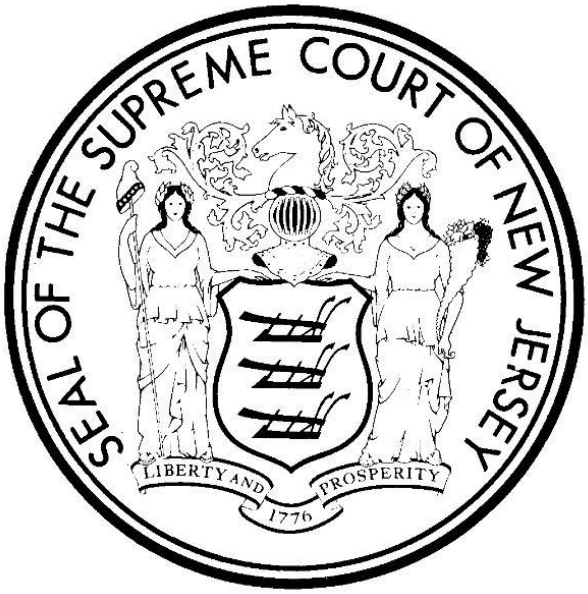
2019 - 2021 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE



Chair: Carmen Messano, P.J.A.D.
Vice-Chair: Mitchel E. Ostrer, J.A.D.

January 25, 2021

I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. NEW JERSEY RULE OF EVIDENCE 803(C)(27) STATEMENTS BY A CHILD RELATING TO A SEXUAL OFFENSE ("TENDER YEARS" HEARSAY EXCEPTION)

The New Jersey Supreme Court directed the Rules of Evidence Committee to consider potential amendments to Rule of Evidence 803(c)(27) (the "tender years" exception to hearsay). Specifically, in State in the Interest of A.R., 234 N.J. 82 (2016), the Court requested the Committee to "consider whether N.J.R.E. 803(c)(27) should be amended to conform to the evidence rule adopted in [State in the Interest of] D.R., and whether any other amendment is advisable as a result of the concerns raised in this case." Id. at 102.

State in the Interest of A.R. involved the trial of a 14-year-old boy who was charged with sexually assaulting a developmentally disabled 7-year-old boy with the fictitious name John. During in-court and out-of-court questioning, John was "unable to distinguish between fantasy and reality" and did not understand the duty to tell the truth. Id. at 86. Prior to trial, John had provided a video-recorded statement to the police. The trial court declared John incompetent as a witness but admitted into evidence the out-of-court statement to the police, and John was

permitted to testify at trial due to the incompetency proviso of Evidence Rule 803(c)(27).[1] Ibid.

Evidence Rule 803(c)(27) provides that a statement of a child relating to sexual misconduct committed against that child is admissible if the proponent of the statement notifies the adverse party that it intends to offer the statement; the court finds, in a Rule 104(a) hearing, that there is a probability that the statement is trustworthy; and the child either testifies at the proceeding or the child is unavailable as a witness and corroborating evidence is admitted. The Rule further provides, in what is called the incompetency proviso, that "no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601." Evidence Rule 601 provides that every person is competent to be a witness unless the proposed witness is: (a) "incapable of expression so as to be understood by the court and any jury either directly or through interpretation, or (b) the proposed

[1] The Appellate Division and the Supreme Court decided that John's prior statement should not have been admitted into evidence, though for different reasons. The Appellate Division found that admitting the prior statement violated the defendant's Sixth Amendment right of confrontation. State in the Interest of A.R., 447 N.J. Super. 485 (App. Div. 2016). Specifically, the Appellate Division found that the objectives of the Confrontation Clause "cannot be achieved by a defense lawyer posing questions to an incompetent witness such as [John], who has been judicially found incapable of reliably distinguishing between truth and fiction, and who does not understand the paramount need to tell the truth about matters of grave importance in a prosecution." Id. at 522. The Supreme Court, however, did not reach the constitutional question. It found that the prior statement "was not admissible because the statement did not possess a sufficient probability of trustworthiness to justify its introduction at trial." A.R., supra, 234 N.J. at 86.

witness is incapable of understanding the duty of a witness to tell the truth, or (c) as otherwise provided by these rules or by law."

In A.R., the Court traced the history of the incompetency proviso; it was first suggested in State in the Interest of D.R., 109 N.J. 348 (1988),[2] and was later adopted in Evidence Rule 63(33), the prior iteration of Rule 803(c)(27). Id. at 98-99. Evidence Rule 63(33) provided, in part, that "no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of paragraph (b) of Rule 17." Rule 17(b) was the prior iteration of Rule 601(b).

The Court in A.R. stated that "there is a difference, for a child, between understanding 'the duty' to tell the truth and having the capacity to tell the truth in a manner that is understandable by the trier of fact." A.R., supra, 234 N.J. at 100.

[2] The Court in D.R. noted that there are often problems of proof in child sex abuse prosecutions and testimony by the victim can be indispensable. 109 N.J. at 358. "Typically, in such cases the assailant is a close relative, a member of the household, or a trusted acquaintance. Acts of child sexual abuse are seldom committed in the presence of anyone other than the perpetrator and the victim. Frequently, there is no visible physical evidence that acts of sexual molestation have occurred. Absent a confession, the victim's account of the sexual abuse may be the best and sometimes the only evidence that a sexual assault has taken place." Id. at 358-59. The Court further found that "a child victim's spontaneous out-of-court account of an act of sexual abuse may be highly credible because of its content and the surrounding circumstances." Id. at 359. "In comparison, the reliability of in-court testimony of a young child victimized by a sexual assault is often affected by the stress of the courtroom experience, the presence of the defendant, and the prosecutor's need to resort to leading questions. The lapse of time between the sexual assault and the trial can affect the child's ability to recall the incident. In cases where the accused is a member of the child's family or household, the victim may be urged or coerced to recant. In general, the courtroom setting is intimidating to children and often affects adversely their ability to testify credibly." Id. at 360 (internal citations omitted).

It noted that the prior version of the incompetency proviso only permitted a child to testify when the incompetence is based on paragraph (b) of Rule 17, concerning the capacity to understand the duty to tell the truth. Ibid. When the Evidence Rules were renumbered in 1993, the scope of the incompetency proviso was broadened to include all reasons for incompetence in Rule 601 – the capacity to understand the duty to tell the truth and also the capability to express oneself in an understandable manner. "The consequences of this expansion are significant and far-reaching because it permits the testimony of a child victim not only incapable of understanding the duty to tell the truth but also incapable of distinguishing between fantasy and reality and of expressing himself in a manner to be understood by a judge or jury." Id. at 101. The Court stated that this expansion of the incompetency proviso was a "significant change" to the Evidence Rules, "yet it is never mentioned in the Evidence Committee's Report." Ibid.

Accordingly, the Court requested the Committee to consider whether Evidence Rule 803(c)(27) should be amended. It noted that while "less exacting standards of competency should apply to a child witness, [the Court in D.R.] did not go so far as to completely suspend the competency rule for child testimony." Id. at 102.

The Committee formed a Subcommittee to review the Court's request. The Subcommittee could not reach a consensus on any issue except to clarify the

standard of proof for finding a probability of the prior statement's trustworthiness. The Subcommittee's Report is attached as Exhibit A.

Specifically, the Subcommittee first considered restoring the incompetency proviso to its prior iteration by amending Rule 803(c)(27) to narrow the proviso to Rule 601(b) (understanding the duty to tell the truth). Hence, a child found incompetent based on Rule 601(a) (incapable of expression so as to be understood) would not be permitted to testify. The Subcommittee discussed the potential benefit of presenting to the factfinder a child who is incapable of making himself or herself understood, so the factfinder can then determine whether the out-of-court statement is credible and trustworthy. It further discussed the rights of the defendant in such cases. Some Subcommittee members supported the amendment but only in criminal cases. It was argued that criminal defendants' interests were weightier than those of civil litigants, notwithstanding the significant interests at stake in some civil cases, such as those involving child abuse and neglect and termination of parental rights. One member supported the amendment as applied in all cases.

The Subcommittee further considered whether the incompetency proviso should be eliminated entirely, either only in criminal cases, or in all cases. The Subcommittee considered that the proviso was intended to assure admissibility of a child's out-of-court statement under the Confrontation Clause jurisprudence of

Ohio v. Roberts, 448 U.S. 56, 67 (1980). See D.R., supra, 109 N.J. at 369. However, Crawford v. Washington, 541 U.S. 36 (2004), significantly altered that standard.[3] Neither proposal carried a majority in the Subcommittee.

The Subcommittee also considered whether the incompetency proviso should be expanded to cover not just child victims but also children who witnessed sexual misconduct against another child. The Subcommittee discussed the policy considerations, such as the need for the witness's evidence in child sexual abuse cases and the potential competency of the child witness when the child victim is not competent. Lacking an underlying record to support this expansion of the Rule, the Subcommittee decided not to recommend the amendment.

The Subcommittee, however, agreed to recommend an amendment clarifying the standard of proof for the trial court's determination that the statement is likely to be trustworthy. As noted above, Rule 803(c)(27)(b) states that the court

[3] Prior to the United States Supreme Court decision in Crawford, out-of-court statements of an unavailable witness could be admitted into evidence in a criminal case if they were sufficiently trustworthy and fell "within a firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. 56, 67 (1980). In Crawford, the Court distinguished between testimonial statements and non-testimonial statements. Construing the Sixth Amendment Confrontation Clause ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"), the Court decided that its protections apply to statements by witnesses who "bear testimony" against the accused, who make "testimonial statements." Id. at 51. Such statements include, "at a minimum[,] prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [] police interrogations." Id. at 68. Testimonial statements of a witness are not admissible into evidence in a criminal case if the witness does not testify, unless the defendant had a prior opportunity to cross-examine the witness. Id. at 53-54. Non-testimonial statements of an unavailable witness that are sufficiently reliable, however, may be admitted under the hearsay rules of evidence. Id. at 57.

must find that "there is a probability that the statement is trustworthy." The Subcommittee noted that the Court, in A.R., found that the statement at issue there was not admissible because "it did not possess a sufficient probability of trustworthiness." A.R., supra, 234 N.J. at 86. The Subcommittee decided that a "sufficient probability" of trustworthiness can be expressed as "more likely than not" or, more technically, by a "preponderance of the evidence." It recommended that the Rule be amended to state that the court must find, by a preponderance of the evidence, that the statement is trustworthy.

Lastly, the Subcommittee discussed the effect of Sixth Amendment Confrontation Clause jurisprudence, which was significantly altered by the Crawford decision in 2004, on the admissibility of an incompetent child's out-of-court statements. If the child's statement is testimonial, the Sixth Amendment requires the criminal defendant to have either a previous opportunity to cross-examine the witness or an opportunity to confront and cross-examine the witness at trial. A defendant may not have the requisite opportunity for meaningful confrontation when faced with an incompetent child witness. The Subcommittee discussed whether the Rule should be amended to expressly state that it is "subject to" the Sixth Amendment right of confrontation. This recommendation was not put to a vote in the Subcommittee but was presented to the full Committee.

The full Committee reviewed the Subcommittee's report and discussed several potential revisions to Rule 803(c)(27). It considered whether the incompetency proviso should be removed entirely; the proposal did not carry, as the vote was 13-13. Next, it considered whether the incompetency proviso should remain but only apply in civil cases and not in criminal cases. This proposal garnered a majority vote, 20-6. The Committee noted that removal of the proviso in criminal cases reflects the new landscape under Crawford. As noted above, a testimonial prior statement by a child witness in a criminal case would be admitted only if the defendant had a previous opportunity to cross-examine the witness, or the child witness testifies at trial and the defendant has the opportunity for meaningful confrontation. With regard to admission of prior testimonial statements, the proviso, permitting a child witness to testify in a criminal case even though the child is incompetent to do so, cannot override the constitutional protections afforded the defendant.

As for non-testimonial statements, the statement of an incompetent child witness may be introduced under some other hearsay exception (such as excited utterance), and reliance on the proviso would not be necessary to assure its admissibility. However, under repeal of the proviso in criminal cases, if the non-testimonial out-of-court statement of an incompetent child does not fall into another hearsay exception, the non-testimonial statement would be admissible only

if it satisfies the trustworthiness test in Rule 803(c)(27)(b), and "the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse." Rule 803(c)(27)(c)(i).[4]

The Committee further decided that the proviso, as modified to apply only in civil cases, should be amended so that it only permits the child to testify when his or her incompetence is due to an inability to understand the duty to tell the truth (Rule 601(b)) and not due to an incapacity to express himself or herself so as to be understood (Rule 601(a)). This vote was 17-9. The Committee found that when a child cannot express himself or herself so as to be understood, such testimony should not be permitted to bootstrap admission of the incompetent child's prior statement into evidence.

