

Ohio v. Clark: What Does It Mean for Child Protective Services?

Last month the U.S. Supreme Court decided [Ohio v. Clark](#), 135 S.Ct. 2173 (2015). The Court determined whether a teacher's testimony of a child's statements to her was barred by the Confrontation Clause. My colleague, Jessica Smith, wrote a [blog post](#) about the holding and its impact in criminal cases. But, what about the world of child protective services?

Ohio v. Clark, 135 S.Ct. 2175 (2015)

The case involved an appeal of Clark's criminal convictions for felonious assault, endangering children, and domestic violence against his girlfriend's three-year-old son and eighteen-month-old daughter. At issue was the **three-year-old child victim's statement** made to his preschool teacher, who is a **mandated reporter** under Ohio's child protective laws. The child did not testify, and the teacher's testimony was offered as evidence of Clark's guilt. The child identified Clark as the person who caused his injuries after the teacher asked what happened and who did this when she noticed multiple injuries on the child. As required by Ohio's mandated reporting law, the teacher called the child protective hotline. A child protective investigation and criminal charges followed.

The U.S. Supreme Court addressed whether the Confrontation Clause applies to statements made to someone who is not a law enforcement officer, and whether the teacher's testimony of the **child's statements** violated the Sixth Amendment Confrontation Clause. The Supreme Court held the teacher's testimony did not violate the Confrontation Clause because the **child's statements** were non-testimonial. A non-testimonial statement is not made for the "primary purpose" of obtaining evidence for prosecution but instead is made during an ongoing emergency so that assistance can be provided to address the situation (i.e., a 911 call for help). The admission of a non-testimonial statement does not violate the Confrontation Clause, although it is still subject to the jurisdiction's rules of evidence. In contrast, a testimonial statement has a "primary purpose" of gathering evidence of events that may be relevant for prosecution. An example of a testimonial statement is a police interview of a domestic violence victim when she is no longer in the presence of her abuser. A testimonial statement is inadmissible under the Confrontation Clause in a criminal trial unless an exception applies.

The Supreme Court declined to adopt a categorical rule that the Confrontation Clause never applies to statements made to someone who is not a law enforcement officer. Instead, a trial court must apply a variety of factors to determine if the statements are testimonial, including "the primary purpose" test, the context in which it was given, the identity of the questioner, and in this case, the child's young age. The Supreme Court further held a State's **mandated child abuse and neglect reporting statute** does not automatically convert a conversation with a mandated reporter to one with a "primary purpose" of prosecution that would trigger the Confrontation Clause.

What, if any, implications does *Ohio v. Clark* have for abuse, neglect, and dependency (A/N/D), termination of parental rights (TPR), and responsible individual list (RIL) actions?

The Confrontation Clause

The Confrontation Clause is part of the Sixth Amendment of the U.S. Constitution. The Sixth Amendment applies to “all criminal prosecutions” and sets forth specific rights of a criminal defendant, including the right “to be confronted with the witnesses against him.” The plain reading of the Sixth Amendment limits the Confrontation Clause to criminal actions. The North Carolina Court of Appeals has held that the Confrontation Clause does not apply to an A/N/D adjudication hearing (See [In re T.M.](#), 180 N.C. App. 539 (2006)) or a TPR action. [In re D.R.](#), 172 N.C. App. 300 (2005); [In re B.D.](#), 174 N.C.App. 234 (2005). Like A/N/D and TPR actions, a RIL proceeding is a civil action where the Confrontation Clause does not apply.

