Introduction to Excerpt from Testimony of Dr. Rick Ellis

Dr. Ellis was our first witness. When we first took Jenny's case, we knew that we would need an expert who would look at Jenny's abilities beyond her IQ score.

We asked Dr. Ellis to focus on Jenny's abilities and her history of making decisions with support to show that, whatever her IQ, when she learned a skill like Supported Decision-Making, she is able to master and repeat it. This allowed us to make the critically important distinction between Jenny's ability to learn new skills, which is generally what IQ measures, and her ability to repeat skills she has learned, like Supported Decision-Making.

This excerpt focuses on Dr. Ellis's evaluation of Jenny and his opinion that her IQ test results do not accurately measure her ability to make decisions with support or to live appropriately and safely in the community.
Q. Okay. Staying on Page 2 of your report, looking at a section titled, Tests Administered.
   A. Yes.
   Q. Do you need a second to put on your glasses?
   A. Uh-huh. Go ahead.
   Q. You say that you administered the Stanford-Binet Intelligence Scales and the Woodcock Johnson Test of Achievement. Why did you do those tests?
   A. She had previously been administered the Wechsler Scale, and I administered the Stanford-Binet, so there wouldn't be overlap between the two tests or a
practice effect, and I administered the
Woodcock-Johnson to find out what kind of skills she
actually has and how could she perform on such a test
as a way of finding out what her abilities might be in
terms of academic achievement and skill level.

Q. Well, is it fair to say that when you're
assessing someone's capacity, one side does not fit
all, you should individualize the assessment for the
person?

A. Correct.

Q. You also mentioned in this section that you
reviewed records from other providers, like Dr.
Burkett, the CSB and others. Why is it important to
look at other records?

A. Because you want to understand what are the
circumstances that led up to where the individual is
now and what has their functioning been or what has the
opinions of other professionals been or other
non-professionals been in terms of the functioning
level of the individual.

Q. You also mentioned that you looked at
testimony and interrogatories. Why was it important to
look at those?

A. To get the perceptions of others, not to
base my claim on somebody else's perceptions but to see
how and why different people form different opinions about Jenny and her functioning.

Q. Okay. Would you stay on Page 2 in the section entitled, Observations?

A. Uh-huh.

Q. I'm looking at the second paragraph under that section where you say that Jenny has difficulty following directions but she appropriately asks for clarification when needed. First, why is it appropriate that she asked for clarification?

A. As opposed to asking questions about some unrelated aspect of the test or why is that picture blue or why is that picture green, she asked questions to try to understand what we were trying to get at when we did the evaluation. She didn't ask about things around the room, she asked about what we were trying to accomplish at the time, so she was -- that gives a picture of her task orientation, and she knows her limitations when she doesn't understand something, she wanted help in understanding it.

Q. So is it significant while you're trying to determine what Miss Hatch's intellectual capacity is that she asks questions like that?

A. Yeah, but one question in isolation doesn't mean anything, but when you take everything together
and you see a whole picture of how she orients toward
tasks, how she has performed in the past and how she
may relate in interview situations or other situations,
you put them all together and this was one aspect of
that evaluation.

Q. A person who then appropriately asked for
clarification is more likely to have a higher
intellectual capacity?

A. Correct, and be more oriented to use what
capacity they have to function at a higher level.

Q. Would you please turn to Page 3 of your
report.

A. Yes.

Q. I'm looking at the last full paragraph on
that page.

A. Uh-huh.

Q. There you say that Miss Hatch has a strength
in verbal fluid reasoning, which you describe as, "The
ability to solve verbal problems using inductive or
deductive reasoning." Can you give me a little detail
so I can understand what exactly what that means?

A. Well, fluid means what's underlying
someone's ability. It's known as the "g" or how they
can think given the optimum situation. And the verbal
means when she interacts with others and the reasoning
part is for her is understanding the -- we call it
deductive or inductive reasoning, either top down or
bottom up with inductive, meaning if I say ringmaster,
elephant and balloons, someone would induce or
logically progress to it's related to a circus. So
that's top up and bottom down, and then the deductive
reasoning if I were to say circus, words in a circus,
and someone could name items, so she has the ability to
see those relationships and what fits in and what
doesn't fit in to different processing styles.

Q. Can you give me a real world example of
someone using verbal fluid reasoning to address
situations in his or her life?

