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The Competency Requirement For The Child Victim Of Sexual Abuse: Must We Abandon It?

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The Competency Requirement For The Child Victim Of Sexual Abuse: Must We Abandon It?

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I. INTRODUCTION

The issue of witness competency never arises in an average criminal trial. In child sexual abuse¹ trials, however, witness competency is often a central issue. The only eyewitness is usually a child of tender years, therefore the child's testimony is usually critical to the state's case against the alleged abuser.² As one commentator observed, "[i]n abuse cases, the eyewitness testimony of the youngster involved may be the only direct link between the child and the offender; any other evidence is generally circumstantial physical evidence that indicates only that abuse was committed."³

In child sexual abuse trials, as in all criminal trials, there are two competing interests: the interest of the state to convict guilty

1. This comment uses the term "sexual abuse" as a generic term encompassing allegations of any type of sexual activity with children by adults. This category includes various crimes: incest, sodomy, indecent liberties, molestation, sexual intercourse with an underaged child, oral or anal sex, indecent assault and lewd and lascivious acts. For a comprehensive analysis of what each state defines as criminal sexual activity with children, see Kocen & Bulkley, *Analysis of Criminal Child Sex Offense Statutes*, in *CHILD SEXUAL ABUSE AND THE LAW* 1 (J. Bulkley ed. 1984).

2. *State v. Gilbert*, 109 Wis. 2d 501, 516, 326 N.W.2d 744, 751 (1982).

3. *Id.* (citing Meyers, *When Children Take the Stand*, 11:1 STUDENT LAW. 14, 15 (Sept. 1982)).

sexual abuse offenders, and the interest of the accused to have a fair trial.⁴ Unfortunately, in the heat of the sexual abuse allegation, the need to balance these interests is overlooked. The following newspaper excerpt is indicative of the devastating effect on one side of the issue—the parents of an abused child:

A Phoenix man accused of molesting three children—hanging two of them with a rope from the ceiling—may evade prison because of the age of a key witness in the case. The victim is only 4 years old.

Fearing that the boy would be barred from testifying in a trial because of his age, [the prosecutor] struck a deal with the defendant, a man she has termed “dangerous” enough to be “warehoused for years and years and years.”

. . . The child's parents . . . are angry. [His mother said:] “They're ignoring our kids because they're young. . . . That's like saying, ‘Ok pervert, go out and molest very young kids because if they're young enough, they're out of luck.’”⁵

Although such articles incite indignation and disgust, legal scholars cannot ignore the competing interest, that of the accused. An equally devastating incident, reported in a recent Miami newspaper, illustrates the problem from the perspective of the accused:

4. The Supreme Court of Wyoming recognized this tension in a recent case: We realize that basing a conviction upon the testimony of a young child presents a serious problem.

“Two alternative hazards are confronted. On the one hand, in accepting the testimony of a child there is the danger that she may not be telling the truth, in which event an innocent man may be convicted of crime and suffer the consequences thereof. On the other [hand], if the child's testimony is not accepted, a man guilty of crime, and possibly with the potential for more such, will go free. In this connection, it must be borne in mind that when such an offense [assaulting and taking indecent liberties upon a child] is committed, it is done with the greatest possible stealth and secrecy, so that most often the testimony of the victim, coupled with the type of corroboration we have here, is the only evidence available upon which to determine guilt or innocence. *The fact that there are difficulties involved should not prevent the processes of justice from functioning.*”

Larsen v. State, 686 P.2d 583, 586-87 (Wyo. 1984) (quoting State v. Smith, 16 Utah 2d 374, 376, 401 P.2d 445, 447 (1965) (emphasis added)). See also Comment, *Minnesota Developments: Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377, 1380-83 (1985).

5. Levinger, *The Editor's Page*, 40:2 J. SOC. ISSUES (1984) (citing The Arizona Republic, Feb. 19, 1984, at B1).

David Whiteside can't let the matter rest. For eight months he was suspected of one of the most heinous of crimes, sexually abusing his own child. His embittered wife made the accusation in the midst of a nasty custody fight, and his world fell apart. . . .

Ultimately, a child psychiatrist concluded that David Whiteside did not sexually abuse his son. A social worker assigned to the case concluded the same thing. Even relatives of his estranged wife came forward to say that she was making up the accusations to gain custody. And finally a judge decided that the accusations were hokum. So now the matter might seem finished.

Except no court ever exonerated David Whiteside. No court can; once the most stumbling and hesitant accusation is made by a child, even if it is retracted immediately, proof of innocence can never be complete.⁶

Recently, courts and legislatures have been easing the traditional rules of evidence in child sexual abuse cases.⁷ When examining the propriety of these actions, it is important to remember the

6. Dorschner, *A Question of Innocence*, Miami Herald, July 28, 1985 (Tropic Magazine), at 11, col. 2. The custody battle situation presents a particularly tragic example of the inherent dangers when a young child testifies. One of the more potent weapons in a custody fight against an ex-spouse is an allegation of abuse according to Lesley Wimberly, cofounder of the California chapter of VOCAL (Victims of Child Abuse Legislation). *The Youngest Witness: Is there a 'witch hunt' mentality in sex-abuse cases?*, NEWSWEEK, Feb. 18, 1985, at 72, 73. The prospect of having a very young child testify against one parent when the other parent claims sexual abuse presents problems in addition to the problems encountered in the average sexual abuse case. In discussing the propriety of a young child testifying as to its preference for custodial parent, an emotionally similar situation, two commentators expressed concern that a parent can manipulate the child. "Often one parent, usually the one with present custody, attempts to coach or counsel the child as to its choice. These tactics can sometimes be proved by direct evidence; however, more frequently the pressure has been applied subtly over a period of time . . ." Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 FAM. L.Q. 1, 15 (1977). Although, the custody battle abuse allegation situation is frightening, the solution is not to find the child incompetent to testify as a bright line rule. A better result would be to emphasize the investigative process and to discover the manipulation prior to trial. Howson, *Child Sexual Abuse Cases: Dangerous Trends and Possible Solutions*, CHAMPION, Aug. 1985, at 6, 11.

7. *State v. Melendez*, 135 Ariz. 390, 661 P.2d 654 (Ct. App. 1983); Note, *Child Molestation Admissibility and Competency*, 8 J. Juv. L. 448 (1984); Comment, *Liberalization in the Admissibility of Evidence in Child Abuse and Child Molestation Cases*, 7 J. Juv. L. 205 (1983); see, e.g., Testimony of Victims of Child Abuse, Pub. Act 85-587, § 2, 1985 Conn. Legis. Serv. 463 (West) (abandoning competency requirements for child victims of sexual abuse); Mo. ANN. STAT. § 491.060(2) (Vernon Supp. 1985) (abandoning competency requirements for child victims of certain sex crimes); UTAH CODE ANN. § 76-5-410 (Supp. 1985) (abandoning competency requirements for child victims under the age of ten of sexual abuse).

two competing interests. Responding to criticism from the general public and from social scientists, courts and legislatures have revised the old practices for determining the competency of very young witnesses. For example, one critic said,

Perhaps the most controversial law applying to child witnesses is the requirement that their competence to testify be demonstrated. . . . Questions have been raised about the wisdom of competency examinations. The practice could easily lead to a situation in which the same child would be deemed competent by one judge but incompetent by another. Furthermore, one must ask whether a judge can accurately ascertain the potential accuracy of a child's testimony.⁸

This comment will analyze the historical roots of the child competency requirement. It will explain the current statutory treatment of the competency requirement, and the judicial application of the statutory requirements. Finally, it will explore proposed resolutions to the competency problem and will suggest some additional resolutions that would avoid the need to eliminate the competency requirement.

II. HISTORICAL BACKGROUND

Early canon law excluded all witnesses under the age of puberty.⁹ Common law rejected this view. One of the earliest cases to raise the issue of child competency was *The King v. Braiser*,¹⁰ a 1779 English child sexual abuse case. The defendant in *Braiser* was convicted of assault with attempt to commit rape on a child of less than seven years.¹¹ The child did not testify at the trial. Her mother and another woman did testify as to out of court statements the child made upon recognizing her assailant the day after

8. Goodman, *Children's Testimony in Historical Perspective*, 40:2 J. Soc. ISSUES 12, 14 (1984). As Professor Goodman feared, in at least one reported case, two judges reached opposite conclusions, but the result does not totally support her charge. In *People v. Edgar*, the examining magistrate, in a preliminary hearing for a sexual abuse case, found the four-year-old child victim competent to testify. 113 Mich. App. 528, 531, 317 N.W.2d 675, 678 (1982). When the case was bound over for trial, the trial court judge ruled that the four-year-old victim was incompetent to testify because she could not appreciate the obligation to testify truthfully and understandably, as required by the Michigan Rules of Evidence. *Id.* at 532, 317 N.W.2d at 677. The Michigan Court of Appeals reversed, holding that once a judge determines that a witness is competent, "[a] subsequent showing of the witness's inability to testify truthfully affects credibility, not admissibility." *Id.* at 535, 317 N.W.2d at 678.

9. 4 W. FINALSON, REEVES' HISTORY OF THE ENGLISH LAW 80 (1880).

10. 168 Eng. Rep. 202 (1779).

11. *Id.* at 202.

the incident.¹² The English court pardoned the defendant because of the child's failure to testify.¹³ The court stated that children are not automatically disqualified from testifying because of their age. As the critical gauge of competency to testify, the court singled out the necessity of understanding the obligation of the oath:

[It is understood that] no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath . . . for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received.¹⁴

Around the mid-part of the 19th century American courts adopted the *Braiser* competency standard. During the next half century, some states incorporated it into statutes.¹⁵ In 1895, the Supreme Court of the United States relied upon *Braiser* in *Wheeler v. United States*.¹⁶ In *Wheeler*, the defendant was convicted of murder in Indian territory. The conviction was based partly on the testimony of the five-year-old son of the murder victim.¹⁷ The Court rejected the defendant's contention that the boy was incompetent to testify. Like *Braiser*, the *Wheeler* Court emphasized the necessity that the child understand the obligation of the oath. In addition, however, the *Wheeler* Court emphasized the child's intellectual capacity:

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former. The decision of

12. *Id.*

13. *Id.* at 201.

14. *Id.*

15. Note, *The Problem of the Child Witness*, 10 Wyo. L.J. 214, 215 (1956).

16. 159 U.S. 523 (1895).

17. *Id.* at 525.

this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath.¹⁸

Thus, the early treatment of the competency issue focused on two criteria—intelligence and capacity to understand the obligation of the oath.

At early common law, many individuals with personal knowledge of facts of consequence to the litigation were held to be incompetent to testify.¹⁹ For example, the courts disqualified parties, spouses of parties, and convicted felons because their testimony was considered self-serving.²⁰ The courts have long since abolished these early grounds of incompetency.²¹ Each remains, however, as a ground for impeaching the credibility of a witness.²² Perhaps the reason for retention of the competency requirement for children is the courts' unspoken belief that children are inherently unreliable as witnesses because they tend to mix fact and fantasy.

Two early commentators on competency requirements for children expressed the opinion that even if the child's testimony were admitted, the testimony would be of dubious value. Children, they said, are limited by immaturity, which too often means that the child has intermingled imagination with memory.²³ The commentators feared that the child's imprecise statements would be "irretrievably engraved on the record by a guileless witness with no conception that they are incorrect."²⁴ Today, scholars²⁵ and legisla-

18. *Id.*

19. M. GRAHAM, EVIDENCE TEXT, RULES ILLUSTRATIONS AND PROBLEMS 30 (1983). The early rules of exclusion prevented the following classes of persons from testifying: (a) those who by reason of a peculiar religious belief, or lack of any religious belief, were not supposed to be amenable to the binding force of an oath; (b) parties to the suit; (c) the husband or wife of a party to the suit; (d) persons pecuniarily interested; (e) naturally incapacitated persons; and (f) those guilty of certain crimes. J. MCKELVEY, EVIDENCE 417 (1924). These rules substantially disappeared between the years 1823 and 1853. *Id.*

20. The theory behind disqualification was that from the nature of human passions and actions there is more reason to distrust such a biased testimony than to believe it. 1 S. GREENLEAF, LAW OF EVIDENCE § 328 (1899).

21. *Id.*

22. M. GRAHAM, *supra* note 19, at 30.

23. Stafford, *The Child as A Witness*, 37 WASH. L. REV. 303, 309 (1962); Comment, *Youth as a Bar to Testimonial Competence*, 1953-1954 ARK. L. REV. 100, 105.

24. Stafford, *supra* note 23, at 309.

25. See, e.g., Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40:2 J. SOC. ISSUES 125, 127 (1984); Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 LAW HUM. BEHAV. 201 (1980); Marin, Holmes, Guth & Kovac,

tures²⁶ are questioning whether the competency requirements are valid and whether the requirement should remain in child sexual abuse cases.

