Panel Discussion: Children: Statements, Testimony, and In Camera Interviews

1. MVLS presents - Jennifer
    a. About MVLS
    b. Judicare/Cohort
    c. Importance of volunteering
    d. OPD panel
2. Intro panel plus put questions in chat (moderate) and format – timing, etc
3. Overview of case law and statutory law - Doris
    a. ADMISSIBILITY OF CHILDREN'S STATEMENTS
    b. THEORIES FOR ADMISSIBILITY AND COUNTER-ARGUMENTS
    c. 1. Constitutional Rights
    d. a. Confrontation Clause – U.S. Constitution Amend. VI – Melendez-Diaz v. Massachusetts, 129 S.Ct. 2597 (2009)
    e. b. Maryland Declaration of Rights – Article 21, Esposito v. State, 264 Md.App. (2024)
    f. 2. Admissibility Based on Exceptions to Hearsay - If the proponent of statement seeks to introduce the statement to prove the truth of the matter asserted in it, the statement constitutes "hearsay." Md. Rule 5-801(c). (Esposito)
    g. a. Statements to Medical Providers - Even if the declarant in this case had been old enough to understand the nature and purpose of the interview with Dr. Pullman, however, the assertion, "Daddy did this," would still not qualify under this particular exception because it was not related to medical treatment. The bruises were at least three days old. No treatment of physical symptoms was involved. The reliable assertions contemplated by this exception are aimed at determining the need for such physical measures as antiseptics, stitches, antibiotics, painkillers, X-rays, surgery, etc. The identity of the person who inflicted the bruises,

albeit perhaps of transcendent social importance, is not ordinarily of strictly *34 medical importance.14 Once the perceived end purpose of the examination moves beyond the medical treatment of a physical ailment, the reason for this particular exception ceases to exist—the fear that a doctor will do a wrong and harmful thing to the declarant's body. The strong motivation to describe present and past symptoms accurately is to avoid having the doctor take out an appendix when he ought to be treating an ulcer. When we move from the realm of physical treatment to the quite different realms of social disposition or even psychiatric counselling, we are involved in very different states of mind on the part of the declarant.

h. b. Psychologist/Psychiatrist – “Statements made pertaining to mental health are not expressly treated. Unlike Uniform Rule 63(12)(c), there is no requirement that the statement be ‘relevant to an issue of declarant's bodily condition.’ Statements made to a psychiatrist or to someone like a psychologist, who would relay them to a medical doctor, fall within Rule 803(4)'s category of ‘statements made for purposes of medical diagnosis or treatment.’ As a general rule all statements made in this context, regardless of their content, are relevant to diagnosis or treatment since experts in the field view everything relating to the patient as relevant to his personality. Nevertheless, the statements may be extremely unreliable as evidence of the facts related, since the condition for which the patient is

i. consulting the psychiatrist may have impaired his perception, memory or veracity.” (Footnotes omitted).

j. When the purpose of the physician's examination moves yet farther afield, from predictions of the emotional and mental impact of the abuse upon the child to a recommendation as to the social disposition of the child, the original logic for the exception has been not only stretched but snapped.

k. c. “Statements made pertaining to mental health are not expressly treated. Unlike Uniform Rule 63(12)(c), there is no requirement that the statement be ‘relevant to an issue of declarant's bodily condition.’ Statements made to a psychiatrist or to someone like a psychologist, who would relay them to a medical doctor, fall within Rule 803(4)'s category of ‘statements made for purposes of medical diagnosis or treatment.’ As a general rule all statements made in this context, regardless of their content, are relevant to diagnosis or treatment since experts in the field view everything relating to the patient as relevant to his personality. Nevertheless, the statements may be extremely unreliable as evidence of the facts related, since the condition for which the patient is consulting the psychiatrist may have impaired his perception, memory or veracity.” (Footnotes omitted).
l. When the purpose of the physician's examination moves yet farther afield, from predictions of the emotional and mental impact of the abuse upon the child to a recommendation as to the social disposition of the child, the original logic for the exception has been not only stretched but snapped.
m. d. Present Sense Impression - declarations of present sense impression (if contemporaneous with the event in issue) – 5-803(b)(1) – A statement describing an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter
n. e. Excited Utterance - To make a statement admissible under excited utterance hearsay exception, the proponent of the evidence must satisfy three requirements: proponent must establish that an exciting or startling event occurred and that the declarant had personal knowledge of that event; statement sought to be admitted must relate to the underlying startling event; and proponent must establish that the statement was

