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SECTION 6 EVIDENCE

A carefully developed strategy for admission of evidence is essential at every phase of a child protection case. Whether the issue is domestic violence, drug use, physical abuse, malnutrition, neglectful supervision, sexual abuse, or some other conduct or condition, trial counsel must be prepared to lay the necessary foundation, cite relevant authority, and respond to objections. The following materials are designed to help attorneys anticipate and meet common evidentiary hurdles in child protection litigation.

Authority

Texas Family Code, Chapters 104, 160-162, 261-266.
Texas Rules of Evidence¹

Standards of Proof

As the moving party, DFPS has the burden of proof at each phase of a child protection suit brought under Chapter 262 of the Texas Family Code.² Unless the Indian Child Welfare Act applies, the standards of proof below apply. If an Indian child is involved, an order for foster care requires clear and convincing evidence, and termination of parental rights requires proof beyond a reasonable doubt.³

Standards of Proof at Each Phase

| Type of Proceeding | Party With Burden | Standard of Proof | Authority |
|--|-------------------|---|-------------------------|
| Removal Hearing | DFPS | Evidence sufficient to <i>"satisfy a person of ordinary prudence and caution"</i> | TFC §§ 262.101, 262.113 |
| 14 th -day Adversary Hearing - Temporary Managing Conservatorship | DFPS | Evidence sufficient to <i>"satisfy a person of ordinary prudence and caution"</i> | TFC § 262.201 |
| 60-Day Status Review | DFPS | <i>Preponderance</i> of Evidence | TFC § 105.005 |
| 180-Day Initial Permanency Hearing | DFPS | <i>Preponderance</i> of Evidence | TFC § 105.005 |
| Subsequent Permanency | DFPS | <i>Preponderance</i> | TFC § 105.005 |

¹ TEX. FAM. CODE §104.001 ("Except as otherwise provided, the Texas Rules of Evidence apply as in other civil cases.").

² The only exception is a post-trial hearing under TEX. FAM. CODE §263.405(d).

³ 25 U.S.C. §1912(e), (f). See Practice Guide, SECTION 9, SPECIAL ISSUES, Indian Child Welfare Act.

| | | | |
|--|------|--------------------------------------|---------------|
| Hearing — Permanent Managing Conservatorship | | of Evidence | |
| Involuntary Termination | DFPS | <i>Clear and Convincing</i> Evidence | TFC § 161.001 |
| Adoption Hearing | DFPS | <i>Preponderance</i> of Evidence | TFC § 105.005 |

| |
|---|
| <p>❖ Scintilla of Evidence</p> <p><</p> <p>❖ Satisfy a Person of Ordinary Prudence and Caution</p> <p><</p> <p>❖ Preponderance of the Evidence</p> <p><</p> <p>❖ Clear and Convincing Evidence</p> <p><</p> <p>❖ Beyond a Reasonable Doubt</p> |
|---|

Sufficient evidence to "satisfy a person of ordinary prudence and caution" is the same burden as the "probable cause" requirement for a search warrant and is not as stringent as preponderance.

"Preponderance of the evidence" means "more likely than not." Think of the scales of justice — if they tip ever so slightly in one direction, this standard has been met.

"Clear and convincing evidence" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.⁴

NOTE: Selective criminal law cases are cited for authority on issues more frequently litigated in the criminal law courts, such as evidence of a burn injury or sexual abuse. Given the higher burden of proof in a criminal prosecution, cases that support admission of evidence should be particularly persuasive in the context of child protection litigation. Criminal cases finding evidence inadmissible, in turn, are not controlling in a CPS case, but can be instructive. The recent U.S. Supreme Court case, *Melendez-Diaz v. Massachusetts* 2009 U.S. LEXIS 4734 (2009) is illustrative. In that case, the Supreme Court concluded that the 6th Amendment confrontation clause prohibits the use of a certificate of forensic drug analysis in a criminal prosecution unless the preparer of the certificate is available for cross-examination. A person whose parental rights are subject to termination does not have the same right to confront witnesses as a criminal defendant. Consequently, while this decision may signal greater scrutiny of documentary evidence, attorneys should be prepared to articulate why *Melendez-Diaz* does not apply to DFPS litigation.

⁴ TEX. FAM. CODE §101.007; *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002).

Evidentiary Issues "A" to "Z"

Autopsy Report

If there is evidence that a child death was due to non-accidental causes, the autopsy report may contain key information. With proper authentication, an autopsy report may be admitted as a business record.⁵ See Business Records.

Bite Marks

"Bite marks should be suspected when ecchymoses, abrasions, or lacerations are found in an elliptical or ovoid pattern."⁶

If a child abuse investigation reveals evidence of possible human bite marks related to physical or sexual abuse, a forensic odontologist should be consulted.⁷ An expert's ability to identify a bite mark as that of an adult human or to link bites on a child to a specific perpetrator can be extremely important to prove abuse and risk of future harm.⁸

Burn Injuries

What are signs that make a burn injury suspicious for abuse?

- Discrepant, vague, or changing history;
- Burn incompatible with developmental age of child;
- Burn attributed to sibling or third person (e.g., babysitter) not present at the time of presentation for medical care;
- Delay in seeking medical care;
- Associated injuries;
- Previous burns or other serious injuries;
- Child is underweight, unkempt, or shows other evidence of abuse or neglect;
- Lack of splash marks;

⁵ *Hernandez v. State*, 118 S.W.3d 469 (Tex. App.—Eastland 2003, pet. ref'd) (medical examiner authenticated 14-page autopsy report).

⁶ *Oral and Dental Aspects of Child Abuse and Neglect*, American Academy of Pediatric Dentistry, Clinical Report, Nancy Kellogg (Pediatrics, Vol. 116, No. 6, December 2005), <http://aappolicy.aappublications.org/cgi/content/abstract/pediatrics;116/6/1565>.

⁷ To locate a forensic odontologist, contact the American Board of Forensic Odontology (ABFO) at www.abfo.org. Another resource is the Forensic Assessment Center Network (FACN), a joint project of the Department of Family and Protective Services and the University of Texas System. The FACN provides consultations for cases of suspected child abuse and neglect throughout Texas. Physicians are available 24 hours a day, 7 days a week for consultation on acute cases and during regular business hours for non-acute cases. Contact FACN at 1-888-TX4-FACN, FACN@uth.tmc.edu or <https://facn.uth.tmc.edu/FACN/>. DFPS employees can log in to the system with their DFPS ID and passwords.

⁸ *Hernandez v. State*, 118 S.W.3d 469 (Tex. App.—Eastland 2003, pet. ref'd) (forensic dentist testified that impressions from mother's mouth matched bite marks found on son's body).