The Federal Rules of Evidence and the 1974 Uniform Rules of Evidence reflect the more modern viewpoint of the purpose of competency requirements for children.²⁷ According to this viewpoint, a child is competent to testify, unless it is so bereft of the

The Potential of Children as Eyewitnesses, 3 LAW HUM. BEHAV. 295 (1979); Melton, *Children's Competency to Testify*, 5 LAW HUM. BEHAV. 73 (1981); Melton, *Sexually Abused Children and the Legal System: Some Policy Recommendations*, 13 AM. J. FAM. THERAPY 61 (1985); Melton, Bulkley & Wulkan, *Competency of Children As Witnesses*, in CHILD SEXUAL ABUSE AND THE LAW 125 (J. Bulkley ed. 1984). For articles discussing the reliability and suggestibility of children's memories, see Goodman, *The Child Witness: An Introduction*, 40:2 J. SOC. ISSUES 1 (1984); Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40:2 J. SOC. ISSUES 157 (1984); Goodman, *supra* note 8; Goodman, Golding & Haith, *Juror's Reactions to Child Witnesses*, 40:2 J. SOC. ISSUES 139 (1984); Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40:2 J. SOC. ISSUES 33 (1984); Loftus & Davies, *Distortions in the Memory of Children*, 40:2 J. SOC. ISSUES 51 (1984).

26. See COLO. REV. STAT. § 13-90-106 (II) (1973) (deeming victims of child abuse under age of ten competent to testify if child is able to describe in language appropriate for one that age the relevant facts); IDAHO CODE § 9-202 (Supp. 1985) (as amended by 1985 Idaho Sess. Laws ch. 215 § 1, 524) (setting forth explicit requirements for competency hearings); MINN. STAT. ANN. § 595.02(f) (West Supp. 1985) (permitting child victims of sexual abuse to use language appropriate to their age group); MO. ANN. STAT. § 491.060 (Vernon Supp. 1985) (deeming child victims of certain sex crimes under ten years old competent by law); UTAH CODE ANN. § 76-5-410 (Supp. 1985) (deeming child victims of certain sex crimes competent by law if the child is less than ten-years-old); Testimony of Victims of Child Abuse, Pub. Act 85-587, § 2, 1985 Conn. Legis. Serv. 463 (West) (excepting victims of child abuse from competency requirements); Judicial Proceedings Involving Children, ch. 85-53 § 3, 1985 Fla. Sess. Law Serv. 122, 125 (West) (modifying the oath requirement for children: "WHEREAS, reports of sexual abuse and the commission of unlawful sexual acts against children have increased dramatically, and . . . a young child is able to relate description of acts involving sexual contact or sexual acts performed in the child's presence in a reliable manner based upon considerations of the child's age and development" *Id.* at 123); Victim and Witness Protection Act, H.F. 462, § 16, 1985 Iowa Legis. Serv. 108, 114 (West) (setting forth explicit requirements for competency hearings).

27. Rule 601 of the Federal Rules of Evidence and Rule 601 of the 1974 Uniform Rules of Evidence have the same first sentence: "Every person is competent to be a witness except as otherwise provided in these rules." FED. R. EVID. 601, 1974 UNIFORM R. EVID. 601. The federal rule includes a second sentence which provides that state competency laws prevail where state law provides the rule of decision with respect to the element of a claim or defense. FED. R. EVID. 601. It is claimed that the Federal Rules of Evidence eliminated all competency requirements. See, e.g., Goodman, *supra* note 8, at 14; Melton, Bulkley & Wulkan, *supra* note 25, at 127; Note, *The Testimony of Child Victims in Sex Abuse Prosecution: Two Legislative Innovations*, 98 HARV. L. REV. 806, 819 n.89 (1985). Nonetheless, the federal rule still provides that any requirements contained in Rules 602 and 603 must be met before the witness is competent to testify. M. GRAHAM, *supra* note 19. See also *Larsen v. State*, 686 P.2d 583, 585 (Wyo. 1984) ("The general principle is that a person is competent if he has a sufficient understanding to receive, remember, and narrate impressions and is sensible to the obligations of the oath.").

powers of observation, recollection, and narration, that the testimony is untrustworthy and thus lacks relevancy.²⁸ Federal Rule 601 provides that any requirements contained in Federal Rules 602 and 603 must be met before the witness is competent to testify. Together, these rules provide the following competency requirements: (1) the witness must have capacity to accurately perceive, record, and recollect impressions of facts (physical and mental capacity); (2) the witness must in fact have perceived, recorded, and must be able to recollect impressions of fact having any tendency to establish a fact of consequence in the litigation (personal knowledge); (3) the witness must declare that he or she will tell the truth and be capable of understanding the duty to tell the truth (oath or affirmation) which requires that the witness be capable of distinguishing between the truth and a lie or fantasy; and (4) the witness must be able to express himself clearly, with the aid of an interpreter if necessary.²⁹

Rule 601 of the Federal Rules reflects the philosophy that few persons are inherently incapable of testifying in a useful manner. The rule also reflects the belief that the trier of fact can consider matters of mental capacity, interest in the action, prior convictions, and other relevant matters in assessing the credibility of the witness and the weight to be accorded to the witness's testimony.³⁰

III. STATUTORY REQUIREMENTS

The competency or lack of competency of a child witness is largely determined by the forum state's statutory requirements. Therefore, one must understand the various statutory schemes utilized by the states³¹ before one can understand the disparate treat-

28. M. GRAHAM, *supra* note 19, at 31; Graham, *infra* p. 19 (*Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecution*, 40 U. MIAMI L. REV. 19, (1985)).

29. Graham, *supra* note 28 at 76.

30. D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 250 (1979); *FED. R. EVID.* 601 advisory committee note.

31. Seven states have developed competency requirements pursuant to case law and do not have a specific statute: Connecticut: *State v. Martin*, 189 Conn. 1, 454 A.2d 256, *cert. denied*, 461 U.S. 933 (1983); *State v. Brigandi*, 186 Conn. 521, 442 A.2d 927 (1982); *State v. Stankowski*, 184 Conn. 121, 439 A.2d 918, *cert. denied*, 454 U.S. 1052 (1981); *State v. Rodriguez*, 180 Conn. 382, 429 A.2d 919 (1980); *State v. Siberon*, 166 Conn. 455, 352 A.2d 285 (1974); *State v. Segerberg*, 131 Conn. 546, 41 A.2d 101 (1945); *State v. Orlando*, 115 Conn. 672, 163 A. 256 (1932)); *But see* *Testimony of Victims of Child Abuse*, Pub. Act 85-587, § 2, 1985 Conn. Legis. Serv. 463 (West) (victims of child abuse are exempt from any competency requirement)); Illinois: *People v. Garcia*, 97 Ill. 2d 58, 454 N.E.2d 274 (1983), *cert. denied*, 104 S. Ct. 355 (1984); *People v. Marsh*, 403 Ill. 81, 85 N.E.2d 715, *cert. denied*, 338 U.S. 837

ment given to the issue of competency. Under the current system, a child may be competent to testify in one state but not in another. It is because of this disparity that it would be preferable to adopt a uniform competency statute.

Statutory competency schemes can be roughly divided³² into four different categories: (1) Every person is competent to testify if he or she is capable of understanding the facts about which the testimony is offered. (2) Every person is competent if he or she can understand the oath. (3) Every person is competent except as provided otherwise (the Federal and 1974 Uniform Rules standard). (4) Every person is competent if he or she understands the obligation to tell the truth and can be understood by the jury.

(1) *Every person is competent to testify if capable of understanding the facts about which the testimony is offered.* Only two state statutes have this particular requirement: Massachusetts³³ and Kentucky.³⁴ The Kentucky statute provides, "every person is competent to testify for himself or another, unless he be found by the court incapable of understanding the facts for which his testimony is offered."³⁵

(2) *Every person is competent who can understand the oath.* Some of the states in this category use an age level to trigger the application of the statute.³⁶ The remaining state statutes in this

(1949); *People v. Karpovich*, 288 Ill. 268, 123 N.E. 324 (1919); *Featherstone v. People*, 194 Ill. 325, 62 N.E. 684 (1901); **Maryland**: *Johnston v. Federick*, 140 Md. 272, 117 A. 768 (1922); *Brandau v. Webster*, 39 Md. App. 99, 382 A.2d 1103 (1978); *see also* Md. Cts. & Jud. Proc. CODE ANN. § 9-103 (Supp. 1985) (1985 amendment: "In a criminal trial, the age of a child may not be the reason for precluding a child from testifying."); **New Hampshire**: *State v. Perkins*, 121 N.H. 713, 435 A.2d 504 (1981); *State v. St. John*, 120 N.H. 61, 410 A.2d 1126 (1980); **Rhode Island**: *In re Gerald*, ___ R.I. ___, 471 A.2d 219 (1984); *State v. Cabral*, 122 R.I. 623, 410 A.2d 438 (1980); *Pierce v. New Eng. Tel. & Tel. Co.*, 86 R.I. 328, 134 A.2d 421 (1957); **South Carolina**: *State v. Hardee*, 279 S.C. 409, 308 S.E.2d 521 (1983); *State v. Lambert*, 276 S.C. 398, 279 S.E.2d 364 (1981); *State v. Green*, 267 S.C. 599, 230 S.E.2d 618 (1976); *State v. Givens*, 267 S.C. 47, 225 S.E.2d 867 (1976); *Payton v. Strickland*, 262 S.C. 210, 203 S.E.2d 388 (1974); *State v. Abercrombie*, 130 S.C. 358, 126 S.E. 142 (1925); **Virginia**: *Cross v. Commonwealth*, 192 Va. 249, 64 S.E.2d 727 (1951); *Rogers v. Commonwealth*, 132 Va. 771, 111 S.E. 231 (1922).

32. Accept these categories with the caveat that the categories are "rough."

33. MASS. GEN. LAWS ANN. ch. 233, § 20 (West Supp. 1985) ("[a]ny person of sufficient understanding"). In Massachusetts, the test of competency of children to testify is not age, but capacity to understand and communicate, coupled with consciousness of the duty to speak the truth. *Malchanoff v. Truehart*, 354 Mass. 118, 236 N.E.2d 89 (1968).

34. KY. REV. STAT. § 421.200 (1981) ("[E]very person is competent to testify for himself or another, unless he be found by the court incapable of understanding the facts concerning which his testimony is offered.").

35. *Id.*

36. The following statutes have built-in age triggers: **Indiana**: IND. CODE ANN. § 34-1-14-5 (Burns Supp. 1985) ("Children under ten [10] years of age [are not competent], unless

category have no age trigger.³⁷ The Tennessee statute is typical of this latter category: "Every person of sufficient capacity to understand the obligation of an oath is competent to be a witness."³⁸

(3) *Every person is competent except as provided otherwise in the rules of evidence.* The state statutes or rules in this category³⁹ follow either the 1974 Uniform Rules of Evidence or the

it appears that they understand the nature and obligation of an oath."); Louisiana: LA. REV. STAT. ANN. § 15-469 (West 1981) ("[N]o child less than twelve years of age shall, over the objection either of the district attorney or of the defendant, be sworn as a witness, until the court is satisfied, after examination, that such child has sufficient understanding to be a witness."); New York: N.Y. CRIM. PROC. LAW § 60.20 (Consol. 1979) ("A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath.").

37. The following statutes have no age trigger: Alabama: ALA. CODE § 12-21-165 (1975) ("[C]hildren who do not understand the nature of an oath, are incompetent witnesses."); Georgia: GA. CODE ANN. § 38-1607 (1981) ("Persons who do not have the use of reason, such as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, shall be incompetent witnesses."); Iowa: IOWA CODE ANN. § 622.1 (West 1950) ("Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, except as otherwise declared."); (*But see* Victim and Witness Protection Act, H.F. 462, § 16, 1985 Iowa Legis. Serv. 108, 114 (West Supp. 1985) (setting forth detailed requirements as to child competency under Iowa R. EVID. 601)); Tennessee: TENN. CODE ANN. § 24-1-101 (Supp. 1985).

