The legislation was killed.

In the 1993 legislative session, the department again pushed for legislation to expand the list of professionals who can give child-abuse hearsay testimony to include any professional employee of any correctional, educational, health, juvenile services or social services agency, institution or licensed facility. This would add to the list counselors, unlicensed social workers, case workers, probation and parole and police officers, etc. The bill won Senate approval but failed by one vote in the House Judiciary Committee.

I find it impossible to understand why such a law does not have unanimous support. Charles A. Chiapparelli, chief of the Child Abuse Division of Baltimore's State's Attorney's Office, says he has seen case after case in which accused child abusers go free because statements from unlicensed social workers could not be used.

The law now stacks the odds against the child victim. If a child discloses an incident of abuse to a policeman, emergency room nurse or any other of the many professionals legally prohibited from presenting hearsay testimony, the case folds, and the abuser goes free.

It also should be noted that the current law defies logic. On one hand, it requires all "health practitioners" to report suspected child abuse; on the other hand, it allows only licensed physicians and psychologists to testify.<sup>238</sup>

In 1993, Senate Bill 498,<sup>239</sup> and again in 1994, Senate Bill 340<sup>240</sup> proposed to add the following "categories" of potential witnesses:

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238. Ulysses Currie, *Stacking the Odds Against Abused Children*, THE WASH. POST, June 6, 1993, at 8. See generally MD. CODE ANN., FAM. LAW § 5-704 (Supp. 1997) (requiring "each health practitioner, police officer, or educator or human service worker" to report suspected child abuse).

239. S. 498, MARYLAND SENATE JOURNAL 430 (1993).

240. S. 340, 1994 Md. Laws ch. 169 (containing bill as enacted and deleted provisions).



5. An intern or resident acting under the supervision of a licensed physician or working in an accredited hospital; 6. A registered nurse, as defined under § 8-101 of the health occupations article;

7. A physician assistant, as defined under § 15-101 of the health occupations article;

8. A school psychologist certified by the state department of education; or

9. A certified professional counselor, as defined under § 17-101 of the health occupations article . . . .<sup>241</sup>

These proposals died in the House Judiciary Committee.<sup>242</sup>

In 1996, Carolyn H. Lingeman, M.D. explained the practicality of expanding the list through written testimony to the House Judiciary Committee:

I believe that admissible testimony regarding out of court statements in child abuse cases should not be limited to the four categories of licensed professionals specified in the current law. Among those whose testimony should also be accepted are nurses, police detectives, members of the clergy, and other trusted individuals to whom a child may confide the details of abuse. Decisions about the credibility of the witnesses should be the responsibility of the Court. . . . Sometimes it is a police detective who is investigating after the mandatory reporting of suspected abuse who is able to elicit the details from the child, or it may be a school counselor who is not a licensed teacher, or other trusted individual who is in a position to assist the child. . . . It would be in the best interests of abused children if the qualifications of the witness and the reliability of the testimony are left to the courts to decide.<sup>243</sup>

Despite the advantages of removing the list, in 1997, only

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241. S. 340, sec. 1, § 9-103.1(b)(2)(i)(5) (deleted from enacted bill); S. 498 amend. 3.

242. *See generally* S. 340 (enacted bill).

243. Carolyn H. Lingeman, M.D., Statement to the Maryland House of Delegates Judiciary Committee (Aug. 6, 1996) (on file with author).

House Bill 34<sup>244</sup> passed in the House; that bill would only have added nurses to the list and removed the licensing requirement as to all listed professionals.<sup>245</sup> In the 1998 legislative session, the Maryland General Assembly passed an amendment to the tender years statute, effective October 1, 1998, which repeals the "licensed" requirement and extended the list of professionals.<sup>246</sup>

*b. Abrogate the List: The Only Sensible Solution*

In 1997, Senate Bills 132<sup>247</sup> and 658<sup>248</sup> and House Bills 648<sup>249</sup> and 98<sup>250</sup> would have simply removed the list altogether. These bills also died in the House Judiciary Committee. Although the Senate passed Senate Bill 658, no compromise was reached in conference; there was no conference committee report, nor were any amendments prepared by the Amendment Office for the Conference Committee.

Mere piecemeal adding to the list of categories of professions ensures only one thing: this statute will be before the General Assembly each year, because there is no logical reason to include one profession and not another. If psychologists and teachers are included, why not school counselors? If physicians are included, why not dentists? If teachers are included, why not coaches? Why not Girl Scout leaders? The *why not*s could go on *ad infinitum*.

The requirement of particular professions is unnecessary, because the statute already requires the trial judge to screen out insufficiently reliable statements.<sup>251</sup> Moreover, the strictures of the list

244. H.D. 34, MARYLAND HOUSE JOURNAL 41 (1997) (full text of bill on file with author).

245. See H.D. 34 amend. 2. Senate Bill 376 would have added only "licensed, registered nurses" to the list of possible fact witnesses. S. 376 (Md. 1997) (on file with author).

246. See H.D. 590, sec. 1, § 775(b)(2)(i) (Md. 1988) (effective October 1, 1998), available in <<http://mlis.state.md.us/1998rs/billfile/HB0590.htm>> (visited April 20, 1998); see also *supra* note 11 and accompanying text. Section 777, with amendments, is reprinted in the Appendix to this Article.

247. S. 132 (Md. 1997) (on file with author).

248. S. 658, MARYLAND HOUSE JOURNAL 1739 (1997) (full text of bill on file with author).

249. H.D. 648 (Md. 1997) (on file with author).

250. H.D. 98, MARYLAND HOUSE JOURNAL 77 (1997) (full text of bill on file with author).

251. See generally MD. ANN. CODE art. 27, § 775(d) (Supp. 1997) (amended 1998) (listing factors the court must consider when determining if the tender years hearsay possesses "particularized guarantees of trustworthiness").

have unnecessarily caused injustices in cases involving child abuse.<sup>252</sup> Thus, the only sensible solution is to abrogate the list.

#### V. STRIDENT ASSERTIONS THAT RECUR IN THE GENERAL ASSEMBLY

When this writer testified in support of the tender years exception and listened to the opponents' comments—whether criminal defense lawyers, MSTA's lawyers, or opponents on the House Judiciary Committee itself—she heard several inflammatory themes repeated.

A number of the opponents of the current tender years exception, or of any liberalizing amendment, have stated or implied the following: (1) the tender years exception is unconstitutional as it violates the Confrontation Clause; (2) children lie; (3) wives, who are "out to get" their husbands, make false accusations of sexual child abuse in virtually every child custody case and cannot be trusted to tell the truth; and, (4) teachers, in particular, will be sent to jail on the basis of false allegations. This section will respond to these assertions, as well as to other arguments that have been made.

##### A. *Does the Current "Tender Years" Hearsay Exception Violate an Accused's Confrontation Right? Would Doing Away With the Limiting List of "Categories" of Witnesses Violate an Accused's Right to Confrontation?*

Maryland's tender years statute specifically incorporates the test that the Supreme Court reaffirmed in *Idaho v. Wright*,<sup>253</sup> thus, the tender years statute does not violate the Confrontation Clause. In *Wright*, the Supreme Court reaffirmed that, as to non-firmly rooted hearsay exceptions, the mandates of the Confrontation Clause may be met on a case-by-case basis by a showing that the circumstances surrounding the making of the statement provide "adequate 'indicia of reliability . . .'" or "particularized guarantees of

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252. See generally, e.g., *supra* notes 12-15, 90 and accompanying text (detailing case where tender years hearsay was excluded because the statements were made to a police officer).

253. 497 U.S. 805 (1990). Compare *id.* at 815 (reaffirming that hearsay that does not fall within firmly rooted exceptions to the rule against hearsay does not violate the Confrontation Clause if the hearsay bears " 'particularized guarantees of trustworthiness' " (quoting *Ohio v. Roberts*, 448 U.S. 56, 65 (1980))), with § 775(b)(3), (d) (allowing admission of tender years hearsay "only if the statement possesses particularized guarantees of trustworthiness," and listing specific considerations for the court when making this determination).

trustworthiness."<sup>254</sup>

Likewise, the proposed statute advocated in this Article is constitutional.<sup>255</sup> It would merely permit judges to look at a child's out-of-court statement, no matter who the statement was made to, and evaluate it under that test, considering to whom it was made as part of the relevant circumstances.<sup>256</sup> Supreme Court precedent in no way requires a restrictive category.

Maryland's exception goes beyond the Supreme Court's requirement by providing the following additional safeguards for an alleged abuser: the defense is given twenty days' notice regarding the statement that the proponent intends to offer;<sup>257</sup> the court's hearing on the reliability of the evidence must be conducted outside the presence of the jury and, in the court's discretion, before the seating of a jury;<sup>258</sup> the defendant and the defendant's lawyer have the right to be present at this hearing;<sup>259</sup> if the child is physically available, the court must conduct an *in camera* examination of the child before ruling on the admissibility of the evidence;<sup>260</sup> the defendant's lawyer has the right to be present at this examination,<sup>261</sup> but not to question the child;<sup>262</sup> if the court finds sufficient indicia of reliability, it must so rule, on the record, stating

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254. *Wright*, 497 U.S. at 815 (quoting *Roberts*, 448 U.S. at 65).