spontaneous, meaning that the declarant was still under the stress of the startling event at the time the statement was made and that the statement was not the product of reflective thought. Md. Rule 5-803(b)(2). (Esposito) –

o. f. Testimonial vs. Non-Testimonial - What is the purpose of the interview—medical treatment vs. forensic evaluation--to gather evidence for a trial, or for purposes of treatment—did the victim know or have reason to know that the statements would be used against the accused at trial. Esposito - Blount argues that his Sixth Amendment right of confrontation was violated when Meadows and Roberts, acting in an

p. investigatory and prosecutorial role, testified to the statements S.F. had made, thereby making S.F.'s statements “testimonial.” He therefore contends that he is entitled to habeas relief. In granting summary judgment, the district court held that “[c]ontrary to Petitioner's conclusion, the North Carolina Court of Appeals' adjudication of the Confrontation Clause issue is not contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States.” J.A. 424. In holding that Blount's claim lacks merit, the district court noted that Blount “has pointed to nothing in the evidence to show that the victim knew or had reason to know that her revelations to Meadows and Roberts would be used against Petitioner at trial.” Id.We agree with the district court that the North Carolina Court of Appeal's determination of this issue is not unreasonable.2 *276 The state court properly analyzed this claim under Crawford and concluded that S.F. could not have known that her statements to the therapists would be used at trial against Blount.

q. Under our review, the North Carolina Court of Appeals' conclusion that S.F.'s statements to her therapists were not “testimonial” is not contrary to or an unreasonable application of

federal law. See e.g., United States v. Peneaux, 432 F.3d 882, 896 (8th Cir.2005) (holding the admission of statements to a physician by a child regarding physical abuse does not violate the Sixth Amendment right to confrontation); State v. Vaught, 268 Neb. 316, 682 N.W.2d 284, 293 (2004) (holding the admission of a statement by a child victim to her physician that the defendant had sexually assaulted her was not testimonial). Therefore, we affirm the dismissal of Blount's habeas petition.

r. i. Argument for non-admissibility if testimonial
s. ii. Age of child consideration
t. 2. Challenges to Direct Testimony (to be covered by Ashley – brief intro)

4. Child(ren) - Larry
    a. How to determine competency – considered judgment
5. -It All depends
    a. Children's Counsel: BIA v. Privilege v. Advocate
        i. -When do we need and which to request
            1. private attorney for child 16 or over
        ii. Talking to the child about court
        iii. -instructions to parents from BIA
6. In court testimony - custody
    a. Nuts and Bolts
        i. When to make a decision if child counsel required
        ii. How to make the decision - financial constraints
        iii. What steps to take – sample Motions – factors to argue in your Motion; Sample Order
        iv. CPS Records in custody cases
7. In court testimony - protective orders
    a. Making a determination
        i. When to make decision - District Court v. Circuit Court
8. -when and how to move your case
        i. How to make decision

ii. What steps to take
iii. Referral to CPS by Court at Temp Prot Order stage

9. -The Report
   a. Testimony of Investigator
   b. -what will they say?
   c. Get them a Subpoena
   d. Need to Postpone
   e. Qualify them as an expert – sample attached

10. In camera interviews – custody and protective orders
   i. Do you have Child's counsel
   ii. Child's counsel not required
   iii. Who is the child living with
   iv. How does the child get to Court
   v. Prot Order v. Custody Case

11. Evidence – Ashley
   a. Child Evidence Admissibility
      i. Maryland v. Craig, 497 U.S. 836 (1990). [Juvenile/criminal In-camera interview requirements] (Delinquency Case)
         1. Elements to child witness to satisfy constitutional confrontation right: (1) Child witness must be competent to testify and must testify under oath; (2) Defendant retains full opportunity for contemporaneous cross-examination; and (3) Judge, jury, and Defendant are able to view the demeanor (and body) of the witness as he or she testifies. Id. at 851.
         2. "If the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the

absence of face-to-face- confrontation with the defendant. Id. at 855.