- Sharp line of demarcation between burned and unburned areas;
- Severe burns to lower half of body, particularly in ordinarily clothed areas; or
- Scald burn that occurred anywhere other than in a kitchen.⁹

Useful measurements in scald burn cases include:

- Maximum temperature of hot water as it emerges from the tub or sink faucet (measured at various times over several minutes);
- Time required to fill the tub or sink to the level indicated by the burn findings; and
- Distance from the hot water heater to the faucet.¹⁰

Even if the admitting physician in the emergency room is not a burn specialist, by reviewing the report or statements of the admitting physician, as well as photos and diagrams of the initial injuries, a burn specialist can usually give an opinion regarding the cause of injury.¹¹

Business Records

A business record is admissible if the proponent can show that the record in question:

- Was made at or near time of events recorded;
- Was made by person with knowledge of events;
- Was kept in the regular course of business; and
- Nothing about the circumstances or source suggests a lack of trustworthiness.¹²

An affidavit prepared by a person with knowledge of the manner in which a business record is prepared is sufficient to establish the predicate for admission of records.¹³ The proponent of a business record should file notice at least 14 days before trial. Failure to do so is not a bar to admission, but requires that the basis for admission of the records be proven at the time of trial. The witness does not have to be the record's creator or have personal knowledge of the contents of the record, but is only required to have personal knowledge of the manner in which the records were prepared.¹⁴

⁹ James L. Lukefahr, M.D., Christus Santa Rosa Children's Hospital Center for Miracles, San Antonio, TX.

¹⁰ *Id.*

¹¹ *In re K.H.*, No. 12-05-00077-CV, 2006 Tex. App. LEXIS 9661 (Tex. App.—Tyler Nov. 8, 2006, no pet.) (mem. op) (where emergency room physician estimated burns were one to two weeks old and seemed to result from a cigarette in direct contact for more than a moment and mother gave at least four inconsistent stories as to how child was burned, jury could have determined that mother's account was not believable).

¹² TEX. R. EVID. 803(6); *In re E.A.K.*, 192 S.W.3d 133 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (child abuse protocol prepared by a physician assistant regarding interview and examination of child was not admissible as a DFPS business record where no agency employee had personal knowledge of the events described).

¹³ TEX. R. EVID. 902 (10).

¹⁴ *Brooks v. State*, 901 S.W.2d 742 (Tex. App.—Fort Worth 1995, no pet.).

CPS File

The CPS file often contains critical evidence of abuse or neglect, reunification efforts and failures, a child's condition and needs, and other issues. Admissibility of a CPS file depends on the nature of the specific documents contained in the file, which may include:

- Caseworker's notes and reports;¹⁵
- Reports from medical and mental health providers;
- Investigative information, photographs, and recordings; and
- Home studies.

If a party seeks to object to admission of the CPS file, the burden is on that party to go through the record and identify any specific documents that are objectionable.

CPS Witness

Before putting a CPS witness on the stand, find out the person's title, experience with the agency and in prior relevant positions (number of investigations performed, for example), education, special training completed, as well as any licenses, credentials or certifications. All of this information can be used to bolster a witness's credibility and in some instances, may serve to establish the witness as an expert in his or her field.

Criminal Records

A parent or caretaker's record of arrests or convictions can be relevant to removal, termination of parental rights or placement. Admissibility generally depends upon the nexus between the specific information and the issues before the court.¹⁶ A certified copy of an individual's criminal conviction is admissible as a public record.¹⁷ Alternatively, a "pen packet" with a certified affidavit prepared by the Texas Department of Criminal Justice-Institutional Division, is a self-authenticating document. Establishing that the pen packet concerns the parent or other person before the court can be done in one of several ways:

- If there is a photograph attached to the packet, the photograph (along with the name, date of birth and other identifying information) can be used to establish the identity of the perpetrator of the offenses;

¹⁵ *In re E.A.K.*, 192 S.W.3d 133 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (arrest warrant containing three levels of hearsay not admissible as a business record merely because it is in DFPS file, but home study prepared by a contract worker under the supervision of a DFPS employee admissible as a business record).

¹⁶ *In re C.A.B.*, 2009 Tex. App. LEXIS 2408 (Tex. App. —Houston [14th Dist.] April 2, 2009, no pet.) (theft offense, prior convictions and positive drug test show voluntary, deliberate, conscious course of conduct that endangered child); *In re J.W.*, 113 S.W.3d 605 (Tex. App. — Dallas 2003, pet. denied) (arrests for injury to other children relevant to the relationship between the parents and the subject children and best interests; "probative value of [arrests and pending prosecutions] was not substantially outweighed by danger of unfair prejudice."); *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W. 2d 531 (Tex. 1987) (while incarceration standing alone will not prove endangerment, it is a factor for consideration on the issue of endangerment).

¹⁷ TEX. R. EVID. 803 (22).

- If a photograph is not available or is not of sufficient quality, check the notes on the fingerprint card for identifying features such as tattoos and scars that may aid in the identification process; or
- In the absence of a photograph, it may be necessary to fingerprint the person in court and have an expert compare the fingerprints, unless the person will admit to the criminal offenses in the packet, or you can establish the identity of the person with a witness from the District Attorney's office, Probation Department, or Parole Office.

Domestic Violence

Domestic violence is often a factor that contributes to an unsafe home environment. Proof of domestic violence can be in the form of criminal history records, emergency response records, medical records, photographs, written statements, and prior legal orders for protection.¹⁸ Certified copies of protective orders, victim statements and related documents, available from the county or district attorney's office, are always useful.

Drug Test Results

There are many different ways to use the results of a parent's drug testing or a record of missed drug tests. The best approach depends on the purpose for which the drug testing evidence is offered, whether to impeach a witness, to prove continuing drug use as a basis for termination of parental rights or to show failure to comply with the service plan. A few useful strategies for using evidence related to drug testing include:

- If a parent fails to appear for scheduled testing, a court can infer that the missed tests would have been positive;
- A drug test may be offered not for the truth of the matter asserted, but to show the state of mind of one or more parties;¹⁹
- If a parent confronted with a positive drug test admits to drug use, offer the statement as a declaration against interest or to impeach a parent who testifies differently at time of trial;

¹⁸ *In re A.S.*, 261 S.W.3d 76 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (evidence of domestic violence by former husband not relevant in termination concerning later born children never exposed to living environment in question); *In re Epperson*, 213 S.W.3d 541 (Tex. App.—Texarkana 2007, no pet.) (evidence that boyfriend physically assaulted his girlfriend twice and left her threatening notes and victim's testimony that boyfriend was "controlling and threatening" over the length of their relationship supports inference of future family violence); *In re T.L.S.*, 170 S.W.3d 164 (Tex. App.—Waco 2005, no pet.) (trial court entitled to infer non-parent who committed family violence in the past will likely continue as neither he nor the mother testified that they would not have future contact with each other); *In re M.G.M.*, 163 S.W.3d 191 (Tex. App.—Beaumont 2005, no pet.) (wife's testimony that husband was emotionally, mentally, and physically abusive for several years supports inference of future violence, despite husband's denial of violence toward wife); *In re J.I.T.P.*, 99 S.W. 3d 841 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (domestic violence, lack of self control and propensity for violence all evidence of endangerment); *In re B.R.*, 822 S.W.2d 103 (Tex. App.—Tyler 1991, writ denied) (abusive or violent conduct by a parent or other resident of a child's home can produce environment that endangers the physical or emotional well-being of a child).

¹⁹ *In re C.R.*, 263 S.W. 3d 368 (Tex. App.—Dallas 2008, no pet.) (failure to take seven out of nine requested drug tests allows court to infer test results would be positive).

- If an affidavit of the custodian of records sets forth sufficient facts to allow the fact finder to assess the trustworthiness of a report, the results of a drug test may be admissible as a business record;²⁰
- Consider asking the court to take judicial notice of a record of a facility's testing protocol, from the facility's website or other source, to establish the reliability and validity of test results;²¹ and
- Request to take a telephonic deposition of a testing facility's lab director to establish the qualifications of the lab personnel, the type of equipment used and the testing protocol.²²

Failure to Thrive

When neglect involves serious food deprivation, a child's resulting failure to grow and develop normally may be diagnosed by a physician as failure to thrive.

