CHAPTER 7
EVIDENCE RELATING TO ABUSE, NEGLECT AND DEPENDENCY PROCEEDINGS

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Sec.

§ 7.1 Introduction

This Chapter on evidence attempts to highlight some of the major issues that a GAL attorney advocate (AA) might face in the course of representing child clients.[1] Rules of evidence are discussed in this Chapter and some of the major cases that explain those rules are also mentioned or discussed.

Case law is essential in explaining the applicability of complex rules of evidence to various factual circumstances. Many cases involving child victims are appealed, so there is a great deal of case law addressing evidentiary matters in such cases. ***However, the vast majority of case law relating to evidentiary matters involving child victims comes from the criminal context.*** Normally, these criminal cases can still be appropriately used to provide direction in civil matters, because the evidentiary rules and issues are the same in the criminal and civil context. One issue that separates criminal evidence from civil in these cases, however, is that of confrontation; the confrontation clause of the Sixth Amendment states that it applies specifically to criminal prosecutions. [See § 7.2.E below discussing confrontation rights.] When applying principles from criminal cases to civil cases, it is always important to remember the difference in what is at stake in each case, because that is where different lines may be drawn with respect to the constitutional rights of the parties involved.

§ 7.2 The Child Witness

A. Introduction

Whether or not to have a child testify is a major decision that some GALs and attorney advocates must make. Whether the child will be an effective witness, whether the child will be traumatized, how to get the child's testimony in a nontraditional setting, and how to prepare the child are all important issues that must be considered. There is a tremendous amount of literature on the topic of children as witnesses. One who desires further information on this topic should have no problem locating books, law journal articles, psychological journal articles, and other resources addressing this issue.

B. Competency [Rule 601]

1. Definition of competency: Under Rule 601(a) of the Rules of Evidence, "Every person is competent to be a witness except as otherwise provided in these rules." Under 601(b), "A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth."

> The test of competency is whether the witness understands the obligation of an oath or affirmation and has sufficient intelligence to give evidence that will assist the jury in reaching its decisions. *State v. Higginbottom*, 312 N.C. 760 (1985).

[1] A primary resource for this chapter was initially an evidence outline written by Ilene Nelson, 1998. Some material here was reproduced from that outline. NOTE: This chapter will discuss common evidentiary issues that arise in abuse, neglect, and dependency proceedings, focusing on issues unique to such proceedings. This chapter is not intended to be a general guide to all areas of evidence in juvenile or civil court. See Chapter 12 on ethics for more information about children in court.

2. Procedure

a. Voir dire, findings of fact, and conclusions of law:

A voir dire hearing is the typical method of determining competency. Through voir dire, a thorough examination of the witness may be made on specific matters relating to competency without mixing in other matters in the case. This allows a determination of competency to be made prior to any other questioning of the witness in the case in chief. In the case of a child, such a hearing might be made in a more informal setting, such as the judge's chambers.

Failure to conduct a voir dire hearing and make specific findings of fact and detailed conclusions of law regarding competency might be considered only harmless error, if error at all, since every witness is presumed competent. See *State v. Eason*, 328 N.C. 409 (1991); *State v. Huntley*, 104 N.C. App. 732 (1991); *State v. Gilbert*, 96 N.C. App. 363 (1989) *State v. Gilbert*, 96 N.C. App. 363 (1989); *State v. Spaugh*, 321 N.C. 550 (1988); *State v. Rael*, 321 N.C. 528 (1988).

Examples of voir dire questions for a child to establish competency:

- What is your name?
- How old are you?
- Where do you live?
- What are the names of the people in your family?
- How old are [the people in your family]?
- Where do you go to school?
- What is your favorite subject at school?
- Do you know what it means to tell the truth?
- What happens if you don't tell the truth?

b. Personal observation is necessary: *State v. Fearing*, 315 N.C. 167 (1985), says that a judge must not enter an order about incompetence without seeing the child and making findings. In *Fearing*, the attorneys had stipulated to such incompetence, and this was found to be in error.

c. Only the trial court has discretion to determine competency: The determination of competency is within the discretion of the trial court, which has the opportunity to observe and examine the witness. *See, e.g.*,; ; *In re Clapp*, 137 N.C. App. 14 (2000); *State v. Ford*, 136 N.C. App. 634 (2000); *State v. Jenkins*, 83 N.C. App. 616 (1986), *cert. den.*, 319 N.C. 675 (1987); *State v. Fields*, 315 N.C. 191 (1985). **Parties cannot stipulate to competency or incompetency**. The judge must make that determination after personal observation and examination. *See, e.g.*, *State v. Fearing*, 315 N.C. 167 (1985).

3. Criteria for competency

Note: Many cases discuss competency of a child witness and the following are merely a few on this subject. Consult casenote citations in an annotated version of the statutes for more cases.

a. The fact that a child fidgets, is inconsistent, forgets, or is not a great witness does not make him or her incompetent, as these factors go to weight and credibility rather than admissibility. *See, e.g.*, *State v. Ward*, 118 N.C. App. 389 (1995).

b. Religious perspective: In *State v. Weaver*, 117 N.C. App. 434 (1994), it was not necessary that a child understood the obligation to be truthful from a religious perspective, only that the child understood the obligation to be truthful. *See also State v. Ford*, 136 N.C. App. 634 (2000).

c. Mental/physical capacity or retardation: In *State v. DeLeonardo*, 315 N.C. 762 (1986), the court addressed the issue of incompetency with a nine-year-old boy who was mildly retarded, discussing the issue of mental capacity (such as retardation) as it relates to competency, and upholding the finding of competence. In *State v. Washington*, 131 N.C. App. 156 (1998), the court of appeals supported a finding of incompetency of a victim with cerebral palsy based on her impaired ability to speak, which made it difficult to understand her.

d. Age: "There is no age below which one is incompetent, as a matter of law, to testify." *State v. Turner*, 268 N.C. 225, 230 (1966). *See also State v. Rael*, 321 N.C. 528 (1988) and *State v. Cooke*, 278 N.C. 288, 290 (1971)(citing the United States Supreme Court's statement that there is no precise age to determine competency but that "no one would think of calling as a witness an infant only two or three years old." *Wheeler v. U.S.*,159 U.S. 523 (1895)).

- Obviously, a child needs to at least be able to communicate, and a two or three-year-old who cannot communicate cannot be a competent witness.

e. Fear of retribution: In *State v. Everett*, 98 N.C. App. 23, *rev'd on other grounds*, 328 N.C. 72 (1991), the court discussed the competency of a witness who was unable to understand her obligation to tell the truth from a religious perspective and *did not have fear of certain retribution* for mendacity. The court allowed a finding of competence since the child indicated an understanding of the difference between the truth and a lie.

4. A finding of incompetence does not address the qualifications of the child as a declarant out of court to truthfully relate personal information and belief. Incompetence is not inconsistent as a matter of law with a finding the child may still be qualified as an out-of-court declarant to truthfully relate personal information and belief. But when the declarant's unavailability is due to an inability to tell truth from falsehood or reality from imagination, then previous statements could lack the requisite guarantees of trustworthiness to justify admission as residual hearsay. *See, e.g., State v. Stutts*, 105 N.C. App. 557 (1992); *State v. Wagoner*, 131 N.C. App. 285 (1998). In the *Wagoner* case, at the time the events occurred, the trial court found that the victim was able to truthfully relate personal information and was able to discern truth from fantasy. Two years later, at the time of the trial, the court concluded that the victim could not understand the obligation of the oath, the duty to tell the truth, and could not express herself articulately in court. The court stated that its conclusion that the child was incompetent to testify did not invalidate prior statements made truthfully with personal knowledge and nothing suggests that at the time of the assault, the victim was incapable of telling the truth or distinguishing reality from imagination. *See also State v. Holden*, 106 N.C. App. 244 (1992). [The issue of unavailability of the child due to incompetence and the resulting possibility of the introduction of certain hearsay statements by the child is discussed in § 7.2.D below titled, "Unavailability of a Witness: Hearsay Exceptions."]

5. Relevance: Whether or not the child is competent, the child's testimony will not be admissible unless it is relevant. If a child is found competent to testify, an argument that the child's testimony would be irrelevant may still prevent the child from testifying.

6. Improper to focus on detriment suffered by testifying: In the case of *In re Faircloth*, 137 N.C. App. 311 (2000), the court of appeals stated that in making a determination as to whether a witness is competent to testify, it is improper to focus on the detriment which would result to the children if they were to testify. It is possible for a child's presently existing mental condition to affect a child's ability to relate events and to understand the obligation to tell the truth as to render the child incompetent but no such evidence was presented in this case. It was improper to focus the determination of competence on the effect the children's testifying would have on their mental health, rather than upon the ability of the children to understand their obligation to tell the truth and their ability to relate events.

C. Leading Questions

In *State v. Hannah*, 316 N.C. 362 (1986), the North Carolina Supreme Court held that "[I]t is settled law in this state that leading questions are necessary and permitted on direct examination when a witness has difficulty understanding the question due to immaturity, age, infirmity or ignorance or when the inquiry is into a subject of a delicate nature such as sexual matters." (*quoting State v. Higginbottom*, 312 N.C. 760 (1985)). *See also State v. Joyce*, 97 N.C. App. 464, *disc. rev. denied*, 326 N.C. 803 (1990); *State v. Murphy*, 100 N.C. App 33 (1990). Leading questions are also allowed on voir dire. *See State v. Oliver*, 302 N.C. 28 (1981).

While the use of leading questions is permissible, an open question that allows a well-prepared child witness to give a full answer may result in more credible testimony than would a mere yes or no response to a leading question.

D. Use of Anatomically Correct Dolls

It is not uncommon to use anatomically correct dolls to assist children in illustrating their story. North Carolina courts have permitted children to use such dolls in the courtroom to aid in their testimony. *See State v. Fletcher*, 322 N.C. 415 (1988); *State v. Watkins*, 318 N.C. 498 (1986); *State v. DeLeonardo*, 315 N.C. 762 (1986). In such a case, the doll should be referred to by exhibit number, and the child's actions should be narrated for the record.