3. Necessity is found on a case-by-case basis where the court must find that in-camera testimony is necessary to protect the welfare of the particular child witness who seeks to testify. Id. at 855-56 (citing Globe Newspaper Co., 457 U.S. 596, 608-09 (1982) (compelling interest in protecting child victims does not justify a mandatory trial closure rule)).
4. "[W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not [prohibit in-camera interviews.]" Id. at 857.

ii. Globe Newspaper Co., 457 U.S. 596 (1982). [Criminal / Juvenile In-camera interview requirements
    1. Weights to be factored to determine necessity are: (1) minor's age; (2) psychological maturity and understanding; (3) nature of the crime; (4) desires of the victim; and (5) the interests of parents and relatives. Id. at 608.
iii. In re Colin R., 53 Md. App. 684-94 (1985) - "[T]he right of confrontation…is not available to the parents of an alleged C.I.N.A."
iv. In re Maria P., 393 Md. 661 (2006). [Evidence rules in CINA & Requirements in lieu of right of confrontation]
    1. In Maria, Mother appealed after being excluded from the courtroom whilst Respondent was testifying.
    2. The court stated that a party's right to be present "is not absolute, and that a determination of whether exclusion of a party constitutes sufficient prejudice,

either presumed or actual, to warrant a new trial depends, to some extent, on the circumstances." Id. at 673 (quoting Green v. North Arundel Hosp. Ass'n, 366 Md. 597, 618-19 (2001)).

3. One factor in determining that there was sufficient prejudice was because the court did not provide a recording to Mother. Id. at 678 (citing Shapiro v. Shapiro, 54 Md. App. 477, 480 (1983) ("In all cases [where a judge interviews a child out of the presence of the parties], unless waived by the parties, the interview must be recorded by a court reporter and immediately following the interview its content shall be made known to counsel and the parties by means of the court reporter's reading of the record to them.").
4. In Maria P., the court ultimately held that "the juvenile court abused its discretion in excluding [Mother] from the hearing without conducting any inquiry as to the reasons for [Mother]'s exclusion." Id. at 676. Notably, the court stated: "To exclude [Mother] on the basis of a brief mention of the Department's allegations alone resulted in unfairness and prejudice to [Mother], and thus denied her due process." Id. at 678.

v. Courts seem to have broad discretion in non-criminal cases of when to conduct an in-camera interview. See In re Adoption of Ta'Niya C., 417 Md. 90, 114 n.22 (2010) ("The court declined to interview Ta'Niya in camera, explaining that interviews of young children tend to produce unreliable testimony and cause children unnecessary trauma. We do not profess an opinion as to whether this was an abuse or discretion, except to say that the judge did exercise his discretion.").

vi. Marshall v. Stefanides talks about the need to protect child from "severe psychological trauma" in custody cases and "solves" the issue of "attempt[ing] to balance the right of the parents to present evidence as to what they deem to be in the best interest of the child as against possible severe psychological damage to the child," by stating: "We believe that a Chancellor's interview of a child in a custody case out of the presence of the [parents] to be proper, in the discretion of the court, with or without the consent of the [parents], and with or without the presence of counsel." 17 Md. App 364, 369 (1973).

vii. Rules of evidence only apply in:

1. Adjudication hearings for CINA proceedings; delinquency proceedings; and CINS, truancy, and peace order proceedings. Md. Rule 11-101(b)(2)(A).
2. Hearings on waiver of reunification efforts. Md. Rule 11-101(b)(2)(B).
3. Hearings on guardianship petitions. Md. Rule 11-101(b)(2)(C).
4. Notably they do not apply in shelter hearings, detention hearings, emergency hearings following removal of a child from court-ordered placements, and guardianship review hearings. Md. Rule 11-101(b)(3).

