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LAVERY, J., dissenting. I respectfully dissent from the opinion of the majority because of fundamental improprieties that occurred during the complex proceedings at trial. I cannot look at the claimed improprieties in distinct parts, as the majority has, because the improprieties are interrelated and overlapping. The trial court abused its discretion in allowing uncorroborated hearsay evidence of the children's claims through the residual exception to the rule against hearsay without any testimony on the mindset of the children, the effects on them were they to testify or the reliability of the statements prior to its ruling on the admissibility. In addition, the court abused its discretion in allowing witnesses to testify as to the credibility of the children with respect to the hearsay statements. The hearsay was then admitted prior to the testimony of a court-appointed therapist regarding the harmful effects on the children and their credibility. This testimony was even more problematic because the therapist had not been instructed by the court to make a determination on the matter of the children's ability to testify. It is clear that the court used this hearsay evidence and bolstered the statements of the children in order to find that there had been a "multitude of independent sources of credible evidence" that the respondent mother's[1] actions within the home had been neglectful to the children.

I agree with the majority on the standard of review for evidentiary challenges. "Our standard of review regarding challenges to a trial court's evidentiary rulings is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . Additionally, it is well settled that even if the evidence was improperly admitted, the respondent must also establish that the ruling was harmful and likely to affect the result of the trial." *In re Latifa K.*, 67 Conn. App. 742, 751–52, 789 A.2d 1024 (2002). Another important standard to acknowledge concerns when the residual exception may be used. The court must determine that "(1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule." Conn. Code Evid. § 8-9. Reasonable necessity is established by showing that "unless the hearsay statement is admitted, the facts it contains may be lost, either because the declarant is dead or otherwise unavailable, or because the assertion is of such a nature that evidence of the same value cannot be obtained from the same or other sources." *State* v. *Sharpe*, 195 Conn. 651, 665, 491 A.2d 345 (1985); Conn. Code Evid. § 8-

9, commentary.

The case law that the majority and the trial court use to decide this case are readily distinguishable, and the case at bar should be considered in light of the distinguishing characteristics. In *State* v. *Jarzbek*, 204 Conn. 683, 687–88, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988), the videotape of the four year old victim's testimony and cross-examination was admitted. In *State* v. *Dollinger*, 20 Conn. App. 530, 541, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990), the victim was twenty-eight months old, and there was corroboration of sexual abuse from a physical examination of the child. *State* v. *Aaron L.*, 79 Conn. App. 397, 420, 830 A.2d 776 (2003), aff'd, 272 Conn. 798, 865 A.2d 1135 (2005), is vastly different because the court allowed under the residual exception hearsay statements made by the victim when she was two years old that she could not remember at the time of trial ten years later. Unlike these cases, in the present case there are no allegations or evidence, even with the most extreme hearsay, of any physical assault on the children.

In this case, not only are there differences in the ages and the situations of the victims, but the court had no proper foundation to make a determination of whether the children were unavailable. The court had never met with the children, and no expert testified before the hearsay was admitted in full. In fact, the court did not even consider the full offer of proof from the attorney for the father before making its ruling:

"[The Father's Counsel]: [T]he therapist thinks it would be very detrimental to the children to have to come in here and testify. And I think that's the only other alternative, quite frankly, is to put them in here on the [witness] stand or to have a hearing in Your Honor's chambers where you can question the children and, if you find it's necessary, we could submit written questions that Your Honor could ask the children. . . .

"The Court: Well, these are children who—Tayler is twelve? Is that right? And Nicholas is ten? . . . . I cannot believe that it would be in the best interests of the children to subject them to this contested hearing and cross-examination, and put them squarely in the middle between [the respondent] and their father. I think that I would not be serving their best interests. . . . I'm going to allow the children's statements to be for the truth of the matter asserted under the residual exception to the hearsay rule, that there is a reasonable necessity for the admission of their statement. And it's supported by the . . . guarantees of reliability and trustworthiness. So, I'm going to allow it in over your objection."

Counsel for the father made suggestions that show that the children were available to testify but in a limited

capacity as to lessen the impact on them. She suggested questioning the children in chambers or having the court ask questions of the children. This case does not fall within the rare instances that the residual exception is meant to cover, and it was an abuse of the court's discretion to make such a quick decision without a full hearing on the matter where it is evident that it harmed the respondent. Further, the court found only that there was reasonable necessity, without explaining why and without finding that the children were unavailable. In its memorandum of decision, the court wrote: "The court finds that there has been a multitude of independent sources of credible evidence that the children, while in the care of the [respondent], have been subjected to witnessing domestic violence between the [respondent] and her live-in boyfriend, William B. In addition, while residing with the [respondent], the children have witnessed a significant physical altercation between William B. and another individual named Chico. In addition, while living with the [respondent], the children were subjected to both verbal and physical abuse at the hands of the [respondent] and her boyfriend, William B.

"The court finds credible evidence that the children witnessed substance abuse by the [respondent] and her boyfriend, William B. The [respondent] has placed her relationship with [William] B. over the safety and well-being of her two children and has not provided proper supervision for the two children while they have been in her care. It is to the [respondent's] credit that she has sought counseling with Dr. [Elizabeth] Ayes to seek to improve her life. The court also finds credible evidence that the children, who have been living with the father for almost two years, have an excellent relationship with him and are doing well while in his care with no child protection concerns existing that would necessitate further involvement by the department of children and families." There was no independent, corroborating evidence of the alleged abuse that the children encountered and the situations they claimed to others that they were placed in.