A. If someone was problem solving how to handle
a situation, you know, of multi-steps, of crossing the
road, being safe is a general concept and looking both
ways, watching the light, all of these other components
would be a part of that, so it's taking the general
concept or the particulars and applying those in real
world situations.

Q. Is it fair to describe -- is it fair to say
that someone with good verbal fluid reasoning skills,
that's indicative of someone able to apply a skill that
they have already learned to new situations?

A. Yes. The more you're feeding the general
potential with new information, the more you're able to
apply that new information in new situations.

Q. In the same paragraph, you say that Miss
Hatch has strength in nonverbal visual-spatial
processing, which you described as, "The ability to see
the patterns, relationships, spatial orientations or
the gestalt, the whole amongst diverse pieces of visual
display."

A. Uh-huh.

Q. Can you give me a little more information on
what exactly that means.

A. Well, the gestalt is seeing the forest for
the trees or the pieces of the puzzle and seeing the
part whole visually of where something might fit in,
where it might not fit in, and, for an example, might
be in a real world situation in a thrift store would
be, boy, you know, that rack of clothes are messy.

Well, what makes up the messy? Well, there's empty
hangers, there's shirts being backwards, you know,
there's other things that might be wrong with it. So
if she can look at the making it look nice maybe in
that type of situation, so using those skills or seeing
the whole gestalt of what makes something look a
certain way, or that room's messy, what are the
components of being messy?
Q. Let me see if I understand putting the two together. Nonverbal visual plus spatial processing would help a person say, I recognize this situation, I was in one like it before --

A. Uh-huh.

Q. -- and verbal fluid reasoning helps a person say, and when I was in a situation like this before, I did X?

A. Right, the fitting it in with the previous learned activity.

Q. So got to allow a person to apply skills they have previously learned to new situations?

A. Correct.

Q. Okay. Would you please turn to Page 5. I'm looking at the section entitled, Mini Mental Status Examination.

A. Uh-huh.

Q. In that section you say, and I quote, "Immediate memory and short-term memory were found to be significantly impaired." Is this indicative of difficulty learning new skills and retaining new information?

A. Yes. It's getting it in the first time that's difficult for her but -- and that's what this evaluation indicator or this component of my assessment
indicated, but it didn't necessarily mean once it's in there that she wasn't able to use it and work with it. Again, and this wouldn't negatively influence her performance on the IQ test, which may not accurately represent her functioning.

Q. So, again, just so I'm clear, what you're saying is this weakness in immediate and short-term memory, it causes her difficulty in learning new things, but if she's got a skill that she's learned, she's got a skill?

A. Right, right.

Q. In your opinion is decision-making a skill?

A. Yes, it is.

Q. We'll discuss this more in some more detail in a few minutes, but do you feel that based upon your evaluation and the material you've reviewed that decision-making is a skill that Jenny has learned?

A. Yes.

Q. Okay. Please look on -- stay on Page 5 of your evaluation in the sections entitled, Conclusion and Recommendations.

A. Yes.

Q. This follows up on something you just said. You said that Miss Hatch's score on the intellectual tests, quote, "Underestimate her true intellectual
potential". Why do you feel that?

A. Because when I compared her score on the IQ test with her score on the Woodcock-Johnson, there's no way that somebody could have more -- more able to perform better than they have the capacity to perform. So if she did, say, about, on a graph it would be one foot high on ability but her score was two foot high on the ability to use her skills that she has, and that was reflected in the Woodcock-Johnson test, it was reflected in the community activity that we did together, it was reflected in the interview when I would discuss her functioning with her. So the lowest of everything that she had done was the IQ test. So in a lot of -- everything else that we had done, she scored significantly higher. And, also, the review of the records indicated that she had some better decision capacity than the IQ would reflect.

Q. Okay. So when we talk about an IQ score, a number like a 52 or a 49, is it so completely out of the realm of psychological possibility that a person could outperform their score?

A. No. I've had it occur in the past also.

Q. So Jenny is not some kind of novel creature who is able to make decisions better than her number would suggest?
A. Correct.

Q. Okay. Staying in the section entitled, Conclusions and Recommendations, you again discuss her strengths in verbal fluid reasoning and nonverbal visual-spatial processing. Can you tell me how those strengths might make up for or outweigh her weakness in short-term memory or in IQ?

