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How to overcome a hearsay objection when you want to testify that
"My child told me that the other parent said/did/didn't . . . ."
offered as evidence that it did/didn't occur.
[Adapted from Barker & Alexander § 803(1).1 (2000)]

1. Did you **discuss** the issue with the other parent and, if so, did the other parent admit that s/he did/didn't-do what the child said? If so, then that is **an admission by party opponent** and it is admissible in Court;

   a. Was the other parent quiet when you made the accusation? Then it might be an **admission by silence**. Did the other parent build on what you said, incorporating it into their response? ("You [also] did/didn't when our [child] was with you either.") Then they **adopted** the **admission** and their adoption of it makes it admissible in Court.

2. Does it go to what might otherwise be **a form of abuse or neglect** of the child? If so, then under *Carlos L. vs. Eva P.*, 190 AD3d 421, 2021 NY Slip. Op. 00018 (1st Dept., 1/5/21) & *Hover v. Shear*, 232 AD2d 749, 648 NYS2d 718 (3rd Dept., 1996), the statements are admissible even in a custody proceeding, under FCA § 1046(a)(vi), if corroborated by another child's *Lincoln* testimony or your observations of other consistent treatment;

3. Was the child's statement an "**excited utterance**"? If the child's statement was made while they were sufficiently startled, "dominated by nervous excitement," so that they had no capacity to reflect before speaking, then it has "indicia of reliability" and is admissible even without the child on the stand. *People v. Caviness*, 38 NY2d 227, 379 NYS2d 695 (1975). Proximity to the startling event depends on the degree of startlement and how long it lasted. For example, the statements of a seriously wounded, in pain victim even 30 minutes later was deemed admissible. *People v. Brown*, 70 NY2d 513, 522 NYS2d 837 (1987); *People v. Fratello*, 92 NY2d 565, 684 NYS2d 149 (1998). Thus, a mother was permitted to testify that when she walked in on her four-year-old daughter and the defendant, the daughter said that

the defendant had sexually molested her. *People v. Knapp*, 139 AD2d 931, 527 NYS2d 914 (4th Dept., 1988).

4. Was the child describing something that was happening to them right then or that just happened (like for example, a 9-1-1- call, or an urgent call to you for help)? If so, then it would be a **present sense impression**. There must be some corroboration of the statement and if there is (like someone else arriving after and seeing the mess the child described, or the injuries to the child), then the statement is admissible under a hearsay exception. *People v. Brown*, 80 NY2d 729, 736, 594 NYS2d 696, 700 (1993). [The declarant need not be unavailable. *People v. Buie*, 86 NY2d 501, 634 NYS2d 415 (1995).]

   a. A victim's prompt outcry is also admissible, though, perhaps not its details. Richardson, §8-615. *See, e.g.*, *People v. McDaniel*, 81 NY2d 10, 595 NYS2d 364 (1993) (no error where mother testified that child reported being bothered, attacked and molested); *People v. Fabian*, 213 AD2d 298, 625 NYS2d 4 (1st Dept. 1995) (outcries made seriatum may be admissible); *People v. Terrence*, 205 AD2d 301, 612 NYS2d 571 (1st Dept., 1994) (no error in admission of report of beating and verbal abuse). *See also People v. Rice*, 75 NY2d 929, 555NYS2d 677 (1990) (description of suspect not admissible). *But see People v. Bott*, 234 AD2d 625, 651 NYS2d 207 (3rd Dept., 1996) (mother was properly permitted to testify to statement by child that it hurt to go to the bathroom and statements as to how she got the "boo-boo," and that child said, "Kurtis won't hurt me anymore, right Mommy?"). If a complaint was made at the first suitable opportunity, a delay does not necessarily render the complaint inadmissible. *See People v. McDaniel*, *supra*, 81 NY2d 10 (child could not be expected to awaken mother in middle of night).[Gary Solomon, ch. 8.]

5. Were the statements **relevant to medical treatment** the child was getting or hoping to get? Expressions of bodily feelings and functions made to a treating physician are admissible. *Davidson v. Cornell*, 132 NY 228 (1892). Strictly, this rule of admissibility applies only to statements made to a treating doctor, but some courts have admitted even statements made to a nurse for purposes of treatment. *People v. Caccese*, 211 AD2d 976, 621 NYS2d 735 (3rd Dept., 1995). Query: will it include what a child tells a parent upon whom the child relies on to arrange medical treatment? The rule might even admit the descriptions and history of the genesis of the injury or condition being treated, *Daliendo v. Johnson*, 147 AD2d 312, 320, 543 NYS2d 987, 992 (2nd Dept., 1989), so long as it relates to the treatment necessary for the condition, but not to extraneous facts. Thus "I was raped" is relevant; "by Mr. X" is not. *Williams v. Alexander*, 309 NY 283 (1955). In one child abuse case, however, the court did permit the nurse to recount that the injured child identified a foster parent as the person who injured him. *Caccese, supra* . In a child abuse case, however, the identity of the abuser might be relevant to the child's psychological treatment and diagnosis and therefore generally admissible under the rule.

6. Was it an involuntary expression of pain (like "ouch")? Screams and groans are admissible though verbal statements of pain are not. *Roche v. Brooklyn City & Newtown R.R. Co.*, 105 NY 294 (1887).

    a. Voluntary expressions of pain or feeling ("My foot hurts," "I'm scared of [the other parent]," "I am embarrassed by . . ."), are a bit more controversial but might still be admissible under the **state of mind or physical condition** exception to the hearsay rule. *People v. Reynoso*, 73 NY2D 816, 537 NYS2d 113 (1988). It must however be an expression of current thought or feeling and not past thoughts or feelings. "I am tired" and not "I was tired when I was at [the other parent's]."

7. Was the statement an expression of future intent? **Expressions of intent** are admissible. ("I'm never going for visitation anymore!") *Mutual Life Ins. Co. v. Hillman*, 145 US 285, 12 S.Ct. 909 (1892); *People v. Malizia*, 92 AD2d 154, 460 NYS2d 23 (1st Dept., 1983), *aff'd* 62 NY2d 755, 476 NYS2d 825 (1984).