

CHILD WITNESSES: THE NUTS AND BOLTS AND REDUCING TRAUMA IMPACTS

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PSYCHOLOGICAL EFFECTS ON CHILDREN WHO TESTIFY



TRAUMA OUTCOMES FOR CHILDREN TESTIFYING

WHAT THE RESEARCH SAYS ABOUT:

The correlations between
testifying and mental
health issues, both short-
term and long-term



AMPLIFICATIONS TO TRAUMA

- Sexual Abuse Victims
- Testifying Multiple Times
- Testifying in Front of Perpetrator
- Other Amplifiers



WHAT MITIGATES TRAUMA IMPACTS AND HOW MIGHT TESTIFYING EMPOWER A CHILD



- Preparing a child for testimony
- Supporting a child before, during and after testifying
- Preparing a child for cross-examination
- Creating a feeling of safety for a child during the process

AS A THERAPEUTIC EXPERT, THIS IS HOW I CAN HELP:

- EXPLAIN ISSUES WHICH ARISE WITH A CHILD'S MEMORY DUE TO TRAUMA
- EXPLAINING TO JURIES THE PROCESS OF CHILD DISCLOSURES: IMMEDIATE, DELAYED AND PARTIAL
- FACTORS WHICH EFFECT DISCLOSURES
- EXPLAIN CHILDREN'S REACTIONS TO ABUSE AND POSSIBLE DEMEANOR IN COURT
- RECANTATION BY THE CHILD OF THE ALLEGATION IN THE THERAPEUTIC PROCESS

CRIMINAL TRIALS

Differential treatment of child-testimony in
criminal versus civil trials

HOW CAN A GUARDIAN AD LITEM SEEK APPOINTMENT FOR A CHILD-WITNESS IN A CRIMINAL TRIAL?

C.R.S. §24-4.1-304 – CHILD VICTIM OR WITNESS – RIGHTS AND SERVICES

... law enforcement agencies, prosecutors, and judges are encouraged to designate *one or more persons* to provide the following services on behalf of a child who is involved in criminal proceedings as a victim or a witness:

- To explain, in language understood by the child, all legal proceedings in which the child will be involved;
- To act, as a friend of the court, to advise the judge, whenever appropriate, of the child's ability to understand and cooperate in any court proceeding;
- To assist the child and the child's family in coping with the emotional impact of the crime and any subsequent criminal proceeding in which the child is involved;
- To advise the district attorney concerning the ability of a child witness to cooperate with the prosecution and concerning the potential effects of the proceeding on the child.

CJD 0406(V)(C) (REVISED MARCH 15, 2013).

"If the appointee finds it necessary and in the best interests of the child, the appointee may request that the court expand the terms of the appointment and scope of the duties."

SIXTH AMENDMENT CONFRONTATION CLAUSE

"In all criminal prosecutions, the accused shall enjoy the right . . .to be confronted with the witness against him."

Prohibits introduction of testimonial statements by non-testifying witness unless the witness is "unavailable" to testify and defendant has had a prior opportunity for cross-examination.

"TESTIMONIAL"

Statements made for the
primary purpose of creating
evidence

911 call : Non-testimonial
Police Interrogation : Testimonial

HEARSAY EXCEPTION 803 AVAILABILITY OF DECLARANT IMMATERIAL

SPONTANEOUS PRESENT
SENSE IMPRESSION

STATEMENTS MADE FOR
THE PURPOSE OF
RECEIVING MEDICAL
TREATMENT

EXCITED UTTERANCE
THEN EXISTING
MENTAL, EMOTIONAL,
OR PHYSICAL
CONDITION

STATEMENTS FOR PURPOSE OF MEDICAL
DIAGNOSIS OR TREATMENT

Colorado Supreme Court address allowing hearsay by child declarant:

People v. Vigil, 127 P.3d 916 (Colo. 2009)

- Court allowed statements child made to medical professional.
- Court allowed statements child made to father and friend of the family as excited utterance.



