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Response

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One argument against admitting identity statements made by a child victim to a doctor under section 90.803(4) is that the Florida Legislature thought of expanding it to include children, but then chose instead to add a new exception.[1] However, the excited utterance hearsay exception was also to be expanded to include children in that same bill, but in the bill's final form it did not include the excited utterance expansion.[2] It would follow that statements of identity should not be admitted under the excited utterance hearsay exception just as the medical diagnosis hearsay exception, but that is not the case. In *Leding v. State*, the lower court allowed a father to testify as to what the children said to him regarding the appellant trying to entice young children into his car under the excited utterance hearsay exception.[3] Appellant asserted that the trial court did not follow section 90.803(23) regarding the admissibility of out-of-court statements made by child victims. The court affirmed the conviction, holding that section 90.803(23) was an additional exception to the hearsay rule, and was added to expand section 90.803, not limit it.

Another argument is that a statement that is admissible under section 90.803(4) will be automatically admissible under section 90.803(23) if it is reliable. That is not the case. Section 90.803(4) statements are reliable because of the circumstances surrounding the making of the statement. A statement made by a child who understands the reason why he is going to the doctor, and the doctor has explained to the child truthful statements will make him better ensure the reliability of the statement. If the statement is not found to be reliable as set by *United States v. Renville*, then the statement should not be admitted.

Section 90.803(23), on the other hand, deals with children in judicial proceedings. There are so many requirements to section 90.803(23) that statements that may be found reliable under section 90.803(4) may not be admitted under section 90.803(23). For example, there is an age requirement that the child making the statement must be eleven years old or younger. At age twelve, the child who is sexually abused in Florida is barred from admitting his statement to a doctor identifying his abuser because he is too old under section 90.803(23) and the statement

1. State v. Jones, 625 So. 2d 821, 826 (Fla. 1993); FLA. STAT. § 90.803(4) (2000).

2. *See* Celina E. Contreras, Comment *Has Florida Won or Lost the Battle by Eliminating Section 90.803(4) as an Alternative Tool in Prosecuting Child Sexual Abuse*, U. MIAMI L. REV. 533, 546 n.90 (2001).

3. 725 So. 2d 1221 (Fla. 4th DCA 1999).

is completely inadmissible under section 90.803(4). That is an immense problem because the only witnesses to the crime are the child and the abuser, therefore, the abuser will get away with having abused a child. While it may be true that a child at that age may be able to testify, that is not the reason for the medical diagnosis hearsay exception. It is to get the truth of what happened from the beginning and to prove that from the beginning the child identified that abuser. Additionally, there must be a case specific finding of reliability and the source must indicate trustworthiness. After that has been determined, the child must testify and if the child cannot testify because he is found to be likely to suffer severe emotional harm, then there must be corroborative evidence.[4] In the case *In re CW*, a child was found to be competent to stand trial but on the stand she said she could not remembered what happened, her statements were found to be inadmissible because there was no corroboration. Lastly, if there is not sufficient notice given, then the evidence is excluded.

The Florida Supreme court in *Jones* did rely on a Maryland case, *Cassidy v. State*, in rejecting the possibility of entering statements under section 90.803(4). However, months after *Cassidy* was decided, *In re Rachel T*[5] determined that statements made by a five year old identifying her abuser were admissible under the medical diagnosis hearsay exception because the trial court found that the child understood that her statements would be used to provide appropriate medical treatment. The rationale was that the identity of the abuser was pertinent to medical diagnosis because the alleged abuser had regular access to the child and was trusted and known by the child. The physician specifically needed to know if the child was exposed to a venereal disease, whether to give the child a tetanus shot, and whether the most effective treatment included removing the child from her home and away from the alleged abuser.[6]

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4. *See In re* CW, 681 So. 2d 1181 (Fla. 2d DCA 1996).
5. 549 A.2d 27 (Md. Court. Spec. App. 1988).
6. *Id.* at 34-35.