Courts have also permitted other witnesses to testify about the child's use of the dolls outside the courtroom when the child has testified in court. *State v. Chandler*, 324 N.C. 172 (1989). In *State v. Fearing*, however, the court questioned the reliability of such hearsay testimony when the witnesses describe the child's use of the dolls but the child does not testify in court. *See State v. Fearing*, 315 N.C. 167 (1985). *See also State v. Waddell*, 130 N.C. App. 488 (1998); *State v. Wagoner*, 131 N.C. App. 285 (1998).

E. Child Testimony in a Non-Traditional Setting and the Right to Confrontation

1. Introduction

A child witness may be intimidated or traumatized by testifying in a traditional courtroom setting. Sometimes the issue is the trauma caused by seeing the person who has allegedly harmed the child or testifying in front of that person or other individuals who intimidate the child. Other times, the difficulty lies simply in speaking to a large group of individuals in a formal, unfamiliar setting. A component of the issue of trauma is the potential that the content

of the child's testimony may be affected if the child must testify in front of the alleged perpetrator or others who intimidate the child.[2]

Attorneys and judges have employed various strategies to deal with these issues. Such strategies include having the child testify in chambers (with or without the defendant's attorney), testimony over closed-circuit TV, clearing the courtroom, altering the courtroom layout, turning the witness chair away from the defendant, or other such measures to protect the child.

The barrier attorneys often face when attempting to protect a child witness from testifying in a traditional setting is the Confrontation Clause of the Sixth Amendment. The Sixth Amendment states: "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." [U.S. Const. amend. VI.] However, the Confrontation Clause typically is not applied in civil cases and is therefore usually addressed in North Carolina case law in the criminal context. [3] *See In re D.R.*, 172 N.C. App. 300 (2005)(holding that the Sixth Amendment right of confrontation does not apply in civil juvenile abuse, neglect, and dependency proceedings).

It can be argued that the most fundamental rights are at stake in termination proceedings when a parent is faced with losing parental rights to a child.[4] An argument might also be made that (to a lesser degree) such rights are at stake in other abuse and neglect proceedings due to the possibility that such proceedings will lead to termination of parental rights. With little guidance from case law involving civil proceedings, AAs must seek to protect the child's best interests without creating issues in a case that will become problematic on appeal. As such, an attorney can strive to afford the parent's rights to confrontation to the same degree as is necessary in a criminal case whenever there would be no sacrifice in protection of the child's best interests. Nevertheless, it is reasonable to argue that parents cannot necessarily expect the same right to confrontation in civil proceedings as they have in criminal proceedings when those rights are infringed upon in order to meet the best interests of the child. *Note that the following cases are from the criminal context.*

2. United States Supreme Court

a. The Court in *Coy v. Iowa*, 487 U.S. 1012 (1988), struck down a statute that provided for the use of a screen to protect a child from viewing the defendant. Justice Scalia wrote a plurality opinion finding it unconstitutional, saying that the essence of the Sixth Amendment right of confrontation was eyeball-to-eyeball contact between the defendant and the witness. In a concurring opinion, Justice O'Connor said that this confrontation was not absolute and that there could be a set of circumstances where protection from the defendant for the witness would be permissible.

b. In *Maryland v. Craig*, 497 U.S. 836 (1990), Justice O'Connor wrote for the majority that when there were specific findings that there would be harm to an individual child the child

[2] *See In re Faircloth*, 137 N.C. App. 311 (2000), for a discussion of the relevance of detriment suffered by testifying.
[3] *See* John E. B. Myers, Evidence in Child Abuse and Neglect Cases, Volume 2, pp. 411-13, 1997; *see also Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).
[4] *See*, John E. B. Myers, *supra* note 1.

could testify outside the presence of the defendant. This had to be more than generalized legislation that imposed a presumption of trauma. The court held that the states' interest in the child's physical and psychological health was a significant state interest that could be balanced along with the defendant's rights under the confrontation clause.

3. North Carolina Courts

a. *State v. Jones*, 89 N.C. App. 584 (1988), used the *Maryland v. Craig* standard in a voir dire process in a criminal hearing to determine trauma to the child during a competency hearing even though *Jones* was decided prior to *Maryland*. In *Jones*, an expert testified that the child could suffer emotional harm if forced to testify in the defendant's presence. Based upon that testimony, the trial judge excluded the defendant in the judge's chambers with a closed circuit television when the victim was examined. The television allowed defendant to see and hear the child's testimony on voir dire for the purposes of determining competency. The Court of Appeals held that the defendant's rights were not infringed upon since the defendant had an opportunity for effective cross-examination of the child through his attorney plus an opportunity to interact freely with his attorney. The closed circuit TV allowed the defendant to hear and refute the evidence.

b. The Court of Appeals dealt with *Maryland v. Craig* directly in the case of *In the Matter of Johnny Stradford*, 119 N.C. App. 654 (l995). Two juvenile petitions were filed alleging that Johnny Stradford committed one count of first-degree rape and one count of first degree sex offense against a seven-year-old child. The court allowed the complaining witness to testify outside the presence of the defendant via closed circuit television due to the child's probable inability to communicate if forced to testify in the defendant's presence. The trial court held an evidentiary hearing prior to ruling that the child could so testify. The defendant argued that there was no statutory authority for such procedures. The state argued that the court has the authority to exercise "reasonable control" over the courtroom pursuant to N.C.G.S. 8C-1 Rule 611 (a). Citing *Maryland*, the state also argued that such testimony did not abridge the defendant's federal or state constitutional right to confront witnesses against him. The court of appeals analyzed *Maryland* and then *State v. Jones* and found that the trial court properly authorized the remote testimony of the child witness. The court held that despite the absence of face-to-face confrontation, the remote testimony preserved the essence of effective communication. The child testified under oath and was subject to full cross-examination and was able to be observed by the judge and the defendant as she testified.

c. In the case *In re Nolen*, 117 N.C. App. 693 (1995), the children, aged five and seven, were unwilling to take the witness stand. The judge then allowed the children to testify in chambers with counsel present. The proceedings were not recorded. After the children testified, the recording of the hearing resumed and the court summarized for the record the children's testimony. N.C.G.S.§7A-289.30(a) [now 7B-1109] states that the reporting for the hearing on termination shall be as provided by §7A-198 for reporting civil trials. The respondent argued that because the children's testimony was not recorded, he must receive a new hearing. The court held that a mere violation of the chapter was not enough; there had to be a showing of prejudice, and there was no such showing.

4. The reality of a non-traditional setting in North Carolina juvenile courts

Neither the North Carolina Court of Appeals nor the Supreme Court in North Carolina has fully examined all of the alternatives to a traditional courtroom setting for a child witness, and the issue has been raised only in the criminal setting. With limited guidance on the issue, attorneys must also factor in the difference between the confrontation rights of a defendant in the criminal setting versus the rights of the alleged perpetrator in the civil setting. Clearly, closed-circuit TV is acceptable, based on *Maryland v. Craig* and *In re Johnny Stradford*, making it the best option for being safe on appeal. While local districts may not have access to such audiovisual equipment, the Administrative Office of the Courts (AOC) has special equipment that allows live testimony to be broadcast; and although it is not referred to as "closed-circuit TV," it seems to accomplish the same. This equipment can be delivered to any courtroom in the state.

This equipment from the AOC is called the Remote Video Witness system and can be set up in one of two ways. The witness can testify from a room adjacent to the courtroom with the defendant in the courtroom with the judge, or the witness can testify in the courtroom with the defendant watching from an adjacent room. Either way the broadcast is live and in color. Throughout the proceeding the defendant is allowed to have confidential communication with his attorney over a secure phone line. Normally the defense attorney is in the room with the witness. To get this equipment, the AOC can be contacted directly (Mike Unruh at 919-212-5753 or email at michael.j.unruh@nccourts.org), but it is advisable to seek a court order from the judge to utilize such equipment, ordering the clerk to procure it from the AOC so that it is clear that the equipment will be used before it is delivered. The AOC would prefer at least two weeks' notice to get this equipment to a courtroom. *See Appendix in this manual for a sample motion.*

In reality, many judges allow children to talk to them in chambers, without the alleged perpetrator present. While courts have not specifically ruled on the circumstances under which such testimony in chambers would be permissible, clearly it is preferable to have the testimony recorded (see *Nolen*, above), and to have the perpetrator's attorney present in chambers to provide some safeguard of his or her client's rights and to cross-examine the child if necessary.

In some situations, clearing the courtroom of all but those who are essential may decrease the child's anxiety with respect to large groups of people. The judge has the discretion to take such an action. Also, the AA can always make a motion for a closed hearing pursuant to 7B-801(a).

5. Making a motion to get the child's testimony in a nontraditional setting or a finding of unavailability

Regardless of the method employed to protect the child, the question always comes back to a balance of interests between the child and the perpetrator. As such, it is wise for a GAL AA who is attempting to get a child out of the traditional courtroom setting to have the support of professionals and any other witnesses who have reason to believe that testimony in a traditional setting would be unwise.

An AA can make a motion to allow the child to testify in some particular nontraditional setting, in which case affidavits from a professional relating to potential trauma should be attached when possible. *See appendix in this manual for a sample motion and order.* There may need to be a hearing on the issue, in which case the AA should subpoena any individual, professional or not, who can contribute information about the child witness and how he or she will be affected. Besides professionals, foster parents, relatives, or others may provide information on the child's behavior upon seeing the perpetrator or having to discuss the events leading to the petition.

If the potential trauma is tremendous, the judge may find that the child will be so affected by the trauma as to be unavailable as a witness. *See State v. Chandler*, 324 N.C. 172 (1989)

F. Admissibility of Character Evidence of Victim (child)

1. General character: While character evidence is typically inadmissible to prove action in conformity with character under Rule of Evidence 404(a), Rule 404(a)(2) makes an exception and admits "evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same." This rule, however, is typically not applicable in abuse and neglect proceedings, because a child is the victim. With a child as the victim, it is unlikely that there is any character trait of the child that is pertinent (would make a difference in the case) since the child is typically blameless regardless of the circumstances. The perpetrator may, however, try to invoke this rule to show that the victim has a reputation for false allegations,[5] also relating to Rule of Evidence 608. **Rule 404(b)** also provides an exception for certain types of evidence not admitted to prove character in order to show action in conformity therewith, but for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

2. Evidence of victim's prior sexual history

a. **Rule of Evidence 412** "shields" the victim from having evidence offered regarding the victim's sexual behavior (often referred to as the "Rape Shield" statute). The Rule sets out certain exceptions for certain types of evidence that are admissible. Rule of Evidence 412:

(a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

[5] See Myers, *supra* note 1, discussing evidence of child's character in such cases.