A. And that also -- put those strengths together with what I indicated earlier and of her asking a question and trying to understand a question on the IQ test, that she can use the skills she has, more than the test would really say that she would be able to, so in actuality, she can do a lot more with what she appears to have because of that short-term memory deficit that interferes with things.

Q. So it's fair to say, then, her strengths help her overcome her weaknesses?

A. Correct.

Q. Like everyone else, I take it?

A. Correct.

Q. Okay. Looking at Page 6, please.

A. Uh-huh.

Q. I am in the fourth full paragraph that begins with the words, in particular?

A. Correct.
Q. And I want to look at this in some detail, so for the record, that paragraph states, "In particular, Miss Hatch's assessed strengths and documented past performance indicate that she should be able to make informed decisions if she's given consistent appropriate support. On the basis of her past performance and the above results, she has shown a requisite capacity to call upon her support network as she has done in the past and apply her facilities to new situations. In addition, her strengths support the conclusion that Miss Hatch's decision-making skills will continue to improve over time if she is given the necessary support she needs and the opportunity to make decisions for herself."

So, first, why will her strengths help her when she receives consistent support?

A. That she'll be able to use that information to make judgments on the new information that's provided to her. She would be able to judge the source of the information on whether it's someone she could trust or someone that she wouldn't trust. And that she would be able to continue to learn about the things that are important in her life, she's motivated, which is a very big piece of the pie, and she also has the ability to think through things, but at her level, and
she needs help with that memory issue.

Q. Now, I want to make sure I understand that you're not just guessing. Did you base that conclusion you just raised just based on the test or did you look at things Miss Hatch has done before to come to that conclusion?

A. Well, I based it upon everything she did during interviews, during the community outing, reading all of the previous reports and testimonies, and, you know, even with that decision-making, one of the critical issues was highlighted today at lunch, Your Honor, if I may. Jenny saw me and recognized me, and she waved at me. There was someone I was eating lunch with, and that person waved at her, and she didn't know them, and she didn't wave back to him, because she didn't know him and wasn't that familiar with him, and not attending to him that, well, so, you know, in terms of one of the issues in the past was with strangers and dealing with novel situations, she was able to make a pretty good decision at lunchtime today. So I was pretty proud of her when I saw her do that.

Q. How important is documented past performance in determining future capabilities?

A. When I'm asked to do evaluations and someone will say, well, we need to do an evaluation for this
reason, we need to do an evaluation for that reason, I'll say, well, the best proof -- you know, I'll say, what's the reason? Well, we want to know how the person is going to act in the future, and I'll say, well, the best predictor of the future is how they acted in the past. So there's nothing magical about our tests that can tell anything in some areas of functioning, but, yeah, we contribute, but the best predictor of the future is the past.

Q. Is it fair to say, then, a person who has successfully shown the intellectual capacity to make decisions in the past is likely to be able to have that intellectual capacity in the future?

A. Correct.

Q. Okay. I want to discuss with you the community-based outing you discussed in that paragraph.

A. Uh-huh.

Q. Tell me about that outing.

A. We took Jenny to Chic-Fil-A. We drove in my SUV. She did not seem any different than any person her age in terms of her ability to function, you know, looking both ways when she crossed the little drive-thru area. She did have some trouble because of her operation in getting in and out of the SUV, it was kind of tough on her. But she, you know, took care of
her belongings, interacted appropriately, ordered her food correctly, got her condiments, asked for condiments, made small talk about her interests when asked. Everything about it was within the normal limits of what someone would do when they went on an outing to Chic-Fil-A with someone they just met.

Q. I mean, you took her to lunch. Why is it significant that she's able to act appropriately at Chic-Fil-A?

A. To find out, you know, the assessment and blocks and puzzles and memory and repeating numbers is one thing, but how well can she apply those to social situations, the knowledge she does have about dealing with people and dealing in the world on her own.

Q. Okay. You said she took precautions to ensure her safety. Why is that an important part of your evaluation?

A. It indicates that level of independence that, you know, she knows she has to keep track of her purse, she knows she needs to be careful when she does this, she knew how she needs to get down from an SUV. I don't know if she's ever been in an SUV before, I didn't ask her, but she knows how to get in and out, to take into consideration her back problem that she has, so knowing how to deal with those kinds of situations.
is important, and it's going to, again, predict the
future and tell us how she handles situations here on
out.

Q. In that section you also said that Jenny
was, "Able to conduct herself appropriately when
engaged in social activities with the examiners and
others." Beyond what we've already said, how so?

