IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

DOCKET NO. 2014-P-0123

Adoption of Kayley D.

On Appeal from Certain Judgments, Orders, and Decrees of the Barnstable Juvenile Court

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BRIEF OF APPELLANT-FATHER,
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II. The court found the Child "unavailable" under G.L. c. 233, § 82 because she would be harmed by testifying in front of her parents. But courts can protect children from the trauma of testifying by removing parents from the courtroom or questioning children in chambers. Here, the court offered no such accommodations to the Child, and her psychiatrist testified that she would not be harmed if she testified with a support person next to her. Did the court err in finding the Child "unavailable"?

III. Section 82 requires that a child's hearsay statements be "reliable." Here, the Child is incompetent and has an I.Q. of 48, a functional age of four, significant memory problems and a history of telling detailed and untrue stories to get attention. Did the court err in finding her statements "reliable" under § 82?

IV. Experts and treating clinicians are not permitted to testify that a child is credible, was sexually abused or shares characteristics with sexually abused children. Here, the DCF experts, many of whom treated the Child, vouched for her credibility, testified that she had been sexually abused by Father, and compared her to sexually abused children. Did the court err in permitting and relying on this testimony to terminate Father's parental rights?

V. Courts cannot terminate parental rights without clear and convincing evidence of parental unfitness. DCF's only evidence against Father was allegations he had sexually abused the Child. Without the improperly admitted evidence, including hearsay from an incompetent child and expert vouching, there was no evidence of Father's unfitness. Did the court err in terminating his rights?

INTRODUCTION

The Juvenile Court terminated Father's parental rights based almost exclusively on the hearsay statements of an incompetent, mentally retarded child who has a functional age of four, a history of fabricating horrific, detailed and untrue stories, a craving for adult attention, and a seizure disorder that causes visual delusions.

The Child never testified. Father challenged her competency, DCF conceded her incompetence, and a court clinician agreed. Still, the judge refused to voir dire her. He allowed the Child's hearsay statements in evidence through her treating clinicians who vouched for her credibility and testified that they believed she had been sexually abused by Father.

That was DCF's only case against Father, a former DCF foster parent with no criminal record or substance abuse history who had successfully raised two biological children.

STATEMENT OF THE CASE

This is an appeal from a judgment of the Barnstable County (Orleans) Juvenile Court (___, J.) finding Kayley D. ("Child" or "Kayley") (DOB 5/10/04) in need of care and protection, finding her parents,

June D. ("Mother") and Kieran D. ("Father") (together, the "Ds"), unfit and terminating their parental rights pursuant to G.L. c. 119, § 26.

On December 19, 2011, the Department of Social Services ("Department" or "DCF," now the Department of Children and Families) filed a care and protection petition in Juvenile Court under G.L. c. 119, § 24. (RA.1, 15).[1] DCF alleged, based on statements by the Child, that Father sexually abused her in the shower.

Father challenged the Child's competency several times. (Tr. I:3, 4; IV:90, 91; VII:11, 13, 16; RA. 287-95; RA. 310-13). He moved to subpoena the Child as a witness at trial (RA. 378; Tr. VI:125), to have the court voir dire her (RA. 6, 319), to have her examined to determine competency (RA. 287), and to have the court deem her incompetent (RA. 310). The court denied all motions. (RA. 7, 287, 336). DCF conceded that the Child was incompetent. (Tr. IV:75; RA.311). The court referred her to the court clinic for a competency

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[1] References to the Record Appendix, filed by Appellant-Mother, are in the form "(RA. __)." References to the transcripts are in the form "(Tr. [volume]:[page])." References to the judge's "Findings, Adjudication, Commitment Order and Order to Issue Decrees" are in the form "(F._)" for Findings and "(C._)" for conclusions of law. References to the judge's § 82 Findings and Rulings are in the form "(§ 82 F._)" and ("§ 82 R. _)," respectively).

evaluation. The clinician determined she was not available to testify in part because she could not understand the "wickedness" of lying. (RA. 304; Tr. IV:18). The court never voir dired the Child.

DCF moved to have the Child's hearsay statements admitted in evidence under G.L. c. 233, § 82. The court heard this motion on March 18, March 25, April 6 and April 10, 2013. (RA. 6, 350). On June 8, 2013, the court ruled the statements admissible at trial and issued written findings ("§ 82 Findings") on June 11, 2013. (Add.; RA. 6, 9-44).

Trial took place on August 17, 18 and 24, 2013. (RA. 350). Over Father's objection, the court admitted the § 82 Findings in evidence. (Tr. VI:3). The court terminated both parents' rights on November 2, 2013. (RA. 7). Mother timely appealed on November 12, 2013; Father timely appealed on November 13, 2013. (RA. 347-48). The court issued "Findings, Adjudication, Commitment Order and Order to Issue Decrees" ("Findings") on January 14, 2014. (Add.; RA.7,349-77).

STATEMENT OF FACTS

Kieran D. ("Father") has never been charged with any crime. (Tr. V:145; RA. 410). He has no record of using or abusing illegal drugs and no record of abusing

alcohol. (Tr.V:146; RA.410-12). At the time of trial, he had been employed full-time as a marine technician for eleven years. (RA. 410). He has two grown children from his first marriage (1979-1997) with whom he maintains frequent contact. (RA. 46, 416, 418).

He married his second wife, June Q. ("Mother"), in 1998. (RA. 47, 416). In 2002, the Ds applied to become foster parents through the Department (RA. 60, 411, 476), and the Department approved them. (RA. 60, 411). As part of that process, the Department checked their medical and mental health histories, references and home, and confirmed that neither had any criminal or substance abuse record. (RA. 60).

Under the watchful eyes of the Department, the Ds fostered eight children over three years. (RA. 411, 475). During that period, the Department had close contact with the Ds, had no complaints about their parenting, and considered them "strong advocates" for their foster children. (RA. 411, 475-76, 480, 482).

The last child placed in their home was Kayley D. ("Child" or "Kayley"). She was born on May 8, 2003 to parents who neglected her; she had a "traumatic" childhood. (RA. 400, 423). She was removed from her birth family in 2001 and then bounced between several

foster homes before placement with the Ds on April 20, 2005. (Tr. IV:98; RA. 421, 423, 480; F. 72).

DCF and collaterals long suspected that Kayley had been sexually abused in the home of her birth family. Many members of the Child's birth family had been sexually victimized. Her mother had been raped at fourteen, and her father had been physically and sexually abused as a child. (RA. 424-25). Her biological sister, too, had been sexually abused. (RA. 424-25, 482). A known perpetrator of sexual abuse lived next door to the birth family (RA. 482), and he had been allowed access to Kayley during unsupervised visits in her parents' home. (RA. 58, 476).

Kayley was "drawn to men" and exhibited "boundary" problems from her earliest days in foster care. (Tr. II:85, 160; IV:51, 52, 66-67, 82, 94-95, 98; RA. 68-69). She underwent a sexual abuse assessment, the results of which are unknown. (RA. 476, 482). The Ds thus took in a child who may have been - like other members of her birth family - sexually victimized. DCF was well aware of this; the information is in the Child's adoption file. (RA. 421-25, 472-83). DCF did not acknowledge the Child's history during Father's termination proceedings; rather, it tried to keep his

attorney from seeing the file and tried to keep it from the judge. (Tr. II:160-68; IV:45-46, 95).