(d) & (e) See statute [The remainder of the statute applies primarily in criminal cases involving a jury]

While this statute is used primarily in a criminal setting with adult victims, in certain circumstances it would be applicable in a setting involving a child. For example, the defendant may utilize the second exception to show that the perpetrator was someone else, or the fourth exception to show that the allegations are false (but could use 404(a) as well).

b. In *State v. Bass*, 121 N.C. App. 306 (1996), the defendant appealed his conviction for taking indecent liberties and first-degree sexual offense. He claimed that he should have been allowed to introduce evidence that the uncle similarly abused the victim when she was three, some three years before. Rule 412 of the rules of evidence prohibits the introduction of evidence concerning "the previous sexual activity of a complainant in a rape or sex offense case." Any "sexual activity of the complainant other that the sexual act which is at issue in the indictment on trial. . ." is deemed irrelevant unless an exception applies. Here none of the exceptions applied. The court identified several situations where the prior acts would be admissible such as to impeach the witness or to show prior inconsistent statements. The court found that where the probative value of the proffered evidence in challenging the witness' credibility is high and the degree of prejudice present by reference to previous sexual activity is low, the proffered evidence might be admissible, at least for impeachment purposes. In this case, the court held that the evidence was not admissible because there was no evidence that the prior accusations were false and that the evidence would show that someone other than the defendant committed the assault. [*See also State v. Trogden*, 135 N.C. App. 85 (1999), another case discussing Rule of Evidence 412 in the context of a child sex abuse case and also discussing the *Bass* case.]

§ 7.3 Hearsay and Hearsay Exceptions Commonly Used in Cases Involving Child Victims

A. Introduction

This subsection specifically addresses the issue of getting a child's out-of-court statements admitted into evidence. Obviously, such exceptions apply to witnesses in general, but this subsection focuses on those most often used with child witnesses.

B. Is Necessity a Prerequisite to the Introduction of Out-of-Court Statements?

The North Carolina Court of Appeals set up a two-part test for introducing hearsay in a criminal trial, requiring that 1) there is a showing of the necessity for using hearsay testimony, and 2) the inherent trustworthiness of the original declaration must be established. *State v. Jones*, 89 N.C. App. 584 (1988). But the origin of this two-part test is the Confrontation Clause, which is specifically applicable in criminal cases. (See Chapter II.E. above, discussing the non-applicability of the Confrontation Clause to civil cases.) As such, it can be argued that such a test is irrelevant to civil abuse, neglect, and dependency proceedings. Nevertheless, with a lack of guidance from case law involving civil abuse and neglect, it is wise to be aware of the position of the courts in criminal matters.

In addition, the U.S. Supreme Court in *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736 (l992), eliminated the requirement of showing necessity when the hearsay is within a well-established hearsay exception.

In *White*, the Court reasoned that there is no need for such a requirement because of the inherent reliability of testimony within hearsay exceptions. "We note first that evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out of court declarations are made in a context that provide substantial guarantees of trustworthiness. But the same factors that contribute to statements' reliability cannot be recaptured even by later in-court testimony." *White* at 356. The court went on to note that exclamation at the time carries more weight with the trier of fact than similar statement in the calm of the courtroom. "We therefore think it clear that out-of-court statements admitted in this case had substantial probative value, value that cannot be duplicated simply by the declarant testifying in court." *Id.* at 743.

Finally, in 1998, the North Carolina Supreme Court dealt directly with this issue, following *White* and holding that *where hearsay offered by the prosecution comes within a firmly rooted exception to the hearsay rule, there is no requirement of necessity or trustworthiness. State v. Jackson*, 348 N.C. 644 (1998). *See also State v. Wagoner*, 131 N.C. App. 285 (1998). In *Wagoner*, the court made it clear that necessity and trustworthiness were required for statements admitted as residual hearsay but not for statements falling within a firmly rooted hearsay exception.

C. Statements Not Excluded as Hearsay When Availability of Declarant Is Immaterial (Hearsay Exceptions)

l. Medical Diagnosis and treatment. Rule of Evidence 803(4) makes an exception to the hearsay rule based on medical diagnosis and treatment. "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." G.S. 8C-1, Rule 803. This exception is based on the premise that people have a strong basis for telling the truth to their doctor.

a. The two-part inquiry: Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment. *State v. Hinnant*, 351 N.C. 277 (2000).

b. *State v. Hinn*ant and the "new law" for this exception: In *State v. Hinnant*, 351 N.C. 277 (2000), the North Carolina Supreme Court overruled some previous cases (to a certain extent) involving children's hearsay statements admitted under the medical diagnosis and treatment exception. Prior to *Hinnant*, a number of North Carolina cases had permitted children's hearsay statements to be admitted under the medical diagnosis and treatment exception, some without strict application of the two-part inquiry stated above. In *Hinnant*, the Court stated that it was inappropriate to admit statements under this exception unless the proponent of such testimony affirmatively establishes that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment. This statement provided a more strict application of the two-part inquiry than many past cases and the court even said that "to the extent that cases such as *State v. Jones*, 89 N.C. App. 584 (1988), are inconsistent with our holding, they are overruled." *Id.* at 287. [Such holding applies only to trials commenced on or after the certification date of the *Hinnant* opinion.]

The Court recognized the difficulty of determining the declarant's intent and stated that "the trial court should consider all objective circumstances of record surrounding declarant's

statement in determining whether he or she possessed the requisite intent under Rule 803(4)." *Id.* at 288. The court acknowledged (in citing other cases) that some such circumstances might include the setting the child is in (e.g. if it is a medical setting), the nature of the questioning, and the fact that a young child is more likely to possess the requisite treatment motive when speaking to medical personnel. In addition, the court indicated that the evidence that the medical purpose of the examination and importance of truthful answers were explained to the declarant can help establish treatment motivation. *Id.* at 289. *Hinnant* also stated that "Rule 803(4) does not include statements to non-physicians made after the declarant has already received initial medical treatment and diagnosis." *Id.* at 289.

- For cases involving *Hinnant* in a juvenile abuse, neglect, dependency proceeding, *see e.g. In re B.D.*, 174 N.C. App. 234 (2004); *In re Mashburn*, 162 N.C. App. 386 (2004).

c. Pre-*Hinnant* cases involving admission of children's hearsay statements under the medical diagnosis and treatment exception.

i. statements made to physicians

- Some North Carolina cases dealt with statements admitted under the medical diagnosis and treatment exception prior to recent cases declaring necessity and trustworthiness as unnecessary prerequisites to a firmly rooted hearsay exception. The court in *State v. Gregory*, 78 N.C. App. 565 (1985), held that statements a child made to her doctor about what her father had done to her were admissible because even a young child has a strong motivation to tell the truth for the purpose of medical diagnosis and treatment. The court also held that because of Sixth Amendment right of confrontation, the hearsay had to meet the two- prong test of necessity and trustworthiness in a criminal proceeding. The Court of Appeals in *State v. Ward*, 118 N.C. App. 389 (1995) followed the same two- prong test outlined above in *Gregory* despite the fact that it was decided after *White.*

- The medical person may testify as to the cause of the injuries as long as is reasonably pertinent to diagnosis and treatment. The medical person can also identify the perpetrator because it is directly related to the treatment, which may include removal or other course of treatment that is different if a nonrelative is the perpetrator. Details of the offense provided by the child are also admissible. *See, e.g., State v. Hughes*, 114 N.C. App. 742, *disc. rev. denied*, 337 N.C. 687 (1994); *State v. Smith*, 315 N.C. 76 (1985); *State v. Rogers*, 109 N.C. App. 491, *disc. rev. denied*, 334 N.C. 625 (1993).

- However, the statements are not admissible when, as in *State v. Stafford*, 317 N.C. 568 (1986), the court has held that statements were not made to the physician for diagnosis and treatment but for preparation for court.

- In *State v. Aguallo*, 318 N.C. 590 (1986), in order to determine whether the statements were made during the course of treatment or for preparation for court, the court balanced such factors as length of time between the incident and seeing a doctor or between seeing the doctor and the trial, as well as who referred the victim for treatment. In *Aguallo*, the child saw the doctor several months before trial, was referred by the social worker, not law

enforcement, and the physician went on to treat the child. The court held that the doctor's statement was admissible.

- In *State v. Woody*, 124 N.C. App. 296 (l996), the court found that a doctor could testify regarding statements made by a sexual abuse victim during examination. The doctor made her diagnosis based both on physical examination of the child and the statements the child made to her. The statements included how she felt about her father and the fact that she loved him before but not after the event.

ii. Statements made to others (not physicians)

The following cases, all decided ***prior*** to *Hinnant*, were cases in which a child's hearsay statements to persons who were not physicians were discussed under the medical diagnosis and treatment exception: *State v. Jones*, 89 N.C. App. 584 (1988); *State v. Figured*, 116 N.C. App. 1 (1994); *State v. Smith*, 315 N.C. 76 (l985); *State v. Richardson*, 112 N.C. App. 58 (1993); *State v. Hammond*, 112 N.C. App. 454 (1993). However, *Hinnant* is now controlling and regardless of the admissibility of statements in these cases, there must now be a finding that the declarant possessed the requisite intent when the statements were made.

d. Post-*Hinnant* cases

i. *State v. Waddell*, 351 N.C. 413 (2000), was a case in which the court concluded that statements should not have been admitted under the medical diagnosis and treatment exception because there was no evidence of a medical treatment motivation on the part of the child making the statement.

ii. *In re Clapp*, 137 N.C. App. 14 (2000), was a case in which treatment motivation was shown. The court of appeals distinguished this case from *Hinnant* saying the child's motivation in making the statement was shown because she made it after she left the bedroom (where she had been sexually abused), pulling at her panties and telling of the abuse. *See also State v. Youngs*, 141 N.C. App. 220 (2000), *disc. review denied*, 353 N.C. 397 (2001), a case in which statements the child made to the doctor were admissible.

iii. *State v. Bates*, 140 N.C. App. 743 (2000), *disc. review denied*, 353 N.C. 383 (2001), was a case in which the trial court reversed and remanded the case because the record failed to show that the child had a treatment motive when she made statements that were admitted under the medical diagnosis and treatment exception. *See also State v. Watts*, 141 N.C. App. 104 (2000), a similar case.

iv. For other illustrative cases, *See State v. Lewis* 172 N.C. App. 97 (2005)(allowing videotapes of interview as substantive evidence as they were in medical center by registered nurse and the children understood that the nurse would share the information with the doctor who would peform the medical exam); *State v. Thorton*, 158 N.C. App. 645 (2003) (statements by child to social worker conducting exam with the pediatrician

were admissible); *State v. Stancil*, 146 N.C. App. 234 (2001); *but see State v. Reeder*, 105 N.C. App. 343 (1992)(exam was for purpose of evaluating whether child was sexually abused, not for purposes of diagnosis or treatment, so child's statement to doctor was inadmissible under hearsay exception).