"Failure to thrive (FTT) in infants and children results from inadequate nutrition to maintain physical growth and development. An infant or child becoming malnourished as the result of parental or caregiver neglect creates concern about child maltreatment. In its extreme form, FTT secondary to neglect may be fatal."²³

Although malnutrition can be caused by disease or medical abnormalities, child neglect is also a common cause. Two of the most common physical signs of malnutrition are kwashiorkor and marasmus.

Kwashiorkor is characterized by:

- Abdominal distension (stomach protruding);
- Very prominent ribcage;
- Enlarged liver;
- Impaired physical or cognitive development;
- Muscles and bones appear wasted; and
- Nails fissured or ridged.

Marasmus is characterized by:

- Decreased subcutaneous tissue- thin arms and legs;

²⁰ *In re A.T.*, No. 2-04-355-CV, 2006 Tex. App. LEXIS 1882 (Tex. App.—Fort Worth, Mar. 9, 2006, pet. denied) (hospital records which show doctor ordered urine test, time of sample collection and recording of testing admissible as business record; in contrast, hospital records from outside laboratory without lab sheets indicating the exact amount of the substances not admissible).

²¹ *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim. App. —2003) ("[i]t is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings," thereafter, "courts may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in those prior hearings.").

²² *In re S.E.W.*, 168 S.W.3d 875 (Tex. App.—Dallas 2005, no pet.) (without evidence of reliability of testing methods at remote laboratory, expert cannot testify regarding testing results); *In re K.C.P.*, 142 S.W.3d 574 (Tex. App.—Texarkana 2004, no pet.) (abuse of discretion to admit drug test results in a termination of parental rights case without information as to the qualifications of the person or equipment used, method of administering the test, and whether the test was standard for the particular substance).

²³ *Failure to Thrive as a Manifestation of Child Neglect*, American Academy of Pediatrics, Clinical Report, Robert W. Block, M.D., Nancy F. Krebs, M.D., and Committee on Child Abuse and Neglect and the Committee on Nutrition (Pediatrics, Vol. 116, No. 5, November 2005).

- No fat under skin;
- Thin paper skin hanging in folds;
- Hair loss or thin, sparse and dry hair;
- Infants appear listless; and
- Stomatitus- cracking of the lips and corners of the mouth.

Photographs, medical records, and expert testimony are all critical to establish the existence of FTT and to rule out other possible medical causes for the child's condition.²⁴

Foundation

Being prepared to offer the necessary predicate for admission of evidence during trial is key. For a quick reference during trial, See Practice Guide, SECTION 10, TRIAL NOTEBOOK, B. Notebook Essentials, Predicate Checklist.

Genetic Testing Reports

To be self-authenticating, a genetic testing report must be in a record signed under penalty of perjury by a testing laboratory designee with documentation that includes the:

- Name and photograph of each individual whose specimens have been taken;
- Name of each individual who collected the specimens;
- Places in which the specimens were collected and the date of each collection;
- Name of each individual who received the specimens in the testing laboratory; and
- Dates the specimens were received.²⁵

Guardian Ad Litem

The guardian ad litem (often CASA) may testify and submit a report regarding the best interests of the child and the bases for the guardian ad litem's recommendations.²⁶

Hearsay

When faced with an objection to hearsay evidence, first consider whether an out of court statement is offered for the truth of the matter asserted; if not, it is not hearsay.²⁷ For a

²⁴ *Contreras v. State*, 54 S.W. 3d 898 (Tex. App.—Corpus Christi 2001, no pet.) (doctor's testimony that three year old weighed nineteen pounds at time of hospital admission, was extremely thin, with visible ribs and bone structure and was in "immediate danger of death, or bodily injury, or mental or physical impairment as a result of chronic malnourishment" supports conviction for child endangerment).

²⁵ TEX. FAM. CODE §160.504.

²⁶ TEX. FAM. CODE §107.002 (d), (e).

²⁷ TEX. R. EVID. 801(d); *In re M.S.*, 115 S.W.3d 534 (Tex. 2003) (an agreement between CPS and parents regarding necessary actions for return of children which was not offered to show their inability to care for children, or that parental rights should be terminated, but rather to show that an agreement had been made,

list of hearsay exceptions commonly used in child protection litigation, See Practice Guide, SECTION 10, TRIAL NOTEBOOK, Notebook Essentials, 5. Trial Objections Checklist. For alternatives for admission of a child's statement, See Child Witnesses, this section.

Impeachment with Prior Inconsistent Statement

Follow the three "C's": **Confirm**, **Credit** and **Confront** to impeach a witness with a prior inconsistent statement. In summary:

- Get the witness to **confirm** the statement to be proven wrong. Counsel's tone conveying skepticism or incredulity in questioning the witness may serve to alert the court and/or jury that something important is about to occur;
- **Credit** the prior inconsistent statement. This requires asking the witness to acknowledge the fact that his or her statement or story has changed; and
- **Confront** the witness with the impeaching statement.

Whether you rely on a deposition transcript or other source, this final step should ideally present the witness with a clear, specific statement at odds with the more recent statement.²⁸

Invoking "The Rule"

On request, a court shall order witnesses excluded from the courtroom so that they cannot hear the testimony of other witnesses.²⁹ Exempt from "the rule" are: parties, or in the case of DFPS, an officer or representative such as an expert witness, designated by the attorney representing the agency, and anyone whose presence can be shown to be essential. Usually, a caseworker or supervisor is designated as the CPS agency representative and is allowed to remain in the courtroom throughout the proceedings. When witnesses are placed under "the rule," the judge typically instructs them not to converse with each other or with any other person about the case except the attorneys, and not to read any report or comment on the testimony. The sanction for violation of the rule can be contempt or the exclusion of the testimony of the witness at issue.

TIP:

Prior to trial explain the significance of the Rule and instruct any DFPS employee designated as a witness who is not present at the start of the hearing not to enter the courtroom once the trial has begun without first consulting with counsel for DFPS.

and what its terms were, was not hearsay); *In re C.R.*, 263 S.W. 3d 368 (Tex. App.—Dallas 2008, no pet.) (drug test results admitted for the limited purpose of establishing state of mind).

²⁸ This strategy is detailed in *Evidence Demonstrations*, Warren Cole, Heather L. King, Peter T. Hoffman, Ch. 16, 34th Advanced Family Law Course (August 2008).

²⁹ TEX. R. EVID. 614.

Judicial Notice

The court can take judicial notice of:

- Any fact that is not subject to reasonable dispute that is either generally known within the territorial jurisdiction of the court or capable of accurate and ready determination based on sources whose accuracy cannot reasonably be questioned;³⁰
- The law of other states;³¹
- The laws of foreign countries;³² and
- Ordinances of cities and counties in Texas, the Texas Register, and the rules of agencies in the Texas Administrative Code (TAC).³³

Lay Opinion

Lay testimony is permitted if the opinion or inferences are: (1) rationally based on the perception of the witness; and (2) helpful to a clear understanding of his or her testimony or the determination of a fact in issue.³⁴

Medical Records

Medical records can be relevant to demonstrate the nature of a child's injury, the condition of a child at a certain point in time, or a parent's mental status or disability.³⁵ For information about how to access privileged medical records, See Privileges, in this section.