255. See *infra* Part VII.

256. See *infra* Part VII.

257. See § 775(c)(3).

258. See *id.* § 775(f).

259. See *id.* § 775(f)(2).

260. See *id.* § 775(f)(1).

261. See *id.* § 775(f)(2)(ii).

262. See *Bayne v. State*, 98 Md. App. 149, 161-63, 632 A.2d 476, 482-83 (1993) (finding that the lower court properly restricted defense counsel's questioning of the victim at the competency hearing); see also *Kentucky v. Stincer*, 482 U.S. 730, 733 (1987) (excluding a criminal defendant, but not his counsel, from an in-chambers hearing held to determine the competency of two child witnesses did not violate the defendant's confrontation right or his right to due process because his exclusion did not interfere with his opportunity for effective cross-examination; additionally, after each child testified on direct examination, defense counsel could have asked the judge to reconsider the earlier ruling that the child was competent); cf. *Maryland v. Craig*, 497 U.S. 836, 837-38 (1990) (holding that a court does not have to observe the child in the presence of the defendant in order to find that the child cannot effectively communicate in the defendant's presence; such a requirement would inflict the very trauma the closed-circuit statute was intended to prevent); MD. ANN. CODE art. 27, § 774 (1996) (amended after *Craig* on remand, 322 Md. 418, 588 A.2d 328 (1991)).

its reasons.<sup>263</sup> If all the preceding conditions are met, the statement will be admissible if the child testifies at the trial.<sup>264</sup> If the child does not testify, the statement will be inadmissible unless there is corroborative evidence that the defendant had the opportunity to commit the alleged abuse.<sup>265</sup>

If the statement is admitted into evidence, the witness testifying to the statement may be impeached, including by showing bias.<sup>266</sup> The child declarant may also be impeached, regardless whether the child testifies or not.<sup>267</sup>

*B. Are There Many More False Allegations of Child Abuse Made in Divorce Cases Than True, or Reasonably Based, Allegations? Are Hordes of Mothers Maliciously Accusing Fathers?*

First, the empirical evidence does not bear out the anecdotal, gender-biased assertion that mothers are rampantly falsely accusing fathers of child sexual abuse in order to gain the upper hand in divorce cases. An important study done by the American Bar Association (ABA), in conjunction with the National Legal Research Center for Child Advocacy and Protection and the Association of Family in Conciliatory Courts, found that only 2% (169 cases) of the 9,000 divorce cases studied involved allegations of sexual abuse.<sup>268</sup> Of those cases, Child Protective Services found only eight cases where allegations were malicious in nature.<sup>269</sup> Accusations of sexual abuse were made not only by mothers (67%), but also by fathers (28%) and third parties (11%).<sup>270</sup> Fewer than half of these cases involved accusations against fathers by mothers<sup>271</sup>—less than 1% of the 9,000 cases studied.

Secondly, there are obvious, legitimate reasons why good faith allegations would be made during custody battles. The American Prosecutors Research Institute reports as follows:

Even when allegations are made, criminal charges are rare in the face of widespread and misplaced cynicism about

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263. See § 775(e)(1).

264. See MD. ANN CODE art. 27, § 775(b).

265. See *id.* § 775(c)(2).

266. See MD. RULE 5-616.

267. See *id.* 5-806.

268. See Kathleen Coulborn Faller et al., *Research on False Allegations of Sexual Abuse in Divorce*, 6 APSAC ADVISOR, Fall 1993, at 1, 3.

269. See *id.*

270. See *id.*

271. See *id.*

their validity. Allegations legitimately occur during this time because: (1) discovery of abuse precipitated the divorce; (2) separation creates opportunities and sometimes incentives for abuse; (3) child victims may disclose only when divorce is pending and the abuser is no longer in the home to enforce silence; (4) the prospect of sole visits with the abuser may prompt disclosure; and (5) the nonoffending parent may be more likely to finally believe the child. Many times, a child has attempted to disclose previously but has been ignored, rejected or misunderstood.<sup>272</sup>

In fact, there is evidence that mothers are initially reluctant to believe that their children's fathers have committed abuse.<sup>273</sup> Ironically, when mothers come to this conclusion and make such allegations, the courts tend overwhelmingly to find against them and to punish them for having accused the fathers.<sup>274</sup> In her testimony at the United States Senate Hearing on the federal Child Victims' Bill of Rights Bill, Dr. Muriel Sugarman testified that cases of sexual child abuse are frequently mishandled by divorce courts:

I have been directly involved in evaluation and/or treatment of about 21 children who were alleged to have been sexually abused during visitation following parental separation or divorce. Almost all of these allegations involved children under age six.

I am aware of a significant number of similar cases in Massachusetts and throughout the country. The magnitude of this problem is alarming. The management of these cases by the divorce courts has been inconsistent and uninformed at best; damaging and punitive to children and the nonabusive parent at worst.

. . . [T]he subject of child sexual abuse stirs in all of us painful, uncomfortable, difficult, and sometimes overwhelming feelings. The first response of those without direct experience of this topic is horror and disbelief. Yet statistics show that there is a veritable epidemic of sexual abuse.

Many adults are skeptical of children's disclosures. They, and the nonabusing adults to whom they disclose the

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272. *Reporting Child Maltreatment*, American Prosecutors Research Institute, attachment 15 (statement on file with author).

273. *See id.*

274. *See id.*

abuse, are often disbelieved. This is particularly true when the allegations arise at the time of parental separation or divorce, when custody and visitation issues are being decided. In part, this is because it is far easier to believe that a child or a reporting parent lied than to believe that an apparently normal adult committed the abusive behaviors disclosed.

A number of allegations of sexual abuse cannot be validated or substantiated for a variety of reasons. These unfounded allegations are often called "false." Many experts feel that few allegations are deliberately false. Allegations made out of vindictiveness or manipulateness probably occur in no more than about 5 to 14 percent of cases. Most allegations are made in good faith, and the majority of them are true.

The responses of divorce courts to allegations of abuse have been far different from the responses of the courts which deal with child protective issues in intact families. In working intensively with many of these cases, certain distinct and troubling patterns have emerged in the responses of the protective agencies and the judicial system.

Twenty children, including four pairs of siblings, were alleged to have been sexually abused by their biological fathers during paternal visitation after parent separation or divorce.

. . . .

There was only one deliberately false allegation of child sexual abuse by a father, and in that case the child had been sexually abused by a friend of the father during a paternal visit.

In the 19 validated cases of paternal sexual abuse occurring during visitation, the average age at evaluation was 4 years, 1.5 months. The average age of disclosure was about 3 years, 8.5 months. The average age when the abuse apparently actually began was 2 years, 10.5 months. All but one child were under age 5 when the abuse began.

Sixty-three percent of the abused children were female; 37 percent were male. In 71.4 percent of families in which there was more than one child, one or more siblings had also been sexually abused by the father.

Only one father was indicted and prosecuted 2 years after the first allegations were made. He was acquitted. None of the other fathers were prosecuted.

In 73.7 percent of the cases, the divorce court system did not believe the allegations. The conclusions of evaluators without proper qualifications who found no evidence of sexual abuse were accepted over those of qualified evaluators. About 58 percent of the children were inadequately protected from further sexual abuse, from intimidation and harassment by the perpetrator, and from fear of retaliation.

Protective agency supervisors failed to be physically present at all times during visitation. The court or protective agency sometimes arranged supervision by parents, siblings, friends, or coworkers of the alleged perpetrator who sometimes left the child alone with the father.

Over half the children were forced against their will to have frequent, prolonged, and poorly supervised contact with the alleged perpetrator, regardless of the degree of traumatization of the child.

Mothers were threatened with loss of custody, contempt of court, and jail if they refused to comply with these visitation orders.

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Significantly, 53.3 percent of the mothers actually had great initial difficulty believing that their husband had abused his own child or children.

.....  
The following recommendations refer more specifically to allegations of sexual abuse after parental separation or divorce. The most important safeguards for the child's well-being are to protect the child from the possibility of further abuse; to protect the child from intimidation, retaliation, and pressure to recant; to protect the child from repeated questioning and evaluation and from repeated physical examinations for sexual abuse; to provide in a situation where contact between the child and the alleged perpetrator may be in the best interests of the child, for appropriate adult supervision of visitation by an objective individual with knowledge of child sexual abuse and clear understanding of the child's need for protection from abuse and



intimidation.<sup>275</sup>

To assist the courts in evaluating allegations of child sexual abuse in custody battles, the National Judicial Education Program, working with the ABA Center on Children and the Law, recently published a model judicial education curriculum.<sup>276</sup> One of the most important points made in the training materials is that it is imperative to distinguish between a person who makes a good faith, but mistaken or insufficiently proven, allegation from one who deliberately fabricates an allegation.<sup>277</sup> A parent who reasonably believes that someone has abused his or her child has a moral and legal duty to act to protect the child and ought not be punished.

*C. Are There Many Successful False Claims, Particularly Against Teachers, as to Abuse of Children Under the Age of 12?*

The studies of which this writer is aware do not show that there is an avalanche of false or unfounded claims of abuse.<sup>278</sup> The media's reporting of a few sensational cases, such as the *McMartin* case in California,<sup>279</sup> overshadows its reporting of the more mundane, day-to-day cases of abuse, which tend to be reported in general, less sensational articles; for every *McMartin*, there are thousands of child abuse cases.<sup>280</sup>

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275. *Child Victims' Bill of Rights: Hearings on S.B. 761 Before the Senate Comm. on the Judiciary*, 101st Cong. 109-11 (1989) (statement of Dr. Muriel Sugarman, Child Psychiatrist).

276. See Lynn H. Schafran, *Adjudicating Allegations of Child Sexual Abuse When Custody is in Dispute*, 81 JUDICATURE 30 (Jul.-Aug. 1997).

277. See *id.* at 32-33.

278. "A review of five studies concluded that fabricated reports occurred in 4% to 8% of all reports." David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 THE FUTURE OF CHILDREN 31, 43 (Summer/Fall 1994). Of these, the fabricated reports are "more likely to originate from adolescents." *Id.*; see also Serrato, *supra* note 47, at 162 (citing to studies and cases indicating that only a small percentage of abuse victims fabricate).

279. See Lois Timnick, *Charges Against Buckley Dismissed—McMartin Case: After Seven Years and Two Trials, All Molestation Counts are Dropped*, L.A. TIMES, Aug. 2, 1990, at 1; Dawn Webber, *McMartin Jury Says 'Not Guilty' 52 Times—Mistrial Declared on 13 Counts*, L.A. DAILY NEWS, Jan. 19, 1990, at N1.

280. See, e.g., *Sexually Abused Teen-agers Face Tougher Road*, THE SUN (BALT.), Oct. 1, 1997, at A5 (discussing the fact that sexual abuse often leads to a difficult life); *Youth Offenders Sent Away, Only to Return*, THE SUN (BALT.), Sept. 29, 1997, at A1 (discussing problems with rehabilitating violent sex offenders); Powder, *supra* note 12, at B6 (reporting on the acquittal of a man who allegedly gave his five-year-old stepdaughter gonorrhea).

There do not appear to be many unwarranted convictions, long prison terms, or big damage awards in sexual abuse cases:

The picture of sexual abuse in the criminal justice system also suggests overall a tempered rather than hysterical response. As with most crimes, a large number of cases are dropped before prosecution. One study found that only 42% of serious sexual abuse allegations (that is, those substantiated by child protection authorities and/or reported to the police) are actually forwarded for prosecution. Moreover, according to statistics from some selected jurisdictions, arrested sexual offenders against children are somewhat less likely to be prosecuted than are other violent offenders.