12. Hearsay exceptions

a. Md. Code Ann., Crim. Proc. § 11-304(b) (i.e. "tender years exception") - The court may admit into evidence in a juvenile court proceeding or in a criminal proceeding [hearsay] made by a child victim or witness who:

i. Is under 13 years old and is an alleged victim or a child alleged to need

assistance in the case concerning: (1) child abuse; (2) rape or sexual offenses; (3) attempted rape in the first or second degree; (4) juvenile court proceedings, abuse or neglect; or (5) neglect of a minor. § 11-304(b)(1). Or

ii. Is under 13 years old and is an alleged victim or witness in a case before the court concerning a crime of violence. § 11-304(b)(2).

iii. Only admissible if statement was made to and is being offered by a lawfully acting (1) physician; (2) psychologist; (3) nurse; (4) social worker; (5) principal, vice principal, teacher, or school counselor; (6) licensed counselor; (7) licensed therapist; or (8) a forensic interviewer. § 11-304(c).

1. Baltimore City - non "Social Workers"

2. If the child testifies
   a. In criminal cases, hearsay from a child can be introduced if the statement is not admissible under any other hearsay exception and if the child victim or witness testifies. § 11-304(d)(1).
   b. In CINA cases, hearsay from a child can come into evidence if the statement is not admissible under any other hearsay exception, **regardless** of whether the child victim testifies. § 11-304(d)(2).
   c. Defendant, Respondent, or alleged offender must be given an opportunity to prepare a

response to the statement within a **reasonable** time for a juvenile court proceeding and at least 20 days before a criminal proceeding. § 11-304(d)(3). Notice includes: (1) State's intention to introduce statement; (2) any audio or visual recording of the statement; and (3) the content of the statement, if no recording is available. § 11-304(d)(3)(i)-(iii).

3. The statement must have a "particularized guarantee[] of trustworthiness" including the following factors:
    a. Child victim's or witness's personal knowledge of the event
    b. Certainty that the statement was made
    c. Any apparent motive to fabricate or exhibit partially by the child victim or witness
    d. Whether the statement was spontaneous or directly responsive to questions
    e. Timing of the statement
    f. Whether the child or witness's young age makes it unlikely that the statement was fabricated based on graphic details beyond expected knowledge and experience;
    g. Appropriateness of the terminology of the statement to the child or witness's age
    h. Nature and duration of the abuse or neglect
    i. The inner consistency and coherence of the statement
    j. Whether the child or witness was suffering pain or distress when making the statement

k. Whether extrinsic evidence exists to show that accused had opportunity to commit the act complained by the child or witness
l. Whether the statement was suggested by use of leading questions; and
m. Credibility of the person testifying about the statement.
    i. See e.g., Prince George's Cnty. Dept. of Soc. Services v. Taharaka, 254 Md. App. 155, 169-87 (2022).

4. Summary of exception: "[Tender years exception] imposes multiple conditions that must be satisfied prior to a juvenile court's determination that the statement is admissible: the court must make a finding as to whether (1) it is unnecessary to examine the child; (2) there is corroborative evidence that the alleged abuser had an opportunity to commit the abuse; and (3) the child's statement contains 'particularized guarantees of trustworthiness.'" In re J.J., 456 Md. 428, 451 (2017).
5. j. "[A] court need not make a competency determination prior to admitting a prior statement pursuant to [the tender years exception]." Id. (internal quotations omitted) (citation omitted).
6. Excited Utterance - proponent must establish that an exciting or startling event occurred and that the declarant had personal knowledge of that event; statement sought to be admitted must relate to the underlying startling event; and proponent must establish that the statement was spontaneous, meaning that the declarant was still under the stress of the startling event at the time the statement was

made and that the statement was not the product of reflective thought. Md. Rule 5-803(b)(2).

13. DSS Records -Controlling law (info from Baltimore County Bar Association presentation from Lunch and Learn with Mark Millspaugh,, Director Baltimore County DSS)Jennifer

a. Human Services Code 1-201 – social services records
    i. Presumption of confidentiality for all social services records
    ii. There are specific exceptions
        1. Court order
        2. Administrative sharing
    iii. There is a penalty for unauthorized disclosure
b. Human Services Code 1-202 – specifically social services records dealing with child abuse and neglect
    i. Presumption of confidentiality
    ii. Limited mandatory exceptions
        1. Court order
        2. Admin reasons
    iii. Limited discretionary exceptions
        1. Can consider releasing to alleged maltreater
        2. Can consider releasing to parent or caregiver who is providing care HOWEVER, See COMAR 07.02.07.21
c. COMAR 07.02.07.21 - disclosure rules for DSS custodian of records
    i. Limits discretionary release to “if it furthers a purpose of the specific exception to confidentiality”
        1. These exceptions have been narrowed significantly by case law
        2. A specific exception is if the request is tied to safe and better care for the child (this would NOT be general interest in the records)

