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# **MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES**

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**Successor Edition  
To  
EVIDENCE IN CHILD ABUSE  
AND NEGLECT CASES,  
Third Edition**

**2008 Cumulative Supplement**

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*This supplement supersedes all previous supplements.*



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# Myers on Evidence in Child, Domestic and Elder Abuse Cases

by John E.B. Myers

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Integrating the psychological, medical, and legal disciplines, this work takes you through all of the issues that arise in the investigative and litigation stages of a child abuse, domestic violence, or elder abuse case. *Myers on Evidence in Child, Domestic and Elder Abuse Cases* clarifies the many complex evidentiary and constitutional issues that an attorney must address.

## Highlights of the 2008 Cumulative Supplement

The 2008 Cumulative Supplement includes discussion of many recent developments and adds significant new and revised material on a number of critical topics including the following:

- Examination of recent studies concerning childhood development regarding memory, recall, and suggestibility issues. (See Chapter 1.)
- Examination of recent studies regarding judicial control of proceedings when children testify. (See Chapter 3.)
- Discussion of important decisions in physical child abuse cases, including those concerning:
  - Corporal punishment
  - What type of evidence is sufficient to support a verdict of abuse
  - The battered child syndrome
  - The battering parent syndrome
  - The identity of the perpetrator(See Chapter 4.)
- Review of recent literature and case law concerning child sexual abuse, focusing on both child victims and child offenders. (See Chapter 6.)



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- Examination of a wide-ranging group of recent court decisions on the subject of hearsay, including whether certain testimony falls under one of the hearsay exceptions, in:
  - Child abuse cases. (*See* Chapter 7.)
  - Rape, domestic violence, and stalking cases. (*See* Chapter 13.)
  - Elder law litigation. (*See* Chapter 14.)

The Table of Cases and Index contain material pertaining only to the supplement to further update the main volume.

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not in the main volume.*

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## CHAPTER 1

# CHILD DEVELOPMENT RELEVANT TO INTERVIEWING CHILDREN AND LITIGATING ALLEGATIONS OF MALTREATMENT

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### § 1.02 FUNDAMENTALS OF MEMORY

#### [B] Childrens' Memory Capacity

*Page 7, add at the beginning of note 13:*

Alison R. Perona, Bette L. Bottoms & Erin Sorenson, Research-Based Guidelines for Child Forensic Interviews, 12 *Journal of Aggression, Maltreatment & Trauma* 81-130, 82 (2006) ("modern research reveals that even young children can be accurate witnesses when questioned about meaningful events under optimal reporting conditions."); Michael E. Lamb, Yael Orbach, Irit Hershkowitz, Phillip W. Esplin & Dvora Horowitz, A Structured Forensic Interview Protocols Improves the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol, 31 *Child Abuse & Neglect* 1201-1231, 1202 (2007) ("In brief, the research showed that, although children clearly can remember incidents they have experienced, the relationship between age and memory is complex. . . ."); Kim P. Roberts & Martine B. Powell, The Roles of Prior Experience and the Timing of Misinformation Presentation on Young Children's Event Memories, 78 *Child Development* 1137-1152, 1148 (2007) ("These results suggest that popular conclusions about the deleterious effects of delays on children's memory accuracy need to be revised because long delays per se did not reduce children's accuracy.")

### § 1.03 FREE RECALL, SCRIPT MEMORY, RECOGNITION, AND CUED RECALL

#### [B] Script Memory

*Page 13, add at the beginning of note 37:*

Deborah A. Connolly, Heather L. Price, Jennifer A.A. Lavoie & Heidi M. Gordon, Preceptions and Predictors of Children's Credibility of a Unique Event and an