38. TENN. CODE ANN. § 24-1-101 (Supp. 1985).

39. The following states have competency statutes or rules which fall in this category: Arkansas: ARK. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); Delaware: DEL. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); Florida: FLA. STAT. § 90.601 (1983) ("Every person is competent to be a witness, except as otherwise provided by statute."); Hawaii: HAWAII R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); Mississippi: MISS. CODE ANN. § 13-1-3 (1972) ("Every person, whether a party to the suit or not, shall be competent to give evidence in any suit at law or in equity, and shall not be incompetent by reason of any interest in the result thereof or in the record as an instrument of evidence in other suits.") (Note that the Mississippi statute is not an adoption of either the Federal Rules of Evidence or the 1974 Uniform Rules of Evidence, but does reach the same standard. The Mississippi statute has been interpreted to mean that "the trial judge should satisfy himself that the child has the ability to perceive and remember events, to understand and answer questions intelligently, and to comprehend and accept the importance of truthfulness." *House v. State*, 445 So. 2d 815, 877 (Miss. 1984)); Nebraska: NEB. REV. STAT. § 27-601 (1979) ("Every person is competent to be a witness except as otherwise provided in these rules."); Nevada: NEV. REV. STAT. § 50.015 (1979) ("Every person is competent to be a witness except as otherwise provided in this Title."); New Jersey: N.J. REV. STAT. § 2A:81-1 (1976) ("Except as otherwise provided by statute no person shall be excluded as a witness in any action, proceeding or matter of a civil or criminal nature, for any of the following reasons: . . . [age not included]); New Mexico: N.M. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); North Carolina: N.C. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); North Dakota: N.D. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); Oklahoma: OKLA. STAT. tit. 12, § 2601 (1980) ("Every person is competent to be a witness except as otherwise provided in this Code."); Oregon: OR. REV. STAT. § 40.310

Federal Rules of Evidence. The Arkansas rule is typical of the rules and statutes within this category. It reads: "Every person is competent to be a witness except as otherwise provided in these rules."⁴⁰ The words "except as otherwise provided in these rules" in statutes of this type usually refer to rules of evidence that require the witness to have personal knowledge and to testify by oath or affirmation.⁴¹

(4) *Every person is competent who is capable of being understood by the jury and understands the obligation to tell the truth.* The state statutes and rules⁴² within this category are very de-

(1983) ("Except as provided in ORS 40.310 to 40.340 [pertaining to personal knowledge, interpreters, and the competency of judges, jurors and attorneys], any person who, having organs of sense can perceive, and perceiving can make known the perception to others, may be a witness."); **Pennsylvania:** 42 PA. CONS. STAT. § 5911 (1982) ("Except as otherwise provided in this subchapter, all persons shall be fully competent witnesses in any criminal proceeding before any tribunal."); **South Dakota:** S.D. CODIFIED LAWS ANN. § 19-14-1 (1979) ("Every person is competent to be a witness except as otherwise provided in chapters 19-9 to 19-18 [South Dakota's version of the 1974 Uniform Rules of Evidence], inclusive."); **West Virginia:** W. VA. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided for by statute or these rules."); **Wisconsin:** WIS. STAT. § 906.01 (1975) ("Every person is competent to be a witness except as otherwise provided by §§ 885.16 and 885.17 [pertaining to the Dead Man's Statute] or as otherwise provided in these rules."); **Wyoming:** WYO. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules.").

40. ARK. R. EVID. 601.

41. See *supra* note 29 and accompanying text.

42. Some of the statutes and rules in this category also use the child's age to trigger the application of the test for competency, as noted below. See, e.g., **Alaska:** ALASKA R. EVID. 601; **Arizona:** ARIZ. REV. STAT. ANN. § 12-2202 (1982) (age trigger); **California:** CAL. EVID. CODE § 701 (West 1966) (no age trigger); **Colorado:** COLO. REV. STAT. § 13-90-106 (1973) (age trigger). But see COLO. REV. STAT. § 13-90-106(II):

This proscription does not apply to a child under ten years of age, in any civil or criminal proceeding for sexual abuse, sexual assault, or incest, when the child is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined.

Id.

A recent commentator believes this amendment does not change Colorado law because the appellate courts dealing with the issue did not expect the children to use sophisticated language. Garnett, *Children as Witnesses: Competency and Rules Favoring Their Testimony*, 12 COLO. LAW. 1982, 1984 (1983). The amendment is important, however, "because it expresses the strong public sentiment that children victims of sex offenses be taken seriously and that trial courts be particularly thorough and cautious before excluding the testimony of a young child on the ground of incompetency to testify." *Id.* For additional statutes which use the child's age to trigger the competency test, see: **Idaho:** IDAHO CODE § 9-202 (Supp. 1985); **Kansas:** KAN. STAT. ANN. § 60-417 (1983); **Maine:** ME. R. EVID. 601; **Michigan:** MICH. COMP. LAWS § 600.2163 (1968); MICH. R. EVID. 601 ("Unless the court finds after questioning a person that he does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules."); **Minnesota:** MINN. STAT. ANN. § 595.02(f) (West Supp. 1985). The Minnesota statute specifically provides the following

tailed. Most of these statutes were modeled after Rule 17 of the 1953 Uniform Rules of Evidence.⁴³ Alaska's rule of evidence is typ-

exception:

Persons of unsound mind, persons intoxicated at the time of their production for examination, and children under ten years of age, if any of them lack capacity to remember or to relate truthfully facts respecting which they are examined, are not competent witnesses. A child describing any act of sexual contact or penetration performed on or with the child by another may use language appropriate for a child of that age.

According to a recent commentator the 1984 amendment did not change Minnesota law. "This 1984 amendment has not changed competency hearings in practice because judges have always expected and accepted children's language from children." Comment, *supra* note 4, at 1383-84 n.11. See also Missouri: MO. ANN. STAT. § 491.060(II) (Vernon Supp. 1985) (age trigger). The Missouri statute reads:

A child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which he is examined, or of relating them truly; provided, however, that except as provided in subdivision (1) [disallowing witnesses mentally incapacitated at time of production] of this section, a child under the age of ten who is alleged to be a victim of an offense under sections 566.030 [rape], 566.060 [sodomy], 566.100 [incest], 568.020 [endangering the welfare of a child], 568.050, 568.060 [abuse of a child], 568.080 [child used in sexual performance], and 568.090 [promoting sexual performance by a child] . . . shall be considered a competent witness and shall be allowed to testify without qualification in any judicial proceeding involving such alleged offense. The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony.

Id. See also Montana: MONT. R. EVID. 601 (no age trigger); Ohio: OHIO REV. CODE ANN. § 2317.01 (Page 1981) ("All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impression of the facts and transactions respecting which they are examined, or of relating them truly."); Ohio R. Evid. 601 ("Every person is competent to be a witness except: (A) Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly . . ."); Texas: TEX. CRIM. PROC. CODE ANN. § 38.06 (Vernon 1979) ("[All persons competent except] [c]hildren or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath."); Utah: UTAH CODE ANN. § 78-24-2 (Supp. 1985) ("Who may not be witnesses . . . (2) Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.") (*But see* UTAH CODE ANN. § 76-5-410 (Supp. 1985): "[A] child victim of sexual abuse, under the age of ten, shall be considered a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall be permitted to determine the weight and credibility to be given the testimony."); Vermont: VT. R. EVID. 601(b) (no age trigger); Washington: WASH. REV. CODE ANN. § 5.60.050 (1963) (age trigger).

43. Rule 17 of the 1953 Uniform Rules of Evidence states:

Disqualification of Witness. Interpreters. A person is disqualified to be a witness if the judge finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all of the provisions of these rules relating to witnesses.

ical of this category. It reads:

A person is competent to be a witness unless the court finds that (1) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the court and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth.⁴⁴

IV. APPLICATION OF THE DIFFERENT STATUTORY SCHEMES

A. *The Substantive Impact*

The issue of a child's competency receives different treatment in different jurisdictions. In one jurisdiction, the courts treat the child's ability to receive accurate impressions of fact as merely indicating the credibility of the witness. In another jurisdiction, the same ability determines the child's competency to be a witness. Thus, the inconsistency is more significant than having the same child found competent by one judge and incompetent by another;⁴⁵ the child may be competent in one state and incompetent in another.

Different rules of laws reflect differing state policies. When the issue is whether the child victim of sexual abuse is competent to testify against the alleged perpetrator, however, the inconsistency in the statutes is too important to be ignored. The statutes must be examined in light of the state policies behind the statutes. Some states have complex competency requirements to enforce a public policy of protecting the defendant's right to a fair trial. In examining the statutes, one should ask whether the very strict competency requirements are broader than necessary to achieve their goal. Some states have lenient competency statutes that appear to waive competency requirements for child victims in sexual abuse cases. These statutes further the state public policy of convicting all guilty parties. Do these lenient statutes achieve their goal, or are the statutes being abused and used to undermine our system of justice?

If the function of the competency requirement is to ensure that only relevant evidence is presented to the jury, then overly

Note, *The Problem of the Child Witness*, 10 Wyo. L.J. 214, 219 (1956). The 1953 Uniform Rule in turn was based on Rule 101 of the American Law Institute's 1942 Model Code of Evidence. MODEL CODE OF EVIDENCE Rule 101 (1942).

44. ALASKA R. EVID. 601.

45. See *supra* note 8 and accompanying text.

strict competency statutes may operate to prevent admission of relevant evidence.⁴⁶ Are states with liberal competency requirements presenting irrelevant evidence to their jurors? Are states with stricter requirements keeping potentially relevant evidence from their jurors? This is not a constitutional requirement, such as the Miranda rule, which uniformly disqualifies acknowledged relevant information because of the unconstitutional method by which the evidence was acquired.⁴⁷ The existence in some states of overly broad competency statutes causes evidence to be inadmissible in one state, but relevant and admissible in another.

An examination of case law applying the different statutes illustrates this problem. The Wyoming rule of evidence on competency can be placed in the "every person is competent except as provided otherwise in the rules of evidence" category.⁴⁸ This means that Wyoming follows the Federal Rules' and the Uniform Rules' approach to competency. In *Larsen v. State*,⁴⁹ the Supreme Court of Wyoming formulated Wyoming's requirement under the rule as follows: "The general principle is that a person is competent if he has a sufficient understanding to receive, remember, and narrate impressions and is sensible to the obligations of the oath."⁵⁰ In *Larsen*, the defendant was convicted of taking indecent liberties with his three and one-half-year-old son.⁵¹ The child was five years old at the time of trial and the trial court found the youngster competent to testify.⁵² The *Larsen* court found the trial court did not abuse its discretion in finding the child was competent because the judge had inquired about the child's knowledge, memory, and awareness of telling the truth.⁵³

In contrast to the standards utilized in Wyoming, Maine has a rule of evidence which puts it in the "everyone is competent who is capable of being understood by the jury and understands the obligation to tell the truth" category.⁵⁴ In *State v. Pinkham*,⁵⁵ the Su-

46. See *supra* notes 27-30 and accompanying text.

47. Nor is this the situation where relevant evidence is not admitted for policy reasons as may be the case with prior bad acts or prior crimes testimony. See Comment, *supra* p. 217 (*Other Crimes Evidence to Prove the Corpus Delicti of a Sexual Offense*, 40 U. MIAMI L. REV. 217 (1985)).

48. See *supra* notes 39-40 and accompanying text.

49. 686 P.2d 583 (Wyo. 1984).

50. *Id.* at 585 (citing 81 AM. JUR. 2d *Witnesses* § 69).

51. *Larsen*, 686 P.2d at 584.

52. *Id.*

53. *Id.* at 586.

54. ME. R. EVID. 601.

55. 411 A.2d 1021 (Me. 1980).

preme Court of Maine reviewed a trial court finding that an eight-year-old witness to criminal threatening was competent to testify. The reviewing court stated that the child's ability to record, recollect, and recount should be part of the jury's assessment of the the child's testimony but should not affect the child's competency to testify:

The child need only be able to express herself "so as to be understood by the judge and jury." Whether he can "receive accurate impressions of facts," "recollect them correctly" and "relate a true version of the impressions received," are matters going to the credibility and weight of the testimony but not to her competency to be a witness.⁵⁶

Thus, in two jurisdictions, the highest state courts have treated the same characteristics (ability to receive accurate impressions of facts and ability to relate facts truthfully) differently. In Wyoming, the court used these characteristics to determine the competency of the child witness. In Maine, the court used the same characteristics to determine not the competency of the child, but credibility of the child. The Maine child in *Pinkham*, may not have passed the Wyoming competency requirements.

This disparate treatment is also reflected in states which have developed competency requirements solely by case law.⁵⁷ *In re Gerald*⁵⁸ sets forth the Supreme Court of Rhode Island's version of the factors to be considered in determining the competency of a child witness. The court said the child must be able to: "(1) observe, (2) recollect, (3) communicate (a capacity to understand questions and to furnish intelligent answers), and (4) appreciate the necessity of telling the truth."⁵⁹ The court in *Gerald* ultimately decided that the five-year-old sexual abuse victim was competent to testify and that the lower court did not abuse its discretion.⁶⁰

The majority of the courts in this country grant the trial judge discretion in testing the competency of a young witness.⁶¹ This would appear to be the reason that far more cases sustain than reverse a competency determination of a lower court.⁶²

56. *Id.* at 1023.