A child's statement, made for the purposes of a medical diagnosis, is admissible under Tex. R. Evid. 803(4). See Child Witness, Statement Made for Medical Diagnosis, in this section.

³⁰ TEX. R. EVID. 201 (b); *In re J.H.* No. 03-02-00667-CV, 2003 Tex. App. LEXIS 5103 (Tex. App. — Austin, June 19, 2003, no pet.) (trial court must take judicial notice of the records from another case in order for appellate court to consider records).

³¹ TEX. R. EVID. 202.

³² TEX. R. EVID. 203.

³³ TEX. R. EVID. 204.

³⁴ TEX. R. EVID. 701; *In re T.N.*, 142 S.W.3d 522 (Tex. App.—Fort Worth 2004, no pet.) (licensed professional counselor not qualified as an expert could testify as to what she observed, heard, or was told, including her characterization of parents' behavior as "childlike, argumentative, and verbally abusive.").

³⁵ *Austin v. State*, 222 S.W.3d 801 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (admission of siblings' medical records not barred by Tex. R. Evid. 404(b) where evidence of Munchausen Syndrome by Proxy was relevant to show mother's motive).

TIP:

MEDICAL RECORDS

If you have a medical expert on the witness stand, but have not yet filed the medical records with a business records affidavit, take the opportunity to establish the expert as the custodian of the records by asking:

1. Was this medical record made at or near the time of the examination?
2. Was it made by a person with knowledge of the events recorded?
3. Was this record made in the course of a regularly conducted business activity?
4. Are you the custodian of these records---do you have care, custody and control of them?

Munchausen by Proxy Syndrome

Munchausen by proxy syndrome is relatively rare, but when it occurs, it is frequently a basis for a finding of child abuse. It is also known by more recent terminology as "Pediatric Condition Falsification," or "Factitious Disorder by Proxy."

This diagnosis is characterized by:

- An apparent illness or health-related abnormality that the caretaker made up or produced;
- Presentation of the child for medical treatment;
- Failure of the perpetrator to acknowledge the deception; and
- Exclusion of simple child abuse/neglect and simple homicide.³⁶

Parent's Prior Conduct

Evidence of a parent's prior conduct that presents a danger to children, including a parent's conduct prior to the child's birth, can be relevant to show the severity of the harm to which a child has been exposed and is at risk of in the future.³⁷

³⁶ Presentation by Randell Alexander, M.D., Ph.D., University of Florida, Morehouse School of Medicine, April 18, 2008.

³⁷ *In re J.O.A.*, No. 08-0379, 2009 Tex. LEXIS 250 (Tex. 2009) (a parent's recent improved conduct does not conclusively negate probative value of long history of drug use and irresponsible choices); *In re A.S.*, 261 S.W. 3d 76 (Tex. App. —Houston [14th Dist.] 2008, no pet.) (mother's single use of marijuana while pregnant shows poor judgment but is not a "conscious course of conduct."); *In re B.C.*, 2007 Tex. App. LEXIS 2519 (Tex. App.—Fort Worth 2007, no pet.) (parent's conduct need not be directed at child who is the subject of termination proceedings or even result in injury to constitute endangerment); *In re C.J.F.*, 134 S.W.3d 343 (Tex. App. —Amarillo 2003, pet. denied) (abuse or neglect of other children supports finding of endangerment even against child not yet born at time of conduct); *Trevino v. Tex. Dep't of Protective and Regulatory Servs.*, 893 S.W.2d 243 (Tex. App.—Austin 1995, no writ) (acts of misconduct directed toward another child, a sibling, or even an unrelated child, can be a course of conduct from which danger to one's own child can be inferred); *Dir. of Dallas County Child Protective Servs. v. Bowling*, 833 S.W.2d 730 (Tex. App.—Dallas 1992, no writ) (termination under (D) and (E) ground proper for violent or negligent conduct directed at the other parent or other children even where the behavior was not committed in the child's presence).

Parent's Statement & Testimony

Child abuse and neglect frequently occur out of sight of any potential witnesses, but a parent's statements, in and out of court, can be key evidence of abuse or neglect.³⁸

TIP:

Consider calling the parent as your first witness. TEX. R. EVID. 611(c) permits cross examination by leading questions with an adverse witness. Using this strategy at the outset of the case will usually prevent a party from tailoring his or her testimony in response to the testimony of other witnesses, particularly the caseworker, and it effectively "locks" a party into whatever testimony is given. To the extent that a party's testimony is then contradicted by subsequent evidence (e.g., positive drug tests, conviction records, proof of non-support, failure to visit, and the like), his or her credibility may be called into question.

Paternity

For detailed information about options for evidence of paternity, the presumption of paternity, and the paternity registry See Genetic Testing, this article and Practice Guide, SECTION 3, LITIGATION ESSENTIALS, Paternity Questions & Solutions.

Photographs

Photos of the physical environment in which a child was found, a bed or couch from which the child allegedly fell, or a bathtub in which a child was injured and photos of the child's injuries or physical condition at the time of removal may all be relevant at various stages of a SAPCR. Photographs include still photos, X-ray films, videotapes, and motion pictures.³⁹

Anticipate that any photo of a child's injury may be challenged on the grounds that the danger of unfair prejudice outweighs the probative value. (See Prejudice Versus Probative Value, this article).⁴⁰

³⁸ *In re K.A.S.*, 131 S.W.3d 215 (Tex. App.—Fort Worth 2004, pet. denied) (where parents testified that father had become a new person, but mother admitted that father had only been that way for about one month, trial court not required to believe that there had been a lasting change in a parent's attitude); *In re A.L.W.*, No. 2-07-342-CV, 2008 Tex. App. LEXIS 2852 (Tex. App.—Fort Worth 2008, no pet.) (mem. op.) (termination affirmed where mother testified she needed more time to work on her life, despite getting more time than most parents, she continued the same cycle of drug abuse and criminal activity); *Wyatt v. Texas Department of Family and Protective Services*, 193 S.W.3d 61 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (where mother admitted that children's burns were serious and that she did not attempt to get medical treatment for them and minimized angry outbursts, trial court could conclude CPS's allegations were true); *Castorena v. Texas Dep't of Protective & Regulatory Servs.*, No. 03-02-00653-CV, 2004 Tex. App. LEXIS 3753 (Tex. App.—Austin 2004, no pet.) (mem. op.) (trial court not required to believe mother when she recanted earlier reports of partner's abuse against her and children).

³⁹ TEX. R. EVID. 1001(b).

⁴⁰ *In re C.J.F.*, 134 S.W.3d 343 (Tex. App.—Amarillo 2003, pet. denied) (autopsy photos of sibling show basis for pathologist opinion and mother's knowledge of abuse); *Peterson v. State*, 137 S.W.3d 739 (Tex.

Polygraph Tests

The results of polygraph examinations are inadmissible in civil actions.⁴¹

Prejudice Versus Probative Value

Objections that evidence of child abuse or grounds for termination of parental rights should be excluded because the probative value is outweighed by the resulting prejudice can generally be countered with proof of a clear nexus between the evidence and an essential element of proof.⁴²

Preserving Error

To preserve error, the party objecting to the admission of evidence must make a timely objection or motion to strike; similarly, the proponent of the evidence must make an offer of proof setting forth the substance of the evidence.⁴³

Privileges

In the context of child abuse and neglect litigation, evidence is not excludable on the ground of privileged communication except in the case of communications between an attorney and client.⁴⁴

One common method for accessing privileged mental health, substance abuse and alcohol treatment records is to obtain written releases from the parents. Another option some DFPS litigators use is to routinely request a court order authorizing DFPS to obtain records from specific providers, which can then be attached to a subpoena.⁴⁵ While courts frequently direct parents to sign releases for this purpose, if a parent is unavailable, or if the provider deems the release too old to be effective by the time it is used, having a court order will save time.