2. Excited utterances

An excited utterance is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." [Rule 803(2) of the North Carolina Rules of Evidence]. How long after the event does the stress of excitement still exist? For adults, even a few minutes between a startling event and a statement can negate the exception, but the time is longer for children. When looking at the spontaneity of statements made by a young child, there is more flexibility with the length of time between the startling event and the statement because for children the "stress and spontaneity" invoking the exception is present longer for young children than adults. *State v. Boczkowski*, 130 N.C. App. 702 (1998).

In order to fall within this hearsay exception, "there must be (1) a sufficiently startling experience suspending relative thought; and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *In re J.S.B.*, --- N.C. App. ---, 644 S.E.2d 580 (2007)(quoting *State v. Smith*, 315 N.C. 76 (1985)).

a. In *State v. Smith*, 315 N.C. 76 (l985), the event took place sometime between Friday night and Monday morning. When the children returned on Monday, they told their grandmother; the court admitted her testimony under this exception. *See also State v. Ford*, 136 N.C. App. 634 (2000), where the court said a statement made by the child to her mother hours after the event could have been admitted as an excited utterance. *See also In re Clapp*, 137 N.C. App. 14 (2000), where child made statement as she left the bedroom where the abuse occurred.

b. In *State v. Jones*, 89 N.C. App. 584 (1988), the court held that a statement made ten hours after a child left the defendant's custody could still be excited.

c. In *State v. Rogers*, 109 N.C. App. 491 (1993), the statement was made three days later and was told to a friend's mother. The court found that it was still excited even after she told others.

d. In *State v. Thomas*, 119 N.C. App. 708(1995), the defendant was convicted of first degree sexual offense and taking indecent liberties with a child. On appeal, the defendant argued that the trial court had erred in admitting testimony of the mothers of his daughter's classmates. The victim told two of her kindergarten classmates that her father had sexually abused her, and these children told their mothers. Each of the mothers testified in court over the defendant's objection. The court held that it was error to admit the testimony. Although the children could testify about what their classmate had told them under the excited utterance rule, their mothers' testimony did not come within the same rule. The children's statements to their mothers were in the nature of reporting the day's events ("narrative rather than instinctive character") and not in the nature of an excited utterance. This was a double hearsay and there was no exception for the mother's testimony. The court held that it was prejudicial error because of the substantial importance of the testimony as the only direct evidence pointing to the defendant's guilt.

e. In *State v. Perkins*, 345 N.C. 254 (l997), a seven-year-old girl was raped and killed by her grandmother's boyfriend while her three-year-old brother watched. The court allowed the

juvenile investigator to testify during the criminal trial about what the three-year-old had told her ten hours after the murder under the excited utterance exception. The Supreme Court ruled that the testimony was properly allowed.

f. In *In re J.S.B.*, --- N.C. App. ---, 644 S.E.2d 580 (2007), a nine-year-old girl made statements to a detective sixteen hours after witnessing conduct that led to her brother's death including seeing her mother hit her brother on the head. During the interview, the child was teary and withdrawn even to the extent of being on the floor in a fetal position. The Court of Appeals rules that under these circumstances that it was proper to admit her statements in the abuse and neglect adjudication under the excited utterance exception to hearsay.

3. Present sense impression: Rule of Evidence 803(1) states an exception to the hearsay rule as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

Utilizing this exception is certainly possible where a child victim or other witness relays what happened immediately after the event occurs. In *State v. Odom*, 316 N.C. 306 (1986), ten minutes was not too remote to be admissible. In *State v. Cummings*, 326 N.C. 298 (1990), statements made by a victim to her mother when she went to her mother's house following the event were admitted as present sense impression.

4. State of mind: Under Rule of Evidence 803(3), an exception to hearsay is a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. Courts have distinguished statements of fact from statements of emotion, saying that the former does not qualify as a "state of mind" exception. *See State v. Marecek*,130 N.C. App. 303 (1998); *State v. Hardy*, 339 N.C. 207 (1994). Examples of "state of mind" statements include "I'm frightened" or "I'm angry." *Hardy.* In *State v. Thompson*, 139 N.C. App. 299 (2000), the court found it proper to admit evidence of physical abuse of the victim's siblings and the family pet because they occurred in the presence of the victim and were introduced to show the victim's state of mind – why she was afraid of the defendant and did not report the abuse – and was not introduced to show the defendant's character or propensity to commit such an act.

5. Residual hearsay: See subsection E. below on residual hearsay.

D. Unavailability of a Witness; Hearsay Exceptions

1. In general. Certain types of out-of-court statements are admissible if the declarant has been deemed unavailable as a witness. [Rule of Evidence 804] Those types of statements include the following:

a. Former testimony
b. Statement under belief of impending death
c. Statement against interest
d. Statement of personal or family history
e. Other exceptions: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, under certain circumstances (See residual hearsay, below in subsection E).

Note: While the residual hearsay exception is available for declarants who are available or unavailable, the fact that the declarant is unavailable may make it easier to meet the requirements for using the residual hearsay exception.[6]

2. Definition of unavailability [Rule of Evidence 804]

Unavailability as a witness includes situations in which the declarant:

- is exempted from testifying on grounds of privilege
- persists in refusing to testify despite a court order[7]
- testifies to a lack of memory of the statement
- is unable to be present or to testify because of death or then existing physical or mental illness or infirmity
- is absent from the hearing and the proponent of his statement is unable to procure his attendance by process or other reasonable means

3. Unavailability of child witness

a. **Generally**: A child witness may fall into one of the above definitions of unavailability due to a refusal to testify, or an inability to testify due to trauma, incompetence, or other factors. (*See, e.g*., *State v. Deanes*, 323 N.C. 508 (1988); *State v. Chandler*, 324 N.C. 172 (1989); *State v. Ward*, 118 N.C. App. 389 (1995); and *State v. Jones*, 89 N.C. App. 584 (1988).

b**. "De facto" unavailability**: The case of *State v. Ward*, makes no mention of an actual order by the trial court telling the child to testify, nor did the trial court make a finding of unavailability (in fact the trial court had found her competent to testify), yet the court of appeals held that this victim was in fact unavailable to testify (on a *de facto* basis). *See also State v. Chandler*,where the child had taken the stand but had been unable to answer questions despite various efforts by the court to make her more comfortable, and the NC Supreme Court said "Under the circumstances, the judge's declaration that the child 'is simply going to be unable to testify,' amounts to an implicit declaration of unavailability within the meaning of Rule 804(a)(4)." *Id*.at 181. *But see State v. Linton* mentioned in footnote 7.

c. **Unavailability does not necessarily result in incompetency even though incompetency can result in unavailability**: In the case *In re Faircloth*, 137 N.C. App. 311 (2000), the trial court had found children "unavailable" to testify based on the potential detrimental effect on the mental condition of the children if they were to testify. However, the competence of the children was at issue, not the unavailability of the children (there was no issue of admitting hearsay statements pursuant to the exceptions for unavailable witnesses), and the Court of Appeals found that the trial court should not have applied standards related to unavailability in order to determine competence.

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[6] *See, e.g., State v. Jackson*, 348 N.C. 644 (1998); *State v. Ward*, 118 N.C. App. 389 (1995); *State v. Gregory*, 78 N.C. App. 565 (1985), *disc. rev. denied*, 316 N.C. 382 (1986). When the witness is "unavailable," it may be easier to show that the statement is more probative of the point than other evidence that could be procured through reasonable efforts (since the victim herself is not testifying), and to show that the general purpose of the rules and the interests of justice will best be served by admission of the statement, both of which are factors to be considered in determining admissibility.

[7] *See State v. Fowler*, 353 N.C. 599 (2001), where witness to a murder refused to testify and was declared unavailable; *but see State v. Linton*, 145 N.C. App. 639 (2001), *rev. denied*, 355 N.C. 498 (2002), where witness was declared unavailable because of refusal to testify but the court of appeals disagreed and said that because the trial court never ordered the victim to testify after the victim initially refused to do so, the trial court erred in declaring the victim "unavailable".

d. **Unavailability due to incompetency**: Unavailability can be based on incompetency. *See State v. Pretty*, 134 N.C. App. 379 (1999), *review denied*, 351 N.C. 117 (1999); *State v. Rogers*, 109 N.C. App. 491 (1993); *State v. Jones*, 89 N.C. App. 584 (1988); *State v. Deanes*, 323 N.C. 508 (1988); and *State v. Gregory*, 78 N.C. App. 565 (1985).

e. **Then-existing physical or emotional condition**. Under Rule 803(a)(4), before finding a child witness unavailable, the court may have to determine whether various accommodations such as closed-circuit television testimony would enable the child to testify.

E. Residual Hearsay: Statements Not Excluded by Hearsay Rule for Available and Unavailable Witnesses

An out-of-court statement may be admissible when the statement does not fit any other category of hearsay exceptions and has circumstantial guarantees of trustworthiness equivalent to those of the other exceptions [Rule 803 (24) for available witnesses and Rule 804(b)(5) for unavailable witnesses].