The majority cites case law that states, regarding the residual exception, that "the exception . . . is particularly well suited for the admission of statements by victims of child abuse and has been used in federal and state courts for this purpose." *State* v. *Dollinger*, supra, 20 Conn. App. 540.[2] The majority, however, fails to recognize that the same opinion notes that "[t]his exception is not to be treated as a broad license to admit hearsay inadmissible under other exceptions, and is to be used *very rarely* and only in *exceptional circumstances*." (Emphasis added.) Id. The case was not an exceptional circumstance, and the use of hearsay suggests that the residual exception is now being used for more than the rare instance when the evidence would otherwise be lost.

There are more prevalent views within the judiciary and the bar that the use of the residual exception in child abuse and neglect cases as well as in criminal cases is not "particularly well suited." One notable opinion is that the residual exception "should not be used for 'near misses' or for a category of situations that cannot be made to fit into traditional exceptions, such as statements of children in child abuse cases." C. Tait, Connecticut Evidence (3d Ed. 2001) § 8.52.2, p. 743. At the June 30, 2008 Annual Meeting of the Judges of the Superior Court, Justice Katz, as chairwoman of the code of evidence oversight committee, presented to the judges a tender years exception to the hearsay rule.[3] In her presentation, Justice Katz said about the proposed exception that "[t]he commentary, I think, identifies some of the concerns why children don't fit neatly into spontaneous utterances. They don't fit in a category. They don't fit neatly into a course of treatment. And so we all know, I think, as a practical matter, what essentially happened is it's the residual exception to the hearsay rule. Instead of being a narrow exception, it's had a truck driven through it, I think, in recognition of the difficulty in dealing with these kinds of victims." Judges of the Superior Court Annual Meeting, June 30, 2008, pp. 65–66. The vote of the judges to accept the new hearsay exception was deemed unanimous. Id., p. 68. This rule was specifically created to deal with criminal and juvenile cases, which include abuse and neglect cases. See Practice Book c. 32a. Although this exception was not in force at the time this case was heard, it is evidence that more needs to be done before hearsay is admitted. It is a recognition that a parent's rights should not be limited or taken away on the basis of uncorroborated hearsay. The case law the majority cites supports this assertion because in those instances there was corroboration or a high degree of necessity before allowing such evidence. This case was not a rare or exceptional instance, and it was an abuse of discretion to allow the children's statements in. This is a case in which the fact finders were the therapist and social workers. Their testimony on the credibility, which was wrongfully admitted, was piled onto the multitude of hearsay evidence under the residual exception to the hearsay rule, which strained the residual hearsay exception beyond all reasonable bounds. The residual exception as interpreted by the majority for all practical purposes eliminated the hearsay rule. The children were ten and twelve and by all accounts were reasonably articulate. The trial court should have, at a minimum, held a hearing with the children in a reasonable setting to determine the ability of the children to testify. In my opinion, the judgments should be reversed because the respondent was denied due process under an extreme enlargement of the residual exception to the hearsay rule. In addition, I find that the credibility testimony of the experts was most harmful to the respondent.

I therefore respectfully dissent.

[1] See footnote 1 of the majority opinion.

[2] It is interesting to note that this court in *Dollinger* cites generally a note entitled "A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases," 83 Colum. L. Rev. 1745 (1983), that recommends a more stringent approach than that adopted by Connecticut to using children's hearsay statements in abuse cases. See *State* v. *Dollinger*, supra, 20 Conn. App. 540–41; K. Gregoire, "A Survey of International Hearsay Exceptions in Child Sex Abuse Cases: Balancing The Equities in Search of A More Pragmatic Rule," 17 Conn. J. Int'l L. 361, 371-75 (2002).

[3] Practice Book (2009) § 8-10 provides: "Hearsay Exception: Tender Years:

"(a) A statement made by a child, twelve years of age or under at the time of the statement, concerning and alleged act or sexual assault of other sexual misconduct of which the child is the alleged victim, or any alleged act of physical abuse committed against the child by the child's parent, guardian or any other person then exercising comparable authority over the child at the time of the act, is admissible in evidence in criminal and juvenile proceedings if:

"(1) The court finds, in a hearing conducted outside the presence of the jury, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness;

"(2) The statement was not made in preparation for a legal proceeding; and

"(3) The child either:

"(A) Testifies and is subject to cross-examination in the proceeding, either by appearing at the proceeding in person or by video telecommunication or by submitting to a recorded video deposition for that purpose; or

"(B) In unavailable as a witness, provided that:

"(i) There is independent corroborative evidence of the alleged act. Independent corroboration does not include hearsay admitted pursuant to this section; and

"(ii) The statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

"(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement, the content of the statement, the approximate time, date, and location of the statement, the person to whom the statement was made, and the circumstances surrounding the statement that indicate its trustworthiness. If the statement is in writing, the proponent must provide the adverse party a copy of the writing; if the statement is otherwise recorded by audiotape, videotape, or some equally reliable medium, the proponent must provide the adverse party a copy in the medium in the possession of the proponent in which the statement will be proffered. Except for good cause shown, notice and a copy must be given sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare to meet the statement.

"(c) This section does not prevent admission of any statement under another hearsay exception. Courts, however, are prevented from:

"(1) applying broader definitions in other hearsay exceptions for statements made by children twelve years of age or under at the time of the statement concerning any alleged act described in the first paragraph of section (a) than they do for other declarants; and

"(2) admitting by way of a residual hearsay exception statements described in the first paragraph of section (a)." See generally R. Marks, "Should We Believe the People Who Believe the Children?: The Need for A New Sexual Abuse Tenders Years Hearsay Exception Statute," 32 Harv. J. on Legis. 207 (1995).