In deciding to remove the incompetency proviso for all criminal cases, retaining it only in civil cases, and restricting it to incompetency under Rule 601(b), the Committee relied, in part, on the potential adoption of the recommendations of the Joint Committee on Assessing the Competency of Child Witnesses ("Bueso Committee"). The Bueso Committee is concurrently

[4] In Ohio v. Clark, 576 U.S. 237 (2015), the United States Supreme Court suggested that an incompetent child may well be unavailable. Clark involved statements of a three-year-old deemed incompetent under Ohio law. Id. at 241-42. The United States Supreme Court rejected the argument that admitting the child's non-testimonial statement was fundamentally unfair . Id. at 250. The Court stated, "That fact that the witness is unavailable because of a different rule of evidence does not change our analysis." Ibid.

presenting its recommendation to the Court regarding a new protocol for assessing the competency of child witnesses, specifically with regard to the child's understanding of the duty to tell the truth, the Rule 601(b) competency standard.

There will be two versions of the test, a carefully-worded oral test for children aged nine and older and a picture-based test for younger children and other children unable to accurately answer the oral questions. The Bueso Committee noted that the picture-based test avoids some of the challenges presented with assessing the competency of child witnesses who are younger, developmentally delayed or disabled, or traumatized. The tests are intended to assist the court in assessing whether the child understands the distinction between the truth and a lie, and that lying has negative consequences. With the use of this new protocol, the Committee anticipates that more children will be found to be competent to testify under Rule 601(b) and it may not be necessary to resort to the incompetency proviso of Rule 803(c)(27).

The Committee decided not to adopt any revision to the Rule extending the provisions to children who are witnesses to abuse and not victims of sexual abuse, by a vote of 15-11. It reasoned that such a change would be significant and the Committee did not have an underlying record to support the revision at this time.

The Committee adopted the recommendation to clarify the burden of proof, for the reasons stated by the Subcommittee, by a vote of 17-9. It found that the clarification would assist the bench in making the required determination.

Lastly, the Committee decided to amend the Rule by adding a sentence at the end stating that "[n]othing in this rule shall permit a court to admit a statement if doing so would violate a defendant's constitutional right to confrontation." The vote was 18-8. While all Evidence Rules must be applied in accordance with constitutional principles and this need not be expressly stated, the evolving jurisprudence regarding the Confrontation Clause is particularly intricate in matters involving young child witnesses, and the Committee decided that a reminder in the Rule itself would be helpful to the bench and bar.

Consistent with its restyling recommendations of last term, the Committee further recommends the addition of the Oxford comma to the phrase "time, content, and circumstances."

Therefore, the Committee recommends that Evidence Rule 803(c)(27) be amended to state:

> A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, <u>by a preponderance of the evidence,</u> in a hearing conducted pursuant to Rule 104(a), that on the basis of the time,

> content, and circumstances of the statement [there is a probability that], the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided in civil cases only that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601(b). Nothing in this rule shall permit a court to admit a statement if doing so would violate a defendant's constitutional right to confrontation.

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. COLLABORATIVE LAW PRIVILEGE

On the request of the New Jersey State Bar Association, the Acting Director of the Administrative Office of the Courts asked the Committee to consider whether the Rules of Evidence should be amended to incorporate the "collaborative law privilege" set forth in the New Jersey Family Collaborative Law Act, N.J.S.A. 2A:23D-1 to -18. The Act, which was enacted in 2014, includes a statutory privilege covering communications made by a party or any nonparty participant during the dispute resolution process, to encourage candid discussion and facilitate amicable resolution of the family law issues. N.J.S.A. 2A:23D-13.

Family collaborative law presents a method for resolving disputes "in which an attorney is retained for the limited purpose of assisting his client in resolving family disputes in a voluntary, non-adversarial manner, without court intervention." N.J.S.A. 2A:23D-2(a). This dispute resolution process is intended

to replace litigation; the process terminates if either party or either attorney brings an action in court to litigate the underlying dispute. N.J.S.A. 2A:23D-2(b).

The Committee formed a Subcommittee to review the matter. The Subcommittee noted that the privilege was enacted by the Legislature, albeit not in accordance with the Evidence Act, N.J.S.A. 2A:84-33 to -44, and is recognized in the practice of family law. The collaborative law privilege is narrow and specialized, covering only that specific type of dispute resolution process. Further, the privilege itself can be adjusted by the parties and participants in the process. See N.J.S.A. 2A:23D-10 ("[t]he parties may define the scope of disclosure during the collaborative family law process except as provided by law"); N.J.S.A. 2A:23D-12 ("[a] family collaborative law communication if [is] confidential to the extent agreed to by the parties in a signed record or as provided by law"); N.J.S.A. 2A:23D-15(f) ("[t]he privileges . . . do not apply if the parties agree in advance in a signed record that all or part of a family collaborative law process is not privileged"). In contrast, the privileges set forth in the Evidence Act are broad, are intended to cover numerous practice areas, and may not be adjusted by parties to a process.

The Subcommittee further noted that there is another avenue by which the privilege could be recognized in the Court Rules. Amendments to Rule 1:40, concerning complementary dispute resolution, could be made to include a direct

reference to collaborative law. Specifically, Rule 1:40-2 could be amended to include a reference to family collaborative law in its "settlement proceedings" definition (Rule 1:40-2(a)(2)) and its "facilitative process" definition (Rule 1:40-2(c)), and the privilege could be specifically included in Rule 1:40-4(c) (Evidentiary Privilege).

Accordingly, the Subcommittee decided that the collaborative law privilege need not be added to the many privileges already set forth in the Rules of Evidence. The Subcommittee Report is attached as Appendix B. The matter was presented to the full Committee, which agreed with the Subcommittee's recommendation.

B. ADMISSIBILITY OF PRIOR STATEMENTS BY CHILDREN – ADOPTING INTO THE RULES OF EVIDENCE THE HEARSAY EXCEPTIONS CONTAINED IN N.J.S.A. 9:6-8.46 ("EVIDENCE") AND N.J.S.A. 30:4C-15.1(A) ("CERTAIN PRIOR STATEMENTS OF A CHILD ADMISSIBLE AS EVIDENCE")

Effective January 21, 2020, N.J.S.A. 30:4C-1 ("Dependent and Neglected Children") was amended to include a hearsay exception that permits, in certain Title 30 proceedings, admission of a child's prior statements related to allegations of abuse and neglect of that child. The exception is applicable in any Title 30 hearing for: termination of parental rights ("TPR") pursuant to N.J.S.A. 30:4C-15; judicial review and approval of a permanency plan pursuant to N.J.S.A. 30:4C-

11.4; determination of care and supervision or custody pursuant to N.J.S.A. 30:4C-12; guardianship pursuant to N.J.S.A. 30:4C-15.2; or in any other hearing during the course of child placement, permanency, or guardianship proceedings.

Before enactment of this statute, prior statements by children were admissible only in abuse and neglect cases brought pursuant to Title 9 and the hearsay exception contained in N.J.S.A. 9:6-8.46.[5] Notably, neither of these statutory hearsay exceptions are contained in the Rules of Evidence. The Acting Director of the Administrative Office of the Courts requested the Committee consider whether the Rules of Evidence should be amended to include the hearsay exceptions contained in Title 9 and Title 30. Additionally, the Acting Director asked the Committee to consider whether, if included in the Rules of Evidence, the hearsay exceptions should be extended to include statements by non-party children.

The Committee chair formed a Subcommittee to consider the referral. Three members of this committee participated along with four members of the Supreme Court Family Practice Committee. The Subcommittee members were selected for participation based on their specialized knowledge and experience in Title 30 and Title 9 proceedings. Membership included representation from the Office of the Attorney General as well as the Office of Parental Representation and Office of the

[5] Rule of Evidence 803(c)(27) contains a hearsay exception for statements by a child related to a sexual offense committed with or against that child. The hearsay exception is applicable in any criminal, juvenile or civil proceeding but is limited by definition, to statements related to sexual misconduct, not broader allegations of abuse and neglect.

Law Guardian in the New Jersey Office of the Public Defender. The Subcommittee was asked to consider the two-part referral of the Acting Director and make a recommendation to the full Committee based on its findings.

The Subcommittee convened to analyze the issues referred by the Acting Director. Members conducted an exhaustive review of caselaw including sixteen unpublished decisions. Ultimately, the Subcommittee unanimously recommended no amendments to the Evidence Rules to encompass the hearsay exceptions in Title 30 and Title 9. The Subcommittee further determined that any extension of these hearsay exceptions to non-party children is best left to be decided by the courts in the context of an actively litigated case after full briefing rather than in the abstract via committee. The Subcommittee authored a report in support of its recommendation. A copy of the report is annexed hereto as Appendix C.

The Subcommittee's reasoning in recommending no amendment was multi-fold. First, the Subcommittee observed that the Rules of Evidence have broad application and are not written to address practice-specific scenarios such as these. Moreover, the Subcommittee was reluctant to adopt amendments for the sole purpose of harmonizing the Rules of Evidence with the statutory provisions. Any subsequent legislative amendments would render the corresponding Rule of Evidence out-of-date. The Subcommittee also observed that the Rules of Evidence are not designed to incorporate every legislative prerogative. Finally, the

Subcommittee observed that there was little basis set forth in the legislative history or any other extrinsic information to support (or oppose) the specific hearsay exceptions. The Subcommittee also weighed the issues attendant to child statements related to abuse and neglect including potential trauma suffered by the child while testifying and the degree to which the child's statements can be considered reliable.

The Subcommittee took particular note of the nature of Title 30 proceedings for termination of parental rights insofar as they require a more rigorous burden of proof by the State than abuse and neglect proceedings pursuant to Title 9 as well as the stated purpose of the proceedings to terminate parental rights permanently. By contrast, Title 9 proceedings are intended to remediate and reunify the family. Based upon the significance of TPR proceedings both in the required burden of proof and the potential result to the parties, the Subcommittee was reluctant to adopt the Title 30 hearsay exception particularly where the record before it lacked sufficient information to support the exception. Based upon all of these factors, the Subcommittee determined that an amendment to the Rules of Evidence was ill-advised without a more robust record related to these issues upon which it could base its recommendation.

In considering the Subcommittee's recommendation, the Committee also observed that the hearsay exceptions in Title 30 and Title 9 were not adopted in

accordance with the Evidence Act, N.J.S.A. 2A:84A-33 to -44. The Evidence Act confers upon the Supreme Court the authority to adopt rules dealing with the admission or rejection of evidence which rules can later be cancelled by a joint resolution adopted by the Senate and General Assembly and signed by the Governor. N.J.S.A. 2A:84-38. The Evidence Act sets forth the framework for adopting or amending rules of evidence; the Supreme Court presents proposed evidence rules at a judicial conference and delivers them to the Senate and General Assembly by the next September 15th after the judicial conference. N.J.S.A. 2A:84A-35. There is no statutory mechanism by which the Legislature is given authority to adopt evidence rules. Nevertheless, Subcommittee members observed that the hearsay exception contained in Title 9 has both been in existence and observed by the bench and bar alike throughout its existence.

In light of the Subcommittee's report and the issues raised during the Committee's discussions, the full Committee voted unanimously to adopt the report of the Subcommittee and not to recommend any amendments to the Evidence Rules to incorporate these legislative hearsay provisions.

C. NEW JERSEY RULE OF EVIDENCE 902 SELF-AUTHENTICATION

In July of 2019, the New Jersey Law Journal published an article, "How the Internet Has Impacted the Procedural Practice of Family Law," which discussed

the role of social media in family law cases in the areas of discovery, service of process and the Rules of Evidence. The Acting Director of the Administrative Office of the Courts referred the article to the Committee to consider whether any changes were warranted to the Rules of Evidence to address advances in technology and social media, including in the use of information derived from the internet and social media sources in court proceedings. The referral to the Committee was part of a larger request by the Acting Director to various Supreme Court Committees to examine their respective rules to determine whether amendments should be recommended in light of technological advancements.

The Committee formed a five-member Subcommittee to examine the topic and make a recommendation to the full Committee based on its findings. The Committee chair asked the Subcommittee to consider the referral within the scope of Rule of Evidence 902 ("Self-Authentication"), the recent amendments to Federal Rule of Evidence 902 ("Evidence That is Self-Authenticating") as they relate to electronically stored information ("ESI"), caselaw referenced in the Law Journal article, and any related issues.

