

A Child's Voice

Navigating the presentation of child witness testimony in Child Abuse and Neglect Proceedings

Child Witness Competency

Prior to preparing a child to testify, it is critical to assess whether the child is competent to do so. The test for competency of a child witness is set forth in Galindo v. United States, 630 A.2d 202, 207 (D.C. 1993). In Galindo, the court addressed a challenge to the lower court's determination that a three year old complainant was competent to testify. Id. In addressing the appellant's argument that the trial court erred in finding the child competent to testify, the reviewing court opined that a child is a competent witness if the child is able to 1) recall the events which are the subject of the testimony, 2) understand the difference between truth and falsehood, and 3) appreciate the duty to tell the truth. Id. (citing Barnes v. United States, 600 A.2d 821, 823 (D.C. 1991)). Noting that the determination of a witness's competence to testify lies within the sound discretion of the trial judge, the court held that absent a factual finding that is plainly deficient, the reviewing court will not disturb the judge's factual determination. Id. (citing Vereen v. United States, 587 A.2d 456, 457 (D.C. 1991)).

In reviewing the court's factual findings with respect to the competency of the child witness, the Galindo court highlighted that evidence of the child's ability to recount events, the child's spontaneous statements that she tells the truth and does not tell lies, coupled with her statements that it is important to tell the truth rather than lies was factually sufficient for the court to conclude the child was competent to testify at trial. See id. Although the child was not accurate in her responses to some of the judge's questions, the inaccuracy as to recounting numbers did not render the trial court's factual determination plainly deficient. Id.

The take away from Galindo, is that the child's responses to the trial judge's colloquy do not need to be perfect. However, the answers do need to demonstrate that the witness can recall events, has an understanding of the distinction between truth and falsehood, and recognizes that it is important to be truthful. The court's determination of competency of a child witness does not rest on the age of the child, rather the court is guided by the other factors set forth in Galindo and its progeny.

Child Witness Testimony in Abuse and Neglect Proceeding

As a Guardian *ad litem*, one of the first issues that arises in the context of trial preparation is whether a child will have to testify in the course of the litigation. Whether it is the parent or the government who seeks to elicit testimony from a child in a neglect trial, if an objection is raised to the testimony, the court is required to engage in a detailed balancing test to determine whether the child must be compelled to testify. For purposes of this discussion, the moving party seeking to elicit the child's testimony is identified as the parent. However, it is important to be mindful that government counsel may seek to have the child testify over the objection of the Guardian *ad litem*.

Guiding Legal Authority

The D.C. Court of Appeals has clearly addressed the question of whether the trial court can preclude the parent from calling their child to testify in the context of a child protection proceeding. In In re. Jam. J., 825 A.2d 902 (D.C. 2003), the court addressed appellant's claim that the trial court abused its discretion by precluding her from cross-examining her two children after their hearsay statements were introduced as primary evidence at trial. In re. Jam. J., 825 A.2d at 906. The court ultimately determined that in the absence of factual findings with support in the record that the probable harm to the children from having to testify substantially outweighed the parent's need for their testimony, the trial court erred by preventing the parent from calling the children to testify. Id. The reviewing court, noting that this was an issue of first impression in the context of neglect proceedings, examined controlling case law related to mechanisms for eliciting a child's opinion in the course of a termination of parental rights trial as well as legal authority from other jurisdictions. Ultimately, the reviewing court highlighted the need for the trial court to strike a balance between the fundamental liberty interest of a parent in the care and control of their child and the best interests of the child. See id. at 914-17. The Jam. J. court held that the trial court has the power to protect a child from the harmful effects of forced testimony. Id. at 916-917. The court further noted that in most cases, the court can exercise this power by imposing reasonable conditions and restrictions on the scope and conduct of the child's examination. Id. However, the court expressed that if there is demonstrated risk of serious psychological or emotional harm to the child, that cannot be mitigated by other means and substantially outweighs the parent's need for the child's testimony, the trial court has the discretion to exclude the child as a witness. Id.

The three part Jam. J. test is as follows:

- 1) Does the act of testifying create a risk of serious harm to the child?
- 2) If the child is at risk of serious harm from having to testify, can the risk be alleviated with procedural modifications?
- 3) Is the value of the child's testimony, and the parent's need for the testimony, required in the interests of justice?

See id. at 918.

In terms of providing direction as to the first prong of the balancing test set forth above, the court emphasized that a finding of serious risk of harm must be supported by concrete evidence individualized to the child. Id. at 917 (citing Johnson v. United States, 398 A.2d 354, 364 (D.C. 1979)). The finding cannot be based solely on generic concerns. Id. The court noted that although expert testimony may not always be required, it will often serve as best evidence of risk. Id.

With respect to the second prong, the Jam. J. court opined that "in neglect proceedings in particular, "[t]he judges of the trial court have broad authority to take whatever steps are necessary to protect the wellbeing of neglected and abused children." Id. at 918 (citing In re. S.L.E., 677 A.2d. at 522). The court suggested consideration of the use of technology to protect a child witness from the negative effects of testimony, referencing use of close-circuit cameras to capture the child's testimony outside the physical presence of the parents. Id. (citing Maryland v. Craig, 497 U.S. 853-854, 110 S.Ct. 3157, 111L.Ed.2d 666 (1990)).

Upon reaching the third prong of the test, the Jam. J. court directs the trial court to consider the materiality of the testimony in light of the allegations of neglect, as well as the degree to which the allegations are grounded in the out of court statements of the child. In re. Jam. J., 825 A.2d 902, 918 (D.C. 2003). The court also directs the trial court to consider the reliability of the statements and the totality of the evidence in its analysis as to the probative value of the testimony and the parent's need for it. Id. Further, the court suggests that in an appropriate case, the court may require the parent to proffer the testimony he/she hopes to elicit from the child and the basis for the proffer. Id. Failure to provide good faith proffer of relevant testimony may result in the court exercising careful control over the testimony to prevent undue trauma to the child. Id. According to the court, the trial judge can also explore alternatives to taking testimony from the child such as admitting out of court statements made by the child or stipulations. Id. Additionally, the court may be able to assess the probative value of the child's testimony by means of an informal *in camera* interview. Id.

Practical Considerations and Practice Tips

Prevailing on a Jam. J. motion requires careful planning and timely filing of pleadings. A motion in limine (also referred to specifically as a Jam. J. motion), should be filed prior to the pretrial hearing requesting an evidentiary hearing. Additionally, it is often imperative to secure a mental health professional, such as the child's treating therapist or an independent evaluator, who is able to provide an expert opinion as to harm the child would suffer if required to testify. Efforts to secure a proffer of the child's testimony should be expended, so an assessment can be made as to the probative value of the anticipated testimony and the parent's need for the testimony. It is also important to attempt to secure alternative sources for the information, as it is possible that the other parties and the court may agree to admit out of court statements or stipulated facts in lieu of the child's testimony. Lastly, it is critical to properly prepare your client for any testimony, even in an alternative setting, to minimize the child's anxiety and apprehension. Arranging a visit to the courthouse in advance of the scheduled proceeding, so that the child is familiar with the environment prior to providing testimony, may be helpful for the child.