

Admission of Hearsay and Assessing Reliability in Dependency Proceedings

FDAP Seminar

February 9, 2018

Louise E. Collari

Staff Attorney

Hearsay

- Generally inadmissible because inherently unreliable.
- Need to protect integrity and accuracy of the judicial fact finding process.
- Evidence Code section 1200, subdivision (a) provides that hearsay evidence is evidence that was made other than by a witness while testifying at the hearing and is offered for the truth of the matter stated.
- Subdivision (b) except as provided by law, hearsay evidence is inadmissible.

Why is hearsay inadmissible?

- It is unreliable
- Statement may be distorted or misinterpreted by witness relating it in court
- Statement not made under oath
- Person who made statement can't be observed by judge or jury to evaluate credibility
- Adverse party has not had opportunity to cross-examine
- Only admissible if meets an exception; has met test of reliability
- "Hearsay evidence alone is insufficient to satisfy the requirement of due process of law, and mere uncorroborated hearsay does not constitute substantial evidence." (Lucero L., *supra*, 22 Cal.4th at 1244-1245.)

Hearsay in dependency proceedings

- *In re Malinda S.* (1990) 51 Cal.3d 368
- *In re Carmen O.* (1994) 28 Cal.App.4th 908
- WIC section 355
- *In re Cindy L.* (1997) 17 Cal.4th 15
- *In re Lucero L.* (2000) 22 Cal.4th 1227
- *In re I.C.* (2018) (at 239 Cal.App.4th 304 but not citable due to Supreme Court review)

In re Malinda S.

- Social study exception
- Social study fits into class of legally *admissible* evidence on which a court can rely in a jurisdictional hearing even though it is hearsay and contains multiple levels of hearsay
- Due process protections
 - Each party receives a copy of the report
 - Has an opportunity to cross examine the preparer of the report
 - Has the opportunity to subpoena and examine the persons whose statements are contained in the report
 - Is permitted to introduce evidence by way of rebuttal

Justification: The social study reports “are prepared by disinterested parties in the regular course of their professional duties” and thus possess the requisite “reliability and trustworthiness” to exempt them from the hearsay rule. (*Malinda S., supra*, 51 Cal.3d at p. 377-381.)

In re Carmen O.

- Fourth District Court of Appeal
- Child dependency hearsay exception to *admit* hearsay
- Newly created rule encompassed only “out-of-court statements of very young children for the truth of the content of the statement, given the existence of factors which show reliability. (*Carmen O., supra*, 28 Cal.App.4th at p. 922.)
- Reliability factors: age and maturity of the child, nature and duration of the abuse, relationship of the child to the offender, reliability of the assertion, and the reliability of the child witness. (*Id.*, at p. 919.)

WIC section 355

- Amended in 1996 as a result of the due process concerns raised by the ruling in *Malinda S.*
- The goal of Senate Bill 86 was that “parties to dependency actions would be afforded the same procedural and due process protections that are required in other legal actions which affect the individual rights of citizens.” (Legis. Analyst, Enrolled Bill Rep., Sen. Bill No. 86 (1995-1996 Reg Sess.) May 9, 1995, p. 5.)

WIC section 355

- Subdivisions (a) and (b) determine if the evidence is admissible
- Subdivision (c) and (d) determine if the hearsay evidence alone can support jurisdictional finding
- Concerns raised by *Lucero L.*
 - Although section 355 created statutory exception to hearsay for minor under age 12, it is “not apparent...why sole reliance on such hearsay statements would not raise the same due process problems as with other hearsay.” (*Lucero L., supra*, 22 Cal.4th at p. 1245.)
 - *Lucero L.* Court did not believe that due process was protected by placing burden on parent to prove minor’s statements were product of fraud, deceit, or undue influence. Especially difficult when witness who is generally most critical to proving such a case is unavailable for cross-examination. (*Ibid.*)

WIC section 355

admissibility

- (a) At the jurisdictional hearing, the court shall first consider only the question whether the minor is a person described by Section 300. Any legally admissible evidence that is relevant to the circumstances or acts that are alleged to bring the minor within the jurisdiction of the juvenile court is admissible and may be received in evidence. Proof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300. Objections that could have been made to evidence introduced shall be deemed to have been made by a parent or guardian who is present at the hearing and unrepresented by counsel, unless the court finds that the parent or guardian has made a knowing and intelligent waiver of the right to counsel. Objections that could have been made to evidence introduced shall be deemed to have been made by an unrepresented child.
- (b) A social study prepared by the petitioning agency, and hearsay evidence contained in it, is admissible and constitutes competent evidence upon which a finding of jurisdiction pursuant to Section 300 may be based, to the extent allowed by subdivisions (c) and (d).