OTHERWISE, WE
ARE STUCK WITH
PROVING
UNAVAILABILITY
UNDER 804 IN
ORDER TO GET IN
HERESAY
STATEMENT OR
PREVIOUS
TESTIMONY

What can we do to protect a child on the criminal side?

STATE CODIFIED LAWS:

C.R.S. 16-10-402

- Child is less than 12 years of age at time of trial
- May testify by closed-circuit television if child would suffer serious emotional distress or trauma such that child would not be able to reasonably communicate, and
- Must file motion 14 days prior to trial
- Equipment must be available
- Limits who may be in courtroom to the GAL, attorney for defendant, DA, operator of television, and a support person for the child.

STATE CASE LAW:

REMOVING DEFENDANT FROM COURTROOM RATHER THAN THE CHILD DID NOT VIOLATE DEFENDANT'S RIGHT TO CONFRONT A WITNESS

People v. Rodriguez, 209 P.3d 1151 (Colo. App. 2008), *aff'd by operation of law*, 238 P.3d 1283 (Colo. 2010)

ACTUAL EVIDENCE OF PSYCHOLOGICAL TRAUMA NOT REQUIRED

People v. Ujaama, 302 P.3d 296 (Colo. 2012)

C.R.S. §18-3-413
USE OF DEPOSITION AS CHILD'S TESTIMONY
(APPLIES TO SEXUAL OFFENSES)

- Child less than 15 years of age at time of commission of the act
 - Prosecutor must apply for an order of the deposition
 - Court must make finding that at the time of the trial, the child is likely to be medically or otherwise unavailable within the meaning of C.R.E. 804(a)
 - Such finding shall be based upon recommendations of child's therapist or other persons having direct contact with the child
 - Video can be admitted in lieu of in-person testimony
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- "Medically unavailability" includes a situation in which testifying in front of the defendant would cause the child substantial long-term emotional or psychological harm. *Thomas v. People*, 803 P.3d 155 (Colo. 1990); *Thomas v. Guenther*, 754 F. Supp. 833 (D. Colo. 1990)

AND FOR HEAVEN'S SAKE, REQUEST FOR A CLOSED COURTROOM

C.R.S. 16-10-403: The court may, if it determines that the best interest of the child overrides public interest in an open criminal proceeding, close the courtroom to the public

*CAN YOU ASK FOR
ACCOMMODATIONS
for the child-witness
UNDER THE
AMERICANS WITH
DISABILITIES ACT?*

Title II of the Americans with Disabilities Act of 1990
42 U.S.C. §12131 *et seq.*

Provides protection to children with disabilities with regard to services, programs, or activities of any public entity including legal proceedings.

© The picture is for illustration

Not all victimized children are disabled, but a significant number of children experience PTSD, bipolar disorder, major depression and schizophrenia.



Not all victimized children are disabled, but a significant number of children experience PTSD, bipolar disorder, major depression and schizophrenia.

*Children also suffer from
trauma induced
emotional and
educational difficulties*



THESE ARE ALL RECOGNIZED DISABILITIES
UNDER THE ADA

42 U.S.C. 12102(2) Definitions

Disability –

- (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) A record of such an impairment; or
- (C) Being regarded as having such an impairment.

“A Major Life Activity” – functions such as bathing, dressing, performing manual tasks such as eating, sleeping, speaking, communicating, interacting with others, or working.

No need to produce scientific, medical, or statistical evidence of disability, a credible claim is enough – and applies even if disability is short term or episodic.

**HOLD ON
TO YOUR
HATS**

THE ADA IS FEDERAL LAW, AND A CHILD IS ENTITLED TO ACCOMMODATIONS AS LONG AS THE ACCOMMODATION IS NECESSARY, REASONABLE AND AVAILABLE.

The Supremacy Clause dictates that Federal Law take precedent over State's laws.