Instance of a Repeated Event, 32 *Law and Human Behavior* 92-112, 110 (2008) (in this research study the authors found that “Children’s reports of an instance of a repeated event may appear less credible than an equally accurate report from a child who experienced the event once.”); Michael E. Lamb, Yael Orbach, Irit Hershkowitz, Dvora Horowitz & Craig B. Abbott, Does the Type of Prompt Affect the Accuracy of Information Provided by Alleged Victims of Abuse in Forensic Interviews?, 21 *Applied Cognitive Psychology* 1117-1130, 1117-1118 (2007) (“In the last 2 decades, researchers have repeatedly documented that information retrieved from memory using free-recall processes is more likely to be accurate than information retrieved using recognition processes, including yes/no and ‘forced-choice’ prompts. This fact has major implications when accuracy is very important such as in the course of forensic interviews. Young children, especially preschoolers, are more likely than older children to respond erroneously to suggestive questions about their experiences and to select erroneous options when responding to yes/no and forced-choice questions. Regardless of age, furthermore, responses to free-recall open-ended questions are more likely to be accurate than responses to more focused questions. Although young children tend to remember less information and provide briefer accounts of their experiences than older children do, their reports are not less accurate. Such findings have helped foster a remarkable consensus concerning the ways in which investigative interviews should be conducted. Professional and expert guidelines recommend that forensic interviewers rely as much as possible on free-recall open-ended questions when obtaining information from alleged victim of child sexual abuse and take special care to avoid risky questions when interviewing young children.”.);

## § 1.04 STRESS AND MEMORY

*Page 15, add at the beginning of note 47:*

Mitchell L. Eisen, Gail S. Goodman, Jianjian Qin, Suzanne Davis & John Crayton, Maltreated Children’s Memory: Accuracy, Suggestibility, and Psychopathology, 43 *Developmental Psychology* 1275-1294 (2007) (“As predicted, children generally demonstrated better memory and greater resistance to misleading information on questions related to central rather than peripheral elements of the stressful event.”); Stephen Porter & Kristine A. Peace, The Scars of Memory: A Prospective, Longitudinal Investigation of the Consistency of Traumatic and Positive Emotional Memories in Adulthood, 18 *Psychological Science* 435-441, 439-440 (2007) (“Subjects’ traumatic memories were not fractured or pushed from conscious awareness over time. Nor did they fade from memory naturally to the same extent as other events. Rather, traumatic experiences persisted in subjects’ memories, remaining highly consistent, years after their occurrence. Violent experiences (including sexual and physical assaults), which one might assume to be optimal contenders for repression or other impairing mechanisms, were no exception. Unlike recent findings with victims of child abuse, our findings indicate

that traumatic severity is unrelated to memory consistency over time. . . . Unlike traumatic experiences, positive emotional memories exhibited a progressive deterioration, changing dramatically during the follow-up. Not only were traumatic memories more factually consistent over time than positive memories, but their vividness, quality, and sensory components remained essentially unchanged during the follow-up period. In contrast, these subjective features of positive memories declined substantially with time. . . . In conclusion, trauma does seem to create scars on memory, resulting in remarkably vivid and consistent recollections over long periods. As much as people may wish to forget painful experiences, the details remain fully intact in their consciousness.”);

## § 1.06 REPPRESSED OR RECOVERED MEMORIES

*Page 18, add at the beginning of note 65:*

Brendan E. Depue, Tim Curran & Marie T. Banich, Prefrontal Regions Orchestrate Suppression of Emotional Memories via a Two-Phase Process, 317 *Science* 215-219 (2007) (study of how the brain is involved in the suppression of emotional memory); Elke Geraerts, Jonathan W. Schooler, Harald Merkelbach, Marko Jelicic, Beatrijs J.A. Hauer & Zara Ambadar, The Reality of Recovered Memories: Corroborating Continuous and Discontinuous Memories of Childhood Sexual Abuse, 18 *Psychological Science* 564-568 (2007) (this empirical study lends support to the argument that some “recovered” memories of abuse are true; the authors examined the presence or absence of corroborative evidence for memories of abuse; some of the subjects always remembered the abuse (continuous), whereas other subjects claimed to have forgotten the abuse for some period of time (discontinuous); would there be more corroborative evidence in cases where the subject always remembered the abuse? “We found that continuous CSA memories and memories recalled unexpectedly out of therapy were comparable in their likelihood of corroborative evidence. This finding indicates that discontinuous memories are not, as has sometimes been suggested, inherently unreliable. . . . At the same time, discontinuous memories that were recalled in the context of therapy were significantly less likely to be corroborated than were either continuous memories or discontinuous memories recalled outside therapy. Indeed, of the 16 therapy-based discontinuous memories, not a single one could be corroborated.” (p. 566). “It seems likely that one reason memories recalled in therapy were not corroborated is that some of these memories were false memories generated from an interaction between expectations induced in therapy and intrinsic source-monitoring difficulties in the clients.” (p. 567). “In sum, this study provides support for both sides of the so-called recovered-memory controversy. Evidence that discontinuous memories can be genuine comes from the observation that discontinuous memories recalled outside the context of therapy were not significantly less likely to be corroborated than were continuous memories. Evidence that discontinuous memories can be false comes from the finding that memories recalled in the context of therapy were markedly less likely to be corroborated