Even when accused sex abusers are convicted, their sentences are not terribly stiff. Studies suggest that 32% to 46% of convicted child sexual abusers serve no jail time. Only 19% receive sentences longer than one year . . . . None of this suggests that the criminal justice system abandons its usual standards of operation when it comes to sexual crimes against children.<sup>281</sup>

The chief of the child abuse division of the Baltimore City State's Attorney's Office has stated that most of the city's prosecutions result in probation rather than prison sentences.<sup>282</sup>

MSTA vigorously opposed broadening of the hearsay statute on the ground that the teachers feared they would be subject to baseless charges.<sup>283</sup> First, the statute under review would have had no effect on the making of out-of-court accusations regarding abuse of students and the stigma that such accusations may cause. Rules of evidence simply have no effect on the making of accusations. In addition, the Maryland General Assembly has given teachers special protection: the State's Attorney must review and investigate charges of child abuse made against teachers before those charges can be filed in the district court.<sup>284</sup>

Moreover, relatively few complaints have been made against Maryland teachers. For example, in a total of sixty-one schools in

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281. Finkelhor, *supra* note 278, at 45 (footnotes omitted).

282. Telephone Interview with Julie Drake, Esq. (Dec. 11, 1997).

283. See generally text accompanying *supra* note 233 (quoting amendments to the tender years statute submitted by MSTTA).

284. See MD. CODE ANN., CTS. & JUD. PROC. § 2-608(b), (c) (Supp. 1997).

Anne Arundel County, over the sixteen-year-period from 1977 to 1993, a total of only seventy-five complaints of alleged physical or sexual child abuse were reported to either Protective Services or the police.<sup>285</sup> Sixty-three more were investigated only within the school system.<sup>286</sup> Of the total of 138 allegations in over sixteen years, it is unknown how many were as to children under twelve, the group affected by the hearsay statute. However, only twenty-three of the schools were elementary schools; nine more were special schools; twenty-nine were middle, junior, and senior high schools.<sup>287</sup> In Howard County, which has 39,000 students and 2,770 teachers, there were only fifteen complaints against teachers between 1995 and 1996.<sup>288</sup> Only four of these cases were prosecuted, three of which involved children under twelve.<sup>289</sup>

Furthermore, most child abuse—physical, sexual, and emotional<sup>290</sup>—is intra-household and intra-familial.<sup>291</sup> To unduly hamper

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285. See *Special Counsel, Anne Arundel County Dept. of Educ. Final Report* (Dec. 15, 1993).

286. See *id.*

287. See *id.*

288. See *Report of Child Abuse in Howard County* (Oct. 6, 1997) (on file with author).

289. See *id.*

290. A striking example of emotional abuse was described in convicted murderer John Thanos's sentencing proceeding:

His father was a sadist who had been treated for mental illness at the Perry Point veterans hospital in Harford County, according to testimony, and beat Freddie [John] regularly from an early age, once punching him in the scrotum.

But the worst abuse may have been mental. When his wife was working, the social worker testified, the elder Thanos would turn the power off in the house, then whisper eerily through the heating vents that he was the devil and that he was coming after Freddie.

At night, according to the testimony, the elder Thanos would put sleeping pills in his wife's coffee so that he could have sex with his oldest daughter. The incest would take place in the same bedroom where Freddie slept, often in the same bed, with only a blanket separating them, the social worker said.

As Freddie got older, his father increasingly kept the boy away from the house, sometimes locking Freddie out so that the elder Thanos could have sex with his daughter, the social worker testified, adding that Mrs. Thanos knew little about what was going on or could do little to stop it if she did know.

Typically, psychologists say, Thanos denies all this and lionizes his father, who died in 1982.

By age 12, Freddie was in trouble. He acted out in school and was expelled for exploding a homemade bomb on school property.

the protection of vulnerable children because of the unsubstantiated fear of a group of adults—teachers—sets social policy on its head. An adult who is erroneously accused is in a far superior position to protect himself than is a child under twelve who is being abused.

*D. Are Children Really Significantly Less Reliable Than Adults When They Make Abuse Accusations?*

As for whether children lie, the answer is that they may lie, but adults also may lie.<sup>292</sup> To exclude testimony on the basis that someone may lie would be to exclude all testimony. The way that we deal with lying witnesses or lying hearsay declarants is to impeach them, either through cross-examination if they testify or, if they do not testify, via Maryland Rule 5-806.

The cornerstone of our judicial system is to trust the fact finder to evaluate the credibility of admitted evidence and give it the appropriate weight. No evidence has been presented to support a conclusion that fact finders give undue weight to young children's out-of-court statements. In fact, if judges and juries share the same prejudice against children's truthfulness that some of the outspoken members of the bar and legislature do, jurors will tend to evaluate children's statements with heightened scrutiny.

Although those involved in the legal system may have long assumed that children are more susceptible to suggestion than adults are, this assumption has been challenged by empirical research.<sup>293</sup>

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Officials called him "ungovernable."

Glenn Small, *Thanos: Violent, Venomous — and 'Damaged' 'Sick' Convicted Killer is Product of Abuse*, *Lawyer Says*, THE SUN (BALT.), Oct. 31, 1993, at B1.

291. See Serrato, *supra* note 47, at 158; see also, e.g., *United States v. Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975) (emphasizing the need for parental testimony in prosecutions for child abuse because of the high incidence of child abuse in the home).

292. *But see supra* note 278 and accompanying text.

293. See Dominic J. Fote, Comment, *Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 PEPP. L. REV. 157, 157-58 (1985). One study found:

[C]hildren and adults ranging in age from 5 to 22 watched the experimenter and a confederate engage in a heated conversation. At varying intervals, those viewing the argument were asked to narrate exactly what they had seen, to answer objective questions about the incident, including a leading question, and to identify the confederate from a photo array.

*Id.* at 158-59. The author cited other such experiments:

Ninety-six subjects were tested in four groups consisting of

In any event, the tender years statute directs the court, when screening children's out-of-court statements for reliability, to look at whether leading questions were asked that suggested the responses obtained.<sup>294</sup> If so, this would be one indicium of unreliability.<sup>295</sup>

*E. Why Not Require That the Out-of-Court Statement be Audiotaped or Videotaped?*

In *Idaho v. Wright*,<sup>296</sup> the Supreme Court implied that taping is not mandated by the Constitution.<sup>297</sup> For practical reasons, a taping requirement would be unwise. Taping equipment costs money and is not universally available. Taping also implies that we knew what

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twenty-four per group. The four groups were comprised of the following subjects, respectively: kindergarten and first graders, third and fourth graders, seventh and eighth graders, and college students. They were tested individually in a small room where the confederate stormed in, argued with the experimenter over the use of the room, then stormed out. The duration of a subject's exposure to the confederate was fifteen seconds, from a distance of approximately seven feet. At intervals of ten or thirty minutes, the subjects were evaluated on free recall, direct questions including one leading question, and photo identification. Two weeks later, the subjects returned and were reassessed, this time using a non-leading question.

*Id.* at 159 n.8.

Results indicated that very young children were as capable as adults in answering direct questions about the incident. Also, young children scored as well as adults in identifying from a photo array. Perhaps most surprising was the data indicating that children were no more easily swayed to answer incorrectly by the use of leading questions than were adults. One finding did indicate that children were not as capable as adults to freely articulate their version of what occurred. Nonetheless, while the youngest children tended to say little, what they did say was three times more likely to be accurate than what the adults said.

The Marin study concluded that the main problem with young witnesses is not their ability to accurately perceive events, but their ability to accurately and meaningfully report their perceptions. Given certain external prompts and cues, however, "the young witness would be expected to perform quite adequately." In the final analysis, "it would seem, then, that children as young as five years of age are no less competent or credible as eyewitnesses than are adults when responding to direct objective questions."

*Id.* at 159 (citing Marin, Holmes, Guth & Kovac, *The Potential of Children as Eyewitnesses*, 3 LAW & HUM. BEHAV. 295 (1979) (footnotes omitted)).

294. See MD. ANN. CODE art. 27, § 775(d)(4) (Supp. 1997) (amended 1998). Section 775, with amendments, is reprinted in the Appendix to this Article.

295. See *supra* note 158 and accompanying text.

296. 497 U.S. 805 (1990).

297. See *supra* Part II.

the subject of the statement would be beforehand: that is why we taped it. A taping requirement could lead to the consideration by the court of only a less spontaneous and less reliable statement than the statements that preceded the taping. Surely it is nonsensical to restrict the court from considering the most reliable and most spontaneous statements.

## VI. COMPARISON OF MARYLAND'S CURRENT STATUTE TO SPECIFIC TENDER YEARS EXCEPTIONS OF OTHER STATES

It is useful to compare Maryland's tender years exception to those of the thirty-eight other states that have specific tender years exceptions.<sup>298</sup>

### A. *Constitutionality*

The state courts that have ruled on the question have upheld the constitutionality of their tender years exceptions, except for decisions in Arizona and Mississippi that were based on a finding that the legislatures had exceeded their powers and trod on the judiciary's power.<sup>299</sup> Subsequently, Mississippi enacted a tender years rule of court.<sup>300</sup>

### B. *Applicability to which Out-of-Court Declarants*

The Maryland statute applies only to the child victim of certain crimes, abuse, or neglect.<sup>301</sup> At least seven states extend the tender years exception to child witnesses other than the victim himself.<sup>302</sup> The proposed statute set forth in Part VII of this Article would similarly extend the Maryland statute.

Maryland's exception applies only to statements made by children under twelve years of age.<sup>303</sup> Six states extend the tender years

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298. See *infra* notes 399-400.

299. See *State v. Robinson*, 735 P.2d 801 (Az. 1987); *Mitchell v. State*, 539 So. 2d 1366 (Miss. 1989).

300. See MISS. R. EVID. 803(25).

301. See MD. ANN. CODE art. 27, § 775(b)(1) (Supp. 1997) (amended 1998). Section 775, with amendments, is reprinted in the Appendix to this Article.

302. See ALA. CODE § 15-25-32 (1975); ARIZ. REV. STAT. ANN. § 13-1416 (West 1989); COLO. REV. STAT. ANN. § 13-25-129 (West 1997); DEL. CODE ANN. tit. 11, § 3513(a)(1995); FLA. STAT. ANN. § 90.803(22) (West 1979); N.D. R. EVID. 803(24); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995). Rhode Island's and South Carolina's statutes could also be read to this effect. See R.I. GEN. LAWS § 14-1-69 (1994); S.C. CODE ANN. § 19-1-180 (Law Co-op. Supp. 1997).