Kayley "thrived" in the care of the Ds according to her DCF adoption worker. (RA. 421). When she got to their home, she was "zombie like" with minimal verbal skills, but soon made "tremendous developmental and language gains." (RA. 475, 480). The Ds closed their home to all other foster children so that they could focus on Kayley's medical and therapeutic needs (F. 11) which DCF regularly found they met. (RA. 73, 475). The Ds ensured she had Early Intervention and special education services to address her cognitive limitations, self-care issues and gross motor delays. (RA. 422). Kayley had a seizure disorder to which the Ds attended. (RA. 54). She was "very bonded" to the Ds (RA. 422, 477) and "loved them both." (Tr. IV:72). Kayley was legally freed for adoption on September 16, 2002, and the Ds adopted her on May 21, 2007. (F. 72).

Kayley often told elaborate, untrue stories for attention. (Tr. V:35, 54, 130; VII:7). Her long-term daycare provider, Roberta Larson, testified that Kayley would "lie about weird things." (Tr. IV:57; RA. 69, 72-73). She once told Ms. Larson that her mother had killed several dogs (Tr. IV:72; RA. 415) and that her

mother had died. (RA. 69). Shortly before DCF filed this case, Kayley told her special education teacher, Jamie Varner, elaborate stories about puppies (Tr. I:17-19; § 82 F. 11), including an "ongoing" story that the police came to her home to take the puppies away. (Tr. I:18-19; IV:58-59). Kayley had no puppies. (Tr. I:19).

The Ds separated in December 2006. (RA. 91; Tr. I:118; II:73-74). The Child remained with Father. Ms. Larson "had no concerns about [his] care of Kayley." (RA. 69, 415-16). When he picked Kayley up from daycare, "she couldn't get to him fast enough. 'Daddy's here! Daddy's here.'" (Tr. IV:72).

On December 10, 2011, while the Child and her teacher, Ms. Varner, were driving, the Child mentioned she wanted a "Baby Alive" doll for Christmas because she could nurse it. (RA. 86) Varner told her that she had nursed her own children, which was "a great thing." (Tr. I:11-12). The Child told her that when she was a baby she "nursed from daddy's pee pee." (RA. 86). Varner told the Child she "hoped" that was the truth. (Tr. I:12). Varner reported the conversation to Nanci Bierman, the school psychologist, who interviewed the Child and then filed a § 51A with DCF. (RA. 86).

DCF asked Father to bring the Child to a Sexual Abuse Intervention Network (SAIN) interview at the District Attorney's office, which he did. (Tr. 5:19-20). At the SAIN interview, the Child said that the alleged contact took place in the shower, but her story changed as she was questioned. (RA 90-91). During the SAIN interview, the Child could not place the alleged contact in time, saying at various points that it happened when she was a baby or when her mother was "at the store." (Her mother had been out of the home for over a year at that time.) (RA. 90-91). The SAIN interview was not recorded. (Tr. II:98).

After the interview, DCF told Father about the Child's statements and removed her from his custody. He denied that he had sexually abused her. (Tr. V:31, 142; Tr. VI:124). The Child was then subjected to an extended sexual abuse evaluation. (Tr. I:55). During the evaluation the Child experienced a seizure and hallucinated that the evaluator hit her. (Tr. I:77, 78, 123). The evaluator denied hitting Kayley. (Tr. I:123). But she determined that Kayley had been abused by Father and recommended no further contact out of fear she would recant. (Tr. VI:62; VII:19). That evaluation, too, was not recorded. (Tr. I:93-94).

Despite the evaluator's determination, the District Attorney filed no criminal charges against Father. (Tr. V:18, 145; RA. 73). Father's grown son and daughter, who were interviewed by an expert on sexual abuse perpetrators, were "shocked" by the allegations. (RA. 416). Nothing of the sort had occurred during their childhood with Father. (RA. 416). Kayley's long-term daycare provider, Ms. Larson, noted that Kayley had never made any such allegations to her: "[S]he was comfortable with me. For her not to say something if something had happened would be strange. . . . [T]he way Kayley would blurt things out, I'm sure she would have said something to lead me to question this." (RA. 415-16).

After removal from her Father, Kayley lived in six short-term foster homes (F. 72) and three long-term foster homes (F.75) and was hospitalized several times. (RA. 149-50). During this period, she continued to experience dissociative seizures (Tr.I:75, 96, 164) and made inconsistent statements about showering with her Father to a foster parent and several clinicians. (Tr. I:65-66, 69; II:28, 130; VI:103). She also recanted and told the foster parent that Father had not done anything to her. (Tr. VI:111-12; RA. 255; § 82 F. 40).

Father requested visits with Kayley on a weekly basis (Tr. V:93) but DCF refused. Kayley missed her Father (Tr. I:81, 101; II:28; VI:111), loved him (Tr. IV:72) and wanted to see him. (RA. 255). One clinician noted that Kayley "cries a lot because she misses him." (RA. 200). The judge denied Father's motion for visits (RA. 44); he has not been allowed to see her since the SAIN interview in December 2007.

Kayley has lived in the Walker School residential program since May 2013. (RA. 150; Tr. V:104). DCF has not found an adoptive home for her and says she is not ready for adoption. (Tr. V:106; F. 84). Father still wants her to come home. (Tr. VI:124).

SUMMARY OF THE ARGUMENT

The Juvenile Court terminated Father's parental rights based on the Child's hearsay statements that he sexually abused her. The Child never testified, and the statements were entered in evidence through documents and testimony. The Child was incompetent at the time of trial and was likely incompetent when she made the statements. Although Father asked the court to voir dire the Child to determine her competence, the court refused and admitted her hearsay statements under G.L. c. 233, § 82. A witness must be competent to

testify; similarly, hearsay statements are not admissible if the declarant is incompetent. The judge erred in admitting the statements. (See pages 14-19).

The court had considerable evidence that placed the Child's competency in doubt. Although the Child was eight and nine at the time of the statements, she has an I.Q. of 48 (moderate mental retardation) and a functional age of four. She has memory problems and suffers from a seizure disorder that causes delusions and dissociations. She has a history of telling elaborate, untrue stories because of deficiencies in her memory. Her treating psychiatrist and a psychologist at the court clinic found that she did not appreciate the consequences of her statements or the "wickedness" of lying. DCF agreed she was incompetent. The court should have held a voir dire and ordered a comprehensive competency evaluation or struck the Child's statements. (See pages 19-28).

Section 82 of G.L. c. 233 requires that the court find the Child "unavailable" before admitting her hearsay statements. The court found that she would be harmed by testifying in front of her parents. The court did not try to accommodate the Child by taking her testimony in chambers or with her parents removed

from the courtroom. The Child's clinicians suggested that, with minor accommodations, the Child could testify without serious harm. The Child was not, therefore, unavailable under § 82. (See pages 28-32).

Section 82 also requires that the court find the statements were made "under circumstances inherently demonstrating a special guarantee of reliability." Here, the Child was incompetent when she made the statements and the details she offered about the alleged abuse were inconsistent. She also had a long history of making up elaborate and untrue stories to gain positive attention from adults and fill in gaps in her memory. The court erred in finding a "guarantee of reliability." (See pages 32-42).