1. Prerequisites for admission as residual hearsay [See specifics of Rule 803(24), 804(b)(5), and *see State v. Wagoner*, 131 N.C. App. 285 (1998); *State v. Swindler*, 339 N.C. 469 (1994); an *State v. Smith*, 315 N.C. 76 (1985).]

a. Written notice, including intention to offer the statement, particulars of the statement, name and address of declarant, to adverse party sufficiently in advance of offering the statement to provide an opportunity to prepare
b. The hearsay is not covered by any other exception
c. The statement is trustworthy
d. The statement is offered as evidence of material fact
e. The statement is more probative of the point than other evidence that could be procured through reasonable efforts
f. Whether the general purpose of these rules and the interests of justice will best be served by admission of the statement

Necessity as another requirement in criminal cases: Another requirement for admission of statements as residual hearsay in *criminal* cases is that of necessity. *State v. Wagoner*, 131 N.C. App. 285 (1998); *State v. Waddell*, 130 N.C. App. 488 (1998); also see § 7.3.B. above, discussing necessity. Although trustworthiness is one of the six requirements above and necessity is not, it can be argued that if one can meet the other requirements, the requirement of necessity will be met. In fact, cases have stated that the necessity prong is adequately demonstrated by the unavailability of the victim due to incompetency and the evidentiary importance of the victim's statements. *See, e.g., State v. Jackson*, 348 N.C. 644 (1998); *State v. Gregory*, 78 N.C. App. 565 (1985), *disc. rev. denied*, 316 N.C. 382 (1986);.

2. Factors to be utilized to inquire about trustworthiness: *State v. Smith*, 315 N.C. 76 (l985), discussed factors that courts have used to guide the trial judge's determination of trustworthiness, and these are set out below. However, *Smith* stated that such factors are not conclusive and that the judge should focus upon factors that bear on the declarant at the time of making the statement and should be aware of the peculiar factual context within which the statement was made.

The factors are as follows:

i. Whether the declarant has personal knowledge of the underlying event
ii. The declarant's motivation to speak the truth
iii. Whether the declarant ever recanted
iv. Whether there is practical availability of the declarant at trial for meaningful cross-examination

See also Idaho v. Wright, 497 U.S. 805 (1990) discussed below in § 7.3.E.4.

3. Trial judge's duties when considering residual hearsay: When the trial judge is considering allowing residual hearsay, he or she must have the record reflect such consideration and then may proceed to analyze admissibility using the six-part inquiry required by the Rule. The record must reflect not only the judge's conclusion but also the reasoning in reaching it and findings of fact and conclusions of law as to trustworthiness. *Smith, supra; see also In re Gallinat*o, 106 N.C. App. 376 (1992). Attorneys should insist on findings by the court because failure of the judge to make findings is error.

4. Case notes

a. In *Idaho v. Wright*, 497 U.S. 805 (1990), the United States Supreme Court dealt with a case where the doctor's testimony as to whom the child accused was not within the medical diagnosis exception in Idaho and addressed the admissibility of the statement under the residual hearsay rule. The Court held that because this did not fall within an established hearsay exception it needed a particularized guarantee of trustworthiness surrounding the making of the statement itself and that corroboration of another witness did not provide support for such trustworthiness. The Court also mentioned a few factors used to determine trustworthiness, including the declarant's mental state and the use of terminology unexpected of a child of similar age, relating to whether the child was particularly likely to be telling the truth when the statement was made.

b. In *State v. Deanes*, 323 N.C. 508 (1988), the court admitted testimony that the child made to the social worker after making the specific findings required in *Smith*. The court said that five-year-olds would be motivated to speak truthfully to a person in authority and the fact that the social worker initiated the conversation was not controlling as to truthfulness. Even inconsistencies in the statement did not necessitate exclusion because such inconsistencies would go to the weight of the evidence. The court also looked to the fact that statements were consistent with the physical findings.

c. In *In re Gallinato*, 106 N.C. App. 376 (1992), the Court of Appeals reversed an adjudication of abuse, holding that the trial court erred in allowing a social worker and daycare workers to testify about statements made to them by the children, who had been found incompetent to testify, without making the six-step inquiry required for admission under the residual hearsay exception to the hearsay rule. The statements did not have the sufficient indicia of trustworthiness.

d. In *State v. Stutts*, l05 N.C. App. 557 (1992), a four-year-old was found unavailable because of her inability to discern truth from falsehood or to understand the difference between reality and imagination. The court held that it was illogical to find that the out of court statements were admissible because they possessed guarantees of trustworthiness. "The very fact that a

potential witness cannot tell truth from fantasy casts sufficient doubt on the trustworthiness of their out of court statements to require excluding them." (*But see Rogers*, below)

e. In *State v. Rogers,* 109 N.C. App. 49l (1993), the mother testified, friends of the mother testified, the doctor testified, and the psychologist testified. The defendant argued that since the court had found the victim incompetent to testify, the statements the child had made to the witnesses were per se unreliable. The court rejected this analysis. The court did not find it inconsistent as a matter of law that when the trial court finds a child incompetent it may also find that the child may nevertheless be qualified as a declarant out of court to relate truthfully personal information and belief.

A child's inability to communicate to the jury at the time of trial might be relevant as to whether an earlier hearsay statement possessed particularized guarantees of trustworthiness. However, a per se rule of exclusion would frustrate the truth-seeking purpose of the Confrontation Clause. The court also stated that even if the out-of-court statement properly falls within an exception to the hearsay rule, it nonetheless must be excluded at a criminal trial if it infringes on the defendant's constitutional right to confrontation. (Note that the court goes through necessity and inherent trustworthiness analysis after *White v. Illinois* and *Idaho v. Wright.)*

f. In *State v. Wagoner,* 131 N.C. App. 285 (1998), certain factors, independent of corroborating physical evidence, supplied sufficient guarantees of trustworthiness. The factors included consistent repetition of the victim's account of what happened, her spontaneity, her mental state on certain dates, her use of terminology unexpected of a child of similar age, her lack of motive to fabricate, the absence of recantation, and the use of anatomically correct dolls and drawings.

g. In *State v. Waddell*, 351 N.C. 413 (2000), the notice requirements for residual hearsay were met and although the state kept waffling as to whether the statements should be admitted as residual hearsay or statements of medical diagnosis and treatment, ultimately the state made it clear they were attempting to get them in under medical diagnosis and treatment and so they could not be admitted as residual hearsay.

h. In *State v. Fowler,* 353 N.C. 599 (2001), the court allowed hearsay statements made by a witness to a murder who had since left the country and refused to return to testify. The N.C. supreme court found that the trial court had properly determined that the statements fell within the residual hearsay exception, Rule 804(b)(5) – including the fact that the witness was unavailable, that none of the other hearsay exceptions outlined in Rule 804(b) apply, and that the trial court had properly considered the six-prong inquiry outlined in *State v. Ali*, 329 N.C. 394 (1991). The Supreme Court then conducted an independent inquiry and found that the guarantees of trustworthiness offered by the state met the demands of the Confrontation Clause.

§ 7.4 Corroboration and Impeachment

A. Corroboration

Prior statements of the witness are admissible as corroboration if they add weight or credibility to witness statements.

1. In *State v. Ramey*, 318 N.C. 457 (1986), the court stated that additional or new information obtained in a witness statement but not offered in trial testimony may be admitted as corroborative evidence.

2. In *State v. Richardson*, 112 N.C. App. 58 (1993), the Court of Appeals stated that if the court instructs the jury to consider adult testimony that corroborates children only to the extent that it actually corroborates, then it is admissible.

3. In *State v. Connell*, 127 N.C. App. 685 (1997), the inconsistencies in statements to a social worker and the testimony at trial were deemed to be only slight variations. The social worker's testimony was therefore admissible as corroborative, strengthening and adding credibility to the victim's testimony.

4. In *State v. McGraw*, 137 N.C. App. 726, *rev. denied*, 352 N.C. 360 (2000), the child victim had testified at trial that the defendant "touched her in her private part," and that it hurt. Later, the child's mother testified that the child had explained the defendant touched her in her "private part," was "rubbing her hard," and that it hurt. Since the testimony of the child and her mother were "nearly identical," the mother's statements were properly admitted as corroborative of the child's testimony.

B. Impeachment

A witness's testimony may be impeached with evidence that the witness told a different story prior to testifying. *See United States v. Hale*, 422 U.S. 171 (1975). Children may be impeached with prior inconsistent statements and attorneys must be prepared to respond. [See Rule of Evidence 613] In some cases, the attorney can "point to developmental and situational reasons for a child's inconsistency -- reasons that explain away the impeaching value of the inconsistency."[8]

Under Rule 806 of the Rules of Evidence, "When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination." G.S. 8C-1, Rule 806.

§ 7.5 Expert Witnesses

A. Rules of Evidence Specifically Applicable to Expert Witnesses

Rule 702 of the N.C. Rules of Evidence: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." G.S. 8C-1, Rule 702(a).

Rule 703 of the N.C. Rules of Evidence: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." G.S. 8C-1, Rule 703.

[8] John E. B. Myers, Evidence in Child Abuse and Neglect Cases, p. 170 of Volume 2, 1997.

Rule 704 of the N.C. Rules of Evidence: "Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." G.S. 8C-1, Rule 704.

Rule 705 of the N.C. Rules of Evidence: "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question." G.S. 8C-1, Rule 705.

Rule 706 of the N.C. Rules of Evidence: Court appointed experts

B. Qualifying a Witness as an Expert

1. Judge's determination: The determination of whether a witness qualifies as an expert is solely within the province of the judge and is a question of fact. *See State v. Bullard*, 312 N.C. 129 (1984); *State v. Parks*, 96 N.C. App. 589 (1989).

2. Criteria for qualification: Under Rule 702, one must possess special knowledge, skill, experience, training, or education to qualify as an expert. An expert need not be experienced with the identical subject area in a particular case or be licensed, a specialist, or engaged in a specific profession. **What is necessary is that the witness, through study or experience, is better qualified than the jury to render an opinion on a certain matter**. *See State v. Bullard*, 312 N.C. 129 (1984); *State v. Howard*, 78 N.C. App. 262 (1985), *appeal dismissed*, 316 N.C. 198 (1986).

> In a Court of Appeals case, the guardian ad litem sought the expert opinion of a witness about treatment of adult child abusers. The witness had no direct clinical experience treating adults and the trial court did not let the witness testify. The Court of Appeals ruled that this was error, stating that an expert need not have had clinical experience in the very subject at issue, rather it is enough that through study or experience, the expert is better qualified that the fact finder to render an opinion on the particular subject. *In re Chasse*, 116 N.C. App. 52 (1994).