303. See § 775(b). Section 775, with amendments, is reprinted in the Appendix to this Article.

exception to persons of similar mental development due to retardation, disability, or senility.<sup>304</sup> The proposed statute set forth in Part VII of this Article would similarly extend the Maryland statute.

*C. Availability or Unavailability of Declarant to Testify*

Maryland's statute applies "regardless of whether the child testifies."<sup>305</sup> Seven states' exceptions apply if the child is either available to testify or unavailable.<sup>306</sup> These are exceptions most similar to Maryland's.<sup>307</sup> Other states, with only residual exceptions, also would permit sufficiently reliable hearsay regardless whether the declarant is available to testify. The proposed statute set forth in Part VII of this Article retains Maryland's current approach, which is also that of Maryland Rule of Evidence 5-803.

Nineteen states' provisions apply if the child actually testifies at the proceeding (or by closed-circuit television) or is unavailable to testify.<sup>308</sup> Six states' exceptions apply only if the child testifies or is available to testify.<sup>309</sup> Six states' provisions apply only if the child is unavailable to testify.<sup>310</sup>

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304. See FLA. STAT. ANN. § 90.803(22) (West 1979); 725 ILL. COMP. STAT. ANN. 5/115-10 (West Supp. 1997); MINN. STAT. ANN. § 595.02 (West Supp. 1998); MISS. R. EVID. 803(25); OR. R. EVID. 803(18a)(b); VT. R. EVID. 804a(a) (including mentally-ill adults).

305. § 775(c).

306. See IOWA CODE ANN. § 232.96 (West 1994); MISS. R. EVID. 803(25); N.H. REV. STAT. ANN. § 516:25-a (Supp. 1995); OKLA. STAT. ANN. tit. 12, § 2803.1 (West Supp. 1998); R.I. GEN. LAWS § 14-1-69 (1994); UTAH CODE ANN. § 76-5-411 (1995).

307. See *infra* Part VII for a discussion of Maryland law.

308. See ALA. CODE § 15-25-32 (1995); ARIZ. REV. STAT. ANN. § 13-1416 (West 1989); COLO. REV. STAT. ANN. § 13-25-129 (West 1997); DEL. CODE ANN. tit. 11, § 3513(a) (1995); FLA. STAT. ANN. § 90.803(22) (West 1979); IDAHO CODE § 19-3024 (1997); 725 ILL. COMP. STAT. ANN. 5/115-10 (West Supp. 1997); IND. CODE ANN. § 35-37-4-6 (Michie 1994); MINN. STAT. ANN. § 595.02 (West Supp. 1998); MO. ANN. STAT. § 491.075 (West 1996); NEV. REV. STAT. ANN. § 51.385 (Michie Supp. 1997); N.J. R. CT. 803(27); N.D. CT. RUL. 803(24); OR. R. CT. 803(18a)(b); 42 PA. CONS. STAT. ANN. § 5985.1 (West Supp. 1997); S.C. CODE ANN. § 19-1-180 (Law Co-op. Supp. 1997); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995); VA. CODE ANN. § 63.1-248.13:2 (Michie 1995); WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1998).

309. See ALA. CODE § 15-25-32 (1995); ARK. CODE ANN. § 803(25) (Michie 1997) (prior inconsistent statement only); GA. CODE ANN. § 24-3-16 (1995); MICH. R. EVID. 803A (prior consistent statement only); TEX. CODE CRIM. P. ANN. art. 38.072 (West Supp. 1998); VT. R. EVID. 804a(a).

310. See CAL. EVID. CODE § 1228 (West 1995); HAW. CT. R. 804(6); KAN. STAT. ANN. § 60-460(dd) (Supp. 1997); ME. REV. STAT. ANN. tit. 15, § 1205 (West 1997);

*D. Corroboration Requirement*

If the child does not testify at the trial, Maryland requires corroboration of the alleged abuser's opportunity to commit the abuse.<sup>311</sup> Seventeen states similarly require corroborative evidence only if the child is unavailable to testify.<sup>312</sup> Maryland's requirement is broader, however, because it applies not only if the child is unavailable to testify, but also if the child is available, but does not testify.<sup>313</sup>

Seven states specify that the corroboration required is of the act of abuse or neglect.<sup>314</sup> Oregon requires corroboration of both the abuse and the alleged abuser's opportunity to commit the abuse.<sup>315</sup> California's very limited exception only permits the evidence to corroborate an accused's confession and the evidence must be in the form of a written report of a law enforcement officer or a county welfare employee.<sup>316</sup> Michigan only permits tender years hearsay evidence if the child testifies consistently with it.<sup>317</sup> The proposed statute set forth in Part VII of this Article retains Maryland's current approach.

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MASS GEN. LAWS ANN. ch. 233, § 81(b) (West Supp. 1997); OHIO REV. CODE ANN. EVID. R. 807 (Banks-Baldwin 1994).

311. See MD. ANN. CODE art. 27, § 775 (Supp. 1997) (amended 1998). Section 775, with amendments, is reprinted in the Appendix to this Article.

312. See ALA. CODE § 15-25-32 (1995); ARIZ. REV. STAT. ANN. § 13-1416 (West 1995); COLO. REV. STAT. ANN. § 13-25-129 (West 1997); FLA. STAT. ANN. § 90.803(22) (West 1979); IDAHO CODE § 19-3024 (1997); 725 ILL. COMP. STAT. ANN. 5/115-10 (West Supp. 1997); MINN. STAT. ANN. § 595.02 (West Supp. 1998); MISS. R. EVID. 803(25); N.J. R. EVID. 803(27); N.D. R. EVID. 803(24); OHIO REV. CODE ANN. EVID. R. 807 (Banks-Baldwin 1994); OKLA. STAT. ANN. tit. 12, § 2803.1 (West Supp. 1998); OR. R. EVID. 803(18a)(b) (only required in a criminal trial); 42 PA. CONS. STAT. ANN. § 5985.1 (West Supp. 1997); S.C. CODE ANN. § 19-1-180 (Law Co-op. 1996); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995); UTAH CODE ANN. § 76-5-411 (1995); WASH. REV. CODE ANN. § 9A.44-120 (West Supp. 1998).

313. See § 775(c)(2).

314. See N.J. R. EVID. 803(27); N.D. R. EVID. 803(24); OKLA. STAT. ANN. tit. 12, § 2803.1 (West 1993); 42 PA. CONS. STAT. ANN. § 5985.1 (West 1982); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995); UTAH CODE ANN. § 76-5-411 (1995); WASH. REV. CODE ANN. § 9A.44-120 (West Supp. 1998).

315. See OR. R. EVID. 803(18a)(b).

316. See CAL. EVID. CODE § 1228 (West 1995).

317. See MICH. R. EVID. 803A.



### *E. Pretrial Notice*

Twenty-three states, including Maryland, impose an across-the-board pretrial notice requirement when a child victim's out-of-court statement is going to be offered into evidence.<sup>318</sup> On the other hand, Nevada requires notice, but only if the child is unavailable to testify.<sup>319</sup> The proposed statute set forth in Part VII of this Article retains Maryland's current approach.

### *F. Defense's Ability to Take Deposition*

No state, other than Maryland, provides that the defense has the right to take the deposition of the witness who will testify to the child's statement.<sup>320</sup> The proposed statute set forth in Part VII of this Article would abrogate this right.

### *G. Limitation as to Who Can Testify to the Child's Statement*

Of the thirty-nine states that rely on specific tender years exceptions, as opposed to catch-all provisions, thirty-four do not create a requirement as to the professions of those to whom the child's statement has been made, electing instead to provide for a case-by-case determination of the reliability of the statement.<sup>321</sup> Of course,

318. See ALA. CODE § 15-25-35 (1995); ARIZ. REV. STAT. ANN. § 13-1416(B). (West 1989); ARK. R. EVID. 803(25); COLO. REV. STAT. ANN. § 13-25-129 (West 1997); DEL. CODE ANN. tit. 11, § 3513(d) (1995); FLA. STAT. ANN. § 90.803(23)(b) (West 1979 & Supp. 1998); IDAHO CODE § 19-3024 (1997); 725 ILL. COMP. STAT. ANN. 5/115-10 (d) (West 1992 & Supp. 1997); IND. CODE ANN. § 35-37-4-6(e) (West 1992 & Supp. 1997); MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1(3) (1995); MICH. R. EVID. 803A(4); MINN. STAT. ANN. § 595.02(3)(c) (West 1988); MO. ANN. STAT. § 491.075(3) (West 1996); N.J. R. EVID. 803(27)(a); OKLA. STAT. ANN. tit. 12, § 2803.1B (West 1993 & Supp. 1998); 42 PA. CONS. STAT. ANN. § 5985.1(b) (West 1996); S.C. CODE ANN. § 19-1-180(c) (Law Co-op. Supp. 1997); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995); TEX. CODE CRIM. P. ANN. art. 38.072(2)(b)(1)(A) (West Supp. 1998); UTAH CODE ANN. § 76-5-411(3) (Supp. 1995); VT. R. EVID. 804a(a); VA. CODE ANN. § 63.1-248.13:2 C (Michie 1995); WASH. REV. CODE ANN. § 9A.44-120 (West 1988 & Supp. 1998).

319. See NEV. REV. STAT. ANN. § 51.385(2) (1985).

320. See MD. ANN CODE art. 27, § 775(c)(4)(i) (Supp. 1997) (amended 1998).

321. See ALA. CODE § 15-25-32 (1995); ALASKA STAT. § 12.40.110 (Michie 1995); ARIZ. REV. STAT. ANN. § 13-1416 (West 1989); ARK. R. EVID. 803(25); CAL. EVID. CODE § 1228 (West 1995); COLO. REV. STAT. ANN. § 13-25-129(3) (West 1997); DEL. CODE ANN. tit. 11, § 3513 (1995); GA. CODE ANN. § 24-3-16 (1995); HAW. R. EVID. 804(b)(6); IDAHO CODE § 19-3024 (1997); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 1992 & Supp. 1997); IND. CODE ANN. § 35-37-4-6 (Michie 1994 & Supp. 1997); IOWA CODE ANN. § 232.96 (West Supp. 1997); KAN. STAT. ANN. § 60-460(dd) (1994 & Supp. 1997); MASS. GEN. LAWS ANN. ch. 233, § 81 (West

those additional states with only general residual hearsay exceptions do not limit potential witnesses at all.