The court allowed DCF's experts and the Child's treating clinicians to vouch for the credibility of the Child, to testify that she was sexually abused by Father, and to compare her to sexually abused children. This was improper. While the court noted that it did not credit the expert vouching, the findings show that the court relied on it extensively. The vouching tainted all of the findings. (See pages 42-47).

Absent the erroneously-admitted Child hearsay and expert vouching, there was no evidence of parental

unfitness. Father had no criminal record or substance abuse history. He successfully raised his adult son and daughter who were "shocked" by the allegations. Father participated in a sexual perpetrator evaluation which indicated he met none of the offender criteria or risk factors. Because there was no properly-admitted evidence of parental unfitness, the court erred in terminating Father's rights. (See pages 47-50).

ARGUMENT

I. The Juvenile Court erroneously determined that Father was unfit based on the hearsay statements of an incompetent child.

A. The court should never have reached the hearsay exception under G.L. c. 233, § 82 because the Child was incompetent when she made the statements.

Competence of all witnesses, child or adult, is governed by G.L. c. 233, § 20. The witness must be able to: (1) observe, remember and give expression to what he has seen, heard or experienced; and (2) understand the difference between truth and falsehood, "the wickedness of the latter and the obligation to tell the truth," and have a general belief that lying will result in punishment. Commonwealth v. Trowbridge, 419 Mass. 750, 754-55 (1995). If an objection is raised with respect to a witness's competence, the

court must hold a voir dire. Commonwealth v. Santos, 402 Mass. 787, 788 (1988) ("If the competency of a witness is placed in issue, it is the duty of the judge to examine into the question of [the witness's] competency"); cf. Dep't of Soc. Servs. v. Doe, 292 S.C. 211, 219-20, 355 S.E.2d 543, 547-48 (App. 1987) (in context of child sexual abuse hearsay statute, "judge has the duty to make an independent judicial determination of competency" by "personally examining and observing the child on voir dire").

Although the Child was eight when the case began, she had an I.Q. of 48 (moderate mental retardation) and a functional age of four. (F. 48; § 82 F. 45). Father raised the issue of her competency several times. (Tr. I:3, 4; IV:90, 91; VII:11, 13, 16; RA. 287-95; RA. 310-13). He moved to subpoena the Child as a witness (RA. 378; Tr. VI:125), to have the court voir dire her (RA. 6, 319), to have her examined to determine competency (RA. 287), and to have the court deem her incompetent (RA. 310), but the court denied each motion. (Tr. VI:125; RA. 7, 287, 336). Father submitted records to support his argument that she was incompetent. (Tr. IV:90-91; RA. 287-95, 310-13). DCF conceded that she was incompetent. (Tr. IV:75; RA. 311).

While the court referred the Child to the court clinic for a competency evaluation, the court clinician instead looked into her availability to testify. In doing so, the clinician opined that the Child could not understand the "wickedness" of telling a lie. (RA. 304; Tr. IV:18). Still, the court did not rule her hearsay statements inadmissible or voir dire the Child. This error formed the basis of the termination decree.[2]

In Commonwealth v. Corbett, 26 Mass. App. Ct. 773, 774 (1989), the trial court determined that a child witness was incompetent because she did not understand the "wickedness" of lying or the obligation to tell the truth, and this Court affirmed. Id. at 776. That is what the judge should have done here. Instead, he turned a blind eye and refused to address the issue. Cf. Commonwealth v. R.P.S., 737 A.2d 747 (Pa. Super.

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[2] Father preserved his objection to the child sexual abuse hearsay through multiple motions in limine (RA. 320-31) which the court denied (RA. 332-26). Father renewed his objections at trial but he was consistently overruled. (Tr. V:25, 28, 30). He consistently objected to the admission of the Child's hearsay in the trial exhibits (Tr. V:9, 41, 43, 60, 76, 79, 80, 132, 135; VI:59, 67, 68, 71, 73). His objections were so consistent that the judge declared he would consider Father's counsel to have made a "standing exception [sic] [on child sexual abuse hearsay] on all of the documents that are admitted." (Tr. V:76). The judge even joked at one point, upon Father's objection to the Child's sexual abuse hearsay, "Any objection beyond the usual?" (Tr. V:136).

Ct. 1999) (six-year-old child deemed incompetent because, among other things, he did not understand duty to tell the truth); Delacruz v. State, 734 So.2d 1116 (Fla. Dist. Ct. App. 1st Dist. 1999) (reversing trial judge's determination that four-year-old child was competent where there was no evidence child understood difference between truth and lies or what would happen if she did not tell the truth).

That the Child "testified" only as a hearsay declarant does not change the analysis; hearsay declarants must also be competent. The admission of hearsay statements "presupposes that the assertor [possesses] the qualifications of a witness." 5 John Henry Wigmore, Evidence in Trials at Common Law 255 (4th Ed. 1974). Hearsay statements "may be inadmissible because of their failure to fulfill the ordinary rules about qualifications, even though they meet the requirements of a hearsay exception." Id.

A declarant must be competent at the time she makes the hearsay statement for it to be admissible. See Commonwealth v. Hurley, 455 Mass. 53, 64 (2009); see also Commonwealth v. Mahar, 430 Mass. 643, 649-50 (2000) (holding that hearsay declarants may be impeached in any fashion; "There is no reason to put a

proponent of an absent witness in a better position than a proponent of a live witness."). See generally, 1 John W. Strong et al., McCormick on Evidence § 61 n. 3 (5th ed. 1999) ("[T]he competency standards apply to hearsay declarants as well as in court witnesses. If a person would be incompetent to testify on the stand, his hearsay statement is usually inadmissible.").

The child sexual abuse hearsay statutes are no exception. A child must be competent at the time the statements are made; only then is it proper to determine whether the exception applies.[3] Cf. Doe, 292

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[3] This should not be confused with the determination under § 82 that the child declarant is "unavailable" because *at the time of trial* she is incompetent. The inherent danger of an "unavailability because of incompetency" finding is that the child may also have been incompetent when the statements were made; if so, they are inadmissible. The Court addressed this problem in Commonwealth v. Colin C.:

> if the judge determines that the child is unavailable because she is "incompetent to testify," the judge's reasons for finding the child incompetent should not be those that call into question the reliability of the child's out-of-court statements. For example, if the trial judge finds that the child witness is incompetent to testify because she is unable to tell the truth at the time of trial or does not know the consequences of not telling the truth in court, the judge should exercise extreme caution in allowing that child's out-of-court statements in evidence pursuant to G. L. c. 233, § 81.

419 Mass. 54, 65 (1994). "Extreme caution" is required

S.C. at 219-20, 355 S.E.2d at 548 (holding that admission of child sexual abuse hearsay under statutory exception presupposes that child declarant was competent at time of statements).

Here, Father asked the court to voir dire the Child, the evidence showed that the Child was incompetent, DCF agreed the Child was incompetent, and the court clinician determined that the Child was incompetent at the time of trial. It was error for the court even to reach the hearsay exception under § 82.

B. The Juvenile Court had considerable evidence that the Child was incompetent when she made the statements and should have voir dired her and excluded her statements.