App.—Houston [1st Dist.] 2004, pet. ref'd) (color photo was graphic, but only to the extent that it accurately depicted the severe burn injuries sustained by child on her lower extremities).

⁴¹ *In re B.N.B.*, 246 S.W.3d 403 (Tex. App.—Dallas 2008, no pet.) (polygraph exams are inherently unreliable and unduly persuasive, and as a result are inadmissible in civil or criminal proceedings).

⁴² TEX. R. EVID. 403; *Trevino v. Tex. Dep't of Protective & Regulatory Servs*, 893 S.W.2d 243 (Tex. App.—Austin, 1995, no writ) (although inflammatory and prejudicial, father's confession regarding nephew's death and facts surrounding it, as well as father's criminal conviction, are admissible because "relevant evidence must be *substantially* outweighed by the danger of *unfair* prejudice to be excluded"; also, "[t]he well being and best interest of three small children lay at the heart of the district court's determination and must remain the focal point of our consideration.").

⁴³ TEX. R. EVID. 103(a).

⁴⁴ TEX. FAM. CODE §261.202.

⁴⁵ See Practice Guide, SECTION 11, TOOLS, Evidence, Motion and Order to Authorize Disclosure of Records and Confidential Communications. Note, this is a noticed motion, in contrast to the *ex parte* motion that is used to request an Order in Aid of Investigation.

If a party seeks to invoke the privilege against self-incrimination in a civil case, the privilege must be asserted in response to each specific question or it is waived.⁴⁶ Moreover, a jury can draw an adverse inference against a party who invokes the Fifth Amendment in a civil case.⁴⁷

Psychological Evaluations and Mental Health Records

If a parent is advised by the court (or therapist) that disclosures made in the course of therapy are not privileged and may be subject to release in a SAPCR, a court-ordered evaluation is not privileged.⁴⁸

Rebuttal Evidence

To the extent the opposing party introduces evidence that discredits or undermines DFPS' case-in-chief, there is an opportunity to admit additional evidence in response.⁴⁹

Reunification Efforts/Service Plan

The contents of the parents' service plan and evidence of a parent's progress or lack thereof in complying with the required elements can be key evidence at any phase of a SAPCR.⁵⁰

Shaken Baby Syndrome

"Shaken baby syndrome is a serious and clearly definable form of child abuse.⁵¹ It results from extreme rotational cranial acceleration induced by violent shaking or

⁴⁶ *In re Verbois*, 10 S.W.3d 825 (Tex. App.—Waco 2000, orig. proceeding).

⁴⁷ *In re C.J.F.*, 134 S.W. 3d 343 (Tex. App.—Amarillo 2003, pet. denied).

⁴⁸ TEX. R. EVID. 510(d)(4) .

⁴⁹ *In re J.B.*, 93 S.W.3d 609 (Tex. App.—Waco 2002, pet. denied) (abuse of discretion to admit testimony and photographs offered as rebuttal evidence where evidence to be contradicted was admitted in CPS' case-in-chief).

⁵⁰ *In re T.N.F.*, 205 S.W. 3d 625 (Tex. App.—Waco 2006, pet. denied) (termination under (O) ground upheld where father testified that distance, time constraints, and employment issues excused his failure to complete court-ordered services; "[Father] presents no authority for his novel excuse argument, and the statute itself does not make provision for excuses."); *Wilson v. State*, 116 S.W.3d 923 (Tex. App.—Dallas 2003, no pet.) (fact that a parent has poor parenting skills and "was not motivated to learn how to improve those skills" is evidence supporting a finding that termination is in the child's best interest); *In re M.G.D.*, 108 S.W.3d 508 (Tex. App.—Houston [14th. Dist.] 2003, pet. denied) ("The elements of a safe, stable, and happy childhood cannot all be reduced to a checklist in a service plan. Nor can CPS provide 24-hour surveillance of at-risk children. As the dangers involved in a parent's circumstances increase, so does the risk noncompliance with a service plan may not be discovered until (from a child's perspective) it is far too late.").

⁵¹ See Practice Guide, SECTION 11, TOOLS, Evidence, *Shaken Baby Syndrome: Recognizing and responding to a lethal danger*, Thomas A. Nakagawa and Edward E. Conway, Jr. (Contemporary Pediatrics, March 2004), an article detailing the mechanics of injury, symptoms, and indicia of shaken baby syndrome.

shaking/impact, which would be easily recognizable by others as dangerous."⁵² Abusive head trauma (or shaken baby syndrome) occurs commonly, but is frequently overlooked and under-diagnosed. "The clinical spectrum of this traumatic disorder may vary tremendously with some infants presenting with poor feeding, vomiting, and failure to thrive, and other infants may present with lethargy, seizures, or cardiopulmonary arrest."⁵³ Shaken baby syndrome has been recognized within the medical community,⁵⁴ and there is a significant body of case law approving admission of evidence regarding shaken baby syndrome.⁵⁵ Be aware, however, that defense counsel may attempt to rely on medical research calling into question the scientific principles underlying Shaken Baby Syndrome.⁵⁶ .

Social Studies/ Home Evaluations

A social study is filed with the court and made a part of the record of the suit.⁵⁷ Disclosure to the jury of the contents of the report, however, is subject to the rules of evidence.⁵⁸ Copies of the report must be provided to all parties before the earlier of: (1) the seventh day after the date the social study is completed; or (2) the fifth day before the start of trial.⁵⁹

⁵² *Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report*, American Academy of Pediatrics, Committee on Child Abuse and Neglect (Abstract, Pediatrics Vol. 108, No. 1, July 2001).

⁵³ *Understanding Abusive Head Trauma in Children*, April 16, 2008, presentation by Thomas A. Nakagawa, M.D., FAAP, FCCM, Wake Forest University Baptist Medical Center, San Antonio, Texas.

⁵⁴ For position statements regarding shaken baby syndrome, see American Academy of Pediatrics (<http://aappolicy.org>), National Association of Medical Examiners (<http://thename.org>) and the Canadian Paediatric Society (www.cps.ca/).

⁵⁵ *Kelley v. State*, 187 S.W.3d 761 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (testimony of pediatric intensive care physician, pediatric ophthalmologist, and pediatric radiologist that injuries to 3 month old with subdural hematoma not consistent with non-accidental trauma, but with shaken baby syndrome, sufficient to support conviction for recklessly causing serious bodily injury to a child); *In re A.I.G.*, 135 S.W.3d 687 (Tex. App.—San Antonio 2003, no pet.) (mother's positive progress in counseling and parenting classes including anger management does not undercut endangerment finding where parents admitted to shaking child, who suffered multiple brain hemorrhages and a stroke, with catastrophic results that child "will never be able to walk, talk, see clearly, potty-train, or understand her surroundings, ... [and] will be in constant pain and suffer seizures for the rest of her unnaturally shortened life"); *Dunn v. State*, 13 S.W.3d 95 (Tex. App.—Texarkana 2000, no pet.) (evidence sufficient to support conviction for causing serious bodily injury to 18 month old child where father admitted to "slamming" her to the floor and pathologist testified that child was shaken in a manner that caused her head to whiplash forward and backward, which caused death by blunt force trauma or "shaken baby syndrome").