The Subcommittee convened to analyze the referral. After drafting its proposed report, the Sedona Conference, a non-partisan research and educational institute, published The Sedona Conference Commentary of ESI Evidence & Admissibility, Second Edition, Public Comment Version, THE SEDONA

CONFERENCE (July 2020), which discussed the recent amendments to Federal Rule of Evidence 902 and the federal framework for authenticating ESI evidence. The Subcommittee reconvened to consider the publication's content as it pertained to the Subcommittee's charge.

Ultimately, the Subcommittee recommended no changes be made to the New Jersey Rules of Evidence, finding that New Jersey's current process for authenticating evidence and relevant case law are sufficient to address issues presented by electronic information. The Subcommittee assessed whether practitioners or judges were experiencing issues with authenticating ESI. They concluded that unlike the federal practitioners, the New Jersey trial courts were not experiencing any problems related to authentication of ESI evidence that would require a rule amendment. This was particularly relevant insofar as the federal amendments to Federal Rules of Evidence 902(13)("Certified Records Generated by an Electronic Process or System") and 902(14)("Certified Data Copied from an Electronic Device, Storage Medium, or File") were adopted, at least in part, to address waste of time, inconvenience, and expense that federal practitioners were experiencing when attempting to introduce ESI evidence. The Subcommittee's report recommending no changes to the rules is annexed hereto as Appendix D.

Recently amended Federal Rule of Evidence 902(13) and 902(14) make certain types of ESI evidence self-authenticating, eliminating the need for a

foundation witness at trial. Instead, the proponent of the evidence must submit a certification of a qualified witness that otherwise meets the requirements of Federal Rule of Evidence 902. The opponent of the evidence can then review the certification to determine whether a legitimate challenge to authenticity exists that would require live testimony. The opponent of the evidence is required to make a timely objection, otherwise the evidence will be considered authenticated. The amendments do not resolve issues of authenticity, rather, they streamline the process for parties to introduce it and eliminate the need for live testimony in many instances.

The Subcommittee reviewed State v. Hannah, 448 N.J. Super. 78 (App. Div. 2016), which was cited in the Law Journal article. In Hannah, the Appellate Division found that New Jersey's current standards for authentication are adequate to evaluate the admission of social media postings. Id. at 82. The defendant in Hannah alleged the court's admission into evidence of a Tweet[6] was improper because the court did not properly authenticate the Tweet with testimony from either the maker of the Tweet or a representative from Twitter to establish genuineness. Id. at 86. The defendant also argued that New Jersey should adopt a stricter test to authenticate ESI evidence. Id. at 88.

[6] Twitter is self-described as 'an information network made up of 140-character messages called Tweets. Id. at 86.

The Hannah court determined that New Jersey's "traditional rules of authentication under N.J.R.E. 901" and case law were adequate to evaluate ESI evidence. The court used Rule 901 and applicable caselaw to evaluate circumstantial evidence including the testimony of the victim and the contents of the Tweet. Id. at 89-91. The Subcommittee agreed with the Hannah court's analysis that the current framework for admissibility was sufficient and that a heightened standard for admissibility is neither required nor intended by the court rules. The Subcommittee further stated that while ESI evidence such as emails and social media posts are relatively new, they nevertheless are writings under Rule 801 and the authentication analysis required by Rule 901 is applicable.

The 902 Subcommittee Report recites a five-step analysis taken from Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007) which applied to the then-existing federal rules and mirrors the currently existing New Jersey Rules of Evidence. The Subcommittee concluded that a rule amendment similar to newly amended Federal Rule of Evidence 902(13) and (14) would serve to address only the process for one element of admissibility – authentication. However, the Subcommittee found that problems in the area of authentication of ESI evidence typically take the form of disputes about whether the person to whom a social media post is attributed has been hacked or "spoofed" (where an individual can fake the identity of another on the internet.) In these situations, the certifications

required by Federal Rule of Evidence 902(13) and 902(14) that render an item of ESI evidence "self-authenticated" would be insufficient and live testimony would nevertheless be required. Any similar amendment to the New Jersey Rules of Evidence would not address issues of alleged "spoofing" of ESI evidence. Finally, the Subcommittee determined that any rule amendments aimed more directly at alleged spoofing of ESI evidence would likely become obsolete in a short period of time. Accordingly, the Subcommittee was satisfied with the current New Jersey Rules of Evidence as they relate to electronic evidence and recommended no rule change.

The Committee approved the 902 Subcommittee Report unanimously.

D. PRETRIAL NOTICE AND DEMAND PROCEDURE FOR AUTHENTICATION OF MAPS FOLLOWING STATE V. WILSON, 227 N.J. 534 (2017)

The Supreme Court asked the Committee to consider a new procedure for authentication of maps in prosecutions under N.J.S.A. 2C:35-7.1 (distributing, dispensing, or possessing with intent to distribute CDS/analog within 500 feet of public property). The procedure was set forth in State v. Wilson, 227 N.J. 534 (2017). The Supreme Court Criminal Practice Committee issued a Supplemental Report in 2018 with proposed Rule 3:10-8 intended to address the Court's holding in Wilson. After a public comment period, the matter was referred to this

Committee to determine whether the holding in Wilson should be developed instead as Rule of Evidence.

In Wilson, the Supreme Court reversed a conviction in a school zone drug case based upon challenge of school zone map admitted at trial. 227 N.J. at 538. The Court held that the map was not testimonial and therefore its presentation did not violate the Confrontation Clause, but that the evidence presented at trial was insufficient to authenticate the map. Id. at 551-553. The map was an "official" map drawn by County Engineer, adopted by the board of freeholders as accurate, and sealed by the engineer who drew the map. Id. at 552. Nevertheless, the Court found that the map did not qualify as self-authenticating under Rule 902 and required the production of a witness to authenticate it. Id. at 553.

The Committee took up the referral and considered several issues. These included that the Comprehensive Drug Reform Act contains a notification and objection mechanism regarding the introduction of maps and that adopting this procedure as a Rule of Evidence would create a special category for public maps where other similar items are not included. The Committee ultimately concluded that the referral was procedural in nature, akin to a pretrial exchange, and therefore the most appropriate vehicle for the procedure was a Court Rule rather than a Rule of Evidence.

The Committee unanimously voted not to adopt a Rule of Evidence. The Supreme Court by order dated January 6, 2020 adopted new Court Rule 3:10-8, "Notice of Intention to Proffer Map of Public Housing, Park, or Building." The new Court Rule, along with a summary of this Committee's consideration, was contained in the January 27, 2020 Notice to the Bar.

III. MATTERS CONSIDERED AND ENDORSED

A. REPORT OF JOINT COMMITTEE ON ASSESSING THE COMPETENCY OF CHILD WITNESSES ("BUESO COMMITTEE")

The Joint Committee on Assessing the Competency of Child Witnesses ("Bueso Committee") is comprised of representatives of the Criminal Practice Committee, Rules of Evidence Committee, and Family Practice Committee, and is informed by recommendations of an expert consultant on child development and psychology, Dr. Thomas D. Lyon. Dr. Lyon developed a two-part protocol for assessing the competency of child witnesses under Rule 601(b), which requires the court to assess whether the child is "incapable of understanding the duty of a witness to tell the truth." The Rules of Evidence Committee supports adoption of the recommendations in the Bueso Committee Report.

Dr. Lyon presented two versions of the test, a carefully-worded oral test for children aged nine and older and a picture-based test for younger children and other children unable to accurate answer the oral questions. The Bueso Committee

noted that the picture-based test avoids some of the challenges presented with assessing the competency of child witnesses who are younger, developmentally delayed or disabled, or traumatized. The tests are intended to assist the court in assessing whether the child understands the distinction between the truth and a lie, and further understands that lying has negative consequences.

The picture-based model includes a scripted description of various scenes, each with two children. In the first part, the children are seated before an object, such as an apple. A thought bubble above each child shows that one child is identifying the object as an apple and the other child is identifying the object as something else. The administrator of the test asks the child which of the children in the picture is telling the truth about the object they are sitting in front of, and which is telling a lie. In the second part of the test, the children are sitting in front of an adult, such as a judge or a teacher. The administrator tells the child that one of the pictured children is telling the truth and the other is lying, and asks which child is going to get "in trouble." There are several iterations of each picture-based test and Dr. Lyon's report includes recommendations about the number and sequence of questions as well as the scoring of the questions.

The Bueso Committee recommended that the Court adopt this protocol, and that trial courts be directed to use only the oral questions or the picture-based

methods to assess the competency of child witnesses. The Rules of Evidence Committee agrees.

IV. CONCLUSION

The members of the Supreme Court Committee on the Rules of Evidence appreciate the opportunity to serve the Supreme Court.

Respectfully submitted,

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APPENDIX A

REPORT OF THE N.J.R.E. 803(C)(27) SUBCOMMITTEE

N.J.R.E. 803(c)(27) Subcommittee Report

In State ex rel. A.R., 234 N.J. 82, 102 (2018), the Supreme Court asked the Committee to consider two questions pertaining to the so-called tender years hearsay exception, N.J.R.E. 803(c)(27). In particular, the Court asked the Committee to address the exception's "incompetency proviso." The proviso states that, if a child's out-of-court statement is offered under the exception, the fact that the child is incompetent under N.J.R.E. 601 will not disqualify him or her. N.J.R.E. 803(c)(27)(c)(ii). The Court asked us, first, whether N.J.R.E. 803(c)(27) should be amended to conform to its predecessor, Evidence Rule 63(33), which the Court proposed in State v. D.R., 109 N.J. 348, 378 (1988). A.R., 234 N.J. at 102. Second, the Court asked the Committee to "consider whether . . . any other amendment is advisable as a result of the concerns raised" in A.R. Ibid.

The first question pertains to an apparently unintended, or at least unexplained, modification of Rule 63(33) when it was adopted as N.J.R.E. 803(c)(27). The second question is an open-ended invitation to consider significant modifications, if tied somehow to concerns that A.R. raised. The subcommittee reviewed both questions, but no majority coalesced behind recommending any changes, except to clarify the standard of proof.

We will review the Rule and the genesis of the Court's charge to the Committee. We will then summarize the subcommittee's deliberations.

The Tender Years Exception and the Incompetency Proviso

The tender years exception allows a party who satisfies the rule's requirements to introduce into evidence in a "criminal, juvenile or civil case" an out-of-court statement by a child under twelve regarding "sexual misconduct committed with or against that child." N.J.R.E. 803(c)(27). The proponent must satisfy three requirements.[1] Ibid. First, the proponent must notify the adverse party that the proponent intends to offer the statement, and must disclose its particulars, allowing enough time for the adverse party to have "a fair opportunity to prepare to meet it." N.J.R.E. 803(c)(27)(a). Second, the proponent must persuade the court in an N.J.R.E. 104(a) hearing that "there is a probability that the statement is trustworthy," based on the statement's "time, content and circumstances." N.J.R.E. 803(c)(27)(b).

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[1] Although the tender years exception does not expressly place the burden on the proponent, the proponent of hearsay generally must establish the prerequisites of admissibility, and do so by a preponderance of the evidence. See State v. Byrd, 198 N.J. 319, 352 (2009) (addressing forfeiture by wrongdoing exception); State v. Phelps, 96 N.J. 500, 517-19 (1984) (regarding co-conspirator exception); State v. Rinker, 446 N.J. Super. 347, 362 (App. Div. 2016) (regarding forfeiture by wrongdoing exception); State v. Stubbs, 433 N.J. Super. 273, 285-86 (App. Div. 2013) (addressing adoptive admission exception); State v. James, 346 N.J. Super. 441, 457 (App. Div. 2002) (addressing co-conspirator exception); see also State v. Pillar, 359 N.J. Super. 249, 289 (App. Div. 2003) (assigning to State the burden of establishing admissibility of hearsay statements made for purposes of medical diagnosis).

The third requirement, which pertains to the declarant's testimony at trial, incorporates the incompetency proviso. N.J.R.E. 803(c)(27)(c). The court may admit the child's out-of-court statement into evidence only if the child (1) "testifies at the proceeding," or (2) is "unavailable as a witness," in which case there must be "offered admissible evidence corroborating the act of sexual abuse" — "provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601." Ibid. (emphasis added). By suspending Rule 601's requirements, the proviso allows a court to receive testimony from a child who (1) "is incapable of expression so as to be understood by the court and any jury either directly or through interpretation," N.J.R.E. 601(a); or (2) "is incapable of understanding the duty of a witness to tell the truth," N.J.R.E. 601(b); or (3) is otherwise deemed incompetent "by these rules or by law," N.J.R.E. 601(c). N.J.R.E. 803(c)(27)(c)(ii).