The judge had evidence that put the Child's competency in doubt. He should have voir dired her, as Father requested (RA. 6, 287, 319), and then determined whether to admit her hearsay statements.

1. The Child suffers from serious cognitive limitations that implicate her ability to perceive, recall and relate events.

a. The Child has an I.Q. of 48 and functions as a four-year-old.

The Court was well aware that the Child has serious cognitive limitations that call into question

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because, if the child was also incompetent at the time of the statements, they must be struck.

her ability to perceive, recall and relate events. She has an I.Q. of 48. (F. 48; Tr. II:36; V:109, 116). While this places her in the "moderately mentally retarded" range (F. 48, 86; Tr. V:109), Dr. Fierman of the court clinic believed she was "probably lower functioning than that." (Tr. IV:12).

Although Kayley was eight and nine at the time of the alleged statements, experts estimated her functioning age to be in the four- to five-year-old range (Tr.I:179; II:119; V:116-17) or like a preschooler (Tr. II:17; § 82 F. 42). Her foster mother described her as "being like a two- or three-year-old[,]" (Tr. IV:24), and her sister-in-law, a teacher, placed her cognitive skills at age three or four. (Tr. VII:8). The judge found that "Kayley [is] developmentally equivalent to a four year old child[.]"). (§ 82 F. 45).

Kayley's cognitive and developmental age alone do not render her incompetent. But with a child so limited - as with a child so young - the court must treat the competency inquiry with extreme care. See Commonwealth v. Dockham, 405 Mass. 618, 624 (1989) (four-year-old child properly found competent after judge observed him in voir dire conferences for three days and child understood consequences of taking oath).

Here, the court did not take the necessary care.

b. The Child has difficulty perceiving reality.

Kayley suffers from a seizure disorder that includes visual delusions and dissociative states. (F. 77; RA. 54; Tr. I:162; Tr. V:105). One such episode occurred with Trudy Harmon, a sexual abuse evaluator; Kayley believed Harmon was hitting her "although this act was not occurring." (F. 49; § 82 F. 31).

DCF: Did you hit her at that session?

Harmon: No.

DCF: Did she say anything about you hitting her?

Harmon: Yeah. She was sitting in a rocking chair rocking and said - when I was asking her questions, she said, "You're hitting me. Don't hit me."
I said, "Kayley, I'm not hitting you."
And she said, "Yes, you are."
And I wasn't even - you know, it was - it was a very interesting dissociation that she was having, so I asked her if she thought someone was hitting her.
She said, yes, that I was.

(Tr. I:77, 78; see also Tr. I:123, 24; VI:42). Kayley experienced ten or more seizures during the two years before DCF filed this case (RA. 54) and they recurred frequently thereafter. (Tr. I:75, 96, 164). During these episodes, the clinicians treated her like "somebody with Alzheimers," asking her "do you know

where you are, who is this . . . what's today[?]" (Tr. I:164; see also Tr. 1:149).

Kayley's delusions and dissociations – which took place contemporaneously with many of her sexual abuse hearsay statements – were red flags that she had difficulty perceiving reality.

c. The Child has memory problems.

According to Kayley's treating psychiatrist, she has problems remembering events from her past (Tr. IV-55) and is not a "reliable historian in terms of her past trauma." (RA. 288, 292). This assessment came just one month after her initial "disclosures."

Kayley "remembered" that Harmon was going to bring her a doll, which Harmon testified she had never promised: "I don't believe I told her I was going to bring it to her, and she was saying, yes, you were. And I don't remember that as being true at all. I told her that was not – we didn't have that conversation." (Tr. I:120: VI:43). Kayley "remembered" it, however. She also told the SAIN evaluator she had told no one else about her allegations (RA. 91), but she had forgotten she had told two school staff members only a few days earlier. (RA. 90-91).

Kayley told Dr. Muir that she liked watching

television but could not remember any programs she liked, and that she liked to play video games but could not remember any games she played. (RA. 294). He observed that Kayley had "difficulty providing reasonable accounts of her day-to-day activities and narratives of recent events" and had "deficiencies in her capacity to [remember]" her experiences. (RA. 295).

Kayley's memory problems are significant because her initial hearsay statement was that she "nursed" on Father "when she was a baby." (RA. 86). It is unclear *when* such "nursing" allegedly took place or when Kayley believed herself to have been a baby. At the unrecorded SAIN interview she allegedly stated that the shower incidents took place when Mother was "at the store." (§ 82 F. 35; RA. 90; Tr.II:67, 73). Mother had moved out of Father's home in December 2006, a year before Kayley's earliest statements (F. 12; RA. 91, 136; Tr. I:118; II:73-74), so Kayley may have been "remembering" an event that occurred *a year earlier*. Her capacity to remember was a crucial issue for the judge to determine, and he refused to meaningfully address it in a thorough competency determination.

d. The Child has a history of making up stories because of active fantasizing or memory deficiencies.

Kayley made up stories in order to fill gaps in her memory. According to Dr. Most, one of Kayley's treating psychiatrists, she spent "a lot of time confabulating" stories (Tr. III:37) which made her "unreliable." (Tr. III:27). Dr. Muir noted that she "confabulated" while they played a game called Barrel of Monkeys: "While she was [sorting monkeys] she stated, 'I used to have a monkey. They are all crazy.' Kayley went on to say the monkey would sleep on her head when she was at home." (RA. 295). "Confabulation" is "[t]he unconscious filling of gaps in one's memory by fabrications that one accepts as facts." American Heritage Medical Dictionary (Houghton Mifflin 2007); see also Gale Encyclopedia of Medicine (Gale Group 2008) ("An attempt to fill in memory gaps by fabricating information or details"). This calls into question not just the Child's truthfulness but her ability to recall information.

Kayley was known for creating detailed, credible but untrue stories. Jamie Varner, the first person who heard her statements, "knew Kayley to have fabricated stories in the past" that were so detailed and convincing that Varner believed them to be true:

> Kayley had previously made up a story about owning a puppy. The story was elaborate. Kayley named

> the puppy and informed Ms. Varner of the dog's activities. Ms. Varner believed Kayley's story of the puppies until she learned it was false. She testified that Kayley's fabrications regarding the puppy's activities were often similar to Ms. Varner's comments regarding her own dog's behaviors.

(§ 82 F. 11; see also Tr. I:17-19).

Some of Kayley's confabulations were alarming and suggested that family members had died or committed criminal acts. She told Varner an "ongoing" story that the police came to her home to take her dog's sick puppies away. (Tr. I:18-19; IV:58-59). Kayley told this story shortly before her initial "disclosures" to Varner. (Tr. I:19). Kayley told her DCF worker that her biological mother "had no food and that the police came and took her away[,]" which the worker explained did not happen. (RA. 92). Kayley told this story a week after the initial "disclosures." She also told Roberta Larson, her former daycare provider, that Mother had killed several dogs (Tr. IV:72; RA. 415) and had died. (RA. 69). She told a story that Mother had been arrested after she moved out of the home. (RA. 417). None of these stories was true.[4]

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[4] The judge seems to have adopted Harmon's view that children may lie about many topics but they do not lie about sexual abuse.