WIC section 355

Reliability

- (c) (1) If a party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based, unless the petitioner establishes one or more of the following exceptions:
 - (A) The hearsay evidence would be admissible in any civil or criminal proceeding under any statutory or decisional exception to the prohibition against hearsay.
 - (B) The hearsay declarant is a minor under 12 years of age who is the subject of the jurisdictional hearing. However, the hearsay statement of a minor under 12 years of age shall not be admissible if the objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence.
 - (C)
 - (D) The hearsay declarant is available for cross-examination. For purposes of this section, the court may deem a witness available for cross-examination if it determines that the witness is on telephone standby and can be present in court within a reasonable time of a request to examine the witness.
- (2) For purposes of this subdivision, an objection is timely if it identifies with reasonable specificity the disputed hearsay evidence and it gives the petitioner a reasonable period of time to meet the objection prior to a contested hearing.
- (d) This section shall not be construed to limit the right of a party to the jurisdictional hearing to subpoena a witness whose statement is contained in the social study or to introduce admissible evidence relevant to the weight of the hearsay evidence or the credibility of the hearsay declarant.

In re Cindy L.

- Supreme Court says that we need a child dependency hearsay exception
- Situation presented was truth incompetent non-testifying minor
- *Admission* of child's statement not barred if child is truth incompetent
- But needed to provide specific due process protections of parents in child dependency proceedings

Cindy L. protections

- 3 conditions for admitting out-of-court statements:
 - Court must find the time, content, and circumstances of the statement provide sufficient indicia of reliability
 - Child must be either available for cross-examination or there must be corroborating evidence
 - Other interested parties must have adequate notice of agency's intention to introduce the hearsay statement so as to contest it

(*Cindy L.*, *supra*, 17 Cal.4th at p. 29.)

Cindy L. reliability factors

- Non-exhaustive list of factors from *Idaho v. Wright* (1990) 470 U.S. 805
 - Spontaneity and consistent repetition
 - Mental state of declarant
 - Use of terminology unexpected of a child of a similar age
 - Lack of motive to fabricate

Cindy L. corroboration requirement

- Because indicia of reliability are “sufficiently ambiguous as to be ‘easily manipulable’”, corroboration required
- Meant as due process protection
- Corroboration was an “additional safeguard against the possibility of fabrication by very young witnesses whose out-of-court statements are insulated from the rigors of cross-examination.” (*Cindy L.*, *supra*, 17 Cal.4th at p. 34.)

Lucero L.

The Supreme Court addressed the amendments made to WIC section 355 in conjunction with child dependency hearsay exception of *Cindy L.*

Court considered “whether the hearsay statements contained in a social study of a minor who is the subject of a section 300 hearing, and who is deemed to be incompetent as a witness because of an inability of the time of testimony to understand the obligation to tell the truth and/or to distinguish between truth and falsehood, may be admitted and relied on under section 355, if such statements fail to measure up to the standards of reliability prescribed in *Cindy L.*” (*Lucero L., supra.*, 22 Cal.4th at 1231.)

Plurality opinion – majority of court members agree on result but no majority agreement on reason for that result.

Question of *Lucero L.*

What is required before a court can base a jurisdictional finding SOLELY on the hearsay statement of a truth incompetent, non-testifying minor

Determined that corroboration was not required by due process as set forth in *Cindy L.*
Corroboration was extra-prudential rule.

Lucero L.

Additional requirement

- Due process imposes an additional requirement for cases where the child cannot qualify to testify or differentiate between truth and falsehood and the statements are the exclusive evidence. (*Id.* at 1247-1248.)
 - Those statements may not be relied on exclusively unless the court finds that the “time, content, and circumstances of the statement provide sufficient indicia of reliability.” (*Ibid.*)
 - Indicia of reliability are required to ensure that the child’s “truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.” (*Id.*, at p. 1249.)

4-part due process test

- Courts must balance:
 1. The private interest that will be affected by the official action;
 2. The risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards;
 3. The dignity interest in informing individuals of the nature, grounds, and consequences of the action and enable them to present their side of the story before a responsible governmental official
 4. The government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. (*Lucero L., supra*, 22 Cal.4th at p. 355)

Application of 4-part test

- Court recognized that parents have an important liberty interest in maintaining custody of their child
- The risk of erroneous deprivation was great because those opposing the government in a section 300 hearing are critically deprived of their right to cross examination.
- Vital government interests in preventing child abuse and the interest in producing an accurate and just resolution of the dependency proceedings at stake.