The Original Tender Years Exception With Limited Proviso

The Court in D.R. fashioned a more limited incompetency proviso when it proposed Rule 63(33). See D.R., 109 N.J. at 378, Appendix A, § 2(c)(ii). According to Rule 63(33), a child witness could testify even if "incapable of understanding the duty of a witness to tell the truth." Id. at 369–70, citing Evid. R. 17(b). But Rule 63(33) still incorporated the competency rule's other

requirements. Referring to Rule 17 — Rule 601's predecessor — Rule 63(33) stated "no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of paragraph (b) of Rule 17." Id. at 378, Appendix A,. § 2(c)(ii) (emphasis added).

The D.R. Court adopted the original tender years exception after concluding that child sex-abuse victims' statements are often reliable, and that problems of proof in sex-abuse prosecutions required an exception for such statements. Id. at 358–63. The Court was persuaded by commentary advocating the exception, as well as by other states' adoption of a hearsay exception for such statements. Id. at 358–63.

The D.R. Court characterized as "the most difficult question" "whether a child's incompetency to testify at trial should preclude admissibility of the child's out-of-court statement." Id. at 365. The Court answered this question by crafting Rule 63(33) to ensure that it conformed to pre-Crawford Confrontation Clause jurisprudence expressed in Ohio v. Roberts, 448 U.S. 56, 66 (1980). See A.R., 234 N.J. at 98–99.[2] In particular, the Court designed the rule to satisfy the "required

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[2] Under Roberts, "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is

(1) availability of the declarant for cross-examination or a demonstration of unavailability, and (2) assurances of reliability." Id. at 99 (quoting D.R., 109 N.J. at 366). The D.R. Court was concerned that if the general competency rule barred a child from testifying, the child still might not meet the Roberts unavailability showing; if so, a court could not admit the child's hearsay statement. 109 N.J. at 366-69.

Our Supreme Court concluded, "In view of the constitutional concerns that a child's incompetency to testify may not satisfy the 'unavailability' prong of Ohio v. Roberts, relaxation of the competency requirements for testimony by child sex-abuse victims appears to be particularly appropriate." Id. at 369. The D.R. Court reasoned that "[a] finding that a child-victim is 'incapable of understanding the duty * * * to tell the truth,' and thus incompetent, is difficult to reconcile with a ruling that admits into evidence, insulated from cross-examination, the out-of-court statements of the same child made several months prior to trial." Id. at 370. As the A.R. Court explained, D.R.'s decision was intended in part to address the fact that "there is a difference, for a child, between understanding 'the duty' to tell

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unavailable . . . [and that his statement] . . . bears adequate 'indicia of reliability.'" 448 U.S. at 66. A court may infer reliability if "evidence falls within a firmly rooted hearsay exception." Ibid. "In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Ibid.

the truth and having the capacity to tell the truth in a manner that is understandable by the trier of fact." A.R., 234 N.J. at 100 (dictum).

The D.R. Court noted that allowing the otherwise-incompetent child witness to testify would allow the jury to assess the child's out-of-court statement based on the child's "communicative skills, demeanor, and credibility as a witness at trial." D.R. at 370. Allowing the child to testify "also affords the defendant a right of cross-examination and limited confrontation . . . that would be lost if the child were disqualified due to incompetency." Id. at 370–71 (citation omitted).

In sum, under the proviso adopted in D.R., a child witness did not have to understand the duty to tell the truth, but the child still had to be capable of expression "so as to be understood." See id. at 369, quoting Rule 17. Notably, the Court did not fully adopt the ABA's recommendation to eliminate entirely the competency requirement for child sex-abuse victims. Id. at 367–69.

A.R. Recognizes That 803(c)(27) Altered 63(33)

In A.R., the Court reversed an adjudication of delinquency, which was based largely on the alleged victim's out-of-court testimonial statement to a detective. See 234 N.J. at 107. Based on the "time[,] content and circumstances of the [child witness's] statement," the trial court found "that the statement [was] probably trustworthy." Id. at 90 (first alteration in original). Although the trial court found

that the child was unable to understand the duty to tell the truth, the court used the incompetency proviso to permit the child to testify. Id. at 91, 94.

The Court held that the trial court's trustworthiness finding lacked evidential support. Id. at 105. It held that in determining trustworthiness, a court should consider the child's "mental state." Id. at 103. Assessing the child's mental state requires examining whether the child can "distinguish between fantasy and reality and whether the child can communicate in a way that shows the child has the mental capacity to tell the truth and to be understood" by the fact-finder. Id. at 103–04. The Court also held that a finding that a child is incompetent to testify should bear on an out-of-court statement's admissibility. Id. at 104. Applying those principles, the Court found that the developmentally disabled out-of-court declarant could not differentiate between "truth and a lie, or reality and fantasy." Id. at 105. The Court also noted that the incompetent child was permitted to testify regarding the out-of-court statement only because the trial court erroneously found that statement was admissible. Id. at 106. Absent the child's out-of-court statement, insufficient evidence supported the adjudication of delinquency. Id. at 107.

Although the Court's decision turned on the out-of-court statement's "trustworthiness," the Court also noted that the incompetency proviso in N.J.R.E. 803(c)(27) differs from the proviso originally adopted in Rule 63(33). Id. at 99.

The Court reviewed its prior decision in D.R., noting that the original proviso, by referring to paragraph (b) of Rule 17 — now recodified at N.J.R.E. 601(b) — only allows testimony that would otherwise be excluded because the child cannot demonstrate that he or she understands the duty to tell the truth. Id. at 99–100. By contrast, the current tender years exception does not merely refer to N.J.R.E. 601(b); it includes all the provisions of N.J.R.E. 601. Id. at 100–01. As a result, the current rule opens the door to the "wholesale allowance of incompetent child testimony." Id. at 102. But the Court noted that nothing in the legislative history of N.J.R.E. 803(c)(27) reflects an intention to expand or alter the proviso from old Rule 63(33). Id. at 101-02. The Court added, "D.R. made clear that less exacting standards of competency should apply to a child witness, but did not go so far as to completely suspend the competency rule for child testimony." Id. at 102. Thus, the Court asked this committee to "consider whether N.J.R.E. 803(c)(27) should be amended to conform to the evidence rule adopted in D.R." Ibid.

Confrontation Clause Issues

Once the A.R. Court found that the out-of-court testimonial statement was inadmissible under N.J.R.E. 803(c)(27) — because it lacked trustworthiness — the Court was able to avoid a constitutional issue that the Appellate Division had addressed. See id. at 108.

In its constitutional analysis, the Appellate Division had reviewed Crawford v. Washington, 541 U.S. 36 (2004), and Crawford's progeny. State ex rel. A.R., 447 N.J. Super. 485, 506-09 (App. Div. 2016), rev'd, 234 N.J. 82 (2018). Crawford addressed the concept of "testimonial" statements, and established the principle that out-of-court testimonial statements by a non-testifying witness may be admitted "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at 59. In other words, absent unavailability and prior opportunity, the declarant must testify and be subjected to "the crucible of cross-examination." Id. at 61. As the United States Supreme Court noted, "[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Id. at 59, n.9 (emphasis added). However, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Id. at 68.

Continuing its constitutional analysis, the Appellate Division noted that in State v. P.S., 202 N.J. 232, 249 (2010), the Court held that the State could not rely on N.J.R.E. 803(c)(27)(c)(ii) to present a child victim's out-of-court testimonial statement unless it produced the child as a witness for cross-examination. A.R.,

447 N.J. Super. at 513-14; see also A.R., 234 N.J. at 103 (noting that "[t]he admissibility of a child's testimonial statement . . . will be conditioned on the child taking the stand"). Expounding on the nature of cross-examination guaranteed by the Confrontation Clause, the Appellate Division held that the clause prohibits the State from introducing a testimonial out-of-court statement unless the defendant has a "meaningful and adequate opportunity at trial to cross-examine." A.R., 447 N.J. Super. at 521. This meaningful and adequate opportunity does not exist when the witness cannot "distinguish[] between truth and fiction, and . . . does not understand the paramount need to tell the truth." Id. at 521–22.[3] Thus, the Appellate Division concluded, because the incompetency proviso permits testimony from an incompetent witness, which in turn permits introduction of the out-of-court testimonial statement, the proviso violates a defendant's confrontation rights. See ibid. Therefore, it may not be enforced. See ibid.

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[3] The court referred to the Indiana Court of Appeals decision in Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005). A.R., 447 N.J. Super. at 519-20. The Indiana court concluded that, at least in some circumstances, "a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for Crawford purposes." Purvis at 581. See also Anderson v. State, 833 N.E.2d 119, 126 (Ind. Ct. App. 2005) (stating that the defendant was denied confrontation rights under Crawford because he "lacked an opportunity for 'full, adequate and effective cross-examination'" of a child who was ruled incompetent at a preliminary hearing). Ibid., quoting Purvis at 581.

The Supreme Court in A.R. chose to "neither address nor endorse the Appellate Division's constitutional analysis." 234 N.J. at 108. Yet, the Court invited this committee to "consider . . . whether any other amendment is advisable as a result of the concerns raised in this case." Id. at 102.

Survey of Other States

A. Student Survey

In considering whether to amend New Jersey's tender years exception, we have studied the analogous exception other states. We have relied on the reports prepared by two of Professor McLaughlin's former students, who surveyed other states' evidence rules or statutes regarding the exception. See Memorandum from Jenn Montan to Denis McLaughlin, Professor, Seton Hall Univ. Sch. L. (Apr. 15, 2019) (on file with author); Memorandum from Michael Sabo to Denis McLaughlin, Professor, Seton Hall Univ. Sch. L. (Apr. 5, 2019) (on file with author). As Ms. Montan's survey was comprehensive, this report will focus on her survey.

Ms. Montan found that thirty-five states, including New Jersey, have a tender years exception in one form or another. A small minority of these states require that, for a child's out-of-court statement to be admissible, the child must be available to testify or to be subject to cross-examination. Other states declare certain children competent, without regard to the usual competency requirements,

see, e.g., Ga. Code Ann. § 24-8-820 (2020) (stating that an out-of-court statement by an under-sixteen-year-old child victim of sexual or physical abuse shall be admissible "if . . . [the] child testifies at trial"); Ga. Code Ann. § 24-6-603 (2020) (stating that in "all criminal proceedings in which a child was a victim of or a witness to any crime, the child shall be competent to testify").

Ms. Montan found that six states have provisions that, like New Jersey's incompetency proviso, expressly permit alleged child victims to testify without requiring those children to satisfy the usual competency requirements. The provisions do so by declaring the child competent, see, e.g., Conn. Gen. Stat. § 54-86h (2020) (stating that "any child who is a victim of assault, sexual assault or abuse shall be competent to testify without prior qualification"), or by exempting child victims from the competency requirement under certain conditions, see, e.g., Colo. Rev. Stat. § 13-90-106 (2020) (stating, as an exception to its competency rule, that a court may hear testimony of a child under ten "in any civil or criminal proceeding for child abuse, sexual abuse" or other identified sexual offenses, "when the child is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined").[4]

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[4] A Colorado court found no Crawford violation where the lower court admitted testimony from children who, though competent under the Colorado statute, had

Ms. Montan also reviewed case law regarding the tender years exception. She found that other state courts have concluded, as did our Court in D.R., that a child's incompetence at trial does not automatically render a child's earlier out-of-court statement unreliable. See, e.g., In re Cindy L., 947 P.2d 1340 (Cal. 1997) (holding that "a finding that a child is not competent to differentiate between truth and falsehood or to understand the duty to tell the truth" does not absolutely bar the child's out-of-court statement, but is a factor in deciding the statement's reliability); In re J.J., 174 A.3d 372, 385 (Md. 2017) (stating that "a preliminary competency determination is irrelevant to a . . . court's admissibility determination" under the tender years exception in a civil "child in need of assistance" case); Commonwealth v. Walter, 93 A.3d 442, 453 (Pa. 2014) (holding that "a child need not be deemed competent to testify as a witness in order for the trial court to admit the child's out-of-court statements into evidence pursuant to the TYHA [Tender Years Hearsay Act]")[5]; but see In re A.S., 790 P.2d 539, 542 (Okla. Civ. App.

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difficulty "articulating the concept of truth and lies"; the children could differentiate between truth and lies, although they could not articulate that difference. People v. Whitman, 205 P.3d 371, 380–81 (Colo. App. 2007). Notably, another Colorado court explained that absent the special statutory competency waiver, an incompetent child would be deemed unavailable. See People v. Trujillo, 923 P.2d 277, 280 (Colo. App. 1996).

[5] The Pennsylvania court in Walter noted that the defendant did not assert that the out-of-court statements were testimonial. 93 A.3d at 453 n.9.

1989) (stating that "if a court finds a child's in-court statements would lack competency, then there must be some assurance that the child was competent when she made the out-of-court statements sought to be introduced").