A. With my tester, she'd say, hi, how are you
today, which we really don't get many kids doing that
and having the social greetings, with having the
interaction with others, saying the thank you when the
Chic-Fil-A person came around and asked if she needed
anything, you know, saying thank you when someone held
the door, those types of activities just indicate how
well she is integrated on reason, level into society
and functioning on her own.

Q. You've said you've conducted over 3,000
evaluations, including 50 or so with people with Down
Syndrome, people all across the spectrum of
functioning. How did Miss Hatch compare in the way
that she acted in public with some others who might
otherwise be seen as in her same intellectual
functioning level?

A. Again, based on the IQ, I don't remember
having anyone with a 50-ish IQ ever function that well
in adaptive behavior, they call it, how well they deal
with the world and take care of their needs, et cetera.
So that was another indication that would -- a 50 IQ
really wasn't accurate of her functioning level.

Q. And adaptive behavior is particularly
important when we discuss ability to live
independently; isn't it?

A. Yes.

Q. What can adaptive behavior tell you about
someone's ability to live in the community or live
independently or make decisions?

A. Well, those are all the component pieces of
functioning in society, being able to get your needs
met, know when to ask, know when to communicate, know
how to take care of yourself and responsibility and
monitor her own purse, all those things that make up
being able to function well in society.

Q. And in that same section regarding the
outing, you said that Miss Hatch, "Exhibited awareness
of the behavioral requirement in a variety of
situations."

THE COURT: Where are you on there?

MR. MARTINIS: I am on -- I didn't mark that
page, I apologize for that.

THE COURT: Back on 5?
MR. MARTINIS: No, I think I'm off 5. I am on 6, and I am on the second full paragraph that begins with, Miss Hatch demonstrated her strengths. Are we all together?

THE COURT: Yes, sir.

BY MR. MARTINIS:

Q. In that paragraph you say that Miss Hatch: Exhibited awareness of the behavioral requirements in a variety of situations and displayed a good understanding of appropriate expectations in order to navigate her environment. How so?

A. As I indicated before: Please, thank you, asking, complimenting, knowing when to order, knowing how to take care of, you know, her food, making, you know, proper conversational etiquette about small talk and her interests, just when you take the whole picture, it was a relative strength for her.

Q. What does the things that you saw from Miss Hatch in that outing and otherwise, including the story you told about lunch today, tell you about Miss Hatch's awareness of behavioral norms and requirements and safety?

A. That she's definitely way above what the 50 IQ would indicate, and she functions extremely well, considering everything that's just been said and what
she's been through with the IQ and experts would say.

Q. There's been some testimony in this case, some anecdotes of some unsafe behavior Miss Hatch took part in, riding a bike unsafely, she got into a car with a stranger once, she's allegedly flirtatious with boys; is that something you observed?

A. No, I did not observe any of that, and I did discuss it with her, and asked her how would she handle this situation again, and she seemed definitely aware that she had made some mistakes in the past and wouldn't do anything like that in the future. So people have -- back to what I said, she has the ability to do, people have talked to her about those mistakes in the past, and I'm confident that she understands the social norm now, that those are things you shouldn't do, that it would be dangerous for her possibly.

Q. So looking back at the strengths you found, the visual reasoning, the nonverbal processing, do you believe that these things have come to the forward to help her, as you said, learn from her mistakes and act more safely in society?

A. Yes.

Q. Do you think that she demonstrated appropriate awareness in how properly to act?

A. Yes.
Q. A moment please. On that -- oh, on Page 6, looking at the next paragraph, the one that begins, Thus in my opinion...

A. Uh-huh.

Q. That one talks about how you believe her IQ score does not measure her talents, and you've discussed that. I'm looking at the next sentence where you say, "Because Miss Hatch can learn and retain information as shown as her areas of strength, her performance on the academic assessments and during the community activity, I believe that she can make informed decisions when given the support she needs to do so."

What kind of support does Miss Hatch need to make these decisions?

A. Well, I think an assisted -- what do they call it -- like, mini boards, as referred to in the literature, that she would have people to -- hopefully, have people that she could draw on, ask questions. She knows one person may help her in social girl things and someone else may help her with legal things or living things or financial things, that she can have those types of supports available to her, and I think that she has the potential to utilize them appropriately.