than were continuous memories or discontinuous memories recalled outside of therapy. The present results also offer an important clue for discerning which discontinuous CSA memories are likely to be factual. Seemingly forgotten memories whose recall was associated with a sense of surprise were much more frequently corroborated than discontinuous memories whose existence was anticipated. This latter finding suggests that whereas deliberately recovered memories are apt to be suspect, spontaneously discovered memories are more likely to be true.” (p. 567)); Stephen Porter & Kristine A. Peace, *The Scars of Memory: A Prospective, Longitudinal Investigation of the Consistency of Traumatic and Positive Emotional Memories in Adulthood*, 18 *Psychological Science* 435-441 (2007) (“Does trauma exert a unique impact on memory? The traditional clinical argument asserts that trauma actively impairs memory. A second prominent view holds that trauma has no unique effect on memory and that traumatic memories show the same deterioration as other autobiographical memories. Finally, the trauma-superiority view holds that traumatic memories — although vulnerable to misinformation — can be highly reliable over time relative to other memories. Overall, our results provide strong evidence that traumatic memories are indeed special, but in a manner contradicting the traditional traumatic-memory argument. Subjects’ traumatic memories were not graced or pushed from consciousness over time. Nor did they fade from memory naturally to the same extent as other events. Rather, traumatic experiences persisted in subjects’ memories, remaining highly consistent years after their occurrence. Violent experiences (including sexual and physical assaults), which one might assume to be optimal contenders for repression or other impairing mechanisms, were no exception. (p. 439) . . . In conclusion, trauma does seem to create scars on memory, resulting in remarkably vivid and consistent recollections over long periods. As much as people may wish to forget painful experiences, the details remain fully intact in their consciousness.” (p. 440));

#### [B] Case Law on Repressed and Recovered Memories

*Page 20, add at the beginning of note 74:*

Phillips v. Gelpke, 190 N.J. 580, 921 A.2d 1067 (2007) (plaintiff in civil case was not required to support with expert testimony her abuse claims based on repressed memories);

### § 1.08 ECOLOGICAL VALIDITY OF SUGGESTIBILITY RESEARCH

*Page 22, add at the beginning of note 89:*

Stephen J. Ceci, Sarah Kulkofsky, J. Zoe Klemfuss, Charlotte D. Sweeney & Maggie Bruck, *Unwarranted Assumptions about Children’s Testimonial Accuracy*, 3 *Annual Review of Clinical Psychology* 311-328 (2007) (Ceci disputes the “assumption” that much of the psychological literature on suggestibility is not relevant to “real world” interviews of children);

## § 1.09 WHAT ACCOUNTS FOR SUGGESTIBILITY?

*Page 23, add at the beginning of note 95:*

Livia L. Gilstrap & Stephen J. Ceci, Reconceptualizing Children's Suggestibility: Bidirectional and Temporal Properties, 76 *Child Development* 40-53, 40 (2005) ("there are many instances in which suggestibility reduces report accuracy not through actual changes in memory but merely because children may acquiesce to false suggestions made to them by interviewers while their original event memories remain unaltered.");

## § 1.10 KEY FINDINGS OF SUGGESTIBILITY RESEARCH

### [A] Age and Suggestibility

*Page 25, add at the beginning of note 104:*

Stephen J. Ceci, Paul B. Papierno & Sarah Kulkofsky, Representational Constraints on Children's Suggestibility, 18 *Psychological Science* 503-509, 503 (2007) ("Children become less vulnerable to suggestions as they get older. Although chronological age is almost always the strongest predictor of suggestibility, there is much variability within age groups.");

*Page 25, add at the end of note 104:*

See also Stephen J. Ceci, Sarah Kulkofsky, J. Zoe Klemfuss, Charlotte D. Sweeney & Maggie Bruck, Unwarranted Assumptions about Children's Testimonial Accuracy, 3 *Annual Review of Clinical Psychology* 311-328 (2007). Ceci and his colleagues describe what they argue are unwarranted assumptions about child witnesses:

Unwarranted Assumption 1: Suggestive Interviews Can Be Indexed by the Sheer Number of Leading Questions

... The means by which the bias is communicated to the child goes well beyond the use of misleading questions; other suggestive techniques include providing positive and negative reinforcement (e.g., praising the child for disclosing information consistent with the interviewer's beliefs, criticizing the child or withholding benefits such as trips to the restroom for not disclosing), utilizing peer or parental pressure (e.g., telling the child that his or her friends or parents have already disclosed), creating a negative or accusatory emotional tone (e.g., urging the child to help keep the defendant in jail), and repeating questions or interviews until the child provides a desired answer. (p. 313) ... [A] simple count of misleading/leading questions would not reflect the suggestiveness of the interview. (p. 314). ...

Unwarranted Assumption 2: Suggestibility Is Primarily a Problem for Younger Age Groups

... Susceptibility to suggestion is highly common in middle childhood, and under some conditions, there are small or even no developmental differences

[between younger and older children]. (p. 315) . . . [A]ll age groups are vulnerable to misleading suggestions, even if preschoolers are disproportionately more vulnerable. (p. 316). . .

Unwarranted Assumption 3: Multiple Suggestive Interviews are Needed to Taint a Report; Milder Forms of Suggestion Do Not Produce Tainted Reports

[C]hildren can incorporate suggestions about salient events after a single suggestive interview. (p. 316). . . Significant tainting and production of false beliefs can also occur with a single mildly suggestive interview. (p. 316). . .

Unwarranted Assumption 4: Children's Spontaneous Reports Are Always Accurate

. . . It is true that children tend to be more accurate when asked open-ended questions compared with more directed questioning. . . . However, it is not the case that children's spontaneous statements are always accurate statements. . . . Furthermore, even if children have not been exposed to misleading suggestions, their open-ended recall is still not guaranteed to be accurate. This is especially true if the child is interviewed about a confusing or ambiguous event. . . . Taken together, these studies show that although children's free-recall and spontaneous statements are generally more accurate than their responses to directed questions, free recall is by no means error free. (p. 318). . .

Unwarranted Assumption 5: Erroneous Suggestions Ineluctably Lead to Erroneous Reports by Children

. . . [S]uggestive interviews need not inevitably lead to false reports by children. (p. 318). . .

Unwarranted Assumption 6: False Reports Produced by Suggestive Interviewing Are Distinguishable from Accurate Reports

. . . [P]rofessionals cannot reliably discriminate between children whose reports are accurate from those whose reports are inaccurate as a result of suggestive interviewing techniques. (p. 321). . . . Children may appear highly credible (or their interviews may have the characteristics of credible narratives), yet their reports may be unreliable. Children can also be reliable yet not appear credible in the eyes of judges and jurors. Accordingly, one cannot use perceived credibility to judge reliability. (p. 322). . .

Unwarranted Assumption 7: Children's Disclosures of Traumatic Events Are Delayed, Denied, and Often Recanted

. . . These data support the view that sexually abused children are silent about their victimization and delay disclosure for long periods of time. . . . For the six methodologically superior studies, the average rate of denial [when directly asked about abuse] was only 14%, and the average rate of recantation was only 7%. Thus, sexually abused children do not usually deny or recant the details of their abuse. In other words, although these children do not readily disclose their abuse, if they are asked about it in a structured interview, they will tell, and few will recant. (p. 322). . . . These data dispel the belief that children need to be bombarded with suggestive techniques to elicit details of their traumatic events;



in fact, children can provide detailed information through open-ended prompts, and if a child denies abuse when asked directly, there is no scientifically compelling evidence that the child is in denial. Abused children usually disclose when directly asked. (p. 323).

Unwarranted Assumption 8: Laboratory Research Is Not an Accurate Reflection of Child Witnesses' Experiences in the Real World

[Ceci and his colleagues disagree with Tom Lyon, who argues that much laboratory research on suggestibility is of marginal relevance to "real world" interviews].