B. Additional State Court Case Law

Post-Crawford, the "testimonial" test has been critical in determining the admissibility of an out-of-court statement by a child who is incompetent and therefore does not testify. In People v. Sisavath, 13 Cal. Rptr. 3d 753, 756 (Ct. App. 2004) (citation omitted), the trial court disqualified an alleged child victim from testifying "because she could not express herself so as to be understood and because she was incapable of understanding her duty to tell the truth." The appellate court concluded that, because the child was disqualified (and therefore unavailable), presenting the child's testimonial out-of-court statement violated the defendant's confrontation rights under Crawford. Id. at 758.

In State v. Foreman, 157 P.3d 228 (Or. Ct. App. 2007), the out-of-court statement of an incompetent child was admissible because it was not testimonial. See 157 P.3d at 233. In State v. Bobadilla, 690 N.W.2d 345, 349-51 (Minn. Ct. App. 2004), rev'd in part and aff'd in part, 709 N.W.2d 243 (Minn. 2006) the appellate court addressed both testimonial and non-testimonial statements, holding that an incompetent child's reliable out-of-court non-testimonial statement to his mother was admissible, but that a testimonial statement to a child welfare worker

with a detective present was not. 690 N.W.2d at 351. The Minnesota Supreme Court reversed in part, holding that the statement to the child welfare worker was not testimonial. 709 N.W.2d at 246.[6]

However, these cases do not directly address another scenario possible under the incompetency proviso: a child is incompetent to testify, but testifies nonetheless. Consequently, the cases do not directly decide the question that the Appellate Division addressed in A.R. and the Indiana court addressed in Purvis: whether a defendant may really confront a witness on the stand, as the Constitutional guarantees, when that witness cannot tell the difference between truth and fiction, or cannot understand the duty to tell the truth.

The Subcommittee's Deliberations

Amendments Assuming The Proviso Remains.

The subcommittee considered a set of amendments to the Rule, based on the assumption that the rule's original rationale retained vitality and the core of the rule was preserved.

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[6] On a petition for habeas corpus, the federal district court held, contrary to the Minnesota Supreme Court, that the statement to the child welfare worker was indeed testimonial. Bobadilla v. Carlson, 570 F.Supp.2d 1098, 1107 (D. Minn. 2008), aff'd, 575 F.3d 785, 793-94 (8th Cir. 2009).

1. Change the cross-reference. The subcommittee considered the need to undo the expansion of the incompetency proviso, which the Supreme Court identified in A.R. To restore the original design of Rule 63(33), the proviso would read (with new matter underlined): "provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding solely by virtue of the requirements of Rule 601(b)." The subcommittee considered that proposal, first, applied only to criminal cases, and then applied to civil and criminal cases. The subcommittee voted 4-4 to change the rule in criminal cases, and 3-5 to change the rule in all cases. Thus, the subcommittee failed to support either amendment.

The amendments would have reversed what was, evidently, an unintended or at least unexplained modification of the rule. In 1991, the Committee had originally proposed to significantly revise the tender years exception, including the proviso. See Proposed N.J.R.E. 804(a)(5) and 804(b)(8), Report of the Supreme Court Committee on the Rules of Evidence (1991), reprinted in 129 N.J.L.J. 1, 4 (Supp. Oct. 10, 1991) (1991 Report). The Committee proposed placing the tender years exception within the rule governing hearsay statements of unavailable witnesses, including witnesses who are unavailable because they were disqualified

pursuant to N.J.R.E. 601.[7] See ibid. Under the proposed rule, the out-of-court statement would not be admissible if the child was available to testify, unless the statement met another hearsay exception. See ibid. An incompetent child declarant could testify only if the person against whom the statement was offered requested that the child be produced for questioning. See ibid.

In response to opposition, however, the Committee reversed course and agreed to re-adopt Rule 63(33) as N.J.R.E. 803(c)(27) without indicating any additional change. In a 1993 report, the Committee stated, "NJRE 804(b)(8) (Statement by a child concerning sexual activity) should be deleted and replaced, as NJRE 803(c)(27), by the rule now denominated Evid.[]R. 63(33)." Supreme Court Committee on the Rules of Evidence, Amendatory Report (May 17, 1993), reprinted in 2D N.J. Practice, Evidence Rules Annotated, Intro. Report (John H. Klock) (3d ed. 2009) (1993 Report). Nothing in the Committee's 1993 report or the drafting history suggests that the Committee intended to propose a significant change when it re-adopted Rule 63(33). Therefore, amending the

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[7] Proposed N.J.R.E. 804(b)(8), along with N.J.R.E. 804(a)(5) are included as an appendix to this report.

current rule to cross-reference only N.J.R.E. 601(b) would seem to fulfill the intent of the 1993 drafters.[8]

In addition, restoration of Rule 63(33)'s original design would also recognize the distinction between children incompetent because they cannot express themselves, and children who cannot demonstrate that they understand the duty to tell the truth. As the Court noted in A.R., the D.R. Court concluded that "there is a difference, for a child, between understanding 'the duty' to tell the truth and having the capacity to tell the truth in a manner that is understandable by the trier of fact." A.R., 234 N.J. at 100. The Supreme Court accepts the premise — although some subcommittee members question it — that an out-of-court statement of a child who is capable of communicable expression may be trustworthy and thereby assist the fact-finder, even if the child does not understand the duty to tell the truth. Thus, the argument goes, the incompetency proviso should override N.J.R.E. 601(b).

On the other hand, a child who is "incapable of expression so as to be understood" cannot convey any information to assist the fact-finder. Therefore,

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[8] Notably, N.J.R.E. 803(c)(27) deviated from Rule 63(33) in at least one other respect. N.J.R.E. 803(c)(27) authorizes admissibility of a child's out-of-court statement in "a criminal, juvenile, or civil case," but Rule 63(33) applied only to "criminal proceeding[s]." The expansion was in keeping with the original 1991 report.

one may argue, the incompetency proviso should not override N.J.R.E. 601(a). Thus, N.J.R.E. 803(c)(27) should be revised to mirror Rule 63(33).

Two members supported the amendment only in criminal cases. In support of the "criminal only" amendment, it was argued that the interests of defendants were weightier than those of civil litigants, notwithstanding the significant interests at stake in some civil cases, such as those involving the termination of parental rights. Another member supported it in all cases, but not in criminal cases only.

The committee considered the view that the rule should not be restored to its original design, because there is a benefit to presenting to the fact-finder a child who is incapable of making himself or herself understood. Assuming that a trial court has found that such a child has made an out-of-court statement that is sufficiently trustworthy under N.J.R.E. 803(c)(27)(b), presenting the child as a witness may help the jury assess whether (1) the child actually made the out-of-court statement that the proponent wishes to offer (which presumably was understandable); and (2) the out-of-court statement is trustworthy.

It was also argued that a defendant should be the one to decide whether an incompetent child should be permitted to testify under such circumstances. In cases involving "non-testimonial" hearsay, the defendant has no constitutional right to confront and cross-examine. See Crawford, 541 U.S. at 68. Were the

proviso limited to N.J.R.E. 601(b) (that is, were it restored to its original design), some children's non-testimonial statements could be admissible under N.J.R.E. 803(c)(27) — without allowing the defendant to present the child to the jury and thereby raise questions about the out-of-court statement's trustworthiness. As noted above, the 1991 proposed rule would have granted defendants the right to request the production of an incompetent child for questioning at trial. See Proposed N.J.R.E. 804(b)(8), 1991 Report, 129 N.J.L.J. at 4. A contrary view was offered: that, as a tactical matter, criminal defense counsel are unlikely to opt to call an incriminating child witness, even if an out-of-court non-testimonial statement is otherwise admissible.

One member opposed the amendments on the basis that the subcommittee should await the recommendations of the Bueso subcommittee, which is examining issues regarding the appropriate techniques for determining a child witness's competency. Conceivably, changes in voir dire may lead courts to find child witnesses competent more frequently, and narrow the circumstances in which a child is deemed incompetent and the proviso would be applicable.

2. Expand the rule to cover statements of child witnesses. The subcommittee considered extending the rule's coverage to statements by a child under the age of twelve who has witnessed sexual misconduct against a child under the age of twelve. The rule would begin (with new matter underlined): "A

statement by a child under the age of 12 relating to sexual misconduct committed with or against that child or with or against another child under the age of 12 as to which the declarant was a witness is admissible in a criminal, juvenile, or civil proceeding if . . . ." Arguably, the same policy justification for admitting the child-victim's out-of-court statement supports admitting the child-witness's out-of-court statement: the evidence is needed, because child sexual abuse is so difficult to prove, and the out-of-court statement is arguably reliable. One subcommittee member observed that in many cases, a child witness — as opposed a child victim — is the only person who is competent to testify in court.

However, one may argue that the prosecution does not have a compelling need for the child-witness's statement, if the prosecution already has a statement from the child-victim. Furthermore, one may question whether a witness is as trustworthy as a child-victim who personally experiences and discloses an assault.

The subcommittee unanimously decided to defer action, pending the report of the subcommittee chaired by Judge Natali and charged with examining issues involving the hearsay exceptions established by N.J.S.A. 9:6-8.46 and N.J.S.A. 30:4C-15.1(a). One of the two issues that Judge Grant identified in his May 22, 2020 referral was "[w]hether the hearsay exception set forth in N.J.S.A. 30:4C-15.1(a) is applicable to non-party children."

3. Clarifying the Standard of Proof. The current rule permits admissibility of a child's statement if the court finds that "there is a probability that the statement is trustworthy." N.J.R.E. 803(c)(27)(b). Some members of the subcommittee were concerned that the phrase "there is a probability" is unclear. One may ask how much of a probability must exist to satisfy the rule, particularly given the general requirement that a hearsay proponent must prove the factual foundation of a hearsay exception by a preponderance of the evidence. See supra note 1.

The Supreme Court in A.R. defined the question before it as "whether there was a probability that [the child's] video-recorded statement . . . was 'trustworthy.'" A.R., 234 N.J. at 103 (emphasis added). The Court held that the statement was inadmissible because it "did not possess a sufficient probability of trustworthiness to justify its introduction at trial under N.J.R.E. 803(c)(27)." Id. at 86. Thus, some level of probability is required. One may ask what constitutes a "sufficient probability." The Court evidently provided the answer, stating, "[W]e do not find that sufficient credible evidence supports the conclusion that [the child's] statement was probably trustworthy." Id. at 106 (emphasis added). "Probably" arguably — but not necessarily — connotes a "more likely than not" or preponderance of the evidence level of certainty.

Unfortunately, other rules that include a "trustworthiness" requirement do not clarify the issue. For example, regarding the deceased declarant exception

under N.J.R.E. 804(b)(6), the Court injected the "there is a probability" standard in a rule that did not already include it. DeVito v. Sheeran, 165 N.J. 167, 193–95 (2000). The deceased declarant exception makes admissible, in civil proceedings, statements of witnesses unavailable because of death "if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy." N.J.R.E. 804(b)(6). The Court held that an "absolute standard of trustworthiness is not essential before evidence is admissible under [804(b)(6)]. The court need find only a probability that the statement is trustworthy from the flavor of the surrounding circumstances." DeVito, 165 N.J. at 195 (quoting Beckwith v. Bethlehem Steel Corp., 185 N.J. Super. 50, 63 (Law Div. 1982) (first alteration in original) (emphasis added)).[9]

To resolve any uncertainty about how much probability is required to satisfy "a probability" of trustworthiness, the subcommittee approved by a vote of 6-2 a recommendation to amend subsection (b) to read (with new matter underlined and deleted matter bracketed): "the court finds, by a preponderance of the evidence, in

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[9] Notably, the newsperson's privilege combines the "preponderance of the evidence" and "reasonable probability" standards in the same sentence. N.J.R.E. 508(e)(b). In order to pierce the privilege and access relevant materials, a court must find "by a preponderance of the evidence that there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense." Ibid. (emphasis added).

a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement [there is a probability that], the statement is trustworthy . . . ."

4. "Subject To" the Constitution. One subcommittee member proposed that the tender years exception be amended to provide specifically that it is "subject to" the Constitutional right of confrontation. It was argued that applying the exception is a complex undertaking, and it is important to remind attorneys and judges that overlaying the requirements for admitting a hearsay statement under N.J.R.E. 803(c)(27) are the requirements established by the Confrontation Clause as interpreted by Crawford and its progeny.

Another member opposed such a caveat, noting that the tender years exception is no different from other hearsay exceptions, and it is implicit that the Rules of Evidence do not answer the question whether admitting an out-of-court statement would violate a constitutional right of confrontation. The issue was not put to a vote.

