Are a Child's Statements to a Treating Psychologist Admissible Under Hinnant?

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Suppose a child victim of sexual abuse is referred to a psychologist for counseling. In the course of treatment the child reveals details about the abuse. If the child doesn't testify at the later sex abuse trial, are the child's statements to the psychologist admissible under the Rule 803(4) hearsay exception for statements made for purposes of medical diagnosis and treatment?

In a paper here I addressed many of the challenging evidence issues that arise in child victim cases. And in a blog post here I addressed generally the Rule 803(4) hearsay exception. As noted in that post, under the *Hinnant* test two inquiries must be satisfied for evidence to be admissible under the Rule 803(4) hearsay exception: (1) that the declarant intended to make the statement in order to obtain medical diagnosis or treatment; and (2) that the declarant's statement was reasonably pertinent to medical diagnosis or treatment. State v. Hinnant, 351 N.C. 277 (2000). When analyzing the first prong, the trial court must consider all objective circumstances; relevant factors include whether an adult explained to the child the need for treatment and the importance of truthfulness, with whom, and under what circumstances, the child was speaking, the setting of the interview, and the nature of the questions.

The law is clear that if a child makes a statement to a physician during treatment the statement may be admissible under *Hinnant*. But what about statements made to a psychologist or other mental health care provider in the course of mental health treatment? *Hinnant* itself held that a child's statements to a psychologist were inadmissible under the Rule 803(4) exception. In that case the child made the statements to the psychologist about two weeks after an initial medical examination. Noting that no one explained the interview's medical purpose or the importance of being truthful, that the interview occurred in a child friendly room, and that the interviewer used leading questions, the court held that the statements failed the first prong of the *Hinnant* test. Turning to the second prong of the test, the court noted that the "nontreating" psychologist did not meet with the child until after the child's initial medical examination. *See also* State v. Waddell, 351 N.C. 413, 418 (2000) (criminal case; statements to same psychologist under nearly identical circumstances were inadmissible); State v. Bates, 140 N.C. App. 743, 746–47 (2000) (same). However, neither *Hinnant* nor the later cases establish a per se bar to admission of a child's statements to a mental health care provider under the Rule 803(4) exception. Rather, in each the evidence was held inadmissible because the *Hinnant* test wasn't satisfied on the facts of the case. And then we have *In re Mashburn,* 162 N.C. App. 386 (2004). *Mashburn* was an abuse and neglect case involving a male and a female child. At trial Dr. Harris, the children's therapist, recounted statements that the children had made to him about the abuse. This evidence was admitted under the Rule 803(4) exception. On appeal, the court easily found the children's statements admissible: "[T]he children's statements to Dr. Harris were made for the purpose of diagnosis and treatment. In fact, Dr. Harris diagnosed the children with a myriad of mental health problems, including borderline post traumatic stress syndrome and developmental delay. As a result, he recommended a course of treatment for the juveniles." *Mashburn*, 162 N.C. App. at 395. In that case, it's clear that Harris was the children's therapist; the decision describes him as such and notes that the female child saw Harris for eighteen therapy sessions. Another unpublished case supports the notion that a child's statements to a treating therapist may be admissible under the Rule 803(4) exception. *In re* N.M.H.*,* 183 N.C. App. 490 (2007) (unpublished) (abuse and neglect case; a child's statements to the child's therapist during ongoing therapy sessions were admissible; the therapist had been practicing sixteen years, her practice was confined to working with children and families, she was licensed by the state Board, and she had a Bachelor's Degree and Master's Degree in Psychology,

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and had done postgraduate study in child trauma, treatment of emotional and psychological disorders in children, and the treatment of physical abuse, sexual abuse and neglect; the child was not directed by the therapist, all of his actions and statements were spontaneous events, and his statements "went directly to [the psychologist's] diagnosis of post-traumatic stress disorder"). In fact, at least one unpublished abuse and neglect case suggests that a child's statements to a psychologist who is not engaged in ongoing treatment of the child may be admissible under the Rule 803(4) exception. *In re* I.M., 708 S.E.2d 215 (N.C. Ct. App. 2011) (unpublished) (abuse and neglect case; children's statements to a psychologist during a psychological evaluation done nine months after removal from the home were admissible; the interview was done in a "consultation room" with no toys or play items and the psychologist explained the purpose of the interview, discussed the importance of telling the truth, and took measures to ensure that the children could distinguish between truth and falsehood; through the evaluation, the psychologist formed specific clinical diagnoses for two of the children and very specific impressions regarding the third child's psychological wellbeing and recommended therapy for all three children). These cases indicate that if the *Hinnant* test is satisfied, a child's statements to a psychologist may be admissible under Rule 803(4).

One final note: If the 803(4) exception doesn't fly, there is always the residual exception. *See, e.g., Hinnant,* 351 N.C. at 291 (noting that the child's statements may be admissible under the residual exception). That, however, is the topic for another blog post.

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