57. *See supra* note 31.

58. ____ R.I.____, 471 A.2d 219 (1984).

59. *Id.* at ____, 471 A.2d at 221.

60. *Id.*

61. *See generally* Note, *Evidence*, 4 AM. J. TRIAL ADVOC. 455, 468 n.112 (1980) (citing cases).

62. *See infra* note 178. Very few cases have reversed a trial court's finding of incompe-

The appellate case law, however, is not where the statutes have their strongest impact. The strongest impact is at the trial level, when a prosecutor is faced with a strict statute and a four-year-old witness. Should the prosecutor attempt to put the child on the stand despite the chance that the judge will find the child incompetent? A finding of incompetency could very well destroy the state's case. Without the child witness, the prosecutor would probably plea bargain with the accused to ensure some type of conviction.⁶³ In the alternative, as happened in *State v. Ryan*,⁶⁴ a recent Washington case, the prosecutor might stipulate that the child is "statutorily incompetent" and never bring the child before the court for a competency determination.⁶⁵

In *Ryan*, the prosecutor had hearsay statements of two victims of sexual abuse. One victim was four and one-half years old and the other was five. A new Washington statute,⁶⁶ in effect at the time of the trial, was supposed to make the hearsay statements admissible. The prosecutor probably believed that he would save the children the trauma⁶⁷ of testifying while simultaneously avoiding a finding of incompetency.⁶⁸ The defense possibly could have

tency. See, e.g., *Pace v. State*, 157 Ga. App. 442, 278 S.E.2d 90 (1981) (eight-year-old victim of molestation incompetent to testify based on review of the competency hearing and the entire testimony); *Lanoue v. State*, 99 Nev. 305, 661 P.2d 874 (1983) (five-year-old witness to ten-year-old sister's rape held incompetent to testify on a review of the competency hearing and the entire testimony).

63. See *supra* note 5 and accompanying text.

64. 103 Wash. 2d 165, ___, 691 P.2d 197, 200 (1984).

65. *Id.*

66. WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1984) (enacted in 1982).

67. See generally Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969) (discussing the trauma a child victim of sexual abuse faces as a witness).

68. The Supreme Court of Washington also indicated that if the trial court found that the children were incompetent at the time they made the hearsay statements, the statements would not be admitted. *Ryan*, 103 Wash. 2d at ___, 691 P.2d at 203. The court indicated that res gestae utterances would be an exception to this rule. *Id.* at ___, 691 P.2d at 203-04.

The Washington decision is not as damaging as it appears because even if a court finds children incompetent when they made the statements, the court may find them competent at the time of trial and thus competent to testify. "The date of competency or incompetency of a witness as a witness is fixed as of the time the witness is offered and not the time when the facts testified to occurred." *Knab v. Alden's Irving Park, Inc.*, 49 Ill. App. 2d 371, 199 N.E.2d 815 (1964); accord *State v. Garner*, 116 Ariz. 443, 569 P.2d 1341 (1977); *Arnold v. State*, 167 Ga. App. 720, 307 S.E.2d 526 (1983); *Cross v. Commonwealth*, 195 Va. 62, 77 S.E.2d 447 (1953).

The court in *Ryan* determined that the hearsay statements were unreliable because the children were incompetent at the time they made the hearsay statements. It is not clear whether the hearsay statements would have been admissible if the children had been pro-

used a finding of incompetency to discredit the hearsay statements. Under the stipulation, the hearsay statements were admitted because the witnesses were "unavailable." The Supreme Court of Washington reversed the defendant's conviction holding that introduction of the hearsay statements violated the defendant's right of confrontation under the sixth amendment.⁶⁹ The court found that under *Ohio v. Roberts*,⁷⁰ "stipulated incompetency based on an erroneous understanding of statutory incompetency was too un-

duced at trial and if the judge had found them competent. One commentator has suggested that "[t]he standard for competency as a witness at the event itself may be lower than the standard for competency to testify." Melton, *Children's Competency to Testify*, 5 LAW HUM. BEHAV. 73, 75 n.10 (1981).

Indiana has a statute similar to the Washington statute. IND. CODE ANN. § 35-37-4-6(c)(2)(B) (Burns Supp. 1984). It also allows admission of hearsay statements of child victims of sexual abuse. The Indiana statute, however, specifically delineates a finding of incompetency (due to failure to understand the obligation of the oath) as one of the grounds of unavailability under which the court may still admit the hearsay statement.

A Kansas appellate court addressed the issue of the admissibility of hearsay statements of witnesses found to be incompetent after a competency hearing in *State v. Pendelton*, 10 Kan. App. 2d 26, 690 P.2d 959 (1984). In *Pendelton*, the defendant was convicted of aggravated indecent solicitation of a child. *Id.* at —, 690 P.2d at 961. At trial, the judge held a preliminary hearing to determine the competency of a seven-year-old. *Id.* The trial court found the child was incompetent because "it appear[ed] that on inquiry he [could not] relate in a logical progression the sequence of events, or, for that matter, the factual situation that [gave] rise to the issues of this particular lawsuit." *Id.* Nevertheless, the court permitted the child's mother to testify as to the child's hearsay statements under a new statutory hearsay exception, KAN. STAT. ANN. 60-460(dd) (1983) (enacted in 1982). The defendant contended this violated his right of confrontation. The *Pendelton* court held:

Where a statement is made by a child victim to his parent shortly after the occurrence of the crime, when the victim is still exhibiting signs of being upset by the occurrence, at the first opportunity for such communication; the statement is corroborated by other testimony at trial; and the trial judge has an opportunity to evaluate the trustworthiness of the child victim in a hearing to determine his unavailability as a witness, we cannot find that the admission of the statement violates any of [defendant's] constitutional rights.

State v. Pendelton, 10 Kan. App. 2d 26, —, 690 P.2d 959, 965 (1984). See also *People v. Stritzinger*, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983) (Admission of child victim's preliminary hearing testimony violated defendant's sixth amendment right to confrontation where the only evidence concerning unavailability of the witness was the child's mother's lay testimony that the child suffered from emotional difficulties. The court indicated that expert testimony as to the child's emotional difficulties may have been sufficient.).

For additional discussion of this issue, see Graham, *supra* note 28 and Note, *supra* note 27, at 817-19. See generally Skoler, *New Hearsay Exceptions for Child's Statement of Sexual Abuse*, 18 J. MAR. L. REV. 1 (1984); Comment, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983); Comment, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of The Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L. REV. 387 (1984).

69. Ryan, 103 Wash. 2d at —, 691 P.2d at 203.

70. 448 U.S. 56 (1980).

certain a basis to find unavailability."⁷¹ Thus the admission of the hearsay statement violated the defendant's confrontation rights when hearsay was admitted.⁷²

The problems with application of the substantive competency requirements at the appellate level are matched at the trial level by the problems of prosecutors' awareness and understanding of the strict competency requirements. Every day prosecutors make decisions that are never subject to review.⁷³ The Washington statute⁷⁴ on competency fits the strictest category ("every person is competent who is capable of being understood by the jury and understands the obligation to tell the truth"). It would be reasonable to presume that this standard influenced the prosecutor's decision not to produce the children for the competency hearing.

B. Procedural Issues

1. THE VOIR DIRE

Some of the procedural issues raised by the competency requirement arise in relation to voir dire. It is generally accepted that the date of competency or incompetency of a witness is fixed when the witness is offered, and not when the facts, which were testified to, occurred.⁷⁵ Thus, one appellate court found that the lower court abused its discretion in finding a witness competent,

71. *Ryan*, 103 Wash. 2d at ___, 691 P.2d at 203.

72. *Ryan*, 103 Wash. 2d at ___, 691 P.2d at 203. See also *State v. Campbell*, 299 Or. 633, 705 P.2d 694 (1985) (Confrontation principles require, as a precondition for admission of hearsay evidence, that the trial court ascertain for itself that the declarant is in fact unavailable.). But see *State v. Myatt*, 237 Kan. 17, ___, 697 P.2d 836, 843 (1985) ("The first prong of the *Roberts* test for admissibility of out-of-court statements of a witness who does not testify is whether that witness is unavailable. In this case, both parties stipulated at trial the child was disqualified as a witness. Therefore, the first prong of *Roberts* was satisfied." (emphasis added)).

73. *Berliner & Barbieri*, *supra* note 25, at 127, 130 (noting the heart of a sexual abuse case is the child's testimony and prosecutors who fear that a child will not convince the jury are often reluctant to prosecute criminal child sexual abuse cases).

74. WASH. REV. CODE ANN. § 5.60.050 (1963).

75. *Knab v. Alden's Irving Park, Inc.*, 49 Ill. App. 2d 371, 199 N.E.2d 815 (1964). Accord *State v. McIntosh*, 10 FLW 2110 (Fla. 4th DCA Sept. 11, 1985) (trial court can make de novo determination of child's competency at trial despite finding of incompetency at the pretrial hearing); *State v. Butcher*, 270 S.E.2d 156 (W. Va. 1980); see also *supra* note 68. But see Comment, *supra* note 23, at 105:

Of course, in all cases the court should be satisfied that the child was competent as a witness at the time the incident litigated took place. Thus it is clearly insufficient as a showing of competence that an eight year old child can testify accurately to contemporaneous happenings when the matter involved happened several years previously.

but the reviewing court stated explicitly that on remand the trial court could find the child competent.⁷⁶ Typically, the judge conducts a voir dire outside the presence of the jury at which time the child is questioned in an effort to determine the competency of the child to testify at the time of trial.⁷⁷ The judge usually limits the questions to issues unrelated to the trial controversy: "What is your name?" "Where do you go to school?" "How old are you?" "Do you know who I am?" "Do you know what happens to anyone telling a lie?"⁷⁸

76. Where an appeal takes time, the child grows and develops during that time period, thus increasing the likelihood the court will find the child competent at a retrial. *Pace v. State*, 157 Ga. App. 442, 278 S.E.2d 90 (1981). The court said:

The record in the present case shows that the child was eight years of age when the trial was had, and it is probable that on another trial she may appear to have sufficient intelligence and to have been the subject of such training as to understand the responsibilities attaching to a witness in a case where human life is involved.

Id. at 443, 278 S.E.2d at 92.

77. Comment, *supra* note 4, at 1378. *But see State v. Brigandi*, 186 Conn. 521, 534, 442 A.2d 927, 934 (1982) ("In Connecticut, the examination to determine the competency of a witness is usually conducted by counsel under direction of the court, except insofar as the court may find it advisable to intervene."). Of course, with Connecticut's newly enacted statute, the child victim of assault, sexual assault, or abuse is deemed competent without prior qualification. See *Testimony of Victims of Child Abuse*, Pub. Act 85-587 § 2, 1985 Conn. Legis. Serv. 465 (West).

78. *Pace v. State*, 157 Ga. App. 442, 443, 278 S.E.2d 90, 91 (1981); Stafford, *supra* note 23, at 312; Note, *The Competency of Children as Witnesses*, 39 Va. L. Rev. 358, 362 (1953); Comment, *supra* note 4, at 1382. The questions asked of the child need not, and should not be complicated or tricky. In practice, the questions asked are simple and direct. The following are examples of questions actually asked:

Q. . . . If I were to say that I'm wearing a red jacket, would that be a lie or would that be the truth?

A. A lie.

Q. And why would it be a lie?

A. Because you're wearing a brown jacket.

Q. Okay. If I were to say that I'm wearing a tan shirt, would that be a lie or would that be the truth?

A. The truth.

Q. And why?

A. Because you're wearing a tan shirt.

In re A.H.B., 491 A.2d 490, 493 (D.C. 1985) (two child robbery victims competent to testify) (omissions in original).

Q. Now, why don't you tell the Judge your name.

A. J.K.G.

Q. . . . And how old are you?

A. Five.

Q. Okay. Now do you know the difference between telling the truth and not telling the truth?

A. Yeah.

Q. Okay. If you were here like you are, and you told the Judge who's sitting up

Generally it is the judge who presents the questions to the child during voir dire. In *State v. Weisenstein*,⁷⁹ the defendant contended that the trial court erred in refusing to allow him to examine the child sexual abuse victim during the competency hearing and in refusing to allow his attorney to present the five-year-old with a hypothetical fact pattern testing the child's ability to observe, recollect, communicate, and express an understanding of moral distinctions.⁸⁰ The *Weisenstein* court held that under the South Dakota rules of evidence, the trial judge was responsible for determining the competency of the witness and that the judge did not abuse his discretion.⁸¹

Another procedural issue raised by the competency requirement concerns who may testify at the voir dire. The Supreme

there—do you see the Judge up there? Alright [sic], you told the Judge I was wearing a bright red suit, okay, today that I was wearing a bright red suit, would that be the truth or would that be not the truth?