In addition, five states have *sui generis* restrictions. California's statute admits only a written report of a law enforcement officer or a welfare employee.<sup>322</sup> Iowa's statute creates a narrow tender years exception that applies to CINA proceedings only.<sup>323</sup> The Iowa statute requires that there be either a writing, audiotape, or videotape made by "a juvenile court officer, a peace officer, or a hospital."<sup>324</sup>

Other states create additional artificial restrictions in their statutes. For instance, South Carolina restricts the testimony of a child's statement only when the statement alleges abuse or neglect by one of his parents, and the allegation of abuse or neglect is made after the parents' separation or divorce.<sup>325</sup> Even in those cases, the statement is admissible only if it was made by the child "to a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, a Department of Social Services staff member, or to a child care worker in a regulated child care facility."<sup>326</sup>

Texas limits its tender years hearsay witness to the first person, eighteen years or older, to whom the child made a statement about the offense.<sup>327</sup> This provision makes the tender years exception somewhat analogous to Maryland's exception for a prompt report of rape or sexual assault,<sup>328</sup> and permits the first allegation by the

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Supp. 1997); MICH. R. EVID. 803A; MINN. STAT. ANN. § 595.02(3) (West 1988); MISS. R. EVID. 803(25); MO. ANN. STAT. § 491.075 (West 1996); NEV. REV. STAT. ANN. § 51.385 (1985 & Supp. 1997); N.H. REV. STAT. ANN. § 516:25-a (Supp. 1995); N.J. R. EVID. 803(27); N.Y. FAM. CT. ACT. § 1046 (McKinney 1983); N.D. R. EVID. 803(24); OHIO REV. CODE ANN. EVID. R. 807 (Banks-Baldwin 1995 & Supp. 1996); OKLA. STAT. ANN. tit. 12, § 2803.1 (West 1995); 42 PA. CONS. STAT. ANN. § 5985.1 (West 1982 & Supp. 1997); R.I. GEN. LAWS § 14-1-69 (1994); S.C. CODE ANN. § 19-1-180 (Law Co-op. Supp. 1997); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995); UTAH CODE ANN. § 76-5-411 (1995); VT. R. EVID. 804a(a); VA. CODE ANN. § 63.1-248.13:2 (Michie 1995); WASH. REV. CODE ANN. § 9A.44-120 (West 1988 & Supp. 1998).

322. See CAL. EVID. CODE § 1228 (West 1995).

323. See IOWA CODE ANN. § 232.96(6) (West 1996).

324. *Id.*

325. See S.C. CODE ANN. § 19-1-180(G) (Law Co-op. Supp. 1997).

326. *Id.*

327. See TEX. CODE CRIM. P. ANN. art. 38.072(2)(a)(2) (West Supp. 1998). Presumably others could testify to the child's subsequent consistent statements if the child is impeached by suggestion of fabrication or improper motive.

328. See MD. RULE 5-802.1(d).

child to be admitted into evidence.<sup>329</sup>

Focusing on the relationship of the witness to the child, Rhode Island requires that the statement be "made to someone the child would normally turn to for sympathy, protection or advice."<sup>330</sup> This provision, of course, is not a restriction on professions. It would seem to broadly include parents, siblings, friends, law enforcement officers, health services and social services workers, school personnel, the clergy, and any other person to whom the child may turn.<sup>331</sup> The proposed statute set forth in Part VII of this Article follows the lead of the thirty-four states that omit the restrictive list.<sup>332</sup> It also incorporates the language of the Rhode Island statute as a factor to be looked at by the court in determining reliability.<sup>333</sup>

#### *H. Types of Proceedings That the Exceptions are Applicable to*

States that have specific tender years exceptions vary widely as to which types of proceedings their exception applies. The states fall within the following eleven categories: (1) any judicial proceeding—Delaware, Georgia, Hawaii, Mississippi, North Dakota, Ohio, Oregon, and Vermont (also permitted in administrative proceedings);<sup>334</sup> (2) any criminal or civil proceeding—Arizona, Florida, and Minnesota;<sup>335</sup> (3) criminal, juvenile, or civil proceeding—New Jersey;<sup>336</sup> (4) criminal, delinquency, or civil proceedings—Colorado;<sup>337</sup> (5) criminal, delinquency, or child protection proceedings—Kansas and Washington;<sup>338</sup> (6) criminal or juvenile proceedings—Oklahoma;<sup>339</sup> (7) criminal or delinquency proceedings—Michigan;<sup>340</sup> (8) criminal proceedings—Alabama, Arkansas, California, Illinois, Indiana, Maine, Massachusetts, Missouri, Nevada, Pennsylvania, South Dakota, Texas, and Utah;<sup>341</sup> (9) grand jury hearings—Alaska;<sup>342</sup> (10) civil proceedings—New Hampshire and

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329. See TEX. CODE. CRIM. P. ANN. art. 38.072 (West Supp. 1998).

330. R.I. GEN. LAWS § 14-1-69 (1994).

331. See *id.*

332. See *supra* note 321.

333. See R.I. GEN. LAWS § 14-1-69 (1994).

334. See *infra* notes 399-400.

335. See *infra* notes 399-400.

336. See N.J. R. EVID. 803(27).

337. See COLO. REV. STAT. ANN. § 13-25-129 (West 1997).

338. See *infra* notes 399-400.

339. See *infra* note 400.

340. See *infra* note 399.

341. See *infra* notes 399-400.

342. See ALASKA STAT. § 12.40.110 (Michie 1985).

Virginia;<sup>343</sup> (11) child protection hearing—Iowa, Michigan, New York (family court), Rhode Island (custody or termination), and South Carolina (family court).<sup>344</sup> The proposed statute set forth in Part VII of this Article would make the exception applicable in criminal, civil, and juvenile proceedings.

### *I. Timing of Admissibility Determination*

Several states do not specify when and where the trial court must make the preliminary determination as to admissibility. However, many require an *in camera* determination. For example, New Jersey requires a "hearing conducted pursuant to [Evidence] Rule 104(a),"<sup>345</sup> which provides that the court "may hear" the matter outside the presence of the jury.<sup>346</sup> Michigan requires a pretrial determination;<sup>347</sup> North Dakota requires an *in limine* hearing;<sup>348</sup> and Oregon requires a determination "immediately prior to the commencement of trial."<sup>349</sup>

## VII. A PROPOSAL FOR AMENDING MARYLAND'S STATUTE

The following proposed statute is based on Senate Bill 658<sup>350</sup> from the 1997 session. Some changes have been made, and footnotes have been added. The proposed statute would extend the tender years exception in the following ways: (1) extend the exception to civil proceedings; (2) make the exception applicable to child witnesses to abuse of other children, such as siblings, when their out-of-court statements are shown to be reliable; (3) make the exception applicable to older retarded or developmentally disabled persons who have a mental or developmental age of under 12 and, therefore, need protection; and (4) omit the list of categories of professions of witnesses, who can testify.

The proposed statute provides that screening by the judge could be held, in the court's discretion, before the seating of a jury. As mandated in *Idaho v. Wright*,<sup>351</sup> the criteria used for determining the reliability of tender years hearsay are modified to preclude the

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343. See *infra* note 400.

344. See *infra* notes 399-400.

345. N.J. R. EVID. 803(27).

346. *Id.* 104(a).

347. See MICH. R. EVID. 803A.

348. See N.D. R. EVID. 803(24).

349. OR. R. EVID. 803(18a)(b).

350. S. 658 (Md. 1997) (on file with author).

351. 497 U.S. 805, 806 (1990).

judge from either considering corroborating evidence or judging the credibility of the witness testifying to the child's statement; instead, these issues are properly left to the trier of fact. Moreover, the criterion included in the Rhode Island statute regarding persons from whom the child likely would seek solace, protection, or advice,<sup>352</sup> is added as an indicium of reliability.

A BILL ENTITLED<sup>353</sup>

AN ACT concerning

**Child Abuse - Out of Court Statements**

FOR the purpose of expanding a provision of law that allows certain out-of-court statements concerning alleged offenses against certain child victims to be admitted in certain court proceedings by allowing these statements to be offered in civil proceedings if found to be sufficiently reliable; and generally relating to the use of certain out of court statements concerning certain offenses in court proceedings.

BY repealing Article 27 - Crimes and Punishments Section 775 Annotated Code of Maryland (1996 Replacement Volume) and re-enacting it with amendments, as Courts and Judicial Proceedings Article Section 9-103.1

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Courts and Judicial Proceedings Article Section 9-103.1

(a) In this section "statement" means:

- (1) An oral or written assertion; or
- (2) Nonverbal conduct, if it is intended as an assertion, including sounds, gestures, demonstrations, drawings, or similar actions.<sup>354</sup>

(b) (1) Subject to the provisions of [paragraphs (2) and (3)] PARAGRAPH (2) of this subsection, if a court finds that the requirements of subsection (c) of this section are satisfied, a court may admit into evidence in a juvenile [court proceeding], CIVIL, or [in a] criminal

352. See *supra* notes 330-31 and accompanying text.

353. Language deleted from the statute currently in force, including amendments effective October 1, 1998, see *supra* notes 11, 246 and accompanying text, are placed in [brackets], and added language is CAPITALIZED.

354. This definition could be removed and replaced with a cross-reference to Maryland Rule of Evidence 5-801(a). However, having the explanation in subsection (a)(2) may be helpful to the courts.

court proceeding an out-of-court statement, to prove the truth of the matter asserted in the statement, made by a child [victim]<sup>355</sup> WHEN<sup>356</sup> under the age of twelve<sup>357</sup> years, who is EITHER the alleged victim or the child alleged to need assistance in the case before the court, concerning an alleged offense against the child, OR A WITNESS TO SUCH AN OFFENSE AGAINST ANOTHER CHILD,<sup>358</sup> of:

- (i) Child abuse OR ABUSE OF A VULNERABLE ADULT,<sup>359</sup> as defined in ARTICLE 27, Sections 35C and 35D [of this article];
- (ii) Rape or sexual offense, as defined in ARTICLE 27, Sections 462 through 464B [of this article];
- (iii) Attempted rape or attempted sexual offense in the first or second degree, as defined in ARTICLE 27, Section 464F [of this article]; or
- (iv) In a juvenile OR CIVIL court proceeding, abuse or neglect as defined in Section 5-701 of the Family Law Article.<sup>360</sup>

(2) FOR PURPOSES OF THIS SECTION, A “CHILD” SHALL INCLUDE A PERSON WHO IS CHRONOLOGICALLY TWELVE YEARS OR OLDER, BUT HAS A MENTAL OR DEVELOPMENTAL AGE OF UNDER TWELVE, BECAUSE OF MENTAL RETARDATION OR DEVELOPMENTAL DISABILITY, AS DEFINED IN Maryland Annotated Code, Health-General I Sections 7-101(1) and 7-101(e).<sup>361</sup>

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355. This proposed statute extends the exception to child witnesses of abuse or negligence of other children, *e.g.*, their siblings.

