

Legal Letters by Andrew Agatston –The Legal List 2/22/13

Determining a Child’s Competency to Testify

Case:

State v. Hutchinson

Wyoming Supreme Court 2012 WY 155

Case No. 11-0258

(decided December 13, 2013).

Facts:

The Defendant was the step-grandfather of “HAL,” who was 6 years old when she reported to her older brother that the Defendant had sexually abused her. Her brother, who was 14 years old, told their grandmother, who reported the information to law enforcement and an investigation followed.

The Defendant was charged with one count of sexual abuse of a minor in the second degree, arising out of allegations that he inappropriately touched HAL’s vagina when he was bathing her.

The day of trial, and after seating the jury, the trial judge began to address the competency of the victim. At the time of trial, HAL was 8 years old.

Neither the State nor the defense asked questions; instead the trial court questioned the child for approximately 25 minutes. Following the questioning, the court concluded, “*The information gathered here today [was] [in]sufficient to overcome the presumption that she is competent, so I’m going to allow her to testify.*”

Following a two-day trial, the Defendant was found guilty, and sentenced to serve two to eight years in the state prison system. The Defendant’s appeal focused on the trial court’s decision that the child was competent to testify.

Result: Conviction affirmed.

Discussion: There were a number of complaints raised by the Defendant. First, he argued that the trial court failed to adequately examine the child, and that HAL showed that she did not know what it meant to tell the truth. The Defendant argued that the child did not have the capacity to express her memory of the event, or understand questions about the event.

Every state has its established rules to determine witness competency. A great resource to survey all states is the National District Attorney's Association website, which seeks to post current information regarding each state's rules. Be careful, however, because they can and will change.

For example, Georgia, as of January 1, 2013, has extensively overhauled its rules of evidence. It "tweaked" the competency statute related to child witnesses, and an interesting provision for purposes of today's discussion is the newly enacted rule found at O.C.G.A. § 24-6-603(b), which states: ". . . *in all criminal proceedings in which a child was a victim or a witness to any crime, the child **shall be competent** to testify, and the child's credibility shall be determined as provided in this chapter.*" (Emphasis added.)

Bam -- that settles that in Georgia, at least as to initial competency questions. There can still be other competency issues with child witnesses that we won't get into, but the point is to have your organization's lawyer research your jurisdiction to see what the competency statutes say as to child witnesses, if at all.

Other states have detailed inquiries. For example, in researching Pennsylvania law, I ran across the following passage in a recent appellate opinion:

*"Although competency of a witness is generally presumed, Pennsylvania law requires that a child witness be examined for competency. . . As we have recently reiterated, "this Court historically has required that witnesses under the **age of fourteen** be subject to judicial inquiry into their testimonial capacity." See Commonwealth v. Ali, 10 A3d 282 (Pa. 2010). "A competency hearing of a minor witness is directed to the mental capacity of that witness to*

perceive the nature of the events about which he or she is called to testify, to understand questions about that subject matter, to communicate about the subject at issue, to recall information, to distinguish fact from fantasy, and to tell the truth." (Emphasis added by me.)

In today's Wyoming case, the Court started with Rule 601 of the Wyoming Rules of Evidence: "[E]very person is competent to be a witness except as otherwise provided in these rules."

This rule has been interpreted by the Wyoming Supreme Court as supporting the proposition that "A person is generally competent to testify if he can understand, receive, remember and narrate impressions and is sensible to the obligations of the oath them before testifying." See *Simmers v. State*, 943 P.2d 1189 (Wyo. 1997).

But here, we have a child witness whose competency has been challenged. As such, Wyoming has determined in these situations that it is the duty of the trial court to make an independent examination of the child to determine competency. As part of this, Wyoming adopted a **five-part test** to assist in determining a child's competency to testify:

- An understanding of the obligation to speak the truth on the witness stand;
- the mental capacity at the time of the occurrence concerning which the child is to testify and the ability to receive an accurate impression of it;
- a memory sufficient to retain an independent recollection of the occurrence;
- the capacity to express in words her memory of the occurrence; and
- the capacity to understand simple questions about it.

Often, we talk about the need for you Legal Eagles, when reviewing statutes or rulings of appellate courts, to try to understand the public policy behind these various rules. In the case of Wyoming's five-part test, it is a balancing approach. It considers on the one hand the goal to diminish the likelihood of false allegations. And on the other hand, the Wyoming Supreme Court, back in 1984, also recognized the importance of allowing children to testify:

"[I]t 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.”

In today’s case, the Wyoming Supreme Court undertook an analysis of the five-part test as applied to the particular case, and affirmed the Defendant’s conviction, concluding that the trial court was not in error in deciding that HAL satisfied the five-part test for witness competency.

What can we do?

Many CACs, as well as prosecutor’s offices, have victim advocate professionals. From the [National Children’s Advocacy Center](#) website, we read, “*Victim Advocates are uniquely positioned to provide information and support to children and families, who often have a host of concerns and needs during the legal process.*”

In *any* case, a child may have a “host of concerns” about going to court and testifying. A CAC’s victim advocate, in coordination with her MDT-prosecutor’s office, is imminently qualified to describe generally the trial processes and the manner which a trial is conducted within the particular jurisdiction. On the other hand, it might be the policy of the MDT that the prosecutor’s office, through its victim advocacy division, will familiarize the victim and her family with the trial processes.

But today’s case example illustrates a prime opportunity to *really* prepare the victim for the trial process. The child’s competency may well be challenged. If we’re in Wyoming, we know that there is a five-part test to determine competency.

This is not a pop quiz to spring upon a child in the courtroom -- just because the judge may or will conduct an examination prior to trial doesn’t mean the process can’t be discussed with the child well before the trial date. It is always good form for lawyers to tell their witnesses what to generally expect in the courtroom, particularly those witnesses unfamiliar with the process. This is not to urge a prosecutor to tell a child, “They’re going to conduct a competency hearing

on you to see whether you can tell the truth and understand and remember the events that you'll be talking about.”

On the other hand, a prosecutor or her assistant can be well-familiar with what Wyoming judges believe satisfy each prong of the five-part test, and ask questions of the child along the same lines.

Prong 1, for example, is an understanding of the obligation to speak the truth. In today's case, the Wyoming Supreme Court was satisfied when the child said she would tell the truth and promised not to lie because lying gets you “in trouble.” The Wyoming Supreme Court was satisfied with **Prong 2**, focusing on the child's mental abilities, when HAL was able to answer questions about her previous and current grade in school; the name of her previous teacher; and her age at the time of the abuse.

In the end, knowing the trial rules of the road is part of victim advocacy as you prepare children for the courtroom.

Best regards.

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