⁵⁶ *The evidence base for shaken baby syndrome- We need to question the diagnostic criteria*, British Medical Journal, J.F. Geddes and J. Plunkett (authors argue that the "concept of shaken baby syndrome is scientifically uncertain" and advocate that "[w]e need to reconsider the diagnostic criteria, if not the existence, of shaken baby syndrome.").

⁵⁷ TEX. FAM. CODE §107.054.

⁵⁸ TEX. FAM. CODE §107.055(a).

⁵⁹ TEX. FAM. CODE §107.055(b); *In re V.T.*, No. 2-03-248-CV, 2004 Tex. App. Lexis 5395 (Tex. App.—Fort Worth, June 17, 2004, pet. denied) (mem. op.) (where party failed to disclose subject matter of expert's testimony, no error to exclude testimony of social worker retained to rebut expert).

Child Witnesses

There are a number of legal options when admission of a child's prior statement into evidence is at issue. Similarly, there are legal alternatives to a child's live testimony which a court may find appropriate in specified circumstances. Familiarity with the requirements for these options will facilitate admission of a child's statement or testimony, which may often be key evidence in child protection litigation.

Child's Out-of-Court Statement

A child's out-of-court statement describing abuse or identifying a perpetrator would ordinarily be inadmissible as hearsay if offered for the truth of the matter asserted. The five alternatives summarized below authorize admission of this type of evidence, if the requisite statutory criteria are met.

Hearsay Statement of Child Abuse Victim

This exception offers a broad tool for getting a child's statement into evidence. A child's statement that would otherwise be hearsay in a SAPCR is admissible if:

- The child is 12 years old or younger;
- The statement describes the alleged abuse against the child;
- The court finds that the time, content, and circumstances of the statement provide sufficient indications of its reliability (following a hearing outside the presence of the jury); and
- Either the child testifies or is available to do so, or the court finds use of the statement in lieu of testimony is necessary to protect the child's welfare.⁶⁰

⁶⁰ TEX. FAM. CODE §104.006; *In re A.J.H.*, No. 14-03-01016, 2004 Tex. App. L EXIS 1969 (Tex. App.—Houston [14th Dist.], Mar. 2, 2004, no pet.) (mem.op.) (no error to allow caseworker to testify about circumstances under which the interview was done where trial court implicitly found that use of the videotaped statements regarding abuse were necessary to protect the child's well being); *In re S.P.*, 168 S.W.3d 197 (Tex. App.—Dallas 2005, no pet.) (in absence of evidence that child's welfare and the circumstances made it necessary to use a recorded statement rather than the child's testimony in court or by alternative means such as closed circuit television, abuse of discretion to admit videotaped interview of minor under TEX. FAM. CODE §104.006); *In re E.A.K.* 192 S.W.3d 133 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (error to admit child's outcry where no hearing held as to reliability and only evidence as to time, content, and circumstances of statement is caseworker's report, which did not demonstrate reliability); *In re K.L.*, 91 S.W.3d 1 (Tex. App.—Fort Worth 2002, no pet.) (requirements of §104.006 are mandatory); *In re K.S.*, 76 S.W.3d 36 (Tex. App.—Amarillo 2002, no pet.) (child's statement describing sexual assault, but not identifying perpetrator, made to nurse practitioner who performed physical examination admitted under TEX. FAM. CODE §104.006); *In re K.R.C.*, No. 2-05-404-CV, 2006 Tex. App. LEXIS 5819 (Tex. App.—Fort Worth, July 6, 2006, no pet.) (mem.op.) (harmless error to admit testimony of CASA and foster mother regarding children's outcry statements where record replete with evidence of outcries against same person admitted without objection); *Thompson v. State*, 227 S.W.3d 153 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (jury free to discredit expert testimony that child interview was flawed and instead believe child's taped statement that defendant held her feet in the hot water).

If this exception is used the record must reflect that the court made the requisite findings as to the reliability of the statement (based on the time, content, and circumstances); that the child either testified or was available to do so; or that the court found that use of the statement in lieu of testimony was necessary for the child's welfare.

Prerecorded Statement of Child

This exception is commonly used for a videotaped statement taken at a Child Advocacy Center. An oral statement recorded prior to trial of a child (age 12 or younger) who is alleged to have been abused is admissible in a SAPCR if:

- No attorney for a party was present when the statement was made;
- The recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
- The statement was not made in response to leading questions;
- Each voice on the recording is identified;
- The person conducting the interview is present and available for testimony or cross-examination; and
- Each party is afforded an opportunity to view the recording before it is offered into evidence.⁶¹

A child's prior statement recorded at a Child Advocacy Center or similar facility may be offered under either §104.006 or §104.002, depending on the circumstances. While §104.002 would appear to be most closely tailored to the CAC type interview, at least one court has found that this section does not authorize admission of a child's statement *in lieu of* a child's testimony at trial.⁶² Since the purpose of a CAC interview is in part to minimize the trauma to a child, if the interview can't be used in lieu of a child's courtroom testimony that is a serious drawback.

TEX. FAM. CODE §104.005(a) provides that if the "testimony of a child is taken as provided by this chapter, the child may not be compelled to testify in court." If "testimony" is construed to include not only prerecorded videotaped testimony (TEX. FAM. CODE §104.003) and remote televised testimony (TEX. FAM. CODE §104.004), but also a child's

⁶¹ TEX. FAM. CODE §104.002. *In re S.P.*, 168 S.W.3d 197 (Tex. App.—Dallas 2005, no pet.) (for purposes of TEX. FAM. CODE §104.002, child interview must be conducted without leading questions, but unlike §104.006, §104.002 does not authorize the trial court to use the statement *in lieu of* child's testimony) *In re S.H.*, No. 10-02-086-CV, 2004 Tex. App. LEXIS 1450 (Tex. App.—Waco, Feb. 11, 2004, no pet.)(mem.op.) (video-recorded statements of child-abuse victim under TEX. FAM. CODE §104.002 do not require a reliability component, unlike TEX. FAM. CODE §104.006).

⁶² *In re S.P.*, 168 S.W.3d 197 (Tex. App.—Dallas 2005, no pet.) (error to admit videotaped statement without making child available to testify under TEX. FAM. CODE §104.002).

videotaped statement at a CAC interview, a child's statement can be admitted under §104.002 without subjecting the child to courtroom testimony.

Alternatively, §104.006 specifically authorizes admission of the child's statement in lieu of testimony if there is proof of reliability and the court determines use of the statement in lieu of the child's testimony is necessary to protect the child's welfare. When asked for evidence that the videotape was necessary to protect the child's welfare, the Department in the *S.P.* case offered none, which led the judge to make a finding based on his common sense and knowledge of his own seven-year-old daughter, which the reviewing court found improper. To avoid this problem, the best strategy is to be prepared to offer specific evidence regarding the child witness, the child's welfare at the time of trial and what circumstances make it necessary to use a statement in lieu of a child's testimony.

If there is a criminal case pending, consider conferring with the district attorney to strategize how to best use evidence of the child's statements or testimony at trial while minimizing the trauma to the child.