Repealing the Proviso

The subcommittee debated proposals to repeal the proviso entirely; to retain it; or to leave it up to the defendant in a criminal case to request testimony from a child otherwise incompetent under N.J.R.E. 601. The subcommittee voted on two proposals: to repeal the proviso in criminal cases; and to repeal the proviso in all

cases. Neither proposal carried a majority. The subcommittee voted 3-5 in favor of repeal in criminal cases, and 2-6 in favor of repeal in all cases.

One may argue that the sea-change in Confrontation Clause jurisprudence following Crawford removed the motivating purpose of the proviso. The Court had adopted the proviso to avoid the possibility that a child's incompetence would not meet the Roberts unavailability showing and would thereby block the admissibility of an otherwise reliable out-of-court statement. D.R., 109 N.J. at 369. As the Court recalled in A.R., "We expressed concern [in D.R.] that a child's incompetency, which would bar the child's testimony, might not constitute unavailability for purposes of Roberts and therefore would present an insurmountable obstacle to the admission of the child-victim's out-of-court statement." 234 N.J. at 99.

In Ohio v. Clark, 576 U.S. 237 (2015), the United States Supreme Court suggested that an incompetent child may well be unavailable. Clark involved statements of a three-year-old deemed incompetent under Ohio law. Id. at 241-42. The United States Supreme Court rejected the argument that admitting the child's non-testimonial statement was fundamentally unfair. Id. at 250. "The fact that the witness is unavailable because of a different rule of evidence does not change our analysis." Ibid. Notably, the Court opined that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." Id. at 247-48.

In his concurrence, Justice Scalia, joined by Justice Ginsburg, noted that "[a]t common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent." Id. at 251 (Scalia, J., concurring) (citing Thomas D. Lyon & Raymond LaMagna, SYMPOSIUM: The History of Children's Hearsay: From Old Bailey to Post-Davis, 82 Ind. L.J. 1029, 1030-31 (2007)).

As a Confrontation Clause matter, the admissibility of a child's out-of-court statement no longer depends on the child's unavailability and the statement's reliability as it did under Roberts. Rather, its admissibility depends on whether it is testimonial. On the one hand, if the out-of-court statement is not testimonial, then the Confrontation Clause is not implicated, and state evidence rules govern. The proviso is not needed to clear the way for introducing an incompetent child's non-testimonial out-of-court statement if that statement satisfies N.J.R.E. 803(c)(27)(c)(ii). Thus, a child's non-testimonial statement was admissible in State v. Coder, 198 N.J. 451, 467–68 (2009), notwithstanding that the child was unavailable (for reasons other than incompetency), because the statement satisfied N.J.R.E. 803(c)(27)(a), (b), and (c)(ii). Of course, as the A.R. result demonstrates, in some cases it may, as a practical matter, be difficult to find a child's statement sufficiently trustworthy under N.J.R.E. 803(c)(27)(b), when the child cannot

distinguish between reality and fantasy, truth and fiction, and cannot understand the duty to tell the truth.

On the other hand, if the statement is testimonial, the proviso does not assure its admissibility under the Confrontation Clause. To comply with Crawford and its progeny, a criminal defendant must have had either a previous opportunity to cross-examine the witness or a meaningful opportunity to confront and cross-examine the witness at trial. As the Appellate Division opined in A.R. and the Indiana court opined in Purvis, allowing an incompetent witness to testify does not provide that constitutional opportunity. A consensus of the subcommittee

Nonetheless, the repeal-the-proviso position did not garner a subcommittee majority. Some members supported keeping the proviso in one form or another, notwithstanding that the impetus for the proviso — Ohio v. Roberts — no longer applied. One member identified a middle position, allowing defendants in criminal cases to choose whether a fact-finder should hear from a child who is otherwise incompetent under N.J.R.E. 601(a) or (b). Whether triggered only at defendant's option or not, retaining the proviso enables the fact-finder to assess the credibility of an otherwise incompetent out-of-court declarant of a non-testimonial statement.

As noted, under Crawford, a defendant does not have a constitutional right to confront an incompetent child's non-testimonial statement. If the statement is sufficiently trustworthy under N.J.R.E. 803(c)(27)(b), and if the child is

unavailable and there is corroboration under N.J.R.E. 803(c)(27)(c)(ii), then — absent a proviso — the statement may be admitted with neither an opportunity for the State to bolster the child's credibility in court, nor an opportunity for the defendant to challenge the declarant's credibility in court. Retaining the proviso, even after Roberts, enables the jury to assess whether the child in fact made the attributed statement and to determine the trustworthiness of that statement, even if the child lacks the power of expression required by N.J.R.E. 601(a), or lacks an understanding of the duty to tell the truth as required by N.J.R.E. 601(b).

Thus, the proviso — particularly a proviso triggered at defendant's option — arguably serves the same policy interest that the D.R. Court sought to achieve with the original tender years exception, taking into account the impact of Crawford's testimonial-non-testimonial dichotomy. The original rule was intended to assure admissibility of reliable out-of-court child statements while protecting "the equally significant interests of the defendant, who seeks to exercise the basic rights of confrontation and cross-examination so essential to the jury's duty to assess the credibility of witnesses." D.R., 109 N.J. at 369-371. Empowering a defendant to call a child (or to require the State to call the child), notwithstanding the child's failure to satisfy N.J.R.E. 601, "will afford the jury an opportunity to evaluate the testimony relating the child's out-of-court statements in the context of the child's communicative skills, demeanor, and credibility as a witness at trial." Id. at 370.

This "affords the defendant a right of cross-examination and limited confrontation that would be lost if the child were disqualified due to incompetency." Id. at 370-71.[10] Providing the defendant the option to require the presence of physically available, but otherwise incompetent child declarant, would be consistent with the view of the drafters of the rejected 1991 rule.

Nonetheless, it was the consensus of the subcommittee, with one notable dissent, that the proviso may not be used at a criminal trial to satisfy the Constitutional right of confrontation, thereby enabling the court to admit testimonial hearsay where the child is not subject to meaningful cross-examination because of the child's incompetence.

Empirical Research

Some subcommittee members support urging the Court to undertake or sponsor a review of the scientific and empirical research regarding the reliability of alleged child victims' out-of-court statements. Such research could assist trial

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[10] One scholar, doubting whether substantive questioning of an incompetent child will yield useful testimony, has stated, "it may serve both sides to have otherwise incompetent children called simply to be asked questions about competency, assuming that the child could be shielded pursuant to Maryland v. Craig, [497 U.S. 836, 855 (1990)], if necessary." Myra S. Raeder, SYMPOSIUM: Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay and Confrontation, 82 Ind. L.J. 1009, 1014 (2007).

judges who are now tasked with assessing a statement's trustworthiness based on the "time, content and circumstances of the statement." N.J.R.E. 803(c)(27)(b).

CONCLUSION

The subcommittee recommends only one change as noted, regarding the standard of proof, and refers that and other issues to the full committee for consideration.

APPENDIX.

1991 Proposed N.J.R.E. 804(a)(5)

(a) Definition of unavailable. Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:

. . .

(5) for the purpose of Rule 804(b)(8), is unable to give full and cogent testimony concerning the substance of the statement because of lack of memory or other cause, including disqualification as a witness pursuant to Rule 601.

1991 Proposed N.J.R.E. 804(b)(8)

(b) Hearsay exceptions. Subject to Rule 807, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . .

(8) A statement made by a child of tender years concerning sexual activity involving the child if:

(A) after a hearing pursuant to Rule 104(a), the judge finds that

(i) the statement was not the product of fabrication or suggestion, after considering the content of the statement in light of the child's youth and lack of

knowledge and experience and the circumstances surrounding the statement, including when and to whom it was made, and the nature of any questions leading to it, and

(ii) the statement is otherwise reliable; and

(iii) the statement is corroborated by other reliable evidence of the occurrence of the sexual activity described in the statement; and

(B) the child is produced for questioning on request of the person against whom the statement is used when the child has not testified as a witness at the hearing but is physically available.

If a statement has been admitted under this rule the party against whom it was admitted may introduce other statements of the child on the same subject.

To: **Professor Denis McLaughlin**

From: **Micheal Sabo**

Date: **April 5, 2019**

Summary of Tender Years Exception

Origin of the Rule:

- *People v. Gage*, 62 Mich. 271, 28 N.W. 825 (1886) (court admitted hearsay statements of 10-year-old sexual assault victim made three months after the incident by recognizing that spontaneity is not only measure of a statement's reliability).
- Case began the balancing approach that is now used in NJRE 803(c)(23).

Reasons for the Rule/Positives

- Unique circumstances of child sex abuse
- Necessary to conviction of sex abusers (uniquely so). Child hearsay statements often constitute the only evidence/proof of the crime. Physical evidence rare in many cases where the crime/act is non-violent in nature. Marks are not left b/c contact not forceful.
- Witnesses other than victim and perpetrator are rare; acts are committed in secrecy. (Testimony of Lucy Berliner, Social Worker). Usually occurs because perpetrator is usually a relative/friend with many opportunities to be alone with the child.
- Children's memory fades more rapidly over time, the account closest to the time of the act is more likely to be reliable. (AD Yarmy- Psychology of Eyewitness Testimony) (children memory fades quicker than adults); But, see study finding kindergartener memory improved over time.
- Child hearsay statements not inherently reliable, but they are at least as reliable as a child's in person testimony.

Negatives/Risks of Admitting Statements

- Limited Reliability
- Confrontation Clause interests under Crawford.
- Bootstrapping Problems- importance of the statement in prosecution does not make it inherently more reliable.

Reliability

- Child statements inherently reliable because:
    - Unlikely that children persist in lying to their parents or other figures of authority about sex abuse.
    - Children do not have enough knowledge about sexual experiences to lie about them.
- Child statements not inherently reliable because:
    - Requiring life testimony adversely affects his or her perception/memory.
    - Courtroom experience traumatic
    - Confronting their accuser and the rigors of cross-examination etc. create problems.
    - Susceptible to leading questions and attorney inclinations.

Law Review Article Sources

- Judy Yun, NOTE: A COMPREHENSIVE APPROACH TO CHILD HEARSAY STATEMENTS IN SEX ABUSE CASES, 83 Colum. L. Rev. 1745 (1983).

- Sheryl K. Peterson, COMMENT: SEXUAL ABUSE OF CHILDREN—WASHINGTON'S NEW HEARSAY EXCEPTION, 58 Wash. L. Rev. 813 (1983).
- NOTE: THE TESTIMONY OF CHILD VICTIMS IN SEX ABUSE PROSECUTIONS: TWO LEGISLATIVE INNOVATIONS, 98 Harv. L. Rev. 806 (1985).
- Susan K. Datesman, SURVEY OF DEVELOPMENTS IN NORTH CAROLINA LAW, 1985: EVIDENCE: STATE v. SMITH: FACILITATING THE ADMISSIBILITY OF HEARSAY STATEMENTS IN CHILD SEXUAL ABUSE CASES, 64 N.C. L. Rev. 1352 (1986).
- Krista MacNevin Jee, NOTE AND COMMENT: HEARSAY EXCEPTIONS IN CHILD ABUSE CASES: HAVE THE COURTS AND LEGISLATURES REALLY CONSIDERED THE CHILD?, 19 Whittier L. Rev. 559 (1998).
- Katherine J. Strle, COMMENT: USE WITH CAUTION: THE ILLINOIS HEARSAY EXCEPTION FOR CHILD VICTIMS OF SEXUAL ABUSE, 60 DePaul L. Rev. 1229, (2011).

Wigmore

- "A rational view of the peculiarities of child nature, and the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire some degree of credibility is futile and unprofitable."
    - 4 Wigmore on Evidence: Evidence in Trials at Common Law § 509 at 719 (**rev. 2018**).

- "A rational view of the peculiarities of child nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable.... Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand to give testimony for what it may seem to be worth." [2 *Wigmore, Evidence* § 509 at 719 (Chadburn **rev. 1979**). (As cited in *DR*).

- Original source: Wigmore, Science of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials §181 (3d ed. 1937).

McCormick/ABA

- Professor McCormick advocates for "allowing the testimony to come in for what it is worth with cautionary instructions to the jury, since the child may be the only person available who knows the facts." *ABA Recommendations* § 4.1 at 31.

Amendment #1 - Amend the Rule to repeal the incompetency proviso in all cases. The Rule as amended would read as follows, with deleted material in brackets:

A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that, the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse[; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601].

Amendment #2 - Amend the Rule to repeal the incompetency proviso only in criminal cases. The Rule as amended would read as follows, with new material underlined:

A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that, the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided <u>in civil cases only</u> that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

Amendment #3 - Amend the Rule to repeal the incompetency proviso in all cases; and, in criminal cases, to require the child out-of-court declarant to testify at the proceeding, so that the defendant has the opportunity to cross-examine the declarant. The Rule as amended would read as follows, with deleted material in brackets and new material underlined:

A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that, the statement is trustworthy; and (c) [either] (i) the child testifies at the proceeding, or (ii) <u>in civil cases only</u>, the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse[; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601].