> Father: So are you saying that if [the Child] – if she lied about other things, that's

The confabulated stories indicate problems with memory. Or they may signify that the Child does not understand that lying is wrong. The court should have voir dired her to determine her competence.

2. The Child did not understand the obligation to tell the truth.

To be competent, the witness must understand the difference between truth and lies[5] and "the wickedness

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irrelevant to the issue of sex abuse?

Harmon: Absolutely.

Father: So it's not that the child is more credible; it's the allegation itself is more credible.

Harmon: Absolutely.

. . .

Father: Okay. Let's say that they're alleging that they nurse on their daddy's pee-pee. The mere fact that that's what the allegation is gives it credibility?

Harmon: Yes, it does.

(Tr. I:111-12). If the mere fact of an allegation makes it credible, hearings under § 82 become a meaningless exercise. Clinical literature shows that children do sometimes lie about sexual abuse and they are easily led, misled and coerced into making inaccurate statements. See Judith K. Adams, "Interviewing Children in Suspected Sexual Abuse Cases," 10(4) Okla. Fam. L. J. 105, 106-07 (Dec. 1995).

[5]Although several DCF witnesses testified that Katie could tell the difference between truth and lies (Tr. I:61, 182; II:17), her psychiatrist, Dr. Most, had doubts:

Child: . . . In your opinion during your time with Katie, did you form an opinion as to whether she was capable of telling the truth?

of [a lie] and the obligation to tell the truth," and have a general belief that lying will result in punishment. See Trowbridge, 419 Mass. at 754-55. Dr. Most, when asked whether Kayley "appreciates the consequences of her statements," answered that she did not. (Tr. III:33; RA. 310). The court clinician determined that she could not appreciate the "wickedness" of a lie or the consequences of her statements. (Tr. III:33; IV:35, 90-91; VII:11; RA. 303-04). He thereafter determined that Kayley was incompetent to testify. (RA. 305).

Kayley was unlikely to have been *more* competent when she made the statements. From the date of the first statement (December 2011) to the time of trial (August 2013), she was cognitively limited, confabulated stories and suffered from delusions from her seizure disorder. Her condition did not change

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> Most: I - I did. The - - in general, I thought that she was somewhat unreliable to - in her verbal responses, so that you needed multiple areas of information to draw accurate conclusions.

(Tr. III:27). In the face of such discrepancy, the judge should have voir dired the Child in order to make the determination himself. The fact-finder must assess a witness's credibility. Here, the judge did not accept that responsibility.

over time. The judge should have determined her to be incompetent and ruled her hearsay statements inadmissible. At the very least, he should have voir dired her to determine for himself whether she understood the consequences of telling lies.

The court's error in this regard is not harmless. Absent the improperly-admitted hearsay, DCF could not meet its burden of proving that Father was unfit.

II. The Child's hearsay statements did not satisfy the requirements of G.L. c. 233, § 82, because the Child was not unavailable, the statements were not reliable, and the Child was already ten years old by the start of trial.

A. The Juvenile Court erred in finding that the Child was "unavailable" because she could have testified outside the presence of her parents or in chambers without "severe trauma."

The declarant child must be found to be "unavailable" before her hearsay statements are admissible under § 82. The proponent of the hearsay must prove that "testifying would be likely to cause severe psychological or emotional trauma to the child[.]" G.L. c. 233, § 82(b)(5). The court did so find (§ 82 R. 6; § 82 FF. 57-64), but it erred as a matter of law because it failed to consider alternative methods of taking the Child's testimony.

The court based its "unavailability" ruling on the

Child testifying in the traditional sense of sitting on the witness stand in front of her parents. (§ 82 R. 6 & F. 58, 62; RA. 336; Tr. II:34).[6] But in termination cases, children are not limited to testifying "formally." To avoid traumatizing children, courts can take their testimony in other ways. See Adoption of Roni, 56 Mass. App. Ct. 52, 55 (2002). The judge could have positioned Kayley or her parents in the courtroom so as to avoid face-to-face confrontation. See Adoption of Don, 435 Mass. 158, 167-68 (2001). He could have removed her parents from the courtroom entirely. See Roni, 56 Mass. App. Ct. at 55-57. He could have interviewed her in chambers. See Adoption of Kimberly, 414 Mass. 526, 535 (1993).[7]

Accommodations for child witnesses also apply in

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[6] Dr. Fierman, the court clinician, testified that he "would recommend against [the Child] having to come to any formal hearing to testify" because of her "emotional instability." (Tr. IV:13). He did not address whether she could testify in a modified courtroom or in chambers.

[7] Deb Benson, Katie's therapist, stated that testifying in front of her parents would harm Katie because she "most likely wouldn't be able to run up and hug them" and get the nurturing she would want from them. (Tr. II:34; § 82 F. 58). There was nothing to prevent such an embrace; the judge could have allowed it and then had Katie testify. Moreover, Katie would not have "needed" the hug if the judge had allowed her to testify without seeing her parents or with her parents outside the courtroom.

the context of the § 82 "unavailability" requirement. In Opinion of the Justices to the Senate, the Supreme Judicial Court, evaluating a precursor to § 82, stressed that trial judges should "modify the usual rules of trial to accommodate child . . . witnesses[.]" 406 Mass. 1201, 1218-19 (1989). The Court further encouraged trial judges to use "methods designed to minimize the stress and trauma which might be imposed on victims[.]"). Id. at 1219 (citations omitted).

Here, the judge made no effort to accommodate Kayley or "minimize the stress and trauma" of testifying. See id. Father asked that the judge use one of these alternative methods (RA. 336), but he refused (RA. 336) without even considering them. This was error. Cf. State v. Smith, 148 Wash.2d 122, 136-37, 59 P.3d 74, 81 (2002) (court cannot find child "unavailable" under child sexual abuse hearsay statute unless it considers use of closed-circuit television).

Trying to accommodate the Child before finding her unavailable was constitutionally mandated. Parents have a due process right to rebut adverse allegations. See Adoption of Mary, 414 Mass. 705, 710 (1993). Admitting damaging hearsay without any opportunity for cross-examination is a violation of that right. While

§ 82 provides certain procedural safeguards designed to substitute for the crucible of cross-examination, courts should only be permitted to use that substitute if it *must* to avoid trauma to a child. If the court can avoid trauma by accommodations, forfeiture of the right to cross-examination is inappropriate. The judge's failure to accommodate the Child violated Father's due process rights.

The judge, in his trial findings, found that an *in camera* voir dire was "inconsistent with the best interest of the [C]hild." (F. 121). This was an error of law. "Best interests" is not the standard for unavailability under § 82(b)(5); the standard is whether testifying would cause "severe trauma."

Moreover, it was also a clearly erroneous finding of fact because there was no evidence to support it. The only witnesses who addressed accommodations for the Child either had no opinion about the potential harm or believed it would be minor. When Child's counsel asked Kayley's therapist whether an interview alone in chambers would harm Kayley, she responded, "I don't know whether that would be damaging to her." (Tr. II:54). Dr. Moorton, Kayley's psychiatrist, stated that it would be "frightening" for her to testify in

open court; she would "act silly and regress and [] clam up." But upon further questioning, it became clear that harm could be avoided with a minor accommodation:

> Child: Well, in what way would [testifying in open court] harm her?
>
> Moorton: Well, I don't know if it would be harmful, harmful. I think it might be scary, but I guess what you mean by harm . . .
> I don't think it's going to cause her a lasting scar, especially if she's with somebody that she knows who's supportive, you know, with her. . . .