A. It would not.

Q. Okay, because I'm not wearing a red suit am I?

A. No.

Q. Do you understand that you have to tell the truth when you are asked questions when you sit in the witness chair?

A. (no response)

Q. Do you understand that?

A. Yes.

Q. And do you intend on, only telling the Judge the truth?

A. Yes.

Q. Okay.

Q. Josie, do you know what the difference is between telling the truth and a lie?

A. Yes.

Q. Do you know what happens to people that tell lies?

A. No.

Jones v. State, ____ Ind. ____, ____, 464 N.E.2d 1283, 1284-85 (1984) (five-year-old child victim of sexual abuse competent to testify) (omissions in original).

During voir dire, if the judge inquires into the substance of the child's testimony in court, the defendant's sixth amendment right to confrontation may be affected. Comment, *supra* note 4, at 1391-92. Although not always, some judges refuse to allow the defendant to be present while the judge conducts voir dire. See, e.g., *Moll v. State*, 351 N.W.2d 639 (Minn. App. Ct. 1984). For cases concluding there was no violation of defendant's confrontation rights, see *State v. Ritchy*, 107 Ariz. 552, 490 P.2d 558 (1971); *People v. Breitweiser*, 38 Ill. App. 3d 1066, 349 N.E.2d 454 (1976); *Moll v. State*, 351 N.W.2d 639 (Minn. App. Ct. 1984); *State v. Taylor*, 704 P.2d 443 (N.M. Ct. App. 1985). See also Comment, *supra* note 4, at 1391.

Idaho recently amended its competency statute to statutorily mandate the defendant's right to be present during voir dire. IDAHO CODE § 9-202 (1985) (amended by 1985 Idaho Sess. Laws ch. 215, § 1, at 524).

79. ____ S.D. ____, 367 N.W.2d 201 (1985).

80. *Id.* at ____, 367 N.W.2d at 204.

81. *Id.* at ____, 367 N.W.2d at 205.

Court of West Virginia, in *Burdette v. Lobban*,⁸² indicated that use of a neutral expert witness could be helpful in determining the competency of a child sexual assault victim when the child is testifying against one of its parents.⁸³ The problem with allowing an expert witness to make such a determination is the likelihood that for each expert that finds the child competent, there will be another who finds the child incompetent.⁸⁴ It would be preferable that judges use competency standards not requiring the use of an expert. For example, a judge could determine, without expert help, whether a child can understand the difference between truth and falsity by the child's response to a question: "If I told you I was your father, would I be telling the truth?"

Addressing another issue, some authorities have held that the competency examination should take place in the presence of the jury.⁸⁵ They contend that the child's understanding of the nature of the oath and his capacity to comprehend the distinction between right and wrong, as disclosed by his preliminary hearing, are proper matters to be considered in determining the weight to be given to the testimony by the trier of fact.⁸⁶ This approach is similar to the stand taken in states which have eliminated the competency requirement for child victims of sexual abuse.⁸⁷ In those states, the jurors listen to the child and determine for themselves whether the child's testimony is credible.

Courts do not always require a formal competency hearing. In *People v. Garcia*,⁸⁸ the trial court did not conduct a formal competency hearing, but did ask the ten-year-old sexual abuse victim certain questions about her age, name, school, and about the difference between telling a lie and telling the truth.⁸⁹ On appeal, the Supreme Court of Illinois held that "[t]here is no rigid formula which is applicable to a determination of competency, and the record reflects that the trial court was satisfied by [the victim's] responses to his questions that she was competent to testify."⁹⁰

82. *Burdette v. Lobann*, 323 S.E.2d 601 (W. Va. 1984).

83. *Id.* at 603.

84. *See, e.g., Roe, supra* p. 95 (*Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985)).

85. For a discussion of the position that the competency hearing should take place before the jury, see *Stafford, supra* note 23, at 312.

86. *Id.*

87. *See infra* note 136 and accompanying text.

88. 97 Ill. 2d 58, 454 N.E.2d 274 (1983), *cert. denied*, 104 S. Ct. 3555 (1984).

89. *Id.* at 74-75, 454 N.E.2d at 280.

90. *Id.* at 75, 454 N.E.2d at 280.

2. THE OATH

a. Jurisdictions Not Patterned After the Federal Rule

Statutory provisions also influence the type of questions the judge asks. In jurisdictions which require only that the child understand the obligation of an oath,⁹¹ the judge concentrates on inquiries into the child's understanding of the concept of truth. Some states specifically require that the court itself be satisfied that the child understands the obligation to testify truthfully under oath.⁹² Courts in states which follow the 1953 Uniform Rules of Evidence⁹³ also inquire into the child's understanding of truth.

In the past, a child (or adult) who did not have sufficient religious training could not take the oath and therefore would be barred from testifying.⁹⁴ The premise was that unless a witness believed in heavenly reprisal for false statement, he or she could not be trusted to speak the truth.⁹⁵ Typically, a general course of religious studies was required; the religious instruction could not be given exclusively for the purpose of trial.⁹⁶ Not surprisingly, this approach has changed.⁹⁷

Usually, the child need not understand the legal nature of the oath or the formality of taking the oath, as long as the child has an "adequate sense of the impropriety of falsehood."⁹⁸ Florida's statute provides this standard: "In the court's discretion, a child may testify without taking the oath if the court determines the child understands the duty to tell the truth, *or the child understands the duty not to lie.*"⁹⁹

91. See *supra* notes 36-37.

92. See, e.g., LA. REV. STAT. ANN. § 15-469 (West 1981); MICH. R. EVID. 601; N.Y. CRIM. PROC. LAW § 60.20 (Consol. 1979).

93. See *supra* note 43 and accompanying text.

94. Goodman, *supra* note 8, at 13.

95. *Id.*

96. *Id.*

97. Compare *State v. Green*, 267 S.C. 599, 606, 230 S.E.2d 618, 621 (1976) ("[I]t is not essential that a challenged witness state a belief in God or His providence before being allowed to testify.") with *State v. Abercrombie*, 130 S.C. 358, 126 S.E. 142 (1925) (eight-year-old incompetent to testify because he stated he had never heard of God).

98. Stafford, *supra* note 23, at 318. Accord *State v. Smith*, 679 S.W.2d 899, 901 (Mo. App. 1984) (citing *State v. Smith*, 641 S.W.2d 463, 466 (Mo. App. 1982)) ("For an infant to be competent to testify, he need not know the meaning of an oath as long as he understands the difference between truth and falsity.").

99. Judicial Proceedings Involving Children, ch. 85-53, § 3, 1985 Fla. Sess. Law Serv. 122, 125 (West) (to be codified at FLA. STAT. § 90.605(2)). The italicized portion was recently added. *Id.* The purpose of this adjustment to the oath requirement is readily apparent when one considers the possibility that children are frequently taught to believe in fictional char-

New York, an oath jurisdiction, requires that the court itself find that witnesses under twelve understand the nature of an oath.¹⁰⁰ The statute, however, provides alternatives. If the court is

acters such as Santa Claus and the Easter Bunny. Technically, if a child believes that Santa Claus exists, then the child lacks an understanding of the difference between truth and falsity. When asked if Santa Claus is real, a child who answers "yes" may nevertheless understand a duty not to lie. But a child can still understand the obligation to tell the truth, even if the child believes in a false idea. Inquiries along these lines are more properly made on cross-examination and should affect the credibility of the child's testimony and not the competency of the child to testify in the first place. Professor Michael H. Graham suggests that this amendment is unwise:

Recommendations have been made to permit a child to testify without taking an oath or giving an affirmation that he or she will testify truthfully, *See* FED. R. EVID. 603. The apparent purpose of the recommendation is to avoid a judicial determination of whether the child knows the difference between the truth and a lie or fantasy. Query: Should a witness who understands the difference between the truth and a lie or fantasy be permitted to testify if the witness doesn't also understand the obligation to tell the truth? A "No" answer is suggested . . . If the child understands the duty to tell the truth, the child can most certainly take an oath or give an affirmation. Moreover, the court has to decide whether the child knows the difference between the truth and a lie as part of the process of determining whether the child understands the duty to tell the truth or not to lie. The wisdom of the Florida statute is certainly subject to challenge.

Graham, *supra* note 28, at 76 n. 131.

Additionally, some courts have held that the child need not know the consequences of lying. In *Hill v. State*, the Supreme Court of Georgia held that it was "not necessary that a child demonstrate his knowledge of the penalties for perjury in order for the trial court to rule him competent to testify." 251 Ga. 430, 431, 306 S.E.2d 653, 654 (1983). *Accord* *State v. Rodriguez*, 180 Conn. 382, 429 A.2d 919 (1980) (child need not be aware of sanctions for perjury as the consequence of not telling the truth). This is particularly relevant because, in the past, defendants have raised the defense that because criminal perjury statutes do not apply to children under certain age limits, children should not be competent to give sworn testimony. *See* Note, *supra* note 78, at 368-69. This argument becomes moot if the child need not know the consequences of perjury.

100. N.Y. CRIM. PROC. LAW § 60.20.2 (Consol. 1979). The wording of the New York statute after its amendment in 1975 is less than clear. Prior to 1975, the statute read:

A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of the oath. If the court is not so satisfied, such child may never the less be permitted to give unsworn evidence if the court is satisfied that he possesses sufficient intelligence and capacity to justify the reception thereof.

Act of May 20, 1970, ch. 996, 1970 N.Y. Laws 3117, 3137. In 1975, the legislature amended the statute to permit witnesses over the age of twelve to testify if they were suffering from a mental disease or defect, provided that the judge was satisfied that the witness possessed sufficient intelligence and capacity to justify the reception:

A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of the oath. If the court is not so satisfied, such child or such witness over the age of twelve years old who cannot, as a result of mental disease or defect, understand the nature of an oath may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof.

not satisfied that the child under twelve understands the nature of the oath, but nevertheless wants to permit the child to testify, the court can allow the child to give unsworn evidence if the court is satisfied that the child possesses sufficient intelligence and capacity to justify the admission.¹⁰¹ The statute also provides an important safeguard—the “defendant may not be convicted of an offense solely upon unsworn evidence.”¹⁰² New York’s approach to the oath requirement is a model for those states which require that the judge personally be satisfied that the child understands the obligation of the oath. The New York approach, however, is not needed in jurisdictions which follow the federal rules approach for reasons noted in the next section.

Understanding the difference between truth and falsity can be a philosophical problem. In practice, the judge may ask the child a question such as “Jenny, if I told someone your name was Mary, would I be telling the truth?” The child would probably answer “no” and the judge would then find her able to understand the difference between truth and falsity. Next, the judge might ask the child to affirm that she would tell only the truth in the courtroom. Not all judges, however, will ask such simple questions. There is much room for discrepancy. To compensate for the discrepancy, if the judge finds the child does not understand the obligation of the oath, the child should be allowed to testify anyway without being sworn in, provided the judge finds the child can record, recollect, and narrate.

The judge should tell the jury that the child has not been sworn in, a factor the jury should consider in assessing the credibility of the child. The court should make reference to this fact in the jury instructions, but should not overemphasize it. The instruction might state that because of the child’s lack of development, the court has determined the child may not give *sworn* testimony, but the jury is free to attach whatever weight it deems appropriate to the child’s unsworn testimony.

Act of June 3, 1975, ch. 133, N.Y. Laws § 181 (McKinney 1975). With the amendment, the statute may appear to restrict unsworn testimony to children over twelve who because of mental defect or disease cannot understand the obligation of the oath. The history of the statute and the fact that courts have allowed children under twelve to give unsworn testimony militates against that interpretation. See, e.g., *People v. St. John*, 74 A.D.2d 85, 428 N.Y.2d 863 (1980) (no abuse of discretion for allowing six and nine-year-old to give unsworn testimony).

101. N.Y. CRIM. PROC. LAW § 60.20.2 (Consol. 1979).

102. *Id.* at § 60.20.3.

b. Jurisdictions Patterned After the Federal Rule

Under the Federal Rules of Evidence, the oath requirement should be treated completely differently than it is treated when a particular state statute requires the court itself to believe the child is competent. Federal Rules of Evidence Rule 603 provides that a witness must make an affirmation prior to testifying that he will testify truthfully.¹⁰³ The advisory committee's notes state that an "[a]ffirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. . . . 'Oath' includes affirmation. . . ."¹⁰⁴ As set forth in the rule, and in the advisory committee note, Rule 603 requires only a mechanical act, not an indepth determination that a witness understands the difference between truth and falsity.¹⁰⁵ The judge's inquiry should be based on relevancy and only marginally on moral qualifications.¹⁰⁶ The judge should only reject the testimony if the judge is convinced the testimony has no probative value and is therefore inadmissible for lack of relevancy.¹⁰⁷ Thus, the focus of the judge's inquiry under Federal Rules 401 and 403 should be whether the child's testimony should be admitted as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹⁰⁸ "All that Rule 401 requires is minimal logical relevancy; the item of evidence need not, by itself, persuade the trier of fact, or be sufficient to persuade the trier of fact, that the fact to be inferred is more probably true than not true."¹⁰⁹ Therefore, in jurisdictions which are patterned after the federal rules, the judge

103. FED. R. EVID. 603. Rule 603 states: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." *Id.*

104. FED. R. EVID. 603 advisory committee note. (citing 1 U.S.C. § 1 (1982 current version) for the proposition that oath includes affirmation).

