

Calif. Supreme Court Expands Child Dependency Hearsay Exception

by Kristine Kim

The hearsay statements of three-year-old Lucero regarding sexual abuse by her father were properly admitted into evidence at a hearing to determine jurisdiction in a dependency proceeding, according to a recent decision of the California Supreme Court.¹ The juvenile court had ordered Lucero removed from her parents' custody, based largely on the child's detailed statements about the abuse that were supported by statements of her teenage half-sister, Maribel. At trial, all parties stipulated that Lucero was legally incompetent to testify, due to her failure to understand the obligation to tell the truth or the difference between truth and falsehood, and the court agreed. Lucero's parents contended that this incompetence meant the child's hearsay statements in a social worker's report were not admissible as evidence. The juvenile court ruled that the statements were admissible, and found that Lucero had been molested by her father and thus came within the jurisdiction of the court. The Court of Appeal affirmed.

The California Supreme Court affirmed the lower court judgments, holding that hearsay statements made by very young children can be admitted into evidence and relied upon to establish jurisdiction over the child as a dependent of the court, *as long as they show special indicia of reliability*, even where the child is too young to be a competent witness. The court noted that, in rendering its decision, it was addressing questions explicitly left open in a 1997 case: *In re Cindy L. v. Edgar L.* Although the *Lucero L.* decision was unanimous, the court was divided as to its reasoning. Justice Mosk authored the plurality opinion, joined by Justices George and Werdegar. Justice Kennard concurred in an opinion joined by Justice Brown, and Justice Chin concurred in an opinion joined by Justice Baxter.

Proceedings Below

In 1997, the San Diego County Department of Health and Human Services received a report that Lucero, then just under three years old, had been molested by her father, Otilio L. Subsequently, a social worker interviewed both Lucero and her half-sister Maribel, who, along with other half-sisters, had been the subject of an earlier molestation report. Initially, Maribel confirmed the earlier abuse, and in fact told the social worker that her step-father Otilio had raped her. She expressed concerns for the welfare of her siblings, especially Lucero. Though Maribel later recanted, the court found that her admission to the social worker, contained in a social study prepared for the jurisdictional hearing, was reliable and thus admissible. Although Lucero was limited in her ability to communicate clearly, the court found that her statements to the social worker regarding Otilio's sexually abusive actions were also admissible, and that she had been molested and therefore came within the jurisdiction of the court. The court said that Lucero's statements would not have been admissible under the framework established by the California Supreme Court in *Cindy L.*, but that they were admissible under a newly amended evidentiary section of the Welfare and Institutions Code, Section 355, the "social study" hearsay exception.

The Court of Appeal affirmed. According to the Supreme Court, the appellate court described the new exception established by the Legislature in Section 355 as "separate from and in some respects

broader than the child dependency exception recognized in *Cindy L.*"² The Supreme Court then granted review.

Background: The *Cindy L.* Case

In *Cindy L.*, the California Supreme Court affirmed the validity of a "child dependency exception" to the hearsay rule.³ The issue before it was whether hearsay statements of a child were admissible in dependency proceedings even when the child was unavailable for cross-examination due to being incompetent to testify. The Court found that such a "judicially-created hearsay exception" was appropriate in cases where there was a substantial need for the evidence, such as those involving child sexual abuse. It set out a three-part test for admissibility of evidence under the child dependency hearsay exception: sufficient indicia of reliability, either the child's availability for cross-examination or independent corroboration of the evidence, and adequate notice to other parties of intent to introduce the hearsay evidence. The Court went on to say that a child's incompetence should not be a categorical bar to the admission of the child's hearsay statements, but rather should be one of the factors considered in determining whether the statement is reliable. The *Cindy L.* court concluded that the "requirements of either corroboration or availability for cross-examination provides additional safeguards against the possibility that the child is fabricating the statement."⁴

After the jurisdictional hearing in *Cindy L.*, but before the Supreme Court decision was issued, the Legislature amended Section 355. The *Cindy L.* court specifically left open the question of the relationship between the new Section 355 and the child dependency exception, and did not address whether and to what extent the former supplanted the latter.⁵ This question was addressed in *Lucero L.*

Supreme Court Analysis: *In re Lucero L.*

Section 355 provides, among other things, that "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 ... may be based ..." [emphasis added]. If a party makes timely objection to specific social study hearsay evidence, however, the evidence may not be admitted unless the child welfare agency establishes one or more of several exceptions. The exception most relevant in *Lucero L.* is that "[t]he hearsay declarant is a minor under the age of 12 years who is the subject of the jurisdictional hearing ..." Even then, the statement is inadmissible if

² 2000 WL 655647, at *5 (Cal.)

³ *In re Cindy L. v. Edgar L.*, 17 Cal.4th 15 (Cal. 1997). See McElroy, "Calif. Supreme Court Approves Child Dependency Hearsay Exception," Youth Law News (Jan.-Feb. 1998). *Cindy L.*, in turn, "was decided against the background of the special evidentiary rules for dependency hearings framed by [the] court in *In re Malinda S.* (1990) 51 Cal.3d 368," in which the Court concluded that a social study, despite being hearsay, was admissible evidence upon which a court could rely in establishing dependency jurisdiction.