3. **Sufficient foundation must be laid** to show that a witness is an expert in the area for which he or she will give an opinion, and the expert must testify as to his or her qualifications. *See State v. Goodwin*, 320 N.C. 147 (1987); *State v. Oliver*, 85 N.C. App. 1, *cert. denied*, 320 N.C. 174 (1987). For a case in which the court found sufficient foundation was not laid for expert testimony, *see State v. Grover*, 142 N.C. App. 411 (2001).

C. Admissibility of Expert Testimony

1. Expert opinion: Under Rule 702, the expert may testify in the form of an opinion if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

2. Basis of opinion: Under Rule 703, the basis of an opinion or inference may be facts or data perceived by or made known to the expert at or before the hearing. If such facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

3. Subject matter of testimony

a. Child's truthfulness

i. The expert may not testify that the child's testimony at trial was truthful or that the child was not fantasizing about a particular incident. *See State v. Heath*, 316 N.C. 337 (1986).

ii. An expert can testify about the truthfulness or lack of it in sexually abused children in general. *State v. Oliver*, 85 N.C. App. 1 (1987). While expert testimony on the credibility of a witness is prohibited, an expert can testify as to whether a victim's behavioral characteristics are consistent with sexual abuse, or about a witness' mental condition that would generally affect the witness' ability to distinguish reality from fantasy. *See State v. Teeter*, 85 N.C. App. 624 (1987).

iii. An expert qualified in the fields of pediatric medicine and child sexual abuse testified that it was her expert opinion that children in general do not lie about sexual abuse and that, based on her examination, the child was sexually abused. On redirect, over strenuous objection, the doctor testified that she had not picked up on anything to suggest that someone had told the victim what to say or that the victim had been coached. The Court of Appeals ruled that an expert witness may not testify regarding the veracity of the prosecuting witness in a sexual abuse trial. The court held that the challenged testimony was a comment on the victim's credibility and was inadmissible. *State v. Baymon*, 108 N.C. App. 476 (1993). The supreme court reversed that ruling, holding as Judge Walker had in dissent, that there is a distinction between testimony from a witness, such as a doctor, that a child victim was truthful or untruthful, which is inadmissible, and testimony that the expert found no evidence that the child had been coached, which is admissible. This ruling was based, in large part, on the fact that the defendant had "opened the door" for this testimony in cross-examination. *State v. Baymon*, 336 N.C. 748 (1994).

iv. The North Carolina Supreme Court held that the trial court erred in allowing a teacher of the victim to relate specific incidents when the child told the truth. The teacher also stated that she had no reason to doubt that what the victim told her was true. The Supreme Court ruled that this testimony as to these specific instances of conduct were improper under Rule 608(b) of the North Carolina Rules of Evidence. Specific instances of conduct pertaining to a witness for character for truthfulness or untruthfulness is prohibited, but evidence of the character of a person may be made by testimony as to reputation or by testimony in the form of an opinion. Rule 405(a). The court held that this error was prejudicial and ordered a new trial. *State v. Baymon, supra.*

v. In *State v. Richardson*, 112 N.C. App. 58 (l993), the court held that evidence of general credibility and characteristics of sexually abused children was admissible if it helped the jury to understand behavior patterns of sexually abused children.

vi. An expert may give his opinion that a child was sexually abused but may not testify about the truthfulness of a particular witness. The rule is that the opinion related to a diagnosis based on the expert's examination of a witness is admissible, while opinion about credibility is not. *State v. Figured*, 116 N.C. App. 1 (1994).

vii. In *State v. Dick*, 126 N.C. App. 312 (1997), the defendant had objected to admission of the testimony of a social worker qualified as an expert in clinical social work. Among other things, the social worker testified that the child waited two years to tell of sexual abuse because she was waiting to disclose in a safe place. The court ruled such testimony admissible as specialized knowledge, helpful to the jury. Furthermore, the defendant had asked questions about failure to disclose for two years and had thereby opened the door to such testimony.

viii. In *State v. Marine*, 135 N.C. App. 279 (1999), the defendant argued that the victim's family counselor, testifying as an expert, improperly commented on the victim's credibility, in violation of Rule of Evidence 405(a) (prohibiting expert testimony regarding a witness' character) and 608(a) (allowing reputation or opinion testimony in order to bolster another witness' credibility). The Court of Appeals stated that the counselor had expressed an opinion that the victim suffered from post traumatic stress syndrome ("PTSSD") and that it was appropriate for the counselor to explain how she concluded that the victim has suffered from PTSSD, including testifying as to the victim's mental and emotional state and as to the reliability of the information used to formulate her opinion. In formulating her opinion, the counselor explained that one of the indicators of PTSSD is that the victim "has experienced actual or threatened serious injury or threat to her physical integrity." The testimony complained of here simply seeks to explain why the counselor felt the victim had experienced a traumatic event: the victim's behavior and lack of sexual education convinced the counselor that the information she was using to formulate her opinion was reliable. In short, this testimony went to the reliability of the counselor's diagnosis, not to the victim's credibility and was therefore permissive use of expert testimony under Rule 702.

b. Medical findings

Parents and caretakers may offer explanations of injuries to children that are anything but abusive. Medical professionals are sometimes in a position to refute an explanation or provide information on the injuries, using medical evidence to show why or how an injury did or did not occur. An expert may testify as to medical findings. The medical professional may even offer an opinion on the probable cause of the injury. *See State v. Brown*, 300 N.C. 731 (1980).

i. In *State v. Bright*, 320 N.C. 491 (1987), a medical doctor testified that in her opinion the victim's vagina had been penetrated, but not recently, and the penetration could have been by a vibrator. A psychologist was permitted to testify as to her opinion of the gender of the perpetrator (and therefore the identity) because the defense attorney had "opened the door" in cross-examination.

ii. Additionally, in *State v. Everett*, 328 N.C. 72 (1991), the North Carolina Supreme Court allowed a medical doctor to state his opinion as to the number of times that penetration took place based on his medical findings concerning the state of the vagina. The court found that the expert's conclusion was admissible because it still left to the jury the task of deciding how much weight to accord to the expert's opinion.

iii. Medical expert testimony on penetration may, of course, be rebutted by alternative explanations for an opening in the hymen and any tears therein. *See, e.g., State v. Baron*, 58 N.C. App. 150 (1982) (evidence of attempted prior use of tampons by the

alleged rape victim held admissible and relevant as consistent with the puncturing of the hymen).

iv. It was not error to allow two medical experts to testify that the nature of injuries to a four-month-old were consistent with intentionally inflicted injuries. The defendant had argued that the testimony was improper because it permitted the experts to testify about a precise legal standard and conclusion. The Court of Appeals found that the testimony was within each physician's area of expertise and was helpful to the jury. *State v. McAbee*, 120 N.C. App. 674 (l995).

v. In *State v. Youngs*, 141 N.C. App. 220 (2000), the defendant argued that a psychologists' diagnosis of the victim's psychological disorder was improperly admitted to prove that the defendant was the perpetrator, but the Court of Appeals disagreed and stated it was admitted only to establish the victim's condition and the expert's resulting opinion that the child was the victim of sexual abuse. The court went on to say that the identity of the offender is important for diagnosis in child sexual abuse cases and is therefore admissible. The reasons the identity is important include: First, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home.

c. Child's symptoms

i. An expert may also testify about symptoms and characteristics of sexually abused children in general and that the symptoms exhibited by the victim were consistent with sexual abuse. *State v. Richardson*, 112 N.C. App. 58 (1993).

ii. In *State v. Hammond*, 112 N.C. App. 454 (1993), the defendant was prosecuted for indecent liberties with a minor. The court held that it was not error to allow an expert to discuss the symptoms and characteristics of sexually abused children and to express her expert opinion about whether the minor child exhibited these characteristics. The expert could also testify about pictures introduced into evidence as part of medical diagnosis and treatment exception to the hearsay rule. This type of testimony can involve consideration and elaboration of the general characteristics of sexually abused children such as secrecy, helplessness, delayed reports, initial denial, depression, extreme fear, nightmares, poor relationships, etc.

iii. The doctor who examined the victim in a first degree rape trial testified that the findings were strongly suggestive of possible sexual abuse. The court held that it was proper for the expert to list the symptoms and characteristics of sexually abused children and to express her expert opinion as to whether the victim showed similar characteristics. *State v. Hughes*, 114 N.C. App. 742 (1994). *See also State v. Hall*, 330 N.C. 808 (1992); *State v. Murphy*, 100 N.C. App. 33 (1990).

iv. In *State v. Robertson*, 115 N.C. App. 249 (1994), the trial court properly excluded expert testimony on the suggestibility of child witnesses where the witness had never examined or evaluated the victim or anyone else connected with the case. The court stated that potential prejudice outweighed probative value.

d. Syndromes

i. Battered Child Syndrome [9]

Purpose and admissibility of battered child syndrome: The North Carolina Supreme Court in *State v. Atkins*, 349 N.C. 62 (1998), again confirmed its approval of the admission of expert testimony with respect to battered child syndrome, stating that "evidence demonstrating battered child syndrome 'simply indicates that a child found with [certain injuries] has not suffered those injuries by accidental means.' " *Id.* at 99, quoting *State v. Wilkerson*, 295 N.C. 559 (1978).

A child with a pattern of injuries that appears to have happened over a span of time and that is inexplicable or inconsistent with any explanation given by a parent or caretaker may be a victim of the "battered child syndrome." Medical testimony to the effect that a particular child is an example of the "battered child syndrome" will generally support an inference that the child's injuries were intentionally inflicted by other than accidental means -- an essential element of proof in child abuse cases. However, in *State v. Byrd*, the court did not find that the evidence was sufficient to withstand defendant's motion to dismiss in spite of the proper introduction of evidence regarding battered child syndrome. *State v. Byrd*, 309 N.C. 132 (1983), *rev'd*, on other grounds; *See also State v. Childress*, 321 N.C. 226 (1987); *State v. Noffsinger*, 137 N.C. App. 418 (2000). Should the child's injuries be the proximate cause of death, the person responsible for abusing the child could be convicted of criminal child abuse, neglect, manslaughter, and even murder. *State v. Evans*, 74 N.C. App. 31 (1985) (defendant convicted of involuntary manslaughter). Generally, medical expert testimony on "battered child syndrome" is allowable when helpful to advance the understanding of an issue in the case and when based on the experience, expertise, and knowledge of the medical professional. *See State v. Stokes*, 150 N.C. App. 211 (2002), *rev'd on other grounds*, 357 N.C. 220 (2003); *State v. Hitchcock*, 75 N.C. App. 65 (1985); *State v. Harper*, 72 N.C. App. 471 (1985); N.CG.S. 8C-1, Rule 703.