a. Very hard to determine
b. Will err on the side of denial

14. Recommendations from Custodian of Records for DSS
    a. Ask your client for the information first
        i. At the end of investigation, DSS sends closure notice with summary of info and findings to any alleged maltreater and caregiver
            1. Sometimes this is what DSS will send when records requested since it was sent anyway
    b. If you believe records are essential to your case
        i. Understand that provision of records is weighed against the responsibility to protect a fragile system that relies on reporters who rely on their information being kept confidential
            1. Even when records are redacted, can typically tell who is who
        ii. Ask the Court to pass an order to release the info
            1. If order is granted, typically, in camera review of records
            2. Can order a release of the records
        iii. Send a subpoena to DSS
            1. Will almost always be met with Motion to Quash
                a. DSS: too difficult to make decision if have the ability to release based on narrow exceptions
            2. Go to Court and argue for the Motion to be denied and DSS be ordered to release the records

15. Special considerations – All

ADMISSIBILITY OF CHILDREN'S STATEMENTS

THEORIES FOR ADMISSIBILITY AND COUNTER-ARGUMENTS

1. **Constitutional Rights**

   a. **Confrontation Clause – U.S. Constitution Amend. VI – Melendez-Diaz v. Massachusetts, 129 S.Ct. 2597 (2009)**

   Case involving use of certificates certifying that substance was cocaine – used to convict D – ruled to violate confrontation clause

   b. **Maryland Declaration of Rights – Article 21: That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.**

c. Cassidy v. State, 74 Md.App. 1 (1988) – Confrontation clause, reason for medical examination and opinion rendered are issues.

d. Esposito v. State, 264 Md.App. (2024) – Case where grandson accused of injuring grandmother, causing her to hit head which resulted in injury and subsequent death. Various text messages and phone calls—what is admissible. All errors determined harmless. This case offers a thorough analysis of the law and what messages and statements fall within hearsay exceptions.

2. Admissibility Based on Exceptions to Hearsay - If the proponent of statement seeks to introduce the statement to prove the truth of the matter asserted in it, the statement constitutes "hearsay." Md. Rule 5-801(c). (Esposito). If the statement is not offered to prove the truth of the matter asserted, it is not hearsay. The most likely exceptions that a child's statement can be admitted under is as follows:

i. Statements to Medical Providers – see Cassidy v. State, 74 Md.App. 1 (1988)

ii. **Psychologist/Psychiatrist — see Cassidy v. State, 74 Md.App. 1 (1988) - distinguish underlying factual assertions where not directly related to treatment "relevant to an issue of declarant's bodily condition."—REFLECTIVE THOUGHT**

When the purpose of the physician's examination moves yet farther afield, from predictions of the emotional and mental impact of the abuse upon the child to a recommendation as to the social disposition of the child, the original logic for the exception has been not only stretched but snapped.

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iii. **Present Sense Impression - declarations of present sense impression (if contemporaneous with the event in issue) – 5-**

803(b)(1) – A statement describing an event or condition made *while the declarant was perceiving the event or condition, or immediately thereafter*

iv. **Excited Utterance - To make a statement admissible under excited utterance hearsay exception, the proponent of the evidence must satisfy three requirements: proponent must establish *that an exciting or startling event occurred* and that *the declarant had personal knowledge of that event*; statement sought to be admitted *must relate to the underlying startling event*; and proponent must establish that *the statement was spontaneous, meaning that the declarant was still under the stress of the startling event at the time the statement was made and that the statement was not the product of reflective thought*. Md. Rule 5-803(b)(2). (Esposito)**

a. **Testimonial vs. Non-Testimonial - What is the purpose of the interview—medical treatment vs. forensic evaluation--to gather evidence for a trial, or for purposes of treatment—did the victim know or have reason to know that the statements would be used against the accused at trial.**

i. **Argument for non-admissibility if testimonial**

ii. Age of child consideration

FACTS MATTER!!!!!