356. This is intended to clarify that the child must be under twelve when the out-of-court statement was made; the child does not necessarily have to be under twelve at the time of trial.

357. This proposed statute does not attempt to change the cut-off age of twelve or older. However, other states vary widely on this policy question.

358. *See supra* note 302 and accompanying text (proposing that the exception also extends to child witnesses of alleged child abuse).

359. *See supra* note 304 and accompanying text (extending the exception to vulnerable adults).

360. This proposed statute does not address whether the events to which the child’s statement pertains should be broadened, *e.g.*, to include all crimes. *See* Andrea J. Sedlak, Ph.D. & Diane D. Braodhurst, M.L.A., *Executive Summary of the Third National Incidence Study of Child Abuse and Neglect*, at 18-21 (Sept. 1996) (report on file with author).

361. *See supra* note 304 and accompanying text (proposing that the exception also

[(2) An out of court statement may be admissible under this section only if:

- (i) The statement was made to and is offered by:
  1. A physician;
  2. A psychologist;
  3. A nurse;
  4. A social worker;
  5. A principal, vice principal, teacher, or school counselor at a public or private preschool, elementary school, or secondary school; and
- (ii) The individual described under item (i) of this paragraph was lawfully acting in the course of the individual's profession when the statement was made.]<sup>362</sup>

(2) An out-of-court statement may be admissible under this section only if [the statement possesses particularized guarantees of trustworthiness.]<sup>363</sup>

THE COURT FINDS, IN A HEARING CONDUCTED OUTSIDE THE PRESENCE OF THE JURY OR, IN THE COURT'S DISCRETION, BEFORE THE SEATING OF A JURY,<sup>364</sup> THAT THE TIME, CONTENT, AND CIRCUMSTANCES SUPPORTING THE MAKING OF THE STATEMENT PROVIDE SUFFICIENT INDICIA OF RELIABILITY TO PERMIT ITS ADMISSION INTO EVIDENCE.<sup>365</sup> THE COURT SHALL MAKE A FINDING ON THE RECORD AS TO THE SPECIFIC INDICIA OF RELIABILITY, SET FORTH IN SUBSECTION (D), THAT ARE PRESENT OR ABSENT IN THE STATEMENT.<sup>366</sup>

(c)(1) Under this section, an out-of-court statement by a child may come into evidence to prove the truth of the matter asserted in the statement[:

- (i) If the child's statement is not admissible under any other hearsay exception;<sup>367</sup> and

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extends to vulnerable adults).

362. See *supra* note 321.

363. In the proposed amendment, the list of categories is removed.

364. For clarity, section (e) of the current statute is moved here and specific language is added, granting flexibility and direction to the trial judge regarding whether the determination may or must be made prior to jury selection. *But see infra* part VIII.

365. See *Idaho v. Wright*, 497 U.S. 805, 815-17 (1990).

366. By creating a record of the judge's determination, this section facilitates appellate review.

367. This provision is omitted because of the adoption of the *Maryland Rules of Evi-*

(ii) Regardless] REGARDLESS of whether the child testifies.

(2) If the child does not testify, the child's out of court statement will be admissible only if there is corroborative evidence that:

(i) The defendant in a criminal proceeding had the opportunity to commit the alleged offense; or

(ii) The alleged offender in a juvenile court OR CIVIL proceeding had the opportunity to commit the alleged abuse or neglect.<sup>368</sup>

(3) In order to provide [the defendant with]<sup>369</sup> an opportunity to prepare a response to the statement, the [prosecutor] PROPONENT OF THE EVIDENCE shall serve on the [defendant,] ADVERSE PARTY in a criminal proceeding or [on the alleged offender] in a juvenile<sup>370</sup> court proceeding [and the alleged offender's attorney], a reasonable time before the juvenile court proceeding and at least twenty days before the criminal proceeding in which the statement is to be offered into evidence, notice of:

(i) The [State's] PROPONENT'S intention to introduce the statement; and

(ii) The content of the statement.

UNLESS PROVIDED OTHERWISE BY PRETRIAL ORDER, THE SAME NOTICE AND SERVICE DESCRIBED IN THIS SUBSECTION SHALL BE PROVIDED, AT LEAST TWENTY DAYS BEFORE TRIAL, TO ALL PARTIES IN A CIVIL PROCEEDING.<sup>371</sup>

*dence.* If the provision was retained, the court would have to decide that the evidence was inadmissible under the residual exceptions before it could consider the statutory exception—an illogical manner of proceeding, to say the least.

368. This proposed statute retains subsection (c)(2), which adds a second condition to admissibility when the child does not testify, even though the statement must have been found to be reliable by the judge after consideration of the factors in subsection (d). MSTA proposed to omit subsection (c)(2), but not subsection (d)(10), *see* MSTA, *supra* note 231, ¶ 5, perhaps because they misread *Idaho v. Wright*. Realistically, a reasonable prosecutor would not proceed without the evidence required by subsection (c)(2).

369. The abuser may not be the defendant. However, the abuser could be a juvenile offender, a CINA, or an employee of the defendant.

370. This change is made in recognition of the fact that the accused may wish to offer an out-of-court statement of the child into evidence.

371. The notice requirement is extended to civil proceedings; nonetheless, the abuser might not be a party.



- [(4)(i) The alleged offender shall have the right to take the deposition of a witness who will testify under this section;
- (ii) Unless the State and the defendant or respondent agree, or the court orders otherwise, the defendant in a criminal proceeding shall file a notice of deposition at least five days before, or in a juvenile court proceeding within a reasonable time 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.]<sup>372</sup>
- (d) In order to determine if a child's statement possesses [particularized guarantees of trustworthiness] SUFFICIENT INDICIA OF RELIABILITY<sup>373</sup> under this section, the court shall consider [, but is not limited to,] the following factors:<sup>374</sup>
- (1) The child's personal knowledge of the event;<sup>375</sup>
- [(2) The certainty that the statement was made;]<sup>376</sup>
- [(3)] (2) Any apparent motive OR LACK OF MOTIVE to fabricate or exhibit partiality by the child, including interest, bias, corruption, or coercion;
- [(4)] (3) Whether the statement was spontaneous [or directly responsive to questions];<sup>377</sup>
- [(5)] (4) The timing of the statement;
- [(6) Whether] (5) THE CONTENT OF THE STATEMENT, INCLUDING, FOR EXAMPLE,<sup>378</sup> WHETHER the

372. The deposition provision is removed because it contravenes the purpose of the tender years exception. Moreover, prosecutors have suggested that the deposition provision discourages them from using the tender years exception.

373. This language conforms to the language in *Idaho v. Wright*, 497 U.S. 805 (1990), and is clearer than the language in *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), which is contained in the current statute.

374. This language is omitted in light of *Wright*, 497 U.S. at 820-21 (determining the reliability of the statement by considering the totality of the circumstances surrounding the making of the statement). *See also supra* Part II.

375. This should be met by a showing sufficient to support a finding by a jury that the child had personal knowledge. *See* MD. RULE 5-602.

376. This factor seems to impermissibly require the court to evaluate the credibility of the witness testifying to the child's statement. *See infra* Part VII.D. (criticizing the current statute, which directs the judge to evaluate the credibility of the witness in child abuse cases as a factor in determining the reliability of the statement).

377. The omitted language is superfluous.

378. *See Wright*, 497 U.S. at 822.

child's young age makes it unlikely that the child fabricated the statement that represents a graphic, detailed account beyond [the] AN UNABUSED<sup>379</sup> child's knowledge and experience and the appropriateness of the terminology to the child's age;

[(7)] (6) The nature and duration of the ALLEGED abuse;

[(8)] (7) The inner consistency and coherence of the statement;

[(9)] (8) 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;<sup>380</sup>

[(11)] (9) Whether the SUBSTANCE OF THE statement [is suggestive due to] WAS SUGGESTED BY the use of leading questions[;]

(10) WHETHER THE PERSON TO WHOM THE STATEMENT WAS MADE IS ONE TO WHOM THE CHILD NORMALLY WOULD TURN FOR PROTECTION, SOLACE, OR ADVICE.<sup>381</sup>

[(12)] (11) The credibility of the person testifying about the statement].

IN MAKING THIS DETERMINATION, THE COURT SHALL NOT CONSIDER WHETHER THERE IS INDEPENDENT PROOF OF THE ALLEGED ACT.<sup>382</sup>

[(e)] The court, in determining whether a statement is admissible under this section, in a hearing outside the presence of the jury, or before the juvenile court proceeding 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.

[(f)] (E)(1) In making a determination under subsection [(e)] (B)(2) of this section, the court shall conduct an in camera examination of a child prior to determining the admissibility of the statement, except where the child:

379. Added for clarity.

380. The holding in *Wright* requires removal of this criterion for reliability. See *Wright*, 497 U.S. at 824.

381. See *supra* notes 330-331 and accompanying text.

382. See *Wright*, 497 U.S. at 824.

- (i) Has died; or
- (ii) Is absent from the jurisdiction for good cause shown or the State OR CIVIL PARTY OFFERING THE EVIDENCE has been unable to procure the child's presence by subpoena or other reasonable means.

(2)(i) Except as provided in subparagraph (ii)2 of this paragraph, any [defendant] PARTY, any [defendant's] PARTY'S attorney, and the prosecutor shall have the right to be present when the court hears testimony on whether to admit into evidence an out-of-court statement of a child under this section.

(ii) If the court is required to observe or question the child in connection with the determination to admit into evidence the out-of-court statement:

1. Any defendant's attorney and the prosecutor OR PLAINTIFF'S ATTORNEY shall have the right to be present at the in camera examination; and
2. The judge may not permit a defendant OR ALLEGED ABUSER to be present at the in camera examination.<sup>383</sup>

[(g)] (F)(1) This section may not be construed to limit the admissibility of a statement under any other applicable hearsay exception or rule of evidence.

(2) This section may not be construed to prohibit the court in a juvenile court proceeding from hearing testimony in the judge's chambers.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 1999.