Due Process

A respondent in a juvenile proceeding has a right to procedural due process. [G.S. 7B-100\(a\), -802](#). Due process encompasses fundamental fairness and requires notice and a meaningful opportunity to be heard, which includes confronting adverse witnesses and presenting evidence and arguments. *Goldberg v. Kelly*, 90 S.Ct. 1011 (1970). The RIL statute specifically provides for cross-examination. [G.S. 7B-323\(c\)\(3\)](#). However, unlike a criminal action, the right to confront and cross-examine witnesses in a civil action is subject to “due limitations.” *In re Murphy*, 105 N.C. App. 651 (1992). For example, a parent may be excluded from a termination of parental rights hearing while her attorney cross-examines the witnesses. *In re Barkley*, 61 N.C. App. 267 (1983). “Due limitations” are determined on a case by case basis. [In re D.W.](#), 202 N.C. App. 624 (2010). If *Ohio v. Clark* had been a civil case, the ability to cross examine the teacher would have satisfied one component of due process, which is to allow a respondent to cross-examine witnesses.

Hearsay

The teacher’s testimony that the child said “Dee Dee” in response to her questions “Who did this? What happened to you?” was offered to prove Dee Dee (a.k.a Clark) hurt the child. This statement is hearsay since it was made out of court and was offered to prove the truth of the matter asserted.

The rules of evidence apply to adjudicatory hearings for A/N/D and TPR actions in North Carolina. [G.S. 7B-804, -1109\(f\)](#). The rules of evidence are relaxed, and hearsay may be considered in any dispositional hearing if the court finds the evidence relevant, reliable, and necessary to determine the child’s best interests. [G.S. 7B-901, -906.1\(c\), -1110\(a\)](#). In a RIL hearing, the rules of evidence apply, but [G.S. 7B-323\(b\)](#) allows for the admission of reliable and relevant evidence if that admission will serve the general purpose of the rules of evidence and the interests of justice.

Under the rules of evidence, the teacher’s testimony of the **child’s statements** could have been

objected to as hearsay. The admissibility of the hearsay would depend on the type of hearing. In an adjudicatory hearing, unless a hearsay exception applied, the teacher's testimony of the **child's statements** that Clark hurt him would be inadmissible. For admission at a dispositional, review, or permanency planning hearing, the court would not be bound by the hearsay restrictions and instead would be able to admit the testimony after finding the statement was relevant, reliable, and necessary. At a RIL hearing, the court would have discretion to admit the hearsay if the court found the statement served the general purposes of the rules of evidence and the interests of justice.

What if the statements were made to the DSS social worker?

The Supreme Court may have reached a different conclusion if the statements had been made to a county department of social services (DSS) social worker. The Supreme Court noted that a trial court "must evaluate challenged statements in context, and part of that context is the questioner's identity."

There are fundamental differences between a teacher's and a DSS social worker's roles when interviewing a child. In talking to a child, a teacher may suspect abuse, neglect, or dependency and is obligated to make a report of that suspicion to DSS. [G.S. 7B-301](#). In contrast, a DSS social worker becomes involved after a report has been "screened in" for an assessment. The social worker is required to make a thorough assessment of whether the child is abused, neglected, or dependent and determine what action should be taken to protect the child. [G.S. 7B-302\(a\), \(c\), \(d\)](#). A DSS social worker may respond to an emergency situation by taking the child into "temporary custody" prior to obtaining an order from the court. *Id.*, [G.S. 7B-500](#). If during an assessment DSS finds evidence of abuse, DSS must make an immediate report to the district attorney and local law enforcement. [G.S. 7B-307](#). A criminal investigation will be initiated and coordinated with the DSS assessment. *Id.*

If DSS initiates an A/N/D action in district court, DSS has the burden of proof at every stage of the proceedings, starting with nonsecure custody and continuing through TPR if DSS initiated the TPR action. [G.S. 7B-506\(b\)](#), [-1109\(f\)](#). If DSS seeks to place an individual on the RIL, DSS has the burden of proving that individual abused or seriously neglected a child. [G.S. 7B-323\(b\), \(e\)](#).

The Supreme Court did not address whether it would be a violation of the Confrontation Clause for a DSS social worker to testify about a **child's statements** in a criminal trial. A criminal court will need to determine if the statements were testimonial and apply the "primary purpose test": was the purpose to gather evidence for prosecution rather than deal with responding to an immediate and ongoing emergency? However, this analysis will not be required in an A/N/D, TPR, or RIL hearing since the Confrontation Clause does not apply in civil actions.