TIP:

An interview with an alleged victim of physical or sexual abuse must be audiotaped or videotaped (unless an investigating agency other than DFPS finds good cause not to do so).⁶³ Unless the recording is both visual and aural, admission under TEX. FAM. CODE §104.002 is not permitted.

Excited Utterance

A child's statement made while under stress of excitement caused by the event or condition may be admissible under TEX. R. EVID. 803(2).

State of Mind

A statement of the child's then existing state of mind, emotion, sensation, or physical condition may be admissible under TEX. R. EVID 803(3).⁶⁴

⁶³ TEX. FAM. CODE §261.302(e).

⁶⁴ *In re M.R.*, 243 S.W.3d 807 (Tex. App.—Fort Worth 2007, no pet.) (although foster mother sought to adopt child, where child's outcry was spontaneous, and foster mother followed CPS protocol by not questioning the child but contacting child's therapist to follow up on the incident, no error to admit child's statement).

Statement Made for Medical Diagnosis

A child's statement made for purposes of medical diagnosis or treatment, including reports of symptoms, pain, other sensations, or the general cause of the condition may be admissible under TEX. R. EVID. 803(4).⁶⁵

Child's Testimony

Children have been found to be competent witnesses in federal court for over 100 years.⁶⁶ Children may only be found incompetent if "after being examined by the court, [they] appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated."⁶⁷ Research suggests that most 5 year olds can tell the difference between a truth and a lie and know that lying is bad; until age 7 they may not be able to define "truth" and "lie."⁶⁸ Consequently, it is necessary to use age appropriate techniques to demonstrate competency, notwithstanding a limited vocabulary.

Many experienced litigators avoid calling a child witness to testify in a proceeding to restrict custody or terminate parental rights, citing the trauma to the child and the inherent difficulty in obtaining admissible evidence, especially if a very young child is involved. These factors should be weighed carefully whenever the prospect of using a child witness arises. The array of hearsay exceptions applicable in these cases often make it unnecessary to call a child as a witness. If the testimony of a child is essential, however, the statutes cited below offer alternatives to facilitate the process and minimize any harm to the child.

Court-Ordered Videotaped Testimony of Child⁶⁹

On motion of a party, the court may order that the testimony of a child be taken outside courtroom and recorded for showing at time of trial. Conditions of admissibility require:

⁶⁵ *Moyer v. State*, 948 S.W. 2d 525 (Tex. App.—Fort Worth 1997, pet. ref'd.) (victim's statements to doctor in response to sexual assault questionnaire admissible as statement made for purpose of medical diagnosis or treatment); *Salinas v. State*, 166 S.W.3d 368 (Tex. App.—Fort Worth 2005, pet. ref'd) (abuse of discretion to admit medical doctor's diagnosis of sexual abuse based solely on the history provided by the child in absence of physical evidence); *Puderbaugh v. State*, 31 S.W.3d 683 (Tex. App.—Beaumont 2000, pet. ref'd) (where therapist conveyed to child the reason for seeing him was to help her with her emotional problems, discussed the importance of telling truth, and child understood the difference between telling the truth and a lie, child's statements made in therapy regarding sexual abuse by father admissible under TEX. R. EVID 803(4)).

⁶⁶ *See, e.g., Wheeler v. U.S.*, 159 U.S. 523 (1895).

⁶⁷ TEX. R. EVID. 601(a)(2); *Ketchum v. State*, 199 S.W.3d 581 (Tex. App.—Corpus Christi 2006, pet. ref'd) (child victim's testimony need not be precise, given at an adult level of sophistication); *De Los Santos v. State*, 219 S.W.3d 71 (Tex. App.—San Antonio 2006, no pet.) (where questioning demonstrated that each child "had the ability to intelligently recall and narrate the events, understood the difference between the truth and a lie, and understood their moral responsibility to tell the truth ..., [a]ny inconsistencies in the children's testimony ... goes to their credibility, not their competency to testify.").

⁶⁸ *Young Maltreated Children's Competence to Take the Oath*, Applied Developmental Science, Vol, 3, No.1, 199, Lyon and Saywitz.

⁶⁹ TEX. FAM. CODE §104.003.

- Only an attorney for each party and the attorney ad litem for the child or other person "whose presence would contribute to the welfare and well-being of the child" and necessary equipment operators may be present;
- Only attorneys for parties may question the child;
- Equipment operators must be out of the child's sight and hearing; and
- The court must ensure that the recording is both visual and aural, that the recording is accurate and not altered, that each voice is identified, and that each party is given an opportunity to view the recording before it is shown in court.

NOTE: There is no age restriction on this option.

Remote Broadcast of Child's Testimony⁷⁰

The court may, on the motion of any party, order that the testimony of a child age 12 or under who is alleged to have been abused be taken outside the courtroom and televised by closed-circuit equipment in the courtroom. The procedures for prerecorded videotaped testimony (TEX. FAM. CODE § 104.003) are applicable.

Child With Medical Condition Incapable of Testifying⁷¹

Although testimony by remote broadcast under TEX. FAM. CODE §104.004 is limited to a child age 12 or under, if the court finds that a child suffers from a medical condition that renders the child incapable of testifying, the court may allow the testimony of a child of any age to be taken in any manner provided by this chapter. Proof of a child's psychiatric treatment or emotional distress stemming from abuse should be sufficient basis to support this finding.

In Chambers Interview

In a nonjury trial or hearing, on application of any party, the court shall interview a child age 12 or older, and may interview a younger child, regarding the child's wishes about conservatorship or any other issue in the SAPCR.⁷² In a jury trial, however, the court may not interview the child in chambers about any issue that is subject to a jury verdict.⁷³

⁷⁰ TEX. FAM. CODE §104.004; *In re R.V.*, 977 S.W.2d 777 (Tex. App.— Fort Worth 1998, no pet.) (no error to permit child to testify by remote televised broadcast where CPS caseworker testified child was apprehensive and fearful whenever parents visited and use of the televised testimony procedure was necessary for child's emotional well-being).

⁷¹ TEX. FAM. CODE §104.005(b).

⁷² TEX. FAM. CODE §153.009.

⁷³ TEX. FAM. CODE §153.009(d).

Expert Witness Testimony

Child protection litigation frequently involves issues and phenomena that are best understood in the context of an expert's special knowledge and experience. Whether the issue is why a 14-year-old would delay revealing ongoing sexual abuse, why an infant's injuries could not have resulted from a fall off the living room couch, or why a burn injury is non-accidental, expert testimony can be crucial to the outcome of a case. The overview that follows is designed to provide a working knowledge of the applicable rules for both proponents of expert testimony and those challenging an expert.⁷⁴

Hurdles Every Expert Must Clear

Since the U.S. Supreme Court announced, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁷⁵ that it is the trial court's duty as "gatekeeper" to assess both the reliability and the relevancy of expert testimony, the contours of that role have been continually refined. As a preliminary matter, before admitting expert testimony the trial court must be satisfied that:

- The witness is qualified by reason of his knowledge, skill, experience, training, or education; and
- The expert testimony will aid the fact-finder to understand the evidence or to determine a fact in issue.⁷⁶

This threshold inquiry requires the proponent of expert testimony to demonstrate two things: (1) the validity of an expert's opinion (qualifications, credentials, and experience); and (2) the reason expert input on a specific issue is necessary.

The criteria used by the trial court to assess a proposed expert's opinion depend largely on whether the particular expertise is in the "hard" or "soft" sciences.