A Court cannot diminish the value of a child's rights under the ADA by balancing them against the rights of the accused. Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

A Court cannot refuse accommodations provided for in the ADA on the possibility that it could interfere with the ability of the defense counsel to conduct cross-examination. In re McDonough, 930 N.E. 2nd 1279 (Mass. 2010)

THE ADA IMPOSES UPON PUBLIC ENTITIES THE OBLIGATION TO ALLOW THE INDIVIDUAL WITH A DISABILITY TO REACH THE SAME LEVEL OF ACHEIVEMENT AS THAT PROVIDED TO OTHERS.

28 C.F.R. §§35.130 (b)(1)(ii)(iii) (2011)

Courts are obligated to provide accommodations to ensure equal participation and effective communication of disabled persons during judicial proceedings.

Tennessee v. Lane, 541 U.S. 509 (2004)

ACCOMMODATIONS SOUGHT

- Allowing children to communicate with investigators, GALs, fact-finders during testimony
- Allowing child to testify by closed-circuit television.
- Allowing child to testify by video tape.
- Allowing child to testify away from abuser.
- Allowing child a comfort animal to be present.

ACCOMMODATIONS SOUGHT

- Requiring attorneys, judges, GALs to formulate questions using vocabulary, terminology, and phraseology consistent with the child's ability to understand.
- Forbidding repetitive questioning.
- Submitting written questions ahead of time for cross-examination
- Forbidding protracted questioning.
- Forbidding delays in the trial process.
- Allowing child to have a family member or representative to be present to advocate for their needs during the process.



WELCOME
TO THE

CIVIL

SIDE OF
LIFE

Sixth Amendment right of
confrontation does not extend to
Dependency and Neglect
Proceedings

People v. In the Interest of S.X.M., 271 P.3d 1124 (Colo. 2011)

C.R.S. § 13-25-129
HEARSAY STATEMENTS MADE BY A CHILD
ARE ADMISSIBLE
(Sex Abuse Only)

WHAT THE STATUTE REQUIRES:

- (1) The time, content, and circumstances of the statements provide sufficient safeguards of reliability; and
- (2) The child either testifies at trial or is unavailable as a witness and there is corroborative evidence of the action which is subject of the statements.

WHAT THE COLO COURT HAS DETERMINED:

Potential traumatic impact of the child victim's giving testimony may form the basis of finding of unavailability if the child's emotional or psychological health would be substantially impaired if the child was forced to testify.

In the Interest of G.E.S., 409 P.3d 645 (Colo. 2016)

§ 24-4.1-304 – Child victim or witness – rights and services

(1) In addition to all rights afforded to a victim or witness under section 24-4.1-302.5, law enforcement agencies, prosecutors, and judges are encouraged to designate ***one or more persons*** to provide the following services on behalf of a child who is involved in criminal proceedings as a victim or a witness:

(a) To explain, in language understood by the child, all legal proceedings in which the child will be involved;

(b) ***To act, as a friend of the court, to advise the judge, whenever appropriate, of the child's ability to understand and cooperate in any court proceeding;***

(c) To assist the child and the child's family in coping with the emotional impact of the crime and any subsequent criminal proceeding in which the child is involved;

(d) ***To advise the district attorney concerning the ability of a child witness to cooperate with the prosecution and concerning the potential effects of the proceeding on the child.***

WHAT WE CAN REQUEST IN A D&N CASE:

- Child testify outside presence of parents/abuser.
- Child testify by closed-circuit television and outside the presence of parent/abuser. *In the Interest of S.X.M.*, 271 P.3d 1124 (Colo. Ct. App. 2011).
- Depose child and request deposition stand in lieu of direct and cross-examination. C.R.S. 16-3-413
- Allow CAC or forensic interview stand as direct examination of child. *In the Interest of G.E.S.*, 409 P.3d 645 (Colo. 2016)
- Limit cross-examination to that which is age appropriate and not psychologically damaging to child. A.D.A.; *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)
- Limit cross-examination to *in camera* with limited individuals present. C.R.S. 16-10-402(2)
- Have child declared unavailable and allow non-testimonial hearsay statements in lieu of testimony. *People v. Vigil*, 127 P.3d 916 (Colo. 2006); *In the Interest of G.E.S.*, 409 P.3d 645 (Colo 2016); *White v. Illinois*, 502 U.S. 346 (1992)
- Close the courtroom. C.R.S. 16-10-403
- Ensure child's advocate is allowed in the courtroom or *in camera* with the child and not subject to sequestration. C.R.S. 16-10-401
- Get ADA qualified diagnosis before the court so that accommodation can be sought which are specific to the child's need. A.D.A.; *in re McDonough*, 930 N.E. 1279 (Mass. 2010). *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)