(Tr. I:189-90). The court could have allowed a "support" person to sit with Kayley. Roni contemplates such an accommodation.

There was no evidence Kayley would have been harmed by talking about the allegations to the judge in chambers or in the courtroom outside her parents' presence. The court erred in finding her unavailable.

B. The Juvenile Court erred in finding that the Child's hearsay statements were reliable.

Before admitting a child's statements under § 82, the court must find the statements were made "under circumstances inherently demonstrating a special guarantee of reliability." G.L. c. 233, § 82(c). A "special guarantee" of reliability means that the

statements must be more than just possibly or likely reliable. A "guarantee" requires certainty. This very high burden was not met here.

The statute sets forth several factors the court "shall" consider to ensure this guarantee:

1. The Child was incompetent (the "clarity" factor).

The first factor, the "clarity" of the statement, looks at the child's competence:[8]

> (i) the clarity of the statement, meaning, the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a *treating* psychiatrist, psychologist, or clinician[.]

G.L. c. 233, § 82(c)(i) (emph. added). No treating professional testified that Kayley was competent. In fact, she was almost certainly incompetent when she made the statements. See sections I and II above.

The court reasoned that the "clarity" factor was met because Kayley repeated "with clarity" the same story to multiple professionals. (§ 82 R. 8a). But repeating a story does not make the original story more credible or more "true." See Edward E. v. Dep't of

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[8] See J. Cross, R. Fleischner & J. Elder, Guardianship and Conservatorship in Massachusetts § 9.06 n. 262 (Michie 1995) (§ 82 "clarity" determination "forms the essence of a finding regarding competency").

Soc. Servs., 42 Mass. App. Ct. 478, 486 (1997) (repetition of child's sexual abuse hearsay statements does not, by itself, make them trustworthy); Commonwealth v. Novo, 449 Mass. 84, 93 (2007) ("[T]he statement of a witness is not made more trustworthy by repeating it.") (citing 4 J. Wigmore, Evidence § 1124, at 255 (1972)). The statute's own definition of "clarity" looks to a child's competence, not how "clear" the story is or how often it is repeated. The statements did not satisfy this factor.

2. The Child's stories changed as she was questioned (the "time, content and circumstances" factor).

The court must also consider "the time, content and circumstances of the statement[.]" G.L. c. 233, § 82(c)(ii). Here, the court found that the Child's statements were reliable because they were consistent and detailed. (§ 82 R. 8b; F. 37).

But her statements were not consistent about when the alleged events occurred. To her teacher, Ms. Varner, Kayley stated that it took place when she was a baby. (RA. 90). When the SAIN interviewer asked when it happened, she said when Mother was "at the store" (RA. 90), suggesting that it occurred when Mother was living at the home but doing errands, a year or more

before the interview. (RA. 90; Tr. I:118; II:73-74; V:38). When the SAIN interviewer asked her a *second* time when it happened, Kayley stated, "I don't know." (RA. 90). When he asked a *third* time, she again stated that it happened when she was a baby but then stated that it happened when she was eight (her age at the time of the interview). (RA. 90). When he asked *a fourth* time when it happened and "if it was recently," she said, "well, it didn't happen today." (RA. 91). These inconsistencies likely explain why no charges were ever filed against Father.

When the SAIN interviewer asked Kayley how often this happened, she stated, "once." (RA. 90). When he asked her again, she said, "two times." (RA. 91). Harmon reported that Kayley told her she did it "a lot." (RA. 192). But Kayley told her long-term foster mother that her Father did not do anything to her at all. (Tr. VI:111-12; RA. 255; § 82 F. 40). Kayley was inconsistent in her description of when, how often, and even *if* anything happened.[9]

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[9] Even Katie's description of the shower contact itself was inconsistent. She told Varner - who had just told Katie that she had nursed her own children, which was "a great thing" (Tr. I:11-12) - that she "nursed from daddy's pee pee" and "it tasted like baby milk." (RA. 86). But Katie told her therapist that "[i]t didn't taste like milk. It tasted yucky." (Tr. II:25). And when her foster mother asked her "if milk

Kayley was interviewed repeatedly, and none of the interviews was recorded. (Tr. I:93-94; II:98).[10] Compounding the problem was selective destruction by experts of their interview notes, contrary to professional ethics. (Tr. I:91-92; II:100-01; VII:18). There was no way the judge (or a defense counsel expert) could evaluate the interviews to determine how Kayley was questioned or whether the interviewers unintentionally "provided" information to her. Clinical literature is clear that "the questioning adults may inadvertently mold and develop an account of sexual abuse in a nonabused child." Judith K. Adams, "Interviewing Children in Suspected Sexual Abuse Cases," 10(4) Okla. Fam. L. J. 105, 107 (Dec. 1995) ("Adams"). Here, the judge could not ensure that such

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had *ever* come out, Katie said no." (Tr. II:134; VI:106 [emph. added]; RA. 255; § 82 F. 40).

[10] The SAIN interview should have been recorded (Tr. III:55), a common practice in the neighboring county, Plymouth. (Tr. III:54). See Maggie Bruck & Stephen J. Ceci, "Amicus Brief for the Case of *State of New Jersey v. Michaels* Presented by Committee of Concerned Social Scientists," 1 Psych. Pub. Pol. & L. 272, 307 (June 1995) ("The failure to have audio- or video-taped records of the initial interviews with children makes it impossible to determine the accuracy of their subsequent statements. Summaries of missing interviews and/or electronic recordings of later interviews in which children make allegations do not substitute for missing original interviews.").

"inadvertent mold[ing]" did not occur.

These were not the only irregularities calling into question the reliability of the interview process. The SAIN interviewer was dissatisfied with Kayley's first answer about when the alleged incident occurred so he asked *four times*. Tainting can occur just from the process of repeatedly asking the same questions. See Commonwealth v. LeFave, 430 Mass. 169, 179 (1999) ("[r]epetitive questions pressure a child to give different answers."); Stephen J. Ceci & Maggie Bruck, Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony 79 (APA 1995); Adams at 108 ("Frequent repetition of questions during forensic evaluations may lead the child to feel there is something wrong with his or her answers and result in the child changing the story in order to provide the right answer to the forensic investigator.").

Even if Kayley's statements had been consistent, consistency after repeated questioning might not be because the statements were true. "[R]epeated interviewing of young children can induce in those children the subjective belief that things are true, when in fact they are not. . . . [I]nterviewing techniques may reinforce a story and fix it in a form

which is repeated." LeFave, 430 Mass. at 180. Here, the judge knew that repeated interviewing might taint the Child's statements. He found this did not occur (§ 82 F. 45 & R. 8b) even though he could not review any recordings, transcripts or interview notes. He could not see Kayley's facial expressions or body language. He could not hear the words she used or the language used by the interviewers.