Battered child syndrome resulting in death: As a general rule, the prosecution in a battered child homicide case need not prove exactly which injury of the many inflicted upon the child proximately caused death. A prosecutor need only establish "(1) a pattern of violent behavior towards the child, or exclusive control, (2) a pattern of non-accidental injuries, and (3) probability of death from such injuries." *State v. Evans*, 74 N.C. App. 31, 36 (1985); *State v. Vega*, 40 N.C. App. 326, *disc. rev. denied* and *appeal dismissed*, 297 N.C. 457, *cert. denied*, 444 U.S. 968 (1979). Note also that a "preexisting condition, but for which the allegedly criminal conduct would not have been fatal does not excuse criminal responsibility." *State v. Evans*, 74 N.C. App. at 34.

What the expert can testify to: The leading case in North Carolina on

[9] Note: Much of the content of this subsection on battered child syndrome was originally drawn from "Children and the Law," Chapter V., by Ilene Nelson.

"battered child syndrome" is *State v. Wilkerson*, 295 N.C. 559 (1978), in which the Supreme Court held that medical testimony was properly admitted to explain the term "battered child syndrome" and to offer an opinion that the particular child was a victim of the syndrome, but not as to a certain event that had in fact caused the injuries. The admission of expert medical testimony regarding the likely cause of injury only under the following circumstances:

> (1) the witness because of his or her expertise is in a better position to have an opinion on the subject than the trier of fact,
>
> (2) the witness testifies only that an event could or might have caused an injury but does not testify to the conclusion that the event did in fact cause the injury, unless his or her expertise leads to an unmistakable conclusion, and
>
> (3) the witness does not express an opinion as to the defendant's guilt or innocence. *State v. Moss*, 139 N.C. App. 106, *rev. denied*, 353 N.C. 275 (2000).

The expert thus renders an opinion as to probable or possible cause of the injury. An expert could therefore offer an opinion on "battered child syndrome," or the probable cause of injuries to a child, apparently even if not based on reasonable medical certainties.

In *State v. Phillips*, 328 N.C. 1, *cert. denied*, 501 U.S. 1208 (1991), the defendant argued that testimony as to "battered child syndrome" made an improper inference that the victim's injuries were caused by the victim's caretaker, relieving the prosecutor of the burden of proof and unfairly shifted the burden to the defendant to prove his innocence. The court stated that while testimony as to "battered child syndrome" does lead to a permissible inference that the child's caretaker inflicted the victim's injuries, but the burden remains on the State.

ii. Rape trauma syndrome or post-traumatic stress disorder (PTSD)

In *State v. Hall*, 330 N.C. 808 (l992), the expert witness testified as to a conversion reaction, which he characterized as PTSD. The supreme court held that it was error when used to confirm that a rape had occurred. The testimony could be used for corroboration and the jury must be instructed that it is for this purpose only. It is permissible to use symptoms and characteristics of sexual abuse to help a jury understand the symptoms consistent with sex abuse but only to aid in assessing credibility. *See also State v. Andre Jones*, 105 N.C. App. 576 (1992)(holding that expert testimony that victim exhibited symptoms of PTSD is admissible for corroborative purposes only

The trial court should always balance the probative value of such evidence against its prejudicial impact under Rule 403 of the Rules of Evidence. *State v. Hall*, 330 N.C. 808 (l992). In *State v. Huang*, 99 N.C. App. 658, *disc. rev. den.*, 327 N.C. 639 (1990), the probative value of the expert's testimony was

outweighed by the danger of unfair prejudice. *See also State v. Hensley*, 120 N.C. App. 313 (1995).

Testimony about PTSD may be admitted for purposes of corroboration and a limiting instruction must be given. With such limitation, the admission of expert testimony regarding PTSD can be helpful to the jury to explain the victim's delay in reporting the offenses and is therefore admissible. *State v. Hughes*, 114 N.C. App. 742, *rev. denied*, 337 N.C. 697 (1994).

In *State v. Marine*, 135 N.C. App. 279 (1999), the court of appeals found it permissible to admit testimony by an expert that the victim suffered from post traumatic stress syndrome, including how that conclusion was reached and evidence concerning the victim's mental and emotional state. The expert had testified that one of the indicators of PTSD is that the victim "has experienced actual or threatened serious injury or threat to her physical integrity." This testimony went to the reliability of the diagnosis and not to the victim's credibility.

iii. Child Sexual Abuse Accommodation Syndrome

In *State v. Stallings*, 107 N.C. App. 241 (1992), the Court of Appeals discussed this syndrome, stating that it consists of "five categories of behavior exemplified by children who are victims of sexual abuse: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and, (5) retraction." *Id.* at 248 citing John E. B. Myers, et al., Expert Testimony in Child Sexual Abuse Litigation, 68 Nebraska Law Review 1, 6667 (1989). The court goes on to emphasize that the syndrome is founded on the premise that abuse has occurred and identifies behavior typical of sexually abused children, but is not a diagnostic tool for determining that abuse has occurred. *Id.* at 248-49.
Testimony of Accommodation Syndrome is not admissible as substantive evidence and may only be admitted for corroborative purposes if the trial court determines (1) it should not be excluded under N.C.R. Evid. 404 and (2) this evidence would be helpful to the jury pursuant to N.C.R. Evid. 702. *State v. Stallings*, 107 N.C. App. 241 (1992); *State v. Black*, 111 N.C. App. 284 (1993).

In *Stallings*, evidence of this syndrome was improperly admitted for several reasons. To begin with, there was no evidence in the record whether the syndrome had been generally accepted in the medical field; CSAAS is not designed to determine whether a child has been abused but rather assumes abuse has occurred, and the potential for prejudice looms large because of the danger that the jury will give too much weight to the expert opinions. In addition, there was no limiting instruction and the testimony was permitted to be considered for both substantive and corroborative purposes. (However, no prejudicial error was found.) *Stallings*, at 251.

e. Testing Devices (Plethysmograph)

In *State v. Spencer*, 119 N.C. App. 662, *disc. rev. denied*, 341 N.C. 655 (1995), the state presented evidence tending to show that the defendant had engaged in sexual activity

with his five-year-old stepdaughter on several occasions from September 1992 until February 1993, while her mother was at work. The defendant denied any sexual activity with the child, saying she had an overactive imagination. The defendant was convicted by the jury of first degree sexual offense and taking indecent liberties with a minor. The defendant argued that the trial court should not have excluded expert opinion testimony. The Court of Appeals said that the trial court did not abuse its discretion in excluding the opinion testimony offered by the defendant of a clinical psychologist who specialized in sexual dysfunction. The part of the testimony that was excluded concerned the likelihood that the defendant committed the offenses charged and was based on the result of a penile plethysmograph. The court based its decision on the lack of general acceptance of the test's validity and utility and therefore its unreliability for forensic purposes in the scientific community. Nonacceptance of this test was also confirmed in *Spencer*.

§ 7.6 Certain Evidence Involving the Alleged Perpetrator

A. Character Evidence

1. Rule of Evidence 404(a): Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

> (1) Character of accused -- Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same. . .

2. During adjudication, evidence of the alleged perpetrator's character may not be offered by the GAL or DSS if it is offered for the purpose of proving that he or she acted in conformity with that trait on a particular occasion. However, *the perpetrator's attorney* may offer evidence of a pertinent trait of character of the perpetrator, in which case DSS or the GAL may offer character evidence in rebuttal. **[404(a)]** In addition, evidence relating to the perpetrator may be offered pursuant to 404(b) (see subsection B below).

3. In *State v. Wagoner*, 131 N.C. App. 285 (1998), *disc. rev. denied*, 350 N.C. 105 (1999), the Court of Appeals stated that "evidence of the defendant's general 'psychological make-up' is not 'pertinent' to the commission of a sexual assault. . . While evidence of a sexual pathology would have been relevant to show motive, evidence of the lack of several mental problems does not qualify as a 'pertinent' character trait." *Id.* at 743(quoting *State v. Mustafa*, 113 N.C. App. 240, 245-246, *cert. denied*, 336 N.C. 613 (1994)).

B. Other Crimes, Wrongs or Acts

Rule of Evidence 404(b): Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. "Recent cases decided by [the North Carolina Supreme Court] under Rule 404 (b) state a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278 (1990)

(emphasis by the court). *But see State v. Al-Bayyinah*, 356 N.C. 150 (2002)("…the rule of inclusion described in *Coffey* is constrained by the requirements of similarity an temporal proximity.")