*Page 26, add at the beginning of note 106:*

Mitchell L. Eisen, Gail S. Goodman, Jianjian Qin, Suzanne Davis & John Crayton, Maltreated Children's Memory: Accuracy, Suggestibility, and Psychopathology, 43 *Developmental Psychology* 1275-1294, 1289 (2007) ("As predicted, children generally demonstrated better memory and greater resistance to misleading information on questions related to central rather than peripheral elements of the stressful event.") ("As predicted, older children showed better memory and less suggestibility than did their younger counterparts. . . . The increase in accuracy and resistance to suggestion from preschool to elementary years has been well documented, including on maltreated samples: Young children have more problems handling suggestive questions."); Stephen J. Ceci, Paul B. Papierno & Sarah Kulkofsky, Representational Constraints on Children's Suggestibility, 18 *Psychological Science* 503-509, 503 (2007) ("Children become less vulnerable to suggestions as they get older. Although chronological age is almost always the strongest predictor of suggestibility, there is much variability within age groups."); Livia L. Gilstrap & Stephen J. Ceci, Reconceptualizing Children's Suggestibility: Bidirectional and Temporal Properties, 76 *Child Development* 40-53, 40 (2005) ("From this research it is clear that children's autobiographical memory can be highly accurate, but that their reports can be distorted when they are obtained under suggestive interviewing conditions. Factors such as question repetition, use of yes-no questions, misleading questions, plausible and implausible suggestions, stereotyping, and invoking peer conformity have been associated with errors in children's reports to adult interviewers. Moreover, younger children appear more vulnerable to the deleterious effects of an interviewer's misleading suggestions than older children.");

*Page 26, add at the end of note 108:*

See also Jodi A. Quas, William C. Thompson, & K. Alison Clarke-Stewart, Do Jurors "Know" What Isn't So About Child Witnesses?, 29 *Law and Human Behavior* 425-456 (2005) (survey given to jurors and potential jurors to assess their knowledge of, inter alia, children's suggestibility; "studies clearly



demonstrated that children's accounts of events can be radically altered through the use of highly suggestive interrogation practices." p. 427 "the study revealed considerable variability in individuals' knowledge about children's eyewitness abilities and reactions to abuse and indicated that individuals possess both accurate and inaccurate beliefs. A critical and much needed role for experts is to reduce this variability and correct the misperceptions of a majority (or a large minority) of jurors. Indeed, Ceci and Friedman [Ceci, S.J., & Friedman, R.D. (2000). The suggestibility of children: Scientific research and legal implications. *Cornell Law Review*, 86, 33-108] highlighted that, as long as a sizable minority of jurors hold incorrect beliefs, expert testimony is important in juror education. Our findings reveal that, even when a majority of individuals held correct beliefs, a large minority did not. Of importance, however, experts need to go beyond simply stating that children can be misled to make false claims of abuse and explain the conditions under which children are more (and less) likely to err. This point was made by Lyon [Lyon, T.D. (1999). The new wave of suggestibility research: A critique. *Cornell Law Review*, 84, 1004-1087], who noted that experts' testimony may be useful in providing insight into specific research findings concerning the reliability of children's testimony that are not well understood by laypersons. Overall then, the knowledge provided by experts could reduce both unwarranted skepticism and naive trust in children's claims of sexual abuse." p. 452).

*Page 27, add at the beginning of note 109:*

Livia L. Gilstrap & Stephen J. Ceci, Reconceptualizing Children's Suggestibility: Bidirectional and Temporal Properties, 76 *Child Development* 40-53, 49 (2005) (study of 3- to 7-year-old children; "analyses of unstructured interviews in which field interviewers are able to tailor their line of questioning in response to the child's response style and personality appear to yield results that are, at least at the global level, at variance from those produced by studies of scripted, highly structured interviews. Unlike the results of these highly structured studies, we found that overall leading questions were likely to be followed by denial, not acquiescence. Such a result calls into question the customary finding that interviewers' suggestive questions are more likely to be followed by increased inaccurate acquiescence by children.");

#### [D] Ambiguous Body Touch

*Page 29, add at the beginning of note 120:*

Stephen J. Ceci, Sarah Kulkofsky, J. Zoe Klemfuss, Charlotte D. Sweeney & Maggie Bruck, Unwarranted Assumptions about Children's Testimonial Accuracy, 3 *Annual Review of Clinical Psychology* 311-328, 318 (2007) ("even if children have not been exposed to misleading suggestions, their open-ended recall is still not guaranteed to be accurate. This is especially true if the child is interviewed about a confusing or ambiguous event.");