Amendment #4 - Retain the incompetency proviso, but amend 803(c)(27) so the incompetency proviso's reference to 601 matches the original design of the incompetency proviso of Rule 63(33) in all cases, criminal and civil. The Rule as amended would read as follows, with new material underlined:

A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601(b).

Amendment #5 - Retain the incompetency proviso, but amend 803(c)(27) so the incompetency proviso's reference to Rule 601 matches the original design of the incompetency proviso of Rule 63(33), but in criminal cases only. The Rule as amended would read as follows, with new material underlined:

A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601(b) in criminal cases, and of Rule 601 in civil cases.

Amendment #6 - Amend the Rule — however amended, if at all, regarding the proviso — to cover statements of child witnesses under the age of 12 of sexual misconduct with or against another child under the age of 12. The Rule as amended would read as follows, with new material underlined (and the existing proviso language left intact for illustration purposes but subject to any approved amendments thereto):

A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child, or with or against another child under the age of 12 as to which the declarant was a witness is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

Amendment #7 - Amend the Rule — however amended, if at all, regarding the proviso and child witnesses — to clarify the standard of proof. The Rule as amended would read as follows, with new material underlined and deleted material in brackets (and all other existing language left intact for illustration purposes but subject to any approved amendments thereto):

A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, by a preponderance of the evidence, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement [there is a probability that], the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

Amendment #8 — Amend the Rule — however amended, if at all — to refer to a defendant's overriding constitutional right to confrontation (as does N.J.R.E. 534(g)(2)). The Rule as amended would read as follows, with new material underlined (and all other existing language left intact for illustration purposes but subject to any approved amendments thereto):

A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that, the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601. Nothing in this rule shall permit a court to admit a statement if doing so would violate a defendant's constitutional right to confrontation.

ADDITIONAL HISTORICAL MATERIALS:

1. Former Rule 63(33):

> A statement by a child under the age of 12 relating to a sexual offense under the Code of Criminal Justice committed on, with, or against that child is admissible in a criminal proceeding brought against a defendant for the commission of such offense if (a) the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 8(1), that on the basis of the time, content, and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of paragraph (b) of Rule 17.[1]

2. 1991 Proposed Substitute for Rule 63(33):

A. 1991 Proposed N.J.R.E. 804(a)(5)

> (a) Definition of unavailable. Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:

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[1] Rule 17 stated: "A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses.

. . .

(5) for the purpose of Rule 804(b)(8), is unable to give full and cogent testimony concerning the substance of the statement because of lack of memory or other cause, including disqualification as a witness pursuant to Rule 601.

B. 1991 Proposed N.J.R.E. 804(b)(8)

(b) Hearsay exceptions. Subject to Rule 807, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . .

(8) A statement made by a child of tender years concerning sexual activity involving the child if:

(A) after a hearing pursuant to Rule 104(a), the judge finds that

(i) the statement was not the product of fabrication or suggestion, after considering the content of the statement in light of the child's youth and lack of knowledge and experience and the circumstances surrounding the statement, including when and to whom it was made, and the nature of any questions leading to it, and

(ii) the statement is otherwise reliable; and

(iii) the statement is corroborated by other reliable evidence of the occurrence of the sexual activity described in the statement; and

(B) the child is produced for questioning on request of the person against whom the statement is used when the child has not testified as a witness at the hearing but is physically available.

If a statement has been admitted under this rule the party against whom it was admitted may introduce other statements of the child on the same subject.

3. **1993 Committee Comment Upon Proposal of Rule 803(c)(27)**

Following publication of the Committee's original report and the adoption and transmission by the Supreme Court to the Legislature of the proposed Revised Rules of Evidence, some members of the law enforcement community objected to any change in Evid.R. 63(33) other than enlargement of its scope to include juvenile and civil actions. The Committee was of the view that these objections had not been sufficiently aired as of this time and that there had not been an adequate opportunity for dialogue between the objecting members of the law enforcement community, supporters of the revised rule, and the Committee, which, except for its members from the prosecutorial community, had been strongly in favor of the revised rule.

Since Evid.R. 63(33) has been in place for four years, the Committee recommends that that rule be retained in its original form subject only to amendment to increase its scope, and that the Committee, supporters of the revised rule, and objectors to the revised rule, undertake a dialogue and full reconsideration at a future time regarding the desirability of amending the rule.

Retention of Evid.R. 63(33) requires shifting of the rule from its present inclusion in Rule 804, which conditions admissibility on the declarant's unavailability, to Rule 803, which does not. Accordingly, New Jersey Evid.R. 63(33) is included in the Revised Rules as Rule 803(c)(27). Note further that the final proviso of Evid.R. 63(33) eliminates the necessity for proposed Rule 804(a)(5), which had provided a special unavailability definition for children's statements admissible under proposed Rule 804(d)(8). Proposed 804(a)(5) is therefore also to be deleted.

4. **Rule 601**

Every person is competent to be a witness unless (a) the court finds that the proposed witness is incapable of expression so as to be understood by the court and any jury

either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) as otherwise provided by these rules or by law.

APPENDIX B

REPORT OF THE COLLABORATIVE LAW PRIVILEGE SUBCOMMITTEE

COMMITTEE ON THE RULES OF EVIDENCE

TO: Committee on the Rules of Evidence

FROM: Subcommittee on Collaborative Law Privilege
Hon. James R. Paganelli, J.S.C., Chair
Hon. David Ragonese, J.S.C.
Jeffrey S. Mandel, Esq. (Member, Evidence Rules Committee)
Lynn Fontaine Newsome, Esq. (Family Practice Committee)
Brian M. Schwartz, Esq. (Family Practice Committee)

DATE: November 5, 2020

RE: Collaborative Law Privilege

This Subcommittee was tasked with recommending whether the New Jersey Rules of Evidence should be amended to incorporate the New Jersey Collaborative Law Act, N.J.S.A. 2A:23D-1 et seq. (2014).

The Act, among other things, creates a statutory privilege for family collaborative law communications to enable candid communications among the participants. Despite the irregular, i.e., non-compliance with Evidence Act 2A:84A-33 to -44, path in adopting the legislation, our Supreme Court has recognized that the "Legislature is free" to create new privileges without the involvement of the Judiciary. See C.A. ex rel. Appelgrad v. Bentolila, 219 N.J. 449, 479 (2014) (Privileges are disfavored as obstacles to this Court's desire to attain the truth through the adversarial process. Despite a presumption against the creation of new privileges, the Legislature is free to do so in situations where the social policy in support of nondisclosure is weightier than the evidence it renders unavailable.).

In adopting the New Jersey Collaborative Law Act the Legislature found and declared (N.J.S.A. 2A:84A-2):

> a. Since at least 2005, attorneys in New Jersey have participated in the dispute resolution method known as family collaborative law, in which an attorney is retained for the limited purpose of assisting his client in resoling family disputes in a voluntary, non-adversarial manner, without court intervention.
>
> b. The family collaborative law process is distinct from other dispute resolution mechanisms because the parties intend to resolve their dispute without

litigation. Instead, each party, represented by his attorney, meets together with the other party to the dispute, that party's attorney, and, as needed, one or more nonparty participants who are not attorneys but are professionals in their fields, such as certified financial planners, certified public accountants, licensed clinical social workers, psychologists, licenses professional counselors, licensed marriage and family therapists and psychiatrists. All participants in the family collaborative law process understand and agree that the process is intended to replace litigation and that the process will terminate if either party or either attorney commences a proceeding related to the subject matter to be addressed through the family collaborative process before a court or other tribunal other than to seek incorporation of a settlement agreement into a final judgment.

c. In order to facilitate full and fair disclosure by the parties to the family collaborative law process, the parties must have an evidentiary privilege to protect them from disclosure of any collaborative law communication. The nonparty participants in the family collaborative law process, who serve as neutral experts, need a privilege from disclosure of communications made by them during the process similar to the privilege created for mediators in the "Uniform Mediation Act," P.L. 2004, c. 157 (C. 2A:23C-1 et seq.). This will enable nonparty participants to participate candidly in the process and thereby facilitate resolution of the family law dispute.

The New Jersey State Bar Association has urged the Court to take the necessary steps to adopt the "Collaborative Law Privilege," tracking and using the same format implemented for N.J.R.E. 519 regarding mediation communications. The Subcommittee did not address the actual wording of the proposed format because it parrots the statutory language.

In consideration of its duty to offer a recommendation, the Subcommittee weighed the following factors:

Arguments For Incorporation

*the privilege has been passed by the Legislature;

*the privilege is recognized in the practice;

*inclusion provides the Bench and Bar with notice of the statutory privilege;

Arguments Against Incorporation

*the Collaborative Law Privilege is too narrow and specialized to be incorporated into the broader concepts of the rules of evidence;

*the Collaborative Law Privilege is too broad and leaves much to the discretion of the

participants, i.e.:

> N.J.S.A. 2A:23D-5(b) (Family collaborative law participation agreement) "parties may agree to include in a family collaborative law participation agreement additional provisions not inconsistent with 2A:23D-1 et seq or other applicable law";
>
> N.J.S.A. 2A:23D-10 (Disclosure of information) "The parties may define the scope of disclosure during the collaborative family law process except as provided by law."
>
> N.J.S.A. 2A:23D-12 (Confidentiality) "A family collaborative law communication if [is] confidential to the extent agreed to by the parties in a signed record or as provided by law."
>
> N.J.S.A. 2A:23D-14(a) (Waiver of privilege) "A privilege...may be waived in a record or orally during a proceeding if it is expressly waived by both parties, and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant."
>
> N.J.S.A. 2A:23D-15(f) (Exemption from privilege) "The privileges . . . do not apply if the parties agree in advance in a signed record that all or part of a family collaborative law process is not privileged."

*a possible amendment of R. 1:40 (Complimentary Dispute Resolution Programs) to reflect the privilege is satisfactory.

> For example:
>
> R. 1:40-2(a)(2)
> Settlement Proceedings: A process by which the parties appear before a neutral party, neutral panel, or attorneys and/or non-party participants pursuant to the family collaborative law process (N.J.S.A. 2A:23D-1 et. seq.) who assists them in attempting to resolve their dispute by voluntary agreement.
>
> R. 1:40-2(b)(2)(c)
> "Facilitative Process" which include mediation and family collaborative law process (N.J.S.A. 2A:23D-1 et. seq.), is a process by which a neutral third party facilitates communication between parties in an effort to promote settlement without imposition of the facilitator's own judgment regarding issues in dispute.

*not every statutory privilege needs to be incorporated into the Rules (i.e. Practicing Psychology Licensing Act, L. 1966, c. 282, sec. 28 (codified as amended at N.J.S.A.

45:14B-28 – creating a psychologist/patient privilege); Practicing Marriage and Family Therapy Act, L. 1968, c. 401, sec. 29 (codified as amended at N.J.S.A. 45:88-29 – creating the marriage-counselor privilege).

Conclusion

After due consideration of the factors weighing in favor for and against incorporation, this Subcommittee, by a vote of five (5) to zero (0) recommends against incorporation of New Jersey Collaborative Law Act, N.J.S.A. 2A:23D-1 et. seq., into the New Jersey Rules of Evidence.

APPENDIX C

REPORT OF THE ADMISSIBILITY OF PRIOR STATEMENTS BY CHILDREN SUBCOMMITTEE

Subcommittee Report on the Admissibility of Prior Statements by Children

On May 22, 2020, the Committee on the Rules of Evidence was asked by the Acting Administrative Director of the Courts to consider two questions regarding the admission of a child's prior statements related to allegations of abuse or neglect of that child. See Exhibit A. Specifically, we were asked to determine whether the New Jersey Rules of Evidence should be amended to comport with the hearsay exceptions set forth in N.J.S.A. 9:6-8.46 and N.J.S.A. 30:4C-15.1a, and whether the hearsay exception set forth in N.J.S.A. 30:4C-15.1a is applicable to non-party children.

The first question pertains to the January 21, 2020 amendment to N.J.S.A. 30:4C-1 that permitted the admission of statements by children related to allegations of abuse or neglect of that child in Title 30 cases, including termination of parental rights (TPR) cases. Prior to the amendment, N.J.S.A. 9:6-8.46 limited these statements to child abuse and neglect cases under Title 9. See New Jersey Div. of Child Prot. & Permanency v. T.U.B., 450 N.J. Super. 210, 239 (App. Div. 2017).