The court instead relied on clinicians who insisted Kayley's statements were consistent. But even the "recounting" of Kayley's initial "disclosure" by Varner is inconsistent. Varner testified that she responded to the Child's statement by saying, "'Kayley, I hope this is the truth,' and [Kayley] didn't say anything more." (Tr. I:12). But on re-direct by DCF, she changed her story: "I said, 'I hope it's a truth.' And [Kayley] said, 'It's a secret.'" (Tr. I:25). Varner also testified that the Child told her, "I nurse from my daddy's pee-pee." (Tr. I:12). Her use of present tense suggests the Child told her the contact was ongoing. But in the more contemporaneous § 51A report, she wrote that the Child told her, "when she was a baby, she nursed from daddy's pee pee" (RA. 86),

suggesting it happened long ago (if at all).[11] It defies logic that the court could find Kayley made consistent statements when the teacher who first heard them could not even repeat *what she heard* consistently.

Many witnesses opined (improperly), and the court found, that the Child's statements were more credible because they were "detailed." (§ 82 R. 8b; Tr.1:117; II:26; VI:32). That the stories were detailed (albeit with different details) provides no special guarantee of reliability. Kayley told many tales that were so detailed that the listener had no idea until later that they were false. For example, her story to Varner about owning a puppy was "elaborate" and sufficiently convincing that Varner believed her until learning of its falsehood. (Tr. I:17-19; § 82 F. 11). Even her tale to Dr. Muir about monkeys at her house was described as "detailed." (Tr. II:119-20).

Kayley's statements were inconsistent. Further, there was no correlation between the amount of detail and the reliability of her stories. The statements did not satisfy this factor.

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[11] While the § 51A was filed by Nanci Bierman, she testified she had only one meeting with Katie, so the "casual conversation" referred to in the § 51A (RA. 86) was between McKenzie, the § 51B reporter, and Varner.

3. The Child would say anything "just to get attention" (the "sincerity" factor).

The court must also consider "the child's sincerity and ability to appreciate the consequences of the statement." G.L. c. 233, § 82(c)(iv). Dr. Fierman, the court clinician, testified that Kayley did not appreciate the consequences of her statements. (Tr. IV:35; VII:11; RA. 304).[12] Her psychiatrist, Dr. Most, agreed. (Tr. III:33; RA. 310). This should have been the end of the reliability inquiry.

Nevertheless, the judge ignored the conclusions of his own expert and the Child's psychiatrist and found that she did, in fact, appreciate the consequences of her statements because she "seemed to understand" why she was not going home. (§ 82 R. 8d). But many professionals told Kayley about "good and bad touches" and that "it was unsafe" to go home because of her Father's "bad" behavior. (E.g., Tr. I:159, II:19-20; RA. 202). That a child with an I.Q. of 48 and a functional age of four can parrot back the words of treating professionals does not show she understands the consequences of her statements.

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[12] The court oddly cited to Dr. Fierman for the proposition that the Child understood the consequences of her statements (§ 82 Ruling 8(c)), but that is clearly erroneous. Dr. Fierman determined that the Child was incompetent because she lacked this

The "sincerity" of the statements must also be evaluated in the context of her "craving" for adult attention. (§ 82 R. 8(d)). According to Kayley's psychiatrist, Kayley was "somewhat unreliable" (Tr. III:27) because "she would say . . . anything that came to mind . . . just to get attention." (Tr. III:30). All the experts and treating professionals acknowledged Kayley's craving for attention. (Tr. I:35-36, 37-38, 41, 181, 183; II:120; VI:42, 55, 57; RA. 213, 244).

Most children desire positive adult attention. But this Child sought (and got) it by making up elaborately detailed falsehoods. Her long-term daycare provider testified that Kayley would "lie about weird things." (Tr. IV:57; RA. 69, 72-73). Kayley told elaborate falsehoods to Varner. (Tr. I:17-21). Both Mother and Kayley's sister-in-law reported that Kayley often made up stories. (Tr. V:35, 54, 130; VII:7). Kayley's propensity to lie was so significant that the DCF adoption worker believed she had to disclose it to prospective adoptive parents. (Tr. V:117).

Finally, the reliability of the Child's statements must be viewed with Father's history and psychological profile in mind. Father has no criminal record (Tr.

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understanding. (Tr. IV:35; RA. 304).

V:145; RA. 60, 410), no substance abuse history and no significant mental health history (Tr. V:146; RA. 410, 412). Dr. Goldstein, an expert in sexual offender evaluations, testified that "there is no connection between [Father's] history and the kind of behaviors and traits that are usually exhibited by sex offenders." (Tr. III:49). Father met none of the sexual offender criteria or risk factors. (Tr. III:49; § 82 F. 68). His now-adult son and daughter were "shocked" by the allegations; nothing of the sort happened to them growing up. (RA. 416). Dr. Goldstein concluded that Father was "not likely" to have committed the offenses alleged. (Tr. III:49).

Kayley's psychiatrist testified that she was unreliable, spoke impulsively and said things to get attention; "you had to be careful" when assessing the reliability of her statements. (Tr. III:31). Here, the judge was not careful. The statements did not satisfy this factor.

C. The Juvenile Court erred in admitting the Child's hearsay statements under § 82 because the Child was ten at the time of trial.

Father incorporates by reference the arguments on this issue in Mother's brief at her Argument II.A.

III. The Court erred in allowing experts and the Child's treating professionals to vouch for the Child's credibility, compare her to sexually abused children and testify that the Child was, in fact, sexually abused.

The trial judge allowed DCF's experts and the Child's treating clinicians to testify that the Child's statements about sexual abuse were credible and that the Child was, in fact, sexually abused by Father. The judge also permitted them to compare the Child's behaviors to those of sexually abused children. Such "vouching" by any witness, lay or expert, is impermissible. See Care and Protection of Rebecca, 419 Mass. 67, 83 (1994) (vacating judgment based in part on judge's reliance on improper vouching by experts as to credibility of children regarding sexual abuse).

Expert testimony regarding the behavioral and emotional characteristics of sexually abused children is admissible where the information is "beyond the [trier of fact's] common knowledge" and the testimony "may aid [him] in reaching a decision." Commonwealth v. Federico, 425 Mass. 844, 847-48 (1997). But experts cannot vouch for the credibility of the alleged victim. See Commonwealth v. Montanino, 409 Mass. 500, 504-05 (1991) (officer's testimony in sexual assault case that key prosecution witness was credible required

reversal); Commonwealth v. Brouillard, 40 Mass. App. Ct. 448, 452-53 (1996) (reversible error for expert to convey his belief in complainants' credibility).

Expert testimony may not include an opinion or diagnosis that the particular person was abused. See Commonwealth v. Colin C., 419 Mass. 54, 60 (1994). Experts also cannot refer directly to symptoms exhibited by an individual victim, nor may they compare the characteristics of the "usual" victim to those of the alleged victim in the case. See Commonwealth v. Trowbridge, 419 Mass. 750, 759 (1995). Such comparisons are even more problematic if the expert is the child's treating clinician. See Federico, 425 Mass. at 849; Brouillard, 40 Mass. App. Ct. at 451 (expert who has treated complainant may "not explicitly or impliedly connect the complainant to the syndrome").

Here, the judge allowed DCF experts and Kayley's treating clinicians to testify that she was credible, that she was abused by Father, and that her behaviors matched those of sexual abuse victims in general. Harmon, a DCF expert, testified at the § 82 hearing that she "believe[d] there is little doubt that this sexual abuse occurred". (Tr. I:83-84). At trial, the court similarly allowed her to vouch for the Child:

DCF: Now, you indicated you just said you believe it did happen to [the Child]. Why is that, Ms. Harmon?

