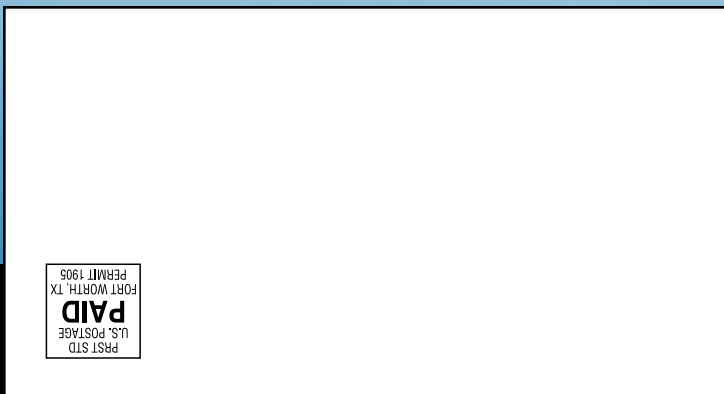


THE TEXAS INVESTIGATOR

SUCCESS IS A JOURNEY,
NOT A DESTINATION



PRST STD
U.S. POSTAGE
PAID
FORT WORTH, TX
PERMIT 1905





The Legal Corner



Hey Kid... Wanna Talk?

By Wes Bearden, Esq.



I get this question a lot; “Wes, can a kid (juvenile) be a witness? Can I interview him? Do I have to have permission by the parent? What about a signed statement? Affidavit?”

The answer may be clearer under the law, but not so clear in front of a jury. What do I mean? Any witness (child or not) really has two hurdles with which to jump through. Competency and credibility. Understanding these concepts can help you assess a child witness and understand if you can use their statements in trial.

First, any testifying witness must be competent. That is, they must have the general mental ability that a witness must possess for them to testify. A witness is competent or is not. Texas Rules of Evidence 601(a) deals with the competency of all witnesses. A careful read indicates that in fact all persons are competent to testify save for two: Insane Persons and Children. In the case of children, the rule states, “a child... whom the court examines and finds lacks sufficient intellect to testify concerning the matters at issue [is incompetent].”

What does that mean? In practice, it means that the child can testify until the court makes an examination and finding that your kiddo witness lacks sufficient intellect to testify. The court makes the call in a hearing or even in chambers outside of the jury. What are some of the factors the court would ask? It can ask and consider a wide range of questions. But, ultimately it must assure itself that the kid has (1.) the ability to intelligently observe the events in question at the time of the occurrence; (2.) the capacity to recollect the events, and (3.) the capacity to narrate the events. *Davis v. State*, 268 S.W.3d 683 (Tex. App.—Fort Worth 2008). I would suggest that any report or interview you do directs questions

to cover the above. For instance; Can they recall what occurred? Can they understand what they saw? Can they tell the story of the events? There are several derivations of these questions that can help provide a basis to find competency. Second, is reliability. This works as it does for any witness credibility issues you have today. Are there competing versions of the event? Has the child fibbed for favor? Those issues will typically be brought in front of a jury. However, many social studies today have indicated that younger children have a particular vulnerability to contextual events. For instance, a change in environment or context or suggestions of past memory and time can cause a child's story to change. We have all had at least one case with an overly-aggressive child sex investigator who "looks" for the right answer. Is that a credibility issue or is that a competency issue? That question can be hard to determine and many times be a mixture of both. Always look for both. If chalry, try and hit both points: capacity and reliability. Remember, capacity is about threshold to testify; reliability is about weight afforded to testimony.

Well, what about an affidavit? No difference. In fact, a Texas court found that an affidavit of a 12-year old stating that there was no cautioning sign in her father's slip in fall case was competent testimony. *Pipkin v. Kroger Tex., L.P.*, 383 S.W.3d 655 (Tex. App.—Houston [14th Dist.] 2012). The court further discussed that the child was considered competent until the court had its chance to examine her. *Rodriguez v. State*,

345 S.W.3d 504 (Tex. App.—Waco 2011). At an appropriate hearing, a properly obtained affidavit may be better than the testimony itself. Before interviewing your witness, ask the lawyer what the testimony is needed for and whether an affidavit is appropriate or not.

Realize, other than the above tests, that children as witnesses are not so different than adults under the law. Children as suspects in a criminal case are treated radically different. This article is too brief to detail those rules. If you are investigating a child as a suspect as an agent of law enforcement, you must be familiar with Title V of the Texas Family Code.

Finally, no rule exists that requires you to ask for parental permission to talk to a minor. If there was one, I would be in jail for regularly yelling at my paper boy. However, common sense dictates that talking to children without attempts to obtain parental permission can make you, your client and your cause look desperate and unprofessional. In fact, your author was involved in a large alleged child sex assault case where police officers did just that. They talked to children witnesses in the absence of and without the attempted notice of the parents. Although legally allowed, the jury found that the officer's tactics were unprofessional and indignant. The investigating officers lost their credibility and the result was acquittal. As always, remember how important your actions become when dealing with children.