105. According to Professor Michael H. Graham:

Neither Rule 603 or 601 imposes any requirement of moral capacity in the sense of requiring that the witness actually possess a sense of responsibility to speak the truth. Similarly no requirement of belief in God is imposed. Rule 603 adopts the position that "[t]he true purpose of the oath is not to exclude any competent witness, but merely to add a stimulus to truthfulness where ever such a stimulus is feasible."

M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 603.1, at 390-91 (1981) (citing 6 J. WIGMORE, EVIDENCE § 1827, at 413-14 (Chadbourn rev. 1976)).

106. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 603[01] (1985).

107. *Id.*

108. FED. R. EVID. 401

109. M. GRAHAM, *supra* note 19, at 11.

should only reject a child's testimony if he finds that no reasonable juror could possibly believe the child capable of telling the truth. The judge need not personally believe the child capable of telling the truth.

Usually, a witness must give the affirmation prior to testifying.¹¹⁰ In at least one case, however, the court held that no formal oath or affirmation was needed prior to testifying. In *Larsen v. State*,¹¹¹ before testifying, the court questioned the five-year-old victim of sexual abuse concerning his understanding of truth and his perception of the punishment incurred for lying. The court did not, however, administer a formal oath. After testifying, the child was asked whether he had promised to tell the truth and if he had in fact told the truth.¹¹² The court noted that technically the affirmation should have occurred before testimony, but that the child's pretestimony affirmation of his understanding of telling the truth satisfied Wyoming's requirement of an oath or affirmation before testifying.¹¹³

3. TIMING OF OBJECTIONS

Parties frequently contest the issue of *when* a defendant must object to the child's competency. The disposition of this issue depends on the particular statute involved. On one hand are the states that have an "every person is competent who can understand the oath" statute or an "every person is competent who is capable of being understood by the jury and understands the obligation to tell the truth" statute, where some of the statutes are triggered at a specific age.¹¹⁴ In *State v. Schossow*,¹¹⁵ the Supreme Court of Arizona interpreted the statute as creating a presumption of incompetency for children under the age of ten that could be overcome only by an actual hearing.¹¹⁶ In *Schossow*, the court held that the statute made a competency hearing mandatory.¹¹⁷

On the other hand, Wyoming,¹¹⁸ Wisconsin,¹¹⁹ and North Car-

110. See, e.g., FED. R. EVID. 603.

111. 686 P.2d 583 (Wyo. 1984).

112. *Id.* at 587.

113. *Id.*

114. See *supra* notes 36 and 42.

115. — *Ariz.* —, 703 P.2d 448 (1985).

116. *Id.* at —, 703 P.2d at 449.

117. *Id.* at —, 703 P.2d at 451. Nevertheless, the Supreme Court of Arizona held the trial court's failure to conduct a hearing was nonprejudicial error in the absence of any indication of incompetency in the record. *Id.* at —, 703 P.2d at 452.

118. Wyo. R. EVID. 601.

olina,¹²⁰ are "every person is competent except as provided otherwise" jurisdictions which are not triggered by age. In these states, courts have held that if the defendant fails to object to the competency of the child witness at trial, he waives the objection.¹²¹ In *State v. Robinson*,¹²² the Supreme Court of North Carolina noted that a properly made objection at trial would allow the trial judge to correct any failure to administer the oath or swear in the witness. Citing an 1885 case, the court stated that "it would be detrimental to public justice to allow a defendant to remain silent, awaiting the chances of acquittal, and, if disappointed in the result, fall back upon a reserved objection."¹²³ The North Carolina court's reasoning seems to be the most practical, even for those jurisdictions which have age-triggered statutes.

4. PROCEDURE ON REVIEW

The combination of the statutory scheme and appellate review methods can create additional problems under the competency requirement. Many states hold that upon review of the competency determination, the appellate court may review all of the child's testimony to determine its competency, not just the voir dire testimony.¹²⁴ This is an improper standard of review. Indisputably, the trial judge's decision must be given great deference and should only be overturned upon a clear showing of abuse of discretion.¹²⁵

119. Wis. Stat. § 906.01 (1975).

120. N.C. R. Evid. 601.

121. *State v. Robinson*, 310 N.C. 530, 540, 313 S.E.2d 571, 578 (1984) (failure to raise an objection to the fact the witness was not sworn in); *Love v. State*, 64 Wis. 2d 432, 439, 219 N.W.2d 294, 298 (1974); *Larsen v. State*, 686 P.2d 583, 587 (Wyo. 1984). See also *Peyton v. Strickland*, 262 S.C. 210, 203 S.E.2d 388 (1974) (failure to object to competency of eight-year-old at trial waived right to object).

122. *State v. Robinson*, 310 N.C. 530, 540, 313 S.E.2d 571, 578 (1984).

123. *Id.* (citing *State v. Gee*, 92 N.C. 756 (1885)).

124. *Pace v. State*, 157 Ga. App. 442, 278 S.E.2d 90 (1981); *State v. Smith*, 679 S.W.2d 899, 901 (Mo. Ct. App. 1984) (citing *State v. Gibson*, 623 S.W.2d 93, 98 (Mo. Ct. App. 1981)); *Lanoue v. State*, 99 Nev. 305, 307, 661 P.2d 874, 874 (1983); *Stafford*, *supra* note 23, at 308 n.39 (citing *State v. Smith*, 3 Wash. 2d 543, 101 P.2d 298 (1940); *Macale v. Lynch*, 110 Wash. 444, 188 P. 517 (1920); *State v. Bailey*, 31 Wash. 89, 71 P. 715 (1903)); *Comment*, *supra* note 23, at 102-03 nn.30-31 (citing *Yother v. State*, 167 Ark. 492, 268 S.W. 861 (1925); *Warner v. State*, 25 Ark. 447 (1869); *People v. Morcumb*, 28 Cal. App. 2d 465, 82 P.2d 714 (1938); *State v. Smith*, 261 S.W.2d 50 (Mo. 1953)).

125. See *supra* note 61 and accompanying text. A justification for reviewing the entire record is evident in *State v. Dagget*, 280 S.E.2d 545 (W. Va. 1981). In *Dagget*, the court indicated that it was the trial judge's duty to evaluate the infant's testimony before the jury and to strike the testimony if the child appears to become incompetent. *Id.* at 555. Such an approach confuses the characteristics of testimony that should go only to the credibility of the witness with characteristics of testimony that should go to the competency of the wit-

It would be illogical to allow the appellate court to review the trial judge's determination based on facts and testimony *not before the judge when the judge made the competency decision*. Once a finding of competency has been made, any further inconsistencies or vague replies should affect only the assessment of the credibility of the witness. In *People v. Edgar*,¹²⁶ the Michigan Court of Appeals supported this proposition in an analogous situation. In *Edgar*, at a preliminary hearing, the magistrate found a four-year-old competent to testify.¹²⁷ At the subsequent trial, the trial judge found that the child was incompetent and refused to allow the child to testify.¹²⁸ The court of appeals held that once a court determines the child is competent, any future indication that the child is unable to testify truthfully should reflect on the child's credibility and not on the child's competency:

Although the change in the child's competency may seem incongruous on its face, her subsequent inability to testify does not alter the magistrate's initial finding. We find that the trial court erred in reversing the magistrate's determination that Caprice was competent to testify. . . . A subsequent showing of the witness's inability to testify truthfully affects credibility, not admissibility.¹²⁹

The same reasoning should apply when the issue is the breadth of review by the appellate court. Once the trial judge has made the initial determination of competency, the ruling should stand unless the reviewing court can determine that based on the voir dire testimony alone, there was an abuse of discretion. It would seem clear that if a trial court's inquiry into a child's understanding of the obligation of the oath is insufficient it could serve as grounds for reversal. That should not be the case if, on the witness stand, the child indicates an inability to distinguish truth from falsity. Inconsistency has traditionally affected credibility,

ness. Once the court finds the child is competent, the child's subsequent inability to testify truthfully or coherently should affect only the credibility of the witness. The opposing counsel often tries to intimidate the child witness in order to discredit the witness. As a result of intimidation, the child is likely to become sullen and uncommunicative on the stand. At this point, the court should recess to allow the child to talk with his parents and compose himself before continuing to give testimony.

126. 113 Mich. App. 528, 317 N.W.2d 675 (1982).

127. *Id.* at 531, 317 N.W.2d at 677.

128. *Id.* at 532, 317 N.W.2d at 677.

129. *Id.* at 535, 317 N.W.2d at 678 (citing *People v. Cobb*, 108 Mich. App. 573, 576, 310 N.W.2d 798, 798-99 (1981)).

not competency.¹³⁰

Recently, in *Jones v. State*,¹³¹ the Supreme Court of Indiana approved the proposition that the reviewing court should be confined to the voir dire testimony. In *Jones*, a father sexually abused his five-year-old daughter.¹³² After the trial court declared the child competent, the defendant renewed his objection to her competency "on the grounds that her testimony was confused and rehearsed."¹³³ The Supreme Court of Indiana held that after the trial court has ruled on the competency of a child witness, the questions asked "cannot be used to undermine the ruling of competency."¹³⁴ It held that such questions go to the credibility of the witness and should influence the weight given to the child's testimony by the trier of fact.¹³⁵

V. LEGISLATIVE TRENDS IN THE LAW

Several states¹³⁶ have enacted statutes which deem child victims of sexual abuse competent by law. The recently enacted Connecticut statute is typical of these statutes.¹³⁷ It deems all child victims of assault, abuse, and sexual abuse competent to testify:

No witness shall be automatically adjudged incompetent to testify because of age and any child who is a victim of assault, sexual assault or abuse shall be competent to testify without prior qualification. The weight to be given the evidence and the credi-

130. See, e.g., *State v. Garner*, 116 Ariz. 443, 569 P.2d 1341 (1977) (inconsistencies in victim's testimony and his inability to place the events in question into a specific timeframe goes to the credibility of the testimony and not to competency); *State v. McKenney*, 101 Idaho 149, 150-51, 609 P.2d 1140, 1141-42 (1980) (trial court's decision that a nine-year-old's indecisiveness went to the weight as opposed to admissibility of testimony was not in error); *State v. Emery*, 434 A.2d 51, 52 (Me. 1981) (nine-year-old's "change of testimony on cross-examination would relate to credibility rather than to competency").

131. ____ Ind. ____, 464 N.E.2d 1283 (1984).

132. *Id.* at ____, 464 N.E.2d at 1284.

133. *Id.* at ____, 464 N.E.2d at 1285.

134. *Id.*

135. *Id.*

136. Colorado, Missouri, Connecticut, and Utah have special competency statutes for child abuse victims: Colorado: COLO. REV. STAT. § 13-90-106 (1973) (deeming victims of child abuse under age of ten competent); Testimony of Victims of Child Abuse, Pub. Act 85-587, § 2, 1985 Conn. Legis. Serv. 463 (West) (deeming all victims of child abuse competent); Missouri: 33 MO. ANN. STAT. § 491.060 (Vernon Supp. 1985) (deeming child victims of certain sex crimes competent by law who do not "appear incapable of receiving just impressions . . ." even though the victims are under ten years old); Utah: UTAH CODE ANN. § 76-5-410 (Supp. 1985) (deeming child victims of certain sex crimes competent by law if under ten years old).