1. Evidence of similar sex crimes

a. *State v. Owens*, 135 N.C. App. 456 (1999), is a case which discusses admissibility of similar sex crimes and the fact that North Carolina appellate courts have been very liberal in admitting evidence of similar sex crimes as an exception to Rule 404(b). *Id*.; *See also State v. Greene*, 294 N.C. 418 (1978). *See State v. White*, 135 N.C. App. 349 (1999), a case in which the court found that the prejudicial effect outweighed the probative value of evidence of other acts where the acts were too dissimilar.

b. In *State v. DeLeonardo*, 315 N.C. 762 (1986), evidence of similar sex crimes committed by the defendant was admissible to establish plan or scheme. In this case, it was permissible to admit evidence of sex with daughter to show sex with son. *See also State v. Beckham*, 148 N.C. App. 282 (2002)(incidents occurring many years prior were admissible); and *State v. Johnson* 145 N.C. App. 51 (2001)(holding sexual acts committed against the witness were sufficiently similar to those at issue in the case and the acts occurred during the same time period as those forming the basis of the indictment, the acts were admissible under Rule 404(b).); *State v. Thompson*, 139 N.C. App. 299 (2000)(holding evidence of alleged sexual acts committed on the victim when she was 5 years old and when she was 10 years old – acts that occurred seven years and two years, respectively, before the first charged offense – did not violate Rule 404(b)); *State v. Blackwell*, 133 N.C. App. 31 (1999)(holding prior sexual acts ten and seven years earlier were not too dissimilar or remote in time to be admitted).

c. In *State v. Frazier*, 121 N.C. App. 1 (1995), *aff'd*, 344 N.C. 611 (1996), it was permissible to admit testimony by other female members of the defendant's family who testified as to how the defendant had sexually abused them when they were young. The abuse had occurred between seven and twenty-six years before the current incident, and this was not too remote to be admissible under Rule 404(b) to establish common plan or scheme. The Supreme Court found that the lapse of time only strengthened the argument that the defendant had a common plan to molest all of the female members of his family. The striking similarities of the abuse also showed evidence of a plan.

d. In a trial for rape of a daughter, the trial court admitted evidence that the defendant had repeatedly beaten his two children and wife. The Fourth Circuit Court of Appeals concluded that the evidence of the defendant's violence against his daughter and family members was admissible under 404(b) to explain the daughter's submission to the acts and her delay in reporting the sexual abuse. The court also held that in comparing the general character of physical violence in this case, the beatings were sufficiently related to the nature of the rape charged. Rape, like a beating, is an act of violence. *U.S. v. Powers*, 59 F.3d 1460 (4th Cir. N.C. 1995), *cert. denied*, 516 U.S. 1077 (1996).

e. *State v. Burr*, 341 N.C. 263 (1995), involved the prosecution of a defendant for murder of an infant. In this case, the court found as admissible testimony concerning the defendant's misconduct toward the mother involving certain types of assaults and injuries that were similar

to what the child suffered. Such evidence was admissible under Rule 404(b) to show identity as perpetrator of the crime.

f. In *State v. Crockett*, 138 N.C. App. 109 (2000), the defendant argued that evidence concerning sexual activity with someone other than the victim was irrelevant and unfairly prejudicial. The Court of Appeals, however, found that the evidence, even if it tended to show other crimes or bad acts committed by the defendant, was admissible under Rule 404(b) because it was relevant for some purpose other than to show that the defendant had the propensity for the type of conduct for which he was being tried. Here the evidence was admissible because it showed intent, knowledge and plan.

2. Evidence of abuse or neglect of other children

a. Following a termination of parental rights proceeding, the mother appealed the court order that allowed the petitioner to introduce evidence of prior adjudications about the mother's four older children. The Court of Appeals held that this was not prejudicial since the situation with regard to the current child was similar to the situation with regard to the older children. The prior orders were relevant to the question of probability of repetition of neglect. *In the Matter of Christian Diane Allred*, 122 N.C. App. 561 (l996).

b. Note that under recent changes to the N.C. Juvenile Code, evidence of abuse or neglect of other children is relevant to a determination of neglect (7B-101) and may also provide grounds for termination of parental rights (7B-1111). The Code therefore makes such evidence *highly* relevant.

§ 7.7 Exhibits

A. Introduction

In adjudications of abuse, neglect, or dependency, attorneys may seek to utilize in evidence medical records, mental health records, DSS records, police reports or records, and other such forms of documentary evidence. There are several Rules of Evidence relating to the admissibility of records, notes, documents or other such evidence. Rules of Evidence 1001 - 1008 relate to the admissibility of Writings, Recordings and Photographs. Rules 901 and 902 relate to authentication of evidence. Rule 803 sets out certain types of written evidence that are not considered hearsay. **The verbatim language of all of the above rules will not be set out in this subsection, even though it will be referred to, so attorneys should consult the rules themselves.**

B. Written Exhibits May or May Not Be Hearsay

Unless the person who actually produced the written exhibit is in court to testify about the exhibit, such exhibit would be considered hearsay unless it falls under one of the following exceptions set out in Rule of Evidence 803.

Rule 803: Hearsay exceptions; availability of declarant immaterial

(5) Recorded Recollection
(6) Records of Regularly Conducted Activity
(7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph 6
(8) Public Records and Reports
(9) Records of Vital Statistics
(10) Absence of Public Record or Entry
(11) Records of Religious Organizations
(12) Marriage, Baptismal, and Similar Certificates
(13) Family Records
(14) Records of Documents Affecting an Interest in Property
(15) Statements in Documents Affecting an Interest in Property
(17) Market Reports, Commercial Publications
(18) Learned Treatises

C. Authentication of Written Exhibits

Rule 901 requires that for evidence to be admissible, it must be authenticated. In other words, there must be a finding that the matter in question is what its proponent claims. Rule 901 gives examples of authentication of certain types of evidence by certain means (see Rule 901).

Rule 902 sets out certain types of evidence that do not require extrinsic evidence of authenticity, as they are "self -authenticating," describing the circumstances for each.

(1) Domestic Public Documents Under Seal
(2) Domestic Public Documents Not Under Seal
(3) Foreign Public Documents
(4) Certified Copies of Public Records
(5) Official Publications
(6) Newspapers and Periodicals
(7) Trade Inscriptions and the Like
(8) Acknowledged Documents
(9) Commercial Paper and Related Documents
(10) Presumptions Created by Law

D. Admissibility of Writings, Recordings, and Photographs under Rules 1001 - 1008

The following is a *summary* of each Rule of Evidence; the Rule itself should be consulted for detail.

1. Rule 1001 sets out **definitions** of terms used in these rules.

2. Rule 1002 requires that the evidence sought to be admitted be an **original.**

3. Rule 1003 discusses the fact that **duplicates** can be admitted as originals with exceptions.

4. Rule 1004 discusses the **circumstances under which an original is not required**.

5. Rule 1005 discusses the issues unique to the admissibility of **public records.**

6. Rule 1006 allows the admission of **summaries** of voluminous writings.

7. Rule 1007 allows the contents of a writing to be proved by the **testimony or deposition** of a party against whom it is offered without accounting for the lack of an original.

8. Rule 1008 discusses the **functions of the court and jury** with respect to such evidence.

E. Laying the Foundation for Introduction[10]

This subsection contains advice on laying the foundation for certain types of evidence commonly used in abuse, neglect, and dependency adjudications. These foundation elements are guidelines and some judges may not require strict adherence to each element as it appears below, depending, in part, on whether the element is a statutory requirement. For foundation on specific categories of evidence not discussed below, consult the Rule of Evidence that is directly applicable.

1. Photographs

Elements for foundation:

a. Relevancy.
b. Witness is familiar with the scene portrayed in the picture.
c. Witness is familiar with the scene at the relevant date (and time if important).
d. Picture fairly and accurately shows the scene as it appeared on the relevant date.
e. Probative value outweighs prejudicial effect.

2. Sound and video recordings

Elements for foundation:

a. Relevant.
b. Recording machine was tested before being used and was in normal operating condition.
c. Recording machine that was used is accurate.
d. Operator was experienced and qualified to operate the machine.
e. Witness heard/saw what was being recorded.
f. After the recording was made, the operator replayed it and checked that it was accurate.
g. Tape was labeled and sealed, placed somewhere to guard against tampering, later removed for trial in sealed condition.
h. Recording machine in court is in normal operating condition and can accurately reproduce sound/images.
i. Witness recognizes and can identify voices/persons on tape.

3. Letters

Elements for foundation:

a. Relevant.
b. Witness received letter.
c. Witness recognizes the signature as the other party's.
d. Letter is in the same condition now as when first received.

[10] Some elements for foundation were obtained from Thomas A. Mauet, *Fundamentals of Trial Techniques*, Chapter 5, 1988.

4. Records of Regularly Conducted Activity [Rule 803(6)]

Much of the written evidence sought to be introduced in abuse, neglect or dependency proceedings would fall under this category and typically would include DSS records, medical records, mental health records, etc.
Elements for foundation:

a. Relevant.
b. Record is a "memorandum, report, record or data compilation in any form."
c. Witness is the "custodian or other qualified witness."
d. Record was made by a "person with knowledge of the facts" or was made from "information transmitted by a person with knowledge" of the facts unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness.
e. It was the regular practice of the organization to make such a record.
f. Record was kept in the course of a regularly conducted business activity.

§ 7.8 Miscellaneous Evidentiary Issues

A. Privileges

Section 7B-310 states that there are no privileges in child abuse, neglect, and dependency cases except attorney-client privilege. There is no doctor-patient (§ 7B-310 and 8-53.1), husband-wife (§§ 7B-310 and 8-57.1), or psychologist-client privilege (§ 8-53.3). Section 7B-601 addresses privileges related to the GAL's ability to obtain information and states that neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the GAL and the court from obtaining such information.

B. Party to the Proceedings (Parent) Called to Testify Without Subpoena

The Department of Social Services called the respondent mother to the stand over the objection of her attorney who argued that the respondent had to be subpoenaed before she could be called. The Court of Appeals held that a party to the proceedings need not be subpoenaed but may be called to testify as an adverse witness upon appearance at the proceedings. *In re Davis*, 116 N.C. App. 409 (1994).

C. Searches and Seizures

In re Beck, 109 N.C. App. 539 (1993), was a TPR action. A child was brought to the hospital with burns that were intentionally caused. Police went to the home to measure the temperature of the water heater and found over 1000 explicitly sexual videotapes. DSS was given the tapes, which were introduced into evidence. The Court of Appeals said it was not error to give DSS the tapes and not error to admit them.

D. Specifying Purpose for Which Evidence Is Offered Is Unnecessary

While it is better for the party offering evidence to specify the purpose for which it is offered, unless challenged, there is no requirement that such purpose be specified. There is no requirement that a trial judge disclose the grounds on which he excludes or admits evidence; on review it is presumed that the trial court had a valid reason. If the offering party does not designate the purpose for which properly admitted evidence is offered, the evidence is admissible as either corroborative or substantive evidence. *See e.g.*, *State v. Goodson*, 273 N.C. 128 (1968); *State v. McGraw*, 137 N.C. App. 726 (2000); *State v. Ford*, 136 N.C. App. 634 (2000).

E. Judicial Notice

Where the trial court did not indicate, in the record of termination proceedings, that it agreed to take judicial notice of the entire juvenile file, it was error to admit a letter by a psychiatrist who testified at the hearing but was not tendered as an expert. *In re Brim*, 139 N.C. App. 733 (2000).