*A. Why Extend the Exception to Apply to Civil Proceedings?*

When present Chief Judge Joseph Murphy and then Chief Judge Alan Wilner of the Court of Special Appeals of Maryland testified before the House Judiciary Committee during the 1996 inter-session, they both expressed surprise that Maryland's tender years statute did not extend to civil proceedings generally. They stated that if the evidence is good enough for criminal proceedings, it is certainly good enough for civil proceedings and that the statute, therefore, should be broadened.

The tender years exceptions of fifteen other states extend to

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383. Added in recognition that there may be cases where a child care facility is being sued for the negligent hiring of a child abuser, so that even though the defendant may not have abused the child, the alleged abuser will not be permitted at the *in camera* examination.

civil proceedings in general.<sup>384</sup> An amendment to this effect would perhaps enable cases that now are being criminally prosecuted to be handled more appropriately in noncriminal proceedings, such as child custody or visitation proceedings or civil proceedings seeking a protective order. It would also enable the courts to protect children in cases where proof of abuse by the alleged abuser could not be shown beyond a reasonable doubt, but the preponderance of the evidence standard was met. In this situation, we have a duty to protect our children when they are in danger.

*B. Why Does the Proposed Statute not Require the Proponent of the Hearsay Evidence to Call the Child as a Witness if the Child is Available to Testify?*

The opponents' argument that the child should have to testify if available is yet another attempt to treat tender years hearsay as particularly dangerous. However, there is no justification for mandating young children to take the stand.

As is the case with the more than twenty Maryland Rule 5-803 hearsay exceptions, if a child's out-of-court statement is sufficiently reliable to be admissible under the tender years hearsay exception, the party offering the statement ought not be compelled to call the child to testify. This decision should be left to trial strategy and the conscience of the proponent, who may not want to put the child through the added stress of testifying.<sup>385</sup>

The opposing party has an equal opportunity to examine the child victim. If the child is available, the opposing party can subpoena the child and examine him just as that party can do with any available hearsay declarant. Moreover, Maryland Rule 5-607 permits one to impeach one's own witness.<sup>386</sup> If calling the declarant as one's own witness is undesirable, that party may ask the court to call the child as the court's witness, thus allowing both sides to proceed as if on cross-examination.<sup>387</sup>

The Maryland statute has no constitutional infirmity. The Supreme Court has held that the Constitution does not require that the State produce the child at trial or prove him or her to be

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384. See *supra* Part VI.H. (Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Minnesota, Mississippi, New Jersey, New Hampshire, North Dakota, Ohio, Oregon, Vermont, Virginia).

385. See generally Serrato, *supra* note 47, at 159-60.

386. See MD. RULE 5-607.

387. See *id.* 5-614.

unavailable.<sup>388</sup>

Moreover, if the child is physically available, the statute requires the court to conduct an *in camera* examination of the child before ruling on the admissibility of the child's out-of-court statement.<sup>389</sup> If the child does not testify, the Maryland statute also requires that there be corroborating evidence of the alleged abuser's opportunity to commit the offense.<sup>390</sup>

*C. Why Does the Proposed Statute Eliminate the Requirement That the Trial Court, in Performing its Screening Function, Evaluate the Credibility of the Person Testifying About the Statement, Including the Court's Certainty That the Statement was Made?*

Another infirmity in the current statute results because it singles out child abuse cases for special scrutiny by directing the trial judge to evaluate the credibility of the witness who is testifying to the child's statement. What is relevant to the trial judge's findings as to the preliminary facts of admissibility of hearsay is the reliability of the out-of-court declarant, established through the foundation for each hearsay exception, not the credibility of the in-court witnesses. Motive to lie or bias does not preclude a witness from testifying to admissible hearsay in other situations.

If the husband of a rape victim wishes to testify to his wife's prompt report of rape, the judge does not look to see if the husband has bias before permitting the husband to testify. Similarly, if an employee of a business wishes to testify to lay the foundation for a self-serving business record, the judge does not preclude the employee from testifying on the basis of the witness's bias.

Under the old common law, parties in civil cases, and their spouses, were incompetent to testify because of their interest in the outcome.<sup>391</sup> Criminal defendants were incompetent to testify for the same reason.<sup>392</sup> Maryland abrogated that common law rule by statute.<sup>393</sup> Under the current statutory regime, the formerly disqualifying fact may simply be brought out to impeach.<sup>394</sup>

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388. See *supra* Part III, B. 2.

389. See MD. ANN. CODE art. 27, § 775(f) (Supp. 1997) (amended 1998). Section 775, with amendments, is reprinted in the Appendix to this Article.

390. See § 775(c)(2).

391. See MCCORMICK, *supra* note 123, § 65-66.

392. 6 McLAIN, *supra* note 70, § 607.1.

393. See MD. CODE ANN., CTS. & JUD. PROC. § 9-101 (1995).

394. See *id.*

In directing whether to believe the witness's testimony, the fact finder will consider, *inter alia*, a witness's bias. In fact, Maryland Criminal Pattern Jury Instructions 3:10 provides:

You are the sole judge of whether a witness should be believed. In making this decision, you may apply your own common sense and every day experiences.

In determining whether a witness should be believed, you should carefully judge all the testimony and evidence and the circumstances under which the witness testified. You should consider such factors as:

- (1) the witness's behavior on the stand and manner of testifying;
- (2) did the witness appear to be telling the truth?
- (3) the witness's opportunity to see or hear the things about which testimony was given;
- (4) the accuracy of the witness's memory;
- (5) does the witness have a motive not to tell the truth?
- (6) does the witness have an interest in the outcome of the case?
- (7) was the witness's testimony consistent?
- (8) was the witness's testimony supported or contradicted by evidence that you believe? and
- (9) whether and the extent to which the witness's testimony in the court differed from the statements made by the witness on any previous occasion.

You need not believe any witness, even if the testimony is uncontradicted. You may believe all, part or, none of the testimony of any witness.<sup>395</sup>

There is nothing unique in this: it is inherent in the fact finding mission of our judicial system. This is the role of the fact finder: the jury in a jury trial, the court in a bench trial. As then Chief Judge Wilner wrote in *Kline v. Green Mount Cemetery*:<sup>396</sup>

Courts are constantly called upon to decide, from conflicting evidence, what is fact. That, indeed, is their daily fare. They have, of course, no firsthand knowledge of what is fact—who really had the green light, whether it was the

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395. MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS § 3:10 (1995); *accord* MARYLAND CIVIL PATTERN JURY INSTRUCTIONS § 1:3 (1993).

396. 110 Md. App. 383, 677 A.2d 623 (1996).

defendant who actually shot the victim—but, to perform their public role as adjudicator, they are empowered to declare, from the evidence presented to them, what is fact, and, based upon those declarations, whether implicit or explicit, to enter judgments.<sup>397</sup>

What is relevant to admissibility is the credibility and apparent sincerity of the out-of-court declarant—in the case of tender years hearsay, the child. The child's motive to lie, if any, is relevant to the trial judge's screening function. If the judge admits the statement, it may be desirable to give a jury instruction like that set forth in the Colorado and Arkansas statutes when tender years hearsay has been admitted:

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.<sup>398</sup>

#### VIII. ADDITION TO THE RULES OF EVIDENCE

For purposes of predictability, stability, and accessibility, the tender years hearsay exception should be added to the *Maryland Rules of Evidence* in order to guarantee Maryland's children a reasonable opportunity to have their complaints of abuse heard, at least by a judge who will screen out what the judge finds insufficiently reliable. For purposes of consistency, the tender years hearsay exception should be included in Maryland Rule 5-803, along with all of the other hearsay exceptions that apply regardless whether the declarant is available or unavailable to testify.

Although the judicial branch is not immune to the vicissitudes of voting blocks, it is less vulnerable to lobbying by self-interest groups than is the legislature. Children do not vote. MSTA members do. Even though teachers are tangential to the big picture of child abuse, MSTA manages to wield a disproportionate power on this subject in the Maryland General Assembly. The danger in this reality is that the child and teacher may, in some instances, have diverging interests.

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397. *Id.* at 387-88, 677 A.2d at 624-25.

398. ARK. R. EVID. 803(25)(A); accord COLO. R. EVID. 803(4).

A number of other states have placed their tender years exceptions in their rules of evidence. Thirty-eight states other than Maryland have specific tender years exceptions. Of these, eight are included in the states' rules of evidence.<sup>399</sup> The remaining thirty states have statutory tender years exceptions.<sup>400</sup> Placing the tender years exception in the rules of evidence makes eminent sense from the standpoint of accessibility for lawyers and judges.

In a letter to Chief Judge Joseph Murphy, Delegate Vallario asked the Standing Committee on Rules of Practice and Procedure for its input on changes to the tender years statute and relevant policy considerations, including "whether there should be an elimination of the list of persons permitted to testify and whether an elimination of the list should result in any requirement that the child testify or be found unavailable, as proposed by the Maryland State Teachers' Association."<sup>401</sup> As of this writing, the committee has before it a proposal by Chairman Chief Judge Joseph Murphy, approved by the subcommittee on evidence, to amend Maryland Rule 5-803 by adding subsection (25), which would provide:

399. See ARK. R. EVID. 803(25); HAW. R. EVID. 804(b)(6); MICH. R. EVID. 803A; MISS. R. EVID. 803(25); N.J. R. EVID. 803(27); N.D. R. EVID. 803(24); OHIO REV. CODE ANN. EVID. 807 (Banks-Baldwin 1995 & Supp. 1996); VT. R. EVID. 804a(a).

400. See ALA. CODE § 15-25-32 (1995); ALASKA STAT. § 12.40.110 (Michie 1995); ARIZ. REV. STAT. ANN. § 13-1416 (West 1989); CAL. EVID. CODE § 1228 (West 1995); COLO. REV. STAT. ANN. § 13-25-129 (West 1997); DEL. CODE ANN. tit. 11, § 3513 (1995); FLA. STAT. ANN. § 90.803(22) (West 1979 & Supp. 1998); GA. CODE ANN. § 24-3-16 (1995); IDAHO CODE § 19-3024 (1997); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 1992 & Supp. 1997); IND. CODE ANN. § 35-37-4-6 (Michie 1994 & Supp. 1997); IOWA CODE ANN. § 232.96 (West Supp. 1997); KAN. STAT. ANN. § 60-460(dd) (1994 & Supp. 1997); MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (1995); MASS. GEN. LAWS ANN. ch. 233, § 81 (West 1986 & Supp. 1997); MINN. STAT. ANN. § 595.02 (West 1988); MO. ANN. STAT. § 491.075 (West 1996); NEV. REV. STAT. ANN. § 51.385 (Michie 1985); N.H. REV. STAT. ANN. § 516:25-a (Supp. 1995); N.Y. FAM. CT. ACT § 1046 (McKinney 1983); OKLA. STAT. ANN. tit. 12, § 2803.1 (West 1983 & Supp. 1995); 42 PA. CONS. STAT. ANN. § 5985.1 (West Supp. 1997); R.I. GEN. LAWS § 14-1-69 (1994); S.C. CODE ANN. § 19-1-180 (Law Co-op. Supp. 1997); S.D. CODIFIED LAWS § 19-16-38 (Michie 1995); TEX. CODE CRIM. P. ANN. art. 38.072 (West Supp. 1998); UTAH CODE ANN. § 76-5-411 (1995); VA. CODE ANN. § 63.1-248.13:2 (Michie 1995); WASH. REV. CODE ANN. § 9A.44-120 (West 1988 & Supp. 1998).