The second question is open ended, as neither N.J.S.A. 9:6-8.46(a) nor N.J.S.A. 30:4C-15.1a address whether a non-party child's hearsay statements are admissible under this exception, or eligible as an acceptable or sufficient form of "corroboration" of hearsay by a child who is a party. The Appellate Division in

T.U.B., however, "assum[ed], but [did] not decide, that the term 'child' does extend to [the] non-party children" in that case. 450 N.J. Super. at 228 n.10.

After thorough deliberation, the subcommittee unanimously concluded that the first point should be answered in the negative and the second question is best reserved for the courts to decide. As to the first question, we observe the broad application of the New Jersey Rules of Evidence and generally do not address practice-specific scenarios. In the subcommittee's view, the hearsay rule has numerous exceptions and is not in need of additional exceptions that merely harmonize statutory provisions.[1] Finally, we have no record to support or oppose these specific hearsay exceptions on which we can base an informed decision. On

[1] We note that a colorable argument can be made that the aforementioned hearsay exceptions do not accord with the Evidence Act of 1960. See State v. Byrd, 198 N.J. 319 (2009). In Byrd, the Court detailed the 1947 New Jersey Constitutional Convention dispute as to what branch of government "had authority to enact and regulate evidence rules." See id. at 343-44. The Court further noted that the language in both the 1942 and 1944 draft constitutions authorized "the Supreme Court to make rules governing evidence." Id. at 344-45 (citing 4 Proceedings of the Constitutional Convention of 1947, at 566). The delegates, however, did not make a final decision as to whether the Supreme Court had "exclusive rule-making power to enact evidence rules." Id. at 345. Indeed, the Evidence Act of 1960 was a "'pragmatic resolution' among the three branches of government, giving each branch a role in the process of enacting rules of evidence." Ibid. (quoting State v. D.R., 109 N.J. 348, 373-74 (1988). This relationship between the branches is evidenced in the Appellate Division's decision in T.U.B., which expressly invited the Legislature to consider whether to enact legislation extending this exception to Title 30 cases. 450 N.J. Super. at 214 (2017).

this point, the legislative history is thin, and we have no reliable information that the trauma to the children from testifying outweighs the interests of the parent whose rights are being terminated. Moreover, we are devoid of any data upon which we can base a determination that the hearsay is intrinsically reliable, or any of the other factors that the Evidence Committee usually refers to when deciding whether a hearsay exception is warranted. While the Legislature makes policy decisions, the Judiciary and this Committee must make decisions based on an adequate record and a strong foundation.

With regard to the second question, we determine that it is beyond the Evidence Committee's role to pass upon the admissibility of hearsay statements of non-parent children in the abstract. Rather, that determination is best left for a decision by a reviewing court, after full briefing and upon a complete record with full consideration of competing views. Apparently, the issue has arisen a few times in unpublished opinions but there has yet to be a dispositive precedent on the subject.

11/13/2020

APPENDIX D

REPORT OF THE N.J.R.E. 902 SUBCOMMITTEE

SUPREME COURT COMMITTEE ON THE
RULES OF EVIDENCE

TO: Committee on the Rules of Evidence

FROM: Rule 902 Subcommittee
Mary F. Thurber, J.S.C., Chair
Robert H. Gardner, J.S.C.
Evan L. Goldman, Esq.
Jeffrey S. Mandel, Esq.
Jeffrey M. Pollock, Esq.

DATE: August 10, 2020

RE: Rule 902 Subcommittee Report

Judge Grant, J.A.D., Acting Administrative Director of the Courts, asked the Committee to review the Rules of Evidence to determine whether advances in technology and social media and the use in court proceedings of information derived from the internet and social media warranted amendment of any of the Rules. Your subcommittee was formed to review N.J.R.E. 902. The subcommittee recommends no Rule changes be made.

Materials Reviewed

The subcommittee reviewed a New Jersey Law Journal article, "How the Internet Has Impacted the Procedural Practice of Family Law," July 19, 2019; State

v. Hannah, 448 N.J. Super. 78 (App. Div. 2016); E.C. v. R.H., (Ch. Div. August 11, 2015, unpublished, dealing primarily with logistical challenges of capturing evidence on cell phones rather than authentication); K.A. v. J.L., 450 N.J. Super. 247 (Ch. Div. 2016) (concerning jurisdiction and service of process issues); and F.R.E. 902 and the federal Advisory Committee Report. The N.J.L.J. article opined that the judiciary "has slowly transitioned into the digital era," but that rules and statutes "remain vastly outdated while the caselaw provides minimal guidance surrounding technological advances." Case law and commentators, on the other hand, view the evidence rules as sufficiently adaptable to respond to evidentiary concerns presented by novel forms of communication resulting from the technology expansion.

After the subcommittee prepared its draft report for the Committee, the Sedona Conference[1] published *The Sedona Conference Commentary on ESI Evidence & Admissibility, Second Edition, Public Comment Version*, THE SEDONA

[1] The Sedona Conference (TSC) is self-described as "a nonpartisan, nonprofit 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The mission of TSC is to move the law forward in a reasoned and just way through the creation and publication of nonpartisan consensus commentaries and through advanced legal education for the bench and bar." THE SEDONA CONFERENCE, https://thesedonaconference.org (last visited August 10, 2020).

CONFERENCE (July 2020).[2] This report discusses evidence issues concerning admissibility of emails; text messages; websites; social media sites and content; the Internet of Things (data gathered from computing devices and sensors embedded in everyday objects); ephemeral or self-destructing photographs or messages (e.g., Snapchat); digitally stored data; digital photographs; group collaboration tools; computer processes, animations, audio/video, virtual reality, and simulations; cloud computing; and emoji. https://thesedonaconference.org/publication/Commentary_on_ESI_Evidence_and_Admissibility. The subcommittee reviewed this lengthy report and several federal cases cited in it. Review of these materials broadened the group's understanding of the types of evidence implicated and the concerns and potential impact of a rule change in complex commercial cases, all of which were considered.

Hannah concerned appeal of the admission of a Twitter[3] post in a municipal trial and Law Division trial de novo in which defendant was convicted of simple assault. The Law Division and Appellate Division discussed out-of-state precedent on methods of authenticating a social media post. The Maryland Court of Appeals

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[2] "ESI" stands for "electronically stored information."

[3] "Twitter is an information network made up of 140-character messages called Tweets . . . posted to your profile, sent to your followers, and . . . searchable." Hannah, 448 N.J. Super. at 85 n.1 (internal quotations and citations omitted).

held that the potential for manipulation of a social networking site by someone other than the purported creator of a post required greater scrutiny and more authentication than that afforded paper records. Griffin v. State, 19 A. 3d 415, 423-24 (2011). It proposed three methods: (1) asking the purported creator if (s)he created the profile and post in question; (2) searching the computer of the purported creator, examining the internet history and hard drive to determine whether that computer created the profile and post in question; and (3) obtaining information directly from the networking site to link the profile to the person who created it and the post to the person who initiated it. Griffin, 19 A.3d at 427-28. The Hannah court rejected Griffin's proposition that social media/social network evidence requires greater scrutiny for admissibility than does other evidence, citing and agreeing with authority from Texas, Delaware, Indiana, and the Second Circuit.

> [W]e agree with Tienda's observation that:
>
> > [c]ourts and legal commentators have reached a virtual consensus that, although rapidly developing electronic communications technology often presents new and protean issues with respect to the admissibility of electronically generated, transmitted and/or stored information, including information found on social networking web sites, the rules of evidence already in place for determining authenticity are at least generally "adequate to the task." [Tienda v. State, 358 S.W.3d 633, 638-39 (Tex. Crim. App. 2012).]

> Indeed, "jurisdictions across the country have recognized that electronic evidence may be authenticated in a number of different ways consistent with Federal Rule 901 and its various state analogs."
>
> "Despite the seeming novelty of social network-generated documents, courts have applied the existing concepts of authentication under Federal Rule 901 to them," including "the reply letter doctrine [and] content known only to the participants" . . .
>
> We need not create a new test for social media postings. Defendant argues a tweet can be easily forged, but so can a letter or any other kind of writing. The simple fact that a tweet is created on the Internet does not set it apart from other writings. Accordingly, we apply our traditional rules of authentication under N.J.R.E. 901.
>
> [State v. Hannah, 448 N.J. Super. 78, 88-89 (App. Div. 2016) (some internal citations and quotations omitted).]

The court commented that authentication is a screening process for genuineness of a document, while more intense scrutiny is reserved for the factfinder. Id. at 89.

F.R.E. 902, which, like N.J.R.E. 902, identifies items of evidence that are self-authenticating and require no extrinsic evidence of authenticity to be admitted, was amended in 2017 to include these two sections:

> (13) *Certified Records Generated by an Electronic Process or System.* A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The

> proponent must also meet the notice requirements of Rule 902(11).
>
> (14) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

The rules are intended to work in the same manner that F.R.E. 902(11) and (12) work regarding business records. The records may be authenticated by a certification sufficient to satisfy the requirements of F.R.E. 901(b)(9) ("Evidence describing a process or system and showing that it produces an accurate result"), allowing authentication by certification in lieu of witness testimony. The effect is to shift to the opponent of the evidence the burden of going forward (not burden of proof) on the authentication issue. The Advisory Committee recognized that data copied from electronic devices, storage media, and electronic files can be authenticated by a "hash value" -- a unique alpha-numeric sequence of approximately 30 characters determined by an algorithm. Identical hash values for the original and copy reliably attest that they are exact duplicates. One means of certifying and self-authenticating electronic evidence is for a qualified person to certify (s)he checked the hash value of the proffered item and it was identical to the original.

Discussion

The subcommittee focused on whether any changes to our Rules of Evidence were advisable, looking to the problems and needs suggested by the materials reviewed. The Law Journal article raised two evidence concerns: (1) whether New Jersey should adopt a self-authenticating rule similar to F.R.E. 902(13) and (14), and (2) how to deal with the mechanics of offering into evidence information stored electronically or digitally on personal devices.

Self-Authentication

The federal rule changes were motivated largely by the Advisory Committee's conclusion that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence was often unnecessary, as the adversary would often stipulate or fail to challenge authentication. The subcommittee members do not perceive that as a problem in state court cases. When the issues of authenticity are problematic or disputed, they will require competing expert testimony and judicial resolution, such that the certification process will not save time or eliminate the need for testimony.

Mechanics of Admitting Specific Types of Evidence

The second concern raised in the Law Journal article related to the mechanics of admitting into evidence information stored digitally or electronically on personal

devices. Issues related to mechanics of offering electronic data (such as text messages, emails, photos, social media posts) do not lend themselves to a rule solution. The court system requires an exhibit that can be marked. The litigants have the obligation of generating a physical exhibit—a printout or an electronic copy of an audio or video file—which they then must authenticate as with every other exhibit. Problems encountered in this area frequently relate to disputes about whether the person to whom an internet posting is attributed was the actual author or the account was hacked or the message "spoofed." A certification that the copy of a post being provided to the court matches the original on the internet site does nothing to alleviate that dispute. Printouts of, for example, pages from Facebook or posts from Twitter cannot be authenticated in that manner, and the experts must have access to the electronic data. The thorny admissibility issues in this area will always require, in the subcommittee's view, judicial review, which will not be obviated or reduced by a self-authenticating rule similar to F.R.E. 902(13) or (14).

Conclusion

The subcommittee's consensus echoed State v. Hannah, agreeing that our existing rules of evidence suffice for addressing all the issues presented by ESI. That is, although emails, social media, and other forms of electronic evidence are relatively new, the same basic rules of authentication and admissibility should apply.

Practitioner members of the subcommittee viewed their tasks as consisting of (1) offering the document, (2) authenticating the document, and (3) requesting it be admitted. While the mechanism to achieve this is slightly different under the new federal rules than under the New Jersey Rules of Evidence, the same results can be obtained.

In a 52-page decision that pre-dated the Federal Rules amendments, Judge Grimm, Chief United States Magistrate Judge for the District of Maryland, provided a treatise on authentication and admissibility of electronic evidence, explaining how the parties failed to submit admissible evidence on their summary judgment motions and providing a road map for what was necessary to have the same evidence admitted at trial. This framework identifies the steps of admissibility analysis as completely workable under the then-existing federal rules, which New Jersey's rules mirror.

> Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an original or

> duplicate under the original writing rule, of if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001-1008); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance.
>
> [Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 538 (D. Md. 2007).]

As can readily be seen, authentication is only one of numerous hurdles to admissibility. A rule amendment would not even remove the authentication issue in most circumstances. Finally, the subcommittee notes that changes in technology are rapid and constant. Rule modifications aimed at specific ESI evidence issues could become obsolete in a short time.