137. Testimony of Victims of Child Abuse, Pub. Act 85-587, § 2, 1985 Conn. Legis. Serv. 463 (West).

bility of the witness shall be for the determination of the trier of fact.¹³⁸

Connecticut is a common law jurisdiction which does not have a general competency statute.¹³⁹

Colorado, Missouri, and Utah all have statutes that fall within the "everyone is competent who is capable of being understood by the jury and understands the obligation to tell the truth" category.¹⁴⁰ They are, arguably, the strictest jurisdictions. Recent amendments which deem child victims competent by law could indicate that legislatures are finding the comprehensive requirements overinclusive. Legislators may believe that the comprehensive statutes create problems in prosecuting child sexual abuse cases. On the other hand, Idaho, which is also in an "everyone is competent who is capable of being understood by the jury and understands the obligation to tell the truth" jurisdiction, recently amended its statute to be more specific.¹⁴¹ Idaho added the following directions for the judge conducting the voir dire:

At the time a child under the age of ten (10) years of age is called to testify in any court proceeding, the court shall conduct a hearing in chambers to determine whether the child qualifies as a witness under this section. In conducting such hearing the court shall take every reasonable means necessary to prevent intimidation or harassment of the child by the parties or their attorneys. The judge, rather than the parties, shall examine the child but he shall do so in the presence of the parties and he shall pose to the child any reasonable questions requested by the parties and previously submitted to the court. The judge may rephrase any questions so that the child is not intimidated.¹⁴²

The history of legislation in Minnesota reinforces the perception that not all states solve the competency problem by allowing children to testify without a predetermination of competency. Minnesota is an "everyone is competent who is capable of being understood by the jury and understands the obligation to tell the truth" jurisdiction. In 1981, it amended its competency statute so

138. *Id.*

139. See *supra* note 31.

140. See *supra* note 43 and accompanying text.

141. IDAHO CODE § 9-202 (1985) (amended by 1985 Idaho Sess. Law, ch. 215, § 1). See also Victim and Witness Protection Act, H.F. 462, § 16, 1985 Iowa Legis. Serv. 108, 114 (West) (setting forth explicit requirements for competency hearings).

142. Victim and Witness Protection Act, H.F. 462, § 16, 1985 Iowa Legis. Serv. 108, 114.

that it did not apply to children under ten in criminal proceedings for intrafamilial sex abuse and other sex crimes.¹⁴³ In 1984, however, the Minnesota Legislature again amended the statute which totally changed the thrust of the statute. Instead of rejecting the competency requirement for children under ten, as it originally did, the statute merely allowed a child to use language appropriate for a child of that age when describing the sexual contact.¹⁴⁴ The few cases that were decided under the 1981 statute do not give any clue to the motivation behind the 1984 amendment. The cases do, however, interpret the statute in a way that limits its application to children who can pass a competency "test."

The Minnesota Supreme Court applied the 1981 statute in *State v. Cermak*.¹⁴⁵ The defendant was charged with thirty counts of criminal sexual conduct.¹⁴⁶ At trial, the court permitted three child victims ages ten, six, and five, to testify.¹⁴⁷ The defendant argued that the children failed to satisfy at least one of two Minnesota competency requirements.¹⁴⁸ The court interpreted the 1981 statute as meaning that the "presumption of incompetency for children under the age of ten was inapplicable to victim testimony in cases of criminal sexual abuse so long as the child can 'describe or relate, in language appropriate for a child of that age, the events or facts respecting which the child is examined.'"¹⁴⁹

The court reviewed the in camera record of the competency

143. Act of May 28, 1981, ch. 273, § 3, 1981 Minn. Laws 1236:

This exception [to the general rule that everyone is competent to testify] does not apply to a child under ten years of age, in a criminal proceeding for intrafamilial sexual abuse as defined 1 section 7, subdivision 10, or in a criminal proceeding under sections 609.342 clause (a) [first degree criminal sexual conduct], 609.343 clause (a) [second degree criminal sexual conduct], 609.344 clause (a) [third degree criminal sexual conduct], or 609.345 clause (a) [fourth degree criminal sexual conduct], who is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined . . .

144. Act of April 26, 1984, ch. 588, § 4, 1984 Minn. Laws 1226 ("A child describing any act of sexual contact or penetration performed on or with the child by another may use language appropriate for a child of that age.") "This 1984 amendment has not changed competency hearings in practice because judges have always accepted children's language from children." Comment, *supra* note 4, at 1383 n.11.

145. — Minn. —, 350 N.W.2d 328 (1984).

146. *Id.* at —, 350 N.W.2d at 330.

147. *Id.* at —, 350 N.W.2d at 331.

148. *Id.* at —, 350 N.W.2d at 331-32. The competency test in Minnesota requires a witness "to understand the obligation of taking an oath and to be capable of correctly narrating the facts to which his or her testimony relates." *Id.* (citing *State ex rel. Dugal v. Tahas*, 278 Minn. 175, 177-78, 153 N.W.2d 232, 234 (1967)).

149. *Id.* at —, 350 N.W.2d at 332 (citing MINN. STAT. § 595.02(6) (1982)).

hearing and the trial testimony of the children and concluded that the record sustained the trial court's determination that each child (1) "understood the difference between truth and falsehood" and (2) "could narrate effectively."¹⁵⁰ Thus, despite the special statute, the court, in effect, still used the general competency test to review the trial court's decision. Without explicitly stating it was doing so, the court treated the special statute as meaning there was no presumption of incompetency. Instead, the court only applied the general competency standards once the child's lack of competency was raised as an issue.

On April 26, 1984, approximately three weeks prior to the *Cermak* decision, the Minnesota legislature amended its competency statute.¹⁵¹ The *Cermak* court should not have been influenced by the amendment because the abuse occurred prior to enactment, and the amendment was prospective. Thus it would be possible, but unlikely, that the court's treatment could have been influenced by the Minnesota Legislature.

Three weeks after *Cermak*, in *Moll v. State*,¹⁵² the Minnesota Court of Appeals applied the 1981 statute in a controversial manner. In *Moll*, the defendant was accused of sexually abusing a four-year-old-child and a six-year-old child.¹⁵³ The court permitted both children to testify.¹⁵⁴ The court stated that the standard for determining the competency of children followed the language of the special statute:

[t]he standard of competency to be tested by the court for a child witness under age ten in a sex abuse case is one "who is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined."¹⁵⁵

The defendant in *Moll* argued that the trial judge committed reversible error by failing to allow the defendant and his attorney to be present during the preliminary determinations of competency.¹⁵⁶ The appellate court ultimately concluded that a criminal defendant does not have the right to attend the in camera competency examination. The defendant's counsel, however, should be

150. *Id.*

151. *See supra* note 144.

152. ____ Minn. App. ____, 351 N.W.2d 639 (1984).

153. *Id.* at ____, 351 N.W.2d at 641.

154. *Id.* at ____, 351 N.W.2d at 642.

155. *Id.* at ____, 351 N.W.2d at 643 (citing MINN. STAT. § 595.02(6) (1982)).

156. *Id.* at ____, 351 N.W.2d at 641.

permitted to attend unless the court finds counsel's presence likely to intimidate the child or to hinder the child's ability to communicate.¹⁵⁷ The concurring opinion raised questions about the children's competency to testify based on the children's testimony during direct and cross-examination:

The four-year-old witness, C.S., was completely led during direct examination. Her testimony was self-contradictory at best, and she stated several times that she didn't remember the incident. On cross-examination, she denied defendant touched her and stated "I don't remember none of this stuff." The six-year-old, N.P., was more spontaneous on direct examination than the four-year-old. On cross-examination, however, N.P. stated she did not know what a lie was. . . . The children probably should not have been allowed to testify.¹⁵⁸

Possibly the trial court's resolution of the competency issue in this case spurred the Minnesota Legislature to amend the 1981 statute which appeared to exempt children under ten from the competency requirements.

In November of 1984, after *Moll*, the Minnesota Supreme Court reiterated its *Cermak* interpretation of the 1981 statute in *State v. Fader*.¹⁵⁹ In *Fader*, the court noted that the 1981 statute set the rule of competency for child victims of sexual abuse, but then ignored the statute and went on to review the lower court's record to see if the five-year-old sexual abuse victim were competent under the general competency standard.¹⁶⁰ Thus, despite the explicit wording of the 1981 statute, which excluded children under ten, the Supreme Court of Minnesota applied the general competency standard: "She seemed to know the difference between telling the truth and lying and seemed to be an intelligent child capable of narrating adequately the facts."¹⁶¹

Minnesota recently modified its statute, but this interpreta-

157. *Id.* at ____, 351 N.W.2d at 644-45.

158. *Id.* at ____, 351 N.W.2d at 646 (Popovich, J., concurring specially) (citations omitted). All of the concerns Judge Popovich expressed should go only to the credibility of the witnesses and not to their competency. It is the tendency to treat everything as affecting competency rather than credibility that supports the conclusion, expressed earlier, that the reviewing court should be limited to a review of the voir dire testimony alone and not the in-court testimony. As noted earlier, the opposing counsel's goal on cross-examination will always be to make the child appear inconsistent and questionable. Adult witnesses are not held incompetent when they appear inconsistent on the stand because it is understood that the trier of fact will take that into consideration.

159. ____, Minn. ____, 358 N.W.2d 42 (1984).

160. *Id.* at ____, 358 N.W.2d at 45; see *supra* note 148.

161. ____, Minn. at ____, 358 N.W.2d at 45.

tion is not moot because other states have similar statutes. Other states may also interpret their statutes to create a rebuttable presumption of competency which means the court need not conduct a competency hearing unless a defendant objects to the competency of a child witness during trial. If the defendant fails to raise the issue at trial, he waives his right to question competency. The trial court does not have a duty to raise the issue on its own. Once the issue is raised, however, the judge must conduct a competency hearing to determine the competency of the witness.

VI. PROPOSALS FOR REFORMING THE COMPETENCY REQUIREMENT

Concern with the propriety of the current judicial determination of children's competency to testify is not a new issue.¹⁶² In Wigmore's 1940 treatise on evidence,¹⁶³ he suggested eliminating any attempt to determine the competency of infants. Wigmore concluded that the most sensible option for the judge was to put the child on the stand regardless of whether the child was competent to testify. The jury would then be allowed to attach whatever significance they saw fit to the child's testimony:

A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure 'a priori' the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable. The desirability of abandoning this attempt and abolishing all grounds of mental or moral incapacity has already been noted, in dealing with mental derangement. . . . The reasons apply with equal or greater force to the testimony of children. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other hand the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its

162. See, e.g., Note, *Evidence: Witnesses: Competency of Children of Tender Years*, 18 CALIF. L. REV. 85, 86 (1929) ("The weakness of the test laid down by the court in [*The King v. Brasier*, 168 Eng. Rep. 202 (1779)] lies in the proposition that the admissibility or exclusion of the testimony turns upon the background of the individual judge."); Hutchins & Slesinger, *Some Observations on the Law of Evidence—the Competency of Witnesses*, 37 YALE L.J. 1017 (1928) (suggesting the use of the Binet test of intelligence as a means for judges to determine the competency of young children).

163. J. WIGMORE, *EVIDENCE* § 509 (1940).

story for what it may seem to be worth.¹⁶⁴

Various arguments can be set forth to support the Wigmore approach. One can argue that unlike someone who is insane the jury can recognize for itself the youth of the child and if the child has trouble communicating the jury can take that into consideration in determining the weight to accord the child's testimony.¹⁶⁵ This does not, however, address the reason for denial of admission in the first place, the lack of relevancy. If the child's testimony is irrelevant then there is a danger of misleading the jury when the court admits the testimony.

Another argument is that disparate competency rulings in different states potentially create a situation where it is easier to abuse children with impunity in one state than in another. This argument could be refuted by noting that the resolution of this problem need not be the total abolition of minimum requirements of competency, rather, states should adopt the approach of the Federal Rules of Evidence.¹⁶⁶ Parents make a similar argument, charging that competency requirements encourage sex abusers to victimize the very young child. This is a difficult argument to counter, however, if the child can communicate the information to a parent, the child should be able to communicate the information to a jury. This of course does not provide a solution for the child that lacks an understanding of the obligation to be truthful. Perhaps, the New York approach would be instructive. New York per-

164. *Id.* at § 600-01. Although, no state has adopted the Wigmore approach for all situations, see *In re Gerald*, a Rhode Island case which appears to rely on Wigmore in finding a five-year-old victim of sex abuse competent to testify. Rhode Island has a common law standard of competency. ____ R.I. ____, 471 A.2d 219, 221 (1984), See also *supra* notes 58-60 and accompanying text.

165. For an argument that the jury can decide for itself if the witness is obviously insane, see Judge Posner's opinion in *United States v. Gutman*, 725 F.2d 417, *cert. denied*, 105 S. Ct. 244 (1984). In discussing the testimony of an alleged mentally incompetent witness, Judge Posner noted that the jury had been read psychiatric reports on the witness and could decide for themselves the accuracy of the witness's testimony:

[The jury] thus knew that [the witness] had a history of serious mental illness and that his latest hospitalization had occurred under bizarre circumstances nine months before the trial. And that a mentally ill person may give testimony that is false (though he may believe it to be true) is a possibility that a jury should be capable of understanding and making appropriate allowances for. [The defendant] argues, moreover, that [the witness's] testimony was "incoherent." If so, the jury would have discounted it. *If a lunatic takes the stand and babbles gibberish, the jury will ignore it and the defendants will not be harmed.*

Id. at 420 (emphasis added).