401. Letter from Delegate Joseph F. Vallario, Jr., Chairman of the Maryland House of Delegates Judiciary Committee, to The Honorable Joseph F. Murphy, Chief Judge of the Maryland Court of Special Appeals (Aug. 21, 1997) (on file with author).



The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

.....

(25) Statements Concerning Assaultive Behavior

A statement concerning assaultive behavior to which the declarant was subjected, if the court determines that the time, content, and circumstances of the statement provide sufficient indicia of reliability. A statement is admissible under this subsection only if: (A) at the time the statement was made, the declarant was (i) under the age of 12 years or (ii) chronologically 12 years or older, but had a mental or developmental age of under 12, because of mental retardation or developmental disability, as defined in Code, Health-General Article, §§ 7-101(l) and 7-101(e); (B) the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant; and (C) the court makes a finding on the records as to each of the following specific indicia of reliability that are present or absent:

- (i) the declarant's personal knowledge of the event,
- (ii) any apparent motive or lack of motive to fabricate or exhibit partiality by the declarant,
- (iii) any apparent motive or lack of motive to fabricate or exhibit partiality by the witness to whom the statement was made,
- (iv) whether the statement was spontaneous,
- (v) the timing of the statement,
- (vi) the content of the statement,

Committee note: This factor includes, for example, whether the declarant's young age makes it unlikely that the declarant fabricated the statement that represents a graphic, detailed account beyond an unabused declarant's knowledge and experience and the appropriateness of the terminology to the declarant's age.

- (vii) the nature and duration of the alleged assaultive behavior,
- (viii) the inner consistency and coherence of the statement,

- (ix) whether the declarant was suffering pain or distress when making the statement,
- (x) whether the substance of the statement was suggested by the use of leading questions, and
- (xi) whether the witness to whom the statement was made is one to whom the declarant normally would turn for protection, solace, or advice.

Committee note: Subsection (b)(25) of this Rule does not limit the admission of an offered statement under any other applicable hearsay exception or law. In this subsection, motive includes interest, bias, corruption, and coercion.

In *Idaho v. Wright*, 497 U.S. 805 (1990), a majority of the Supreme Court held that, in determining the admissibility of a child victim's hearsay statement, the court may not consider corroborating evidence.

*Reporter's Note*

The proposed amendments to Rule 5-803 add two categories to the list of types of hearsay that are not excluded by the hearsay rule even though the declarant is available as a witness.

.....

The second proposed new subsection is subsection (b)(25), Statements Concerning Assaultive Behavior, a "tender years exception" to the hearsay rule, applicable in both civil and criminal proceedings. Subject to safeguards to keep unreliable statements out of evidence, subsection (b)(25) allows admission of a child's out-of-court statement concerning assaultive behavior to which the child was subjected. For a statement to be admissible under this subsection, (1) the statement must have been made by a person with a chronological or mental age of under 12 years at the time the statement was made, (2) the proponent of the statement must have given an advance notice similar to the advance notice requirement set forth in subsection (b)(24) of this Rule, and (3) the court must determine that the time, content, and circumstances of the statement provide sufficient indicia of reliability and must make a specific finding on the record as to each indicia of reliability, based upon the list set out at pp. 43-44 of the October 6, 1997 memorandum of Professor Lynn McLain, with the addition of subsection (b)(25)(c)(iii), concerning motive or lack of

motive to fabricate or exhibit partiality by the witness. Also, with respect to the "tender years exception," the Subcommittee recommends that concurrent legislative changes be made to Code, Article 27, Section 775.<sup>402</sup>

Chief Judge Murphy recommended that the legislature make consistent changes in the statutory evidence law. His proposal should be embraced by the Standing Committee on Rules and Procedure and forwarded to the Court of Appeals of Maryland.

## IX. CONCLUSION

Over ten years of illogically hamstringing Maryland's tender years hearsay exception is too many. The exception must be broadened so as to permit a trial judge to at least consider a child's reports of physical or sexual abuse, in both civil and criminal cases, so as to screen and admit the reports if reliable.

Maryland's current restrictions—to criminal and juvenile cases, to certain occupations of people who can testify to a child's statement, and the *sui generis* provision that the defense may depose such witnesses—serve only as artificial, illogical barriers to the protection of children who cannot protect themselves. In order to effectively serve the purpose of the tender years exception, these restrictions must be removed.

The tender years exception must be extended both to other children who witness the alleged abuse of the child victim and to vulnerable adults who have the developmental age of young children. Finally, the tender years hearsay exception should be codified in the *Maryland Rules of Evidence*, where it will be less vulnerable to lobbying by such groups as MSTA.

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402. Proposed MD. RULE 5-803(25) (on file with author).

## APPENDIX

MD. ANN. CODE art. 27, § 775 (1997), *amended by* H.D. 590 (Md. 1998); S. 688 (Md. 1998).<sup>403</sup>

§ 775. Out of court statements of child abuse victims.

(a) *Statement defined.* — In this section "statement" means:

- (1) An oral or written assertion; or
- (2) Nonverbal conduct, if it is intended as an assertion, including sounds, gestures, demonstrations, drawings, or similar actions.

(b) *Admissibility* — In general. —

- (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, if a court finds that the requirements of subsection (c) of this section are satisfied, a court may admit into evidence in a juvenile court proceeding or in a criminal proceeding an out of court statement, to prove the truth of the matter asserted in the statement, made by a child victim under the age of 12 years, who is the alleged victim or the child alleged to need assistance in the case before the court, concerning an alleged offense against the child of:
  - (i) Child abuse, as defined in § 35C of this article;
  - (ii) Rape or sexual offense, as defined in §§ 462 through 464B of this article;
  - (iii) Attempted rape or attempted sexual offense in the first or second degree, as defined in § 464F of this Article; or
  - (iv) In a juvenile court proceeding, abuse or neglect as defined in § 5-701 of the Family Law Article.
- (2) An out of court statement may be admissible under this section only if:
  - (i) The statement was made to and is offered by:
    1. A [licensed] physician[, as defined in § 14-101 of the Health Occupations Article];
    2. A [licensed] psychologist[, as defined in § 18-101 of the Health Occupations Article];
    3. A nurse;
    4. A [licensed] social worker[, as defined in § 19-101 of the Health Occupations Article];

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403. Amendments, which take effect October 1, 1998, are noted as follows: (1) additions are underlined, and (2) deleted provisions are placed in [brackets]. Section 775, as amended, now appears in 1998 Md. Laws ch. 638 and ch. 639.

- [4.] 5. A principal, vice principal, teacher, or school counselor at a public or private preschool, elementary school, or secondary school; and
- (ii) The individual described under item (i) of this paragraph was lawfully acting in the course of the individual's profession when the statement was made.
- (3) An out of court statement may be admissible under this section only if the statement possesses particularized guarantees of trustworthiness.
- (c) *Same — Conditions precedent. —*
- (1) Under this section, an out of court statement by a child may come into evidence to prove the truth of the matter asserted in the statement:
    - (i) If the child's statement is not admissible under any other hearsay exception; and
    - (ii) Regardless of whether the child testifies.
  - (2) If the child does not testify, the child's out of court statement will be admissible only if there is corroborative evidence that:
    - (i) The defendant in a criminal proceeding had the opportunity to commit the alleged offense; or
    - (ii) The alleged offender in a juvenile court proceeding had the opportunity to commit the alleged abuse or neglect.
  - (3) In order to provide the defendant with an opportunity to prepare a response to the statement, the prosecutor shall serve on the defendant in a criminal proceeding or on the alleged offender in a juvenile court proceeding and the alleged offender's attorney, a reasonable time before the juvenile court proceeding and at least 20 days before the criminal proceeding in which the statement is to be offered into evidence, notice of:
    - (i) The State's intention to introduce the statement; and
    - (ii) The content of the statement.
  - (4) (i) The alleged offender shall have the right to take the deposition of a witness who will testify under this section;
  - (ii) Unless the State and the defendant or respondent agree, or the court orders otherwise, the defendant in a criminal proceeding shall file a notice of deposition at least 5 days before, or in a juvenile court pro-

- ceeding within a reasonable time 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.
- (d) *Particularized guarantees of trustworthiness.* — In order to determine if a child's statement possesses particularized guarantees of trustworthiness under this section, the 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.
- (e) *Role of court.* — The court, in determining whether a statement is admissible under this section, in a hearing outside the presence of the jury, or before the juvenile court proceeding 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.
- (f) *In camera examination of child.* —
- (1) In making a determination under subsection (e) of this section, the court shall conduct an in camera examination

of a child prior to determining the admissibility of the statement, except where the child:

- (i) Has died; or
  - (ii) Is absent from the jurisdiction for good cause shown or the State has been unable to procure the child's presence by subpoena or other reasonable means.
- (2) (i) Except as provided in subparagraph (ii) of this paragraph, any defendant, any defendant's attorney, and the prosecutor shall have the right to be present when the court hears testimony on whether to admit into evidence an out of court statement of a child under this section.
- (ii) If the court is required to observe or question the child in connection with the determination to admit into evidence the out of court statement:
1. One attorney for each defendant, one attorney for the child, and one prosecutor shall have the right to be present at the in camera examination; and
  2. The judge may not permit a defendant to be present at the in camera examination.
- (g) *Construction of section.* —
- (1) This section may not be construed to limit the admissibility of a statement under any other applicable hearsay exception or rule of evidence.
  - (2) This section may not be construed to prohibit the court in a juvenile court proceeding from hearing testimony in the judge's chambers.