Harmon: Because she said it did.

Father: I object.

Court: Overruled.

(Tr. VI:32). A few moments later, this was repeated:

DCF: Okay. Do you believe that Kayley was sexually abused?

Harmon: I do.

Father: Objection.

Court: Overruled.

(Tr. VI:37). Debra Benson, a DCF expert who was also Kayley's therapist, testified at the § 82 hearing that she found Kayley's statements credible:

DCF: Based on your years of experience with this, do you have any concerns that Kayley is not telling the truth relative to these statements?

Father: Objection.

Court: You can have that.

Benson: Again, I - I believe her statements to be credible.

(Tr. II:37; see also II:53). At trial, over objection, the court again allowed Benson to vouch for Kayley's credibility by opining that her low I.Q. makes it more likely she was telling the truth. (Tr. VI:9-10). By

closing arguments, it was clear that expert vouching was a key component of DCF's case.[13]

The court stated that it did not credit any of the expert vouching. (F. 116, 118, 120). But the findings themselves show otherwise. In trial findings 44-49, 56 and 62,[14] and § 82 findings 33, 44, 49, 52, 55, 56[15] and

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[13] The DCF attorney closed as follows: "We had an extensive forensic evaluation done by [Harmon] who indicates that these statements are reliable and material, and that she believes that this happened to Katie . . . ." (Tr. VII:9). Father's counsel cited Federico and reminded the court in his closing that vouching by experts was impermissible. (Tr. VII:29-30). Nevertheless, Child's counsel followed this by stating: "Both Deb Benson and Tamara Harmon were qualified as experts, and they both believed that the sexual interaction between father and daughter did, in fact, take place. In fact, Deb Benson testified to the fact that she felt Katie was all the more credible, because of her low I.Q." (Tr. VII:37). Such pervasive vouching influenced all of the court's findings.

[14] Finding 62, on its face, is a "permissible" discussion of the traits of sexually abused children. What makes this finding the result of vouching is that Harmon's testimony on this point was followed immediately by a statement that the Child meets this criterion. (Tr. VI:53). The last sentence of F. 62 is thus the product of Harmon's improper comparison of the Child to sexually abused children generally.

[15] While § 82 Findings 55 and 56 contain overt vouching, they also contain more insidious forms of it. For example, the court found credible the reasoning of Dr. Most and Deb Benson that the Child's PTSD diagnosis stems from the alleged sexual abuse by Father and that her symptoms are a re-experiencing of the initial events. The experts explicitly *assume* the abuse took place, which requires a determination that the Child's statements are credible.

63 and Ruling 8d, the court found the Child to be credible specifically based on opinions by DCF's experts that the Child was credible or would not lie about sexual abuse.[16] The judge boldly stated that he relied on the experts to determine the Child's credibility. (§ 82 F. 45, last sentence; F. 116). This was an abdication of the court's responsibilities. The judge had no direct exposure to the Child, and the vouching substituted for his own credibility determination. This tainted all of the findings.

IV. The court's termination findings were fatally tainted by admitting the § 82 findings after the judge announced that the evidence taken at the § 82 hearing would be admitted solely for purposes of that hearing, and Father's counsel relied on the judge's statements to Father's detriment.

Father incorporates by reference the arguments on this issue in Mother's brief at her Argument I.

V. The remaining findings do not support a conclusion of parental unfitness by clear and convincing evidence.

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[16] In one egregious example, the judge found that "Dr. Moorton [the Child's treating psychiatrist] found Katie to be a truthful child." (§ 82 F. 49). In another, the judge quoted the court clinician who stated that, despite "Katie's past fabrications," he "does not believe [the Child] is capable of being creative with stories of a sexual nature." (§ 82 F. 63). In other words, the court allowed the experts to say that the Child was incapable of lying about sexual abuse. This is clearly impermissible.

DCF's case against Father was based entirely on its allegation that Father sexually abused Kayley in the shower. Other than the improperly admitted hearsay, the improper vouching by DCF's experts and Kayley's clinicians, and the improperly admitted § 82 findings, there is no evidence Father abused or neglected Kayley. The remaining evidence shows that Father has no criminal record and has never been charged with any crime (Tr. V:145; RA. 60, 410); has no substance abuse or significant mental health history (Tr. V:146; RA. 410, 412); had been vetted, approved, re-approved and praised by DCF as a foster parent (RA. 60, 411, 475-76, 480, 482-83); had raised his own (now-adult) children without incident (RA. 416); and had parented Kayley well for many years (RA. 73, 421, 475, 480).

Father did not comply with all services on his DCF service plans. (FF. 24-27). He did not participate in services for sex offenders, but there was no properly-admitted evidence that he sexually abused the Child, so those services did not apply. See Care and Protection of Rebecca, 419 Mass. 67, 84 n. 15 (1994) (where there was doubt mother sexually abused children, department's demand that she participate in treatment "did not

justify the conclusion that the mother had failed to cooperate" with services). Father did participate in a sexual offender evaluation, and the evaluator determined that Father presented no risk of being an offender. (Tr. III:49, V:144; RA. 408-20).

DCF wanted Father to attend counseling, not because he had a mental health condition that impaired his parenting, but to "evaluate" or "assess" him. (Tr. V:73, 84). The DCF social worker believed counseling "might have been helpful" to Father because he had "lots of sadness" about the case. (Tr. V:137-38, 145-46). Father's failure to attend counseling to address his "sadness" does not render him unfit. See Adoption of Yale, 65 Mass. App. Ct. 236, 242 (2005) (mother not unfit for failure to partake in services absent evidence those services were necessary to correct parenting deficiencies).

The judge also faulted Father for not taking part in a parenting assessment. (F. 27). But Father had been approved and re-approved by DCF as a foster and adoptive parent (RA. 60, 411, 475-76, 480, 482-83) and, other than the shower allegations, no one raised any concerns about Father's parenting. Finally, the judge faulted Father for not meeting with DCF regularly.

(FF. 24, 26, 29). But failure to meet with a DCF worker does not render a parent unfit. Moreover, meetings between parents and DCF workers usually take place at visits. Father contacted DCF weekly to ask for visits, but DCF refused. (Tr. V:93; F. 68).

Accordingly, absent the improperly admitted evidence, there was insufficient evidence of parental unfitness to terminate Father's rights.

CONCLUSION

Father requests that this Court (a) vacate the judgment of the Juvenile Court finding him unfit and terminating his parental rights, and (b) remand this matter for a new trial. Father requests that this Court order that, prior to trial on remand, the Juvenile Court voir dire the Child and order a comprehensive competency evaluation. If the Child is determined to have been incompetent at the time of her statements, they must be ruled inadmissible.

DATED: July 9, 2014 ***Kieran D. (Appellant-Father)***

By his counsel,

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Brief Certification

I, Andrew L. Cohen, hereby certify, pursuant to Mass. R. App. P. 16(k), that this brief complies with all court rules governing appellate briefs, including but not limited to Mass. R. App. P. 16, 18 and 20.

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Andrew L. Cohen