Lucero L. and WIC section 355

- Although section 355 created a statutory exception to the hearsay rule for minors under age 12, the court thought it “not apparent...why sole reliance on such hearsay statements would not raise the same due process problems as with other hearsay.” (*Lucero L.*, *supra*, 22 Cal.4th at p. 1245.)
- Court did not believe that due process was protected by placing the burden on those opposing the government to prove the minor’s statements were the product of fraud, deceit, or undue influence...especially when witness who is generally most critical to proving such a case is unavailable for cross examination. (*Ibid.*)

Concurring opinions

- Justice Kennard – there was corroborating evidence so no need to determine reliability of the hearsay statements in the report.
- Justice Chin – Section 355 is balanced statute that addresses admissibility and reliability. No need for extra reliability requirement of plurality

In re I.C.

- Three-year-old child made statement to mother, preschool teacher, emergency social worker, and CALICO interviewer in one 24-hour period that father “put penis on me”.
- No other evidence to corroborate allegation
- In fact, child had been sexually abused by eight-year-old neighbor two months before her allegation against father

CALICO interview

- Child had CALICO interview day that she made statement about father.
- CALICO interview was not objected to by trial counsel
- Admitted into evidence and played in court

Problems with CALICO interviews

- Non-profit private corporation
- Work with social workers, law enforcement, district attorney
- Not cross examination
- Presumes abuse
- Parents are not part of the process
- Was method of obtaining statement reliable
- Due process disadvantages
- To court, it becomes its own corroboration
- How can interview provide necessary indicia of reliability?
- No assurance of truthfulness

Trial court ruling

- After contested jurisdictional hearing, court found that it was a “very difficult case”, only had statements of 3-year old child, “who at times, was very clear in her statements about what happened, and at other times was very unclear, and at times very confusing about the statements she makes”

- Court states:

“there’s supporting evidence on both sides. There’s evidence that support reliability of her statements, and there’s evidence that supports a conclusion that her statements are unreliable.”

“But, the court finds the evidence that supports the reliability more compelling.”

(Under *Lucero* standard, doesn’t that mean that truthfulness was not clear?)

What trial court did wrong

- Relied on CALICO to assess reliability
- Determined statements more reliable than not but did not find that I.C.'s truthfulness was clear
- Treated DVD as if it was testimony
- Used DVD to provide corroboration of same hearsay statements that were in the report.
Hearsay cannot corroborate itself.
- DVD cannot be validation of child's truthfulness

Court of Appeal opinion

- Division 2
- Richman writes opinion, Miller concurs, Stewart dissents
- COA focuses on CALICO interview – No video played for court in Lucero
- Says “test of cross-examination” does not refer to the minor but refers to the totality of evidence concerning the surrounding circumstances that may establish the truthfulness of the minor’s hearsay statements
- Says video recording was “significant” because in viewing it the juvenile court was exercising its power to judge credibility

- COA said:

The issue here is not whether we think I.C.'s statements bear sufficient indicia of reliability to satisfy Lucero, but whether substantial evidence supports the juvenile court's finding that they did.

What COA did wrong

- Focused too heavily on video –said not to be ignored or reduced to nothing more than source of statements
- Thought viewing DVD was significant difference with facts of Lucero
- Deferred to trial court decision as if assessing credibility of testifying witness
- Confused hearsay and testimony

Justice Stewart's dissent

Highlights:

“The majority defers wholesale to the court’s modest conclusion. In doing so, it abdicates this court’s responsibility under *Lucero L.* to review the whole record for substantial evidence of I.C.’s clear truthfulness.” (*I.C.*, *supra*, 239 Cal.App.4th at pp. 328-329.)

“The juvenile court ultimately determined that I.C.’s hearsay was more credible than not, based almost entirely on the video-recorded CALICO interview; it did not find that her truthfulness was clear nor could it have. (*Id.*, at p. 330.)

- “My colleagues quote the juvenile court’s explanation of its decision in its entirety but analyze none of it”
- “Hearsay and witness testimony are two different things. The majority conflates them and by doing so avoids engaging in careful appellate review of the juvenile court’s decision to admit and rely on I.C.’s hearsay statements as required by *Lucero L.* (*Id.*, at p. 330.)
- “I am not aware of any appellate court that has so precipitously acquiesced in a trial court’s determination of a hearsay declarant’s credibility without further review.” (*Id.*, at p. 346.)

California Supreme Court

- Petition for rehearing
- Petition for Review
- Granted
- Opening Brief on the Merits
- CADC Amicus brief on CALICO interview
- Oral argument
- Decision....