Q. So looking at now the last paragraph on that
page where you say, I recommended Miss Hatch be given support that allows her to use both verbal and visual learning skills. This support should include receiving information through explanations, examples, and the opportunity to ask questions.

How will that help Miss Hatch, given her strengths, make decisions for herself?

A. That support -- and then, again, you know, the premise is that she's interested in her own life, you know, as we saw in the assessment and we saw in the records, and since she has that interest, she will know when and when not to utilize resource A or resource B, that she'll ask questions before she makes decisions on something, that she'll consult with, maybe, one or more of the members before she does something. She'll maybe think about it, I believe that occurred previously, that, initially, when she wasn't too keen on the idea of the operation but people spoke with her about it, she had time to process it, and according to the records, she made the decision to have the operation, which was in her best interest, so she had been doing that in the past.

Q. So mini board, it's just kind of a fancy literature term for people who support and care about her giving her the assistance she needs to make
decisions?

A. Correct.

Q. And that assistance, based upon what you said, is best done as explaining things to Miss Hatch in language that she can understand the issues before her?

A. Correct, yes. She can't understand and comprehend a legal document, but if you explain it to her in her own terms, maybe repeat some of the items in different ways, that she'll be able to get it.

Q. Turn to Page 7, please.

A. Pardon me?

Q. Turn to Page 7, please. In the first paragraph you talk about a real world example that involves understanding a legal document. What did reviewing Interrogatory Number 3, which is in evidence, about a power of attorney that Miss Hatch's parents helped her sign, what did that tell you about Jenny's ability to understand, say, legal documents?

A. That with the help and support of others, that she signs documents that are in her best interests.

Q. So in your opinion, the example described in Interrogatory 3 is consistent with, you said, her strengths and abilities will let her do to make
decisions?

A. Correct.

Q. And that was because in that situation, her parents, Mr. Ross, Mrs. Ross gave her the support she needed and explained that document in language she could understand?

A. Correct.

Q. Second paragraph down you talk about Hampton/Newport News CSB records showing Jenny making other decisions, like, having surgery. Is that another example of Jenny using those strengths to get information in ways that she understands to make a decision?

A. Yes, I indicate earlier, yes.

Q. And like you said before, past performance is the best indicator of future performance. These are two pretty important decisions --

A. Correct.

Q. -- surgery and a legal document? Does it sound like if she has the support, she could keep making those decisions?

A. Yes, and I think these -- all these proceedings and the fact that she should be eligible for Medicaid assistance to help her develop these kinds of -- the process of going through the decisions, not
only just one decision one place and another decision somewhere else, we'll have a method for her to deal with decisions, and it would be more formal than it has been in the past.

Q. And because there's a method and it's a skill that Miss Hatch has previously learned, she should be able to repeat it?

A. Correct.

Q. Okay. On that same page, Page 7, the next -- the third to last full paragraph beginning with the words, It is important.

A. Uh-huh.

Q. You say it's important to note that Miss Hatch made each of these decisions without a guardian or conservator. Why is that important?

A. Because if we say she needs one, it's to do what? Well, if it's to have one or not have one, which is the way we used to look at things, you know, there are some situations where she may make a mistake, but now we know that there will be people to support her in the decision, she'll be more involved in that decision, and she'll be more comfortable, more relaxed, able to ask questions better, and be more involved in it in a positive way.

Q. So because decision-making is a skill, it's
a skill that she would improve the more she did it?

A. Correct.

Q. At this time I'd like to refer you to some testimony in this case previously given from Dr. Lori Burkett.

Judge, may I pass up the transcript?

THE COURT: Sure.

MR. MARTINIS: Would you give that to the Judge, please. This has previously been provided to other counsel. I have another copy if they want it.

BY MR. MARTINIS:

Q. And, sir, for the record, this is a transcript of the testimony of Dr. Lori Burkett given on August 27, 2012. I'd like you to please turn to Page 26, and as that -- I mean, the page numbers are on the upper right-hand corner. I don't know if it's the actual 26th page in the transcript.

A. Okay.

Q. And I'm looking specifically at Pages 26 and 27, Page 26, line 13 through Page 27, line 10. This is a question and answer between the Court and Dr. Burkett about Miss Hatch's abilities and referring specifically to Page 27, lines 5 through 9.

Dr. Burkett says that Miss Hatch is going to

REPORTERS.com
Norfolk - (757) 625-6695