

Issues Involving Child Witnesses, Statements of Children and Confrontation

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Four Primary Issues

1. FRE 404/ FRE 414 Character
2. FRE 702: Use of Experts
3. FRE 801-7: Hearsay and the Confrontation Clause
4. FRE 601/ FRE 603: Competency and Oath

Character Evidence

- FRE 404(b): Other Act: Traditional FRE 404(b) purposes or to show propensity for unusual or abnormal sexual relations
- FRE 414: Evidence of Similar Crimes in Child Molestation Cases
- FRE 415: Evidence in Civil Cases concerning Sexual Assault or Child Molestation
- Potential Conflict in Michigan CJI2nd

FRE 702: Experts

- FRE 702 and Daubert v. Merrell Dow 509 U.S. 579 (1993)
- New formula: Qualifications +(relevance + reliability) = admissibility
- Types of Testimony: PTSD, Rape Trauma Syndrome, Child Abuse Accommodation Syndrome, Medical testimony from treating physician or rape trauma expert
- Problem: Vouching for the Witness

Hearsay and Confrontation

■ Hearsay

- Non-hearsay purpose
- Hearsay Exclusions
- Hearsay Exceptions
- Hearsay and Confrontation Clause
 - Issues:
 - Testimonial v. Non-testimonial
 - The “emergency” exception
 - Governmental v. non-governmental
 - Two recent Supreme Court cases
 - State Tender Years Exceptions: No federal equivalent
 - State Statutes which permit child’s recorded statements

Competency and Oath

- FRE 601: All witnesses including children competent. Burden rests with challenger
- FRE 603: Oath
- *Wheeler v. United States* 159 U.S. 523 (1895)
 - Child's capacity and intelligence
 - Whether child understands difference between telling the truth and falsity
 - Whether child appreciates duty to tell the truth
- The competency hearing

The Confrontation Clause Cases

- Ohio v. Roberts, 448 U. S. 56 (1980)
- United States v. Inadi, 475 U.S. 387 (1986)
- White v. Illinois, 112 S. Ct. 736 (1992)
- Idaho v. Wright, 497 U.S. 805 (1990)
- Lilly v. Virginia 527 U.S. 116 (1999) FRE 804(b)(3)
- Crawford v. Washington 541 U.S. 36 (2004) FRE 804(b)(3)
- Davis v. Washington and Hammon v. Indiana, 126 S. Ct. 2266 (2006) (911 call) (Battery affidavit)
- Whorton v. Bockting, 127 S. Ct. 1173 (2007) (not retroactive)
- Giles v. California – U.S. – , 128 S. Ct. 2678 (2008) (dying declaration)
- Melendez-Diaz v. Massachusetts cert. granted 2008 U.S. Lexis 2537 (crime lab reports)
- Unresolved: residual clause. See also U.S. v. Ismoila (CA5 1996)

For More Information

- Ryan, *Ryan's Essential Evidence Outlines, Practitioner and Student Handbook*, 2nd Edition (iUniverse 2007) ISBN 0-595-42798-7 (Available at barnesandnoble.com and amazon.com)
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