**NON-LEGAL
ADVOCACY**









USE OF SUPPORT ANIMALS IN COURT

RMvIC

ROCKY MOUNTAIN
victim law center

§ 24-4.1-304 – Child victim or witness – rights and services

Court may appoint a person (b) To act, as a friend of the court, to advise the judge, whenever appropriate, of the child's ability to understand and cooperate in any court proceeding;

JUVENILE DELINQUENCY

CONSIDERATIONS FOR WHEN THE
CHILD WITNESS IS
THE DEFENDANT

A) Applicable Law

Colorado Children's Code, Title 19 of the Colorado Revised Statutes

Colorado Juvenile Justice System, C.R.S. 19-2-101 -- 19-2-1305

Colorado Rules of Evidence

Colorado Rules of Criminal Procedure

Colorado Rules of Juvenile Procedure

B) Jurisdiction

1. Children under 10 years old cannot be charged with crimes under the Colorado Children's Code. C.R.S. 19-2-104(1)(a)
2. Children cannot be charged, per Direct File, as an adult if under 16 years old. C.R.S. 19-2-517.
3. Child who is subject to a Juvenile Delinquency case cannot be transferred into an adult case if under 12 years old. C.R.S. 19-2-518.

C) Competency Considerations

Unless proceeding suspended/dismissed due to the court finding the child incompetent per C.R.S. §19-2-1301 through 19-2-1305, lack of competency should not be an issue with regard to children testifying on their own behalf in Juvenile Delinquency proceedings.

D) Factors in Deciding Whether or not to Testify

1. Before Juvenile decides whether or not to testify, Court must give him/her *Curtis* Advisement. C.R.S. 19-2-802(3). *People v. Curtis*, 681 P.2d 504 (Colo.1984)
2. Juvenile does not have to testify at his/her trial and if he/she does not testify, this cannot be used against him/her. C.R.S. 19-2-802(3)(f).
3. Juvenile has a right to testify and no one, including his attorney (or his/her parent or Guardian *ad Litem*) can prevent him/her from testifying. C.R.S. 19-2-802(3)(b).

E) Factors to Consider if Juvenile Testifies

- 1) Prosecutor can cross-examine Juvenile. C.R.S. 19-2-802(3)(c) and can impeach Juvenile in any way an adult defendant can be impeached. C.R.S. 19-2-802(1).
- 2) Juvenile can be impeached with prior felony convictions or felony juvenile adjudications. C.R.S. 19-2-802(2)(3)(d). Note, cannot be impeached with juvenile adjudications in adult cases. *People v. Armand*, 873 P.2d 7 (Colo.App.1993).
- 3) Unless otherwise specifically provided, all statutes and rules of adult evidence apply to trials in Juvenile Delinquency cases. C.R.S. 19-2-802(1)

F) Role of Guardian *Ad Litem*

- 1) Guardian *ad Litem* does not have the right to participate as a party in Juvenile Delinquency cases. C.R.S. 19-1-111(3) Further, Guardian *ad Litem* cannot act as a substitute for defense counsel in Juvenile Delinquency cases. C.R.S. 19-1-111(2.5). Therefore, most Judges will not allow Guardians *ad Litem* to examine Juvenile when testifying.
- 2) Given crucial nature of decision on whether or not Juvenile should testify, very important that Guardian *ad Litem* be part of this decision.