166. See *supra* text accompanying note 29.

mits the child to testify without being sworn in if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify admission. This rule should only be used in conjunction with the New York requirement that the defendant not be convicted solely on unsworn testimony. If the jurisdiction follows the federal rules, then the proper approach is for the judge to reject the child's testimony only if he finds that no reasonable juror could believe the child capable of telling the truth.¹⁶⁷

Another argument is that under the current system, the prosecutors prep their young witnesses on the correct responses prior to giving testimony. Thus, failure of the child to be competent may only reflect poor preparation.¹⁶⁸ If all prosecutors properly prepare the witnesses, then this argument becomes moot, because only truly incompetent children will not be found competent.

An alternative solution was utilized in a recent California case, *People v. Price*.¹⁶⁹ In *Price*, the defendant was arrested for sexually abusing his four-year-old stepdaughter, but was released after being held for seventy-two hours and was told no charges were being filed.¹⁷⁰ Ten months later, the prosecutor filed a complaint. At trial, the prosecutor explained that she had delayed filing the complaint "because of the immaturity of the victim at the time of the offenses."¹⁷¹ When the prosecutor first interviewed the child, the child was very fidgety and had a very short attention span. The prosecutor decided to reinterview the child after the child developed a longer attention span and a little more maturity, hoping that the child would then remember what had occurred.¹⁷² The defendant argued that he had been denied his right to a speedy trial in violation of the sixth amendment to the United States Constitution and of the California Constitution and also argued that he had

167. See *supra* notes 103-09 and accompanying text.

168. See, e.g., Croteau, *Child Victims of Sexual Abuse: Qualifying the Child Witness Competent to Testify*, 16:1 THE PROSECUTOR 16 (1981). This article was written by an assistant commonwealth attorney for Prince William County, Virginia. She said, "Remember, the most important thing is to rehearse the competency questions before you go to court, so the child will know what to expect and you will know what questions the child can answer." *Id.* at 16. It is important to distinguish between coaching the child as to the exact responses to make on the stand and preparing the witness for the questions the judge will ask in the competency hearing. While coaching could improperly affect the child's ability to testify to actual recollections, the preparation should only teach the child what a competency hearing is like.

169. 165 Cal. App. 3d 536, 211 Cal. Rptr. 642 (1985).

170. *Id.* at 529, 211 Cal. Rptr. at 644.

171. *Id.* at 539-40, 211 Cal. Rptr. at 644-45.

172. *Id.* at 540, 211 Cal. Rptr. at 645.

been denied fourteenth amendment due process.¹⁷³ The court rejected the sixth amendment argument noting that "[t]he provisions of the Sixth Amendment contemplate a pending charge, not the mere possibility of a criminal charge."¹⁷⁴ To find a due process violation, the court held, there must be a finding of actual prejudice. Under the facts in the appeal, the defendant had not shown actual prejudice.¹⁷⁵ The defendant was not precluded, however, from trying to prove actual prejudice at trial. The court went on to note that awaiting competence in this case presented a very compelling reason for delay:

Delay to await the competence of a potential child witness is not significantly different from a delay occasioned by the temporary incompetence of an adult witness, whether due to physical or mental impairment. Were we to hold such delay prejudicial, it would provide incentive to criminals to disable their victims and to pedophiles to seek out the youngest and most vulnerable victims. The constitution does not encourage such results in the name of due process.¹⁷⁶

The *Price* solution seems like a viable alternative, especially when the child is at an age when a six month to one year delay will make a great difference in the child's mental capacity. The prosecutor would have to weigh the danger of temporarily putting a potential child abuser back on the street against the increased probability of gaining a conviction. It seems more sensible to delay the filing of formal charges while waiting for the child to become competent, than to do away with all competency requirements.

To the advocates of special competency statutes for abused children, the Minnesota interpretation of its statute could seem tragic.¹⁷⁷ If other jurisdictions follow the Minnesota interpretation of the special competency statutes for abused children as creating only a presumption of competency, the interpretation could arguably limit the effectiveness of the special statutes. Yet, the real problems that result from application of the general competency statutes are not readily apparent at the appellate level. The majority of the cases which raise this issue merely rubber stamp the trial judge's decision on competency.¹⁷⁸ It is a rare case in which the

173. *Id.* at 539, 211 Cal. Rptr. at 644.

174. *Id.* at 541, 211 Cal. Rptr. at 645.

175. *Id.* at 542, 211 Cal. Rptr. at 646-47.

176. *Id.* at 544, 211 Cal. Rptr. at 648.

177. See *supra* notes 143-61 and accompanying text.

178. See, e.g., *State v. Melendez*, 135 Ariz. 390, 661 P.2d 654 (Ct. App. 1982) (trial

trial judge is found to have abused his or her discretion.¹⁷⁹

Another potential problem arises in the application of competency statutes when the courts fail to properly distinguish between characteristics of competency and characteristics of credibility. Defendants will attempt to argue on appeal that the child's performance on the witness stand demonstrates that the child was incompetent. The defendants will point to inconsistency, testimony changes, reluctance to respond, reliance on a parent's or counsel's guidance, indecisiveness, and inability to place incidents in a proper time frame as establishing the child's incompetency. These characteristics, however, are properly indicative of the child's credibility, not competency.¹⁸⁰ The distinction between credibility and

court did not abuse its discretion in finding six-year-old sexual abuse victim competent to testify); *State v. Martin*, 189 Conn. 1, 454 A.2d 256, cert. denied, 461 U.S. 933 (1983) (trial court did not err in finding six-year-old victim competent to testify); *State v. Brigandi*, 186 Conn. 521, 442 A.2d 927 (1982) (trial court did not abuse its discretion in finding victim's ten-year-old son competent to testify); *In re A.H.B.*, 491 A.2d 490 (D.C. 1985) (trial court did not err in finding eleven-year-old robbery victim competent to testify); *Hill v. State*, 251 Ga. 430, 306 S.E.2d 653 (1983) (trial court did not err in finding eleven-year-old murder witness competent to testify); *People v. Garcia*, 97 Ill. 2d 58, 454 N.E.2d 274 (1983), cert. denied, 104 S. Ct. 3555 (1984) (no abuse of discretion in finding eleven-year-old sexual abuse victim competent to testify); *People v. Marsh*, 403 Ill. 81, 85 N.E.2d 715, cert. denied, 338 U.S. 837 (1949) (no abuse of discretion to find six-year-old murder witness competent to testify); *Jones v. State*, ___ Ind. ___, 464 N.E.2d 1283 (1984) (no abuse of discretion in finding five-year-old sexual abuse victim competent to testify); *State v. Foy*, 439 So. 2d 433 (La. 1983) (trial court did not err in finding eight-year-old competent to testify); *State v. Pinkham*, 411 A.2d 1021 (Me. 1980) (no abuse of discretion to find eight-year-old witness competent to testify); *People v. Edgar*, 113 Mich. App. 528, 317 N.W.2d 675 (1982) (no abuse of discretion in magistrates finding four-year-old competent to testify nor in the trial court's subsequent finding of incompetence); *State v. Cermak*, ___ Minn. ___, 350 N.W.2d 328 (1984) (trial court did not err in finding five, six, and ten-year-olds competent to testify); *State v. D.B.S.*, ___ Mont. ___, 700 P.2d 630 (1985) (trial court did not err in finding approximately four-year-old sexual abuse victim competent to testify); *State v. Perkins*, 121 N.H. 713, 435 A.2d 504 (1981) (trial court did not err in finding six-year-old competent to testify); *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985) (trial court did not err in finding four-year-old sexual abuse victim competent to testify); *State v. Lambert*, 276 S.C. 394, 279 S.E.2d 364 (1981) (trial court did not abuse its discretion in finding thirteen-year-old sexual abuse victim competent to testify).

179. See *supra* note 62 and accompanying text.

180. See, e.g., *State v. Garner*, 116 Ariz. 443, 568 P.2d 1341 (1977) (nine-year-old victim of sexual abuse, inconsistencies in victim's testimony, and his inability to place the events in question into a specific time frame goes to the credibility of the testimony and not to competency); *State v. McKenney*, 101 Idaho 149, 150-51, 609 P.2d 1140, 1141-42 (1980) ("The testimony of this nine year old child reveals a fair measure of embarrassment and lack of poise. With respect to the sequence of events her testimony was at times vague . . . we cannot say as a matter of law that the decision that the nine year old's indecisiveness went to weight as opposed to admissibility was in error."); *State v. Emery*, 434 A.2d 51, 52 (Me. 1981) (Defendant contended that nine-year-old victim was incompetent because on cross examination she supposedly changed her testimony. "Even if true, [the witness's] change of testimony on cross examination would relate to credibility rather than competency."); *Peo-*

competency is critical. Once the court finds the child competent, the child's subsequent inability to testify perfectly should affect only the credibility accorded to the testimony of the witness by the trier of fact. The defendant's counsel often tries to intimidate the young witness in an attempt to discredit the testimony. As a result of intimidation, the child is likely to become sullen and uncommunicative on the stand. To handle this the court should recess to allow the child to talk with parents or counsel and to regain composure before continuing to give testimony. Adult witnesses are not held incompetent when they appear inconsistent on the stand because it is understood that the trier of fact will take that into consideration.

Another example of the improper application of the competency statutes is the situation where the prosecutor decides to stipulate to the child's incompetence without a hearing.¹⁸¹ In that situation, the *Price* solution seems to be a better alternative. The prosecutor should just wait for the child to become competent and have the child qualify at a later date.¹⁸²

VII. CONCLUSION

The determination of a child's competency to testify can be critical to the outcome of the trial. There are dangers inherent in allowing a truly incompetent child to testify. It is hardly fair to the defendant to have some unknown individual, so to speak, pulling the strings of an incompetent witness. It is not necessary to totally abandon competency requirements. It would be preferable for the courts to properly apply the relevant competency criteria to each and every witness, no matter how young, carefully distinguishing

ple v. Cobb, 108 Mich. App. 573, 575-76, 310 N.W.2d 798, 799 (1981) ("The court examined the witness (who was of kindergarten age) and determined he was competent to testify notwithstanding his reluctance to respond to some of the questions. From listening to all of the boy's answers, the trial court ascertained to its own satisfaction that he would tell the truth. . . . This comports with the requirements of MRE 601. A subsequent showing of the child's inability to testify truthfully reflects on credibility, not competency."); State v. Higginbottom, 312 N.C. 760, —, 324 S.E.2d 834, 839 (1985):

Although it is true that the child several times asked her mother questions while testifying, those questions related to matters which were not pertinent to the issues of the case and included such matters as what a "Smurf" was and whether one of [the victim's] siblings was a stepsister or a real sister. . . . [w]hile this conduct may have been an appropriate subject for cross examination or a jury argument, it in no-way alters [the victim's] competence as a witness.

181. See, e.g., State v. Myatt, 237 Kan. 17, —, 697 P.2d 836, 843 (1985); State v. Ryan, 103 Wash. 2d 165, —, 691 P.2d 197, 203 (1984).

182. See *supra* notes 165-76 and accompanying text.

between testimony that reflects on credibility and testimony that reflects on competency and to use unsworn testimony, with the proper safeguards, when the child cannot understand the obligation of the oath. Children today are much brighter and receive education¹⁸³ much earlier than children did when competency statutes were first used. A Washington appellate opinion related the following testimony of a three and one-half year old victim of sexual abuse:

Q. How old are you, [B]?

A. Three and a half.

Q. Three and a half? When is your birthday?

A. June 19, 1979.

Q. What is your address?

A. 5722 Fickett Lane.

Q. Do you go to school at all?

A. Yeah.

Q. What type of school is it, or do you know?

A. Preschool.

Q. What are you learning in preschool?

A. Songs.

Q. Can you sing us a song here?

A. Yeah.

Q. Would you?

A. (Singing) "Three little monkeys jumping on a bed, one fell off and bumped his head, Mama called the doctor and the doctor said no more monkeys jumping on the bed."

When B.W. was brought back into the court in the presence of the jury, she again gave her correct name, address, age, birthdate, and, in addition, sang the same song and recited the ABC's with four mistakes.¹⁸⁴

As the above excerpt indicates, it is fairly easy for even very young children to demonstrate their competency. For this reason, if the child is truly incompetent, we should not sanction admission of the child's testimony; because that would be the same as putting a puppet on the stand.

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183. In the past, public education for all ages was the exception not the rule. *State v. Hunsaker*, 39 Wash. App. 489, 491 n.1, 693 P.2d 724, 725 n.1 (1985).

184. *Id.* at 492 n.2, 693 P.2d at 726 n.2.

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