TIP:

For sample questions to use in establishing the reliability and the validity of an expert's opinion, See Practice Guide, SECTION 11, TOOLS, Evidence, Questions for Expert Witnesses.

For help deciphering an expert's credentials, See Practice Guide, SECTION 11, TOOLS, Evidence, Acronyms for Commonly Encountered Degrees, Licenses and Certifications.

Hard Sciences

If an expert's field is in the "hard sciences," the non-exclusive criteria set forth for the trial court to assess validity include:

⁷⁴ For information about expert witnesses for a case subject to the Indian Child Welfare Act, See Practice Guide, SECTION 9, SPECIAL ISSUES, Indian Child Welfare Act.

⁷⁵ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

⁷⁶ TEX. R. EVID. 702.

- The extent to which the theory or technique can be and has been tested;
- The extent to which the theory or technique relies upon the subjective interpretation of the expert;
- Whether the theory or technique had been subjected to peer review and or publication;
- The technique's known or potential rate of error;
- Whether the underlying theory or technique has been generally accepted by the relevant scientific community; and
- The non-judicial uses that have been made of the theory or technique.

These are known as the *Daubert-Robinson* factors, named after the seminal U.S. Supreme court and Texas Supreme Court cases which construed this approach to expert witness testimony.⁷⁷ In child protection litigation, the science underlying the opinions of a medical burn specialist, for example, can be readily established. An expert's ability to assess whether a burn injury is non-accidental is well established in the medical literature, as are the standards of practice and protocols for diagnosis and treatment of burn injuries. Similarly, there is substantial scientific data and medical literature to buttress a physician's diagnosis of Shaken Baby Syndrome (SBS). Be aware, however, that although trial courts have repeatedly accepted expert testimony diagnosing SBS, medical researchers who question the underlying scientific principles of SBS have been published in at least one reputable medical journal. As a result, proponents of an SBS medical expert, should be prepared not only to meet the criteria enunciated in *Daubert* but also to refute theories purporting to undercut the scientific bases of SBS. See Evidentiary Issues "A" to "Z," Shaken Baby Syndrome, this section.

TIP:

Make the most of the opportunity to challenge an opponent's expert on voir dire by reviewing any publications the expert has authored, as well as professional guidelines, ethical standards, and methodologies used in the expert's field.

Soft Science

The *Daubert-Robinson* factors are not a good fit when applied to the "soft sciences" that are so frequently at the heart of child protection litigation. The Texas Court of Criminal Appeals has applied a modified version of these factors to assess the validity of expert opinion with respect to the "soft sciences."⁷⁸ Using this approach, the validity of "soft" scientific evidence depends on whether:

⁷⁷ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) (Texas Supreme Court applying *Daubert* standard in a products liability case).

⁷⁸ *Nenno v. State*, 970 S.W. 2d 549 (Tex. Crim. App. 1998), *overruled in part on other grounds in State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999) (general principles of *Daubert*, but not necessarily the

- The field of expertise is a legitimate one;
- The subject matter of the expert's testimony is within the scope of that field; and
- The expert's testimony properly relies on and/or utilizes the principles involved in the field.

These criteria are used to determine the reliability of the testimonial evidence of frequent expert witnesses in CPS litigation, such as social workers, therapists, counselors, and similar professionals.⁷⁹

TIP: For an informal forum for exchange of information about expert witnesses, check the user discussion group maintained by the Texas District and County Attorney's Association (TDCAA) offers, at www.tdcaa.com.

The link between an expert's experience and the subject matter of the proposed testimony is key to establishing the validity of expert testimony.⁸⁰ In some cases, the validity of an expert's testimony may be established by asking the court to take judicial notice of records that demonstrate the validity of the expert's theory or opinion.⁸¹ An expert may also give an opinion based on a hypothetical, provided that the fact pattern upon which the hypothetical is based is either admitted into evidence or conforms to the theory of the case.⁸² A qualified expert can not testify as to the truth of a child victim's testimony, but can testify as to

specific factors, apply and permit F.B.I. agent specializing in sexual victimization to testify regarding defendant's future dangerousness).

⁷⁹ *Taylor v. Tex. Dep't Protective & Regulatory Servs.*, 160 S.W.3d 641 (Tex. App.—Austin 2005, pet. denied) (*Robinson* factors not applicable to inherently subjective process of home study, but social worker with degrees in sociology and psychology and extensive experience with foster or substitute care who has prepared approximately 150 previous studies qualified to testify regarding home study); *In re K.L.R.*, 162 S.W.3d 291 (Tex. App.—Tyler 2005, no pet.) (although deemed harmless, error to admit testimony of expert with bachelor's, master's and a doctorate degree in custody dispute without proof that counseling is a legitimate field, that testimony was within the scope of her field, and that her testimony properly relied on principles involved in her field); *In re A.J.L.*, 136 S.W.3d 293 (Tex. App.—Fort Worth 2004, no pet.) (testimony of licensed counselor with master's degree sufficiently reliable under *Nenno*, based on evidence showing play therapy is a legitimate field of expertise, that expert's opinion was within the scope of her legitimate field of expertise, and that she properly utilized the principles of play therapy); *In re J.B.*, 93 S.W.3d 609 (Tex. App.—Waco 2002, pet. denied) (expert's testimony about parenting assessment he devised which had no peer review, had not been published, was unsupported by scientific data and was not used except in litigation, rejected under *Robinson* factors).

⁸⁰ *In re S.E.W.*, 168 S.W.3d 875 (Tex. App.—Dallas 2005, no pet.) (without evidence of reliability of testing methods at remote laboratory, expert cannot testify regarding testing results); *Fox v. State*, 115 S.W.3d 550 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (expert with bachelor's in psychology and master's in social work, 10 years' experience with CPS but experience with only 35-55 child victims of sexual abuse, no publication in the field or independent studies on topic, not qualified to testify regarding interview protocols, developmental stages and behavior patterns of child sexual abuse victims).

⁸¹ *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim. App. 2003) ("[i]t is only at the dawn of judicial consideration of a particular type of forensic scientific evidence that trial courts must conduct full-blown "gatekeeping" hearings," thereafter "courts may take judicial notice of the scientific validity (or invalidity) of that scientific theory based upon the process, materials, and evidence produced in those prior hearings").

⁸² *Matson v. State*, 819 S.W.2d 839 (Tex. Crim. App. 1991) (expert's testimony can be helpful to the trier of fact even when the expert does not have personal knowledge of the relevant facts).

the characteristics and dynamics of sexually abused children.⁸³ In the absence of proof of reliability, expert testimony regarding propensity for sexual misconduct is not admissible.⁸⁴

⁸³ *Reyes v. State*, 274 S.W. 3d 724 (Tex. App.—San Antonio 2008, pet. denied) (with extensive child abuse background and experience examining 8000-9000 children, Dr. Nancy Kellogg able to testify regarding common behavioral characteristics of abused children and that a specific child's examination was consistent with penetration); *Perez v. State*, 113 S.W.3d 819, 832 (Tex. App.—Austin 2003, pet. ref'd) (expert testimony that a child exhibits behavioral characteristics that have been empirically shown to be common among children who have been abused admissible under Rule 702).

⁸⁴ *In re C.D.K.*, 64 S.W. 3d 679 (Tex. App.—Amarillo 2002, no pet.) (without a showing of reliability and validity of testing, error to admit expert testimony that father had propensity for sexual deviancy).