⁴ See *Cindy L.*, 17 Cal. 4th at 34, 35. The court also said that "[t]here is no logical reason for denying admission of out-of-court statements that circumstances indicate originate from a child's 'rooted ingeniousness' merely because he or she appears unable to understand, in the abstract, the duty to tell the truth. ... [A]lthough a child's truth competence is a factor in determining the reliability of a hearsay statement, it is not necessarily the decisive factor."

⁵ See *Cindy L.*, 17 Cal. 4th at 28. ("The precise meaning of section 355, and whether it permits a social service agency to produce via a social study report all the evidence that would be produced through the child dependency exception is a question left for another day.")

¹ *In re Lucero L. v. Otilio L.*, 998 P.2d 1019 (Cal. 2000).

“the objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence.”⁶

In his plurality opinion, Justice Mosk framed the question before the Court as “(1) whether the out-of-court statements of a truth incompetent minor who is the subject of a jurisdictional hearing is [sic] admissible in such a hearing under section 355, even if these statements do not meet the requirements of the child dependency exception recognized in *Cindy L.* and, (2) if so, whether such evidence, by itself, is sufficient to sustain a jurisdictional finding.”⁷ The Court had little trouble finding that *admitting* hearsay statements contained in a social study of an incompetent minor who was the subject of a dependency hearing did not violate parental due process rights. Relying solely on such hearsay statements as a basis for a jurisdictional finding, however, was a different matter. The Court ruled that hearsay statements of a child who is the subject of a dependency proceeding and who is not competent to testify may not be relied upon exclusively to find jurisdiction in the absence of “sufficient indicia of reliability.”

In the case before it, however, the Court held that, while the question was close, Lucero’s statements met this standard. The statements were spontaneous; Lucero consistently, and in her own words, informed questioners that she had been molested; and she had no apparent motive to lie. Given Lucero’s very young age and overall manner, these facts seemed to indicate to the court a degree of “inherent reliability.” Under these circumstances, her hearsay statements contained in the social study constituted substantial evidence on which to find her a dependent child of the juvenile court.

Though agreeing with the plurality’s analysis and result, Justice Kennard disagreed with its consideration of the reliability of Lucero’s statements. She said that Maribel’s corroborating testimony, as well as medical findings introduced into evidence, constituted “significant other evidence” beyond Lucero’s hearsay statements to support the jurisdictional finding. Thus, Lucero’s statements need not be seen as the sole support for the jurisdictional finding, and doing so was “unnecessary and a potential source of confusion.”⁸

Justice Chin, in his concurrence, placed an emphasis on following the plain language of section 355, which he found to be the sole controlling authority. He described Section 355 as “a balanced statute, giving the parents substantial rights while allowing children to be protected as fully as possible The competing interests . . . are both important; a parent has important interests at stake, but so too does the child and the state as *parens patriae*.” Justice Chin pointed out that the Legislature, in enacting section 355, “thoughtfully addressed” these competing interests, and that the court should thus “give effect to [the Legislature’s] solution.”⁹

Significance of *In re Lucero L.*

Despite the Court’s unanimous agreement to affirm the rulings below, the fact that the case produced three different opinions suggests that the parameters of the child dependency hearsay exception are far from resolved. This split leaves plenty of room for disagreement among practitioners and courts. Comments by attorneys for the parties confirms the uncertainty. San Diego Deputy County Counsel Gary Seiser expressed concern about the decision, even though he represented the child welfare agency, which was the prevailing party. He said that the decision was “a victory for Lucero but may put other children at a disadvantage by setting a high threshold for courts to rule against parents. [I]n cases of very young children



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in which there isn’t a lot of evidence but in which it is substantially the parents’ word against the child’s word, it will make it more difficult for the court to sustain dependency hearings.” On the other hand, Elic Anbar, who represented Otilio L., Lucero’s father who sought unsuccessfully to have her statements excluded, took an optimistic view. He expressed his regrets for Lucero’s parents but also said that the decision was “a good global result for parents’ rights advocates.” Mr. Anbar also pointed out that the decision serves as “a bit of a guarantee that the evidence used in dependency cases will be more reliable.”¹⁰

Jan Sherwood, a board member of the Northern California Association of Counsel for Children who represents parties in dependency court, thinks that the *Lucero L.* holding will not affect the state’s ability to protect young children. “The decision does not necessarily make it more difficult for the state, because the holding is so specific that it represents only a very small percentage of actual cases.” She found it interesting that the court focused on situations in which child testimony is uncorroborated, since in this case, Lucero’s testimony was indeed supported by Maribel’s statements and medical reports.

Ms. Sherwood said that in reality, without the corroborating evidence, the county would probably not even have filed a dependency petition. “Where counties do file petitions on very little testimony,” she said, “cases will be decided based on the competency of the parents’ attorneys.” She went on to say that, for practical purposes, the *Lucero L.* holding is significant insofar as it “provides parents’ attorneys with an extra ground upon which to make an evidentiary objection.”¹¹

⁶ Other exceptions are that 1) the statement would be admissible under another hearsay exception, 2) the declarant is a peace officer, health practitioner, social worker, or teacher, and 3) the declarant is available for cross-examination.

⁷ 2000 WL 655647, at 9 (Cal.).

⁸ 2000 WL 655647, at 17 (Cal.).

⁹ 2000 WL 655647 at 21 (Cal. 2000).

¹⁰ Peter Blumberg, “State High Court Accepts Hearsay Evidence from Children,” San Francisco Daily Journal, May 23, 2000.

¹¹ Telephone interview, June 14, 2000.