Evidence and Experts

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CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Certified: Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-2015 and appointed through 2018); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-2004)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Honors Received:

Texas Center for the Judiciary, Exemplary Non-Judicial Faculty Award (2014)
Texas Bar Foundation *Dan Rugeley Price Award* for "an unreserved commitment to clients and to the practice of our profession" (2014)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2013)
State Bar of Texas Family Law Section Best Family Law CLE Article (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
State Bar of Texas *Certificate of Merit*, June 2004
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
Association for Continuing Legal Education's Award for Best Program (*Enron, The Legal Issues*) (Co-director, March, 2002)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Certificate of Merit*, June 1997
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1996
State Bar of Texas *Certificate of Merit*, June 1995

Professional Recognition:

Listed as San Antonio Scene's Best Lawyers in San Antonio (2004 - 2018)
Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2010 - 2018)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2014)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2013)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2012)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Listed as Family Lawyer of the Year by BEST LAWYERS (2012)
Listed as Family Lawyer of the Year by BEST LAWYERS (2011)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2015)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2017); Appellate Law (2007-2017)

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules*, SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

Magazines:

A New Day: Same Sex Marriages: Emerging Gender Identity Issues; IN CHAMBERS Fall 2015; Texas Center for the Judiciary, p 10.

Error Preservation for Evidentiary Rulings; THE ADVOCATE Fall 2016; State Bar of Texas, p __.

Continuing Legal Education Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011, 2013, 2015, and 2017)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director
- 1987 Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Discovery Issues Facing Associate Judges and Title IV-D Masters (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Troubling Issues of

Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014); Probate & Family Law - What a Family Lawyer Can Learn from the Texas Estates Code (2015); Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid (2016); Compensation, Return on Capital and Return of Capital (2017); Tracing and Characterization Techniques (2018)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003); Court-Imposed Sanctions in Texas (2012)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeal and Mandamus) (2012); Sanctions in Texas Courts: Trial and Appeal (2018)

Other CLE: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers` - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); Family Law Update - 2013, Judicial Conference (2013); Family Law and Fiduciary Duty, Fiduciary Litigation Course (2013); Two Hot Topics in Family Law: Same-Sex Marriage; Mediated Settlement Agreements, 2014 Judicial Conference, Texas Center for the Judiciary (2014); SBOT Advanced Personal Injury Course, Court-Ordered Sanctions (2014); Texas Center for the Judiciary, Same-Sex Marriage and Gender Identity Issues (2015); History of Texas Supreme Court Jurisprudence, The Rise of Modern American Contract Law (2015); New Frontiers In Marital Property Law, Distributions from Business Entities: Six Possible Approaches to Characterization (2015); Selective Fiduciary Issues in Family Law, 10th Annual Fiduciary Litigation Course (2015); Same-Sex Marriage and Gender Identity Issues, Texas Center for the Judiciary (2016); Dividing the Estate Upon Divorce, Texas Center for the Judiciary (2017); 20 Rules for Characterizing Marital Property in Texas, Texas Center for the Judiciary (2017); New Frontiers in Marital Property Law, Gifts, Trusts and How to Unwind Them; Current Issues Related to Child Custody, Texas Center for the Judiciary (2019)

Continuing Legal Education Webinars: *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012); *Family Law Update - 2013*, Texas Center for the Judiciary Video

Table of Contents

Evidence and Experts

by

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I. INTRODUCTION. This Article discusses evidentiary issues that arise in suits affecting the parent-child relationship (SAPCRs). The Department of Family and Protective Services is abbreviated as DFPS. The Texas Family Code is called "TFC." The Texas Rules of Civil Procedure are called "TRCP." The Texas Rules of Evidence are called "TRE."

II. PLEADINGS AND RELEVANCY IN SAPCRs. The TRCP and TRE apply to SAPCRs. TFC § 105.003(a); TFC § 104.004.

TRE 402, General Admissibility of Relevant Evidence, says:

> Relevant evidence is admissible unless any of the following provides otherwise:
>
> - the United States or Texas Constitution;
> - a statute;
> - these rules; or
> - other rules prescribed under statutory authority.
>
> Irrelevant evidence is not admissible.

TRE 401, Test for Relevant Evidence, provides:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

Ordinarily, the parties' pleadings define the scope of the claims and defenses, and thus are the measure of what evidence is relevant and what relief the court can grant. *In re D.N.*, 495 S.W.3d 863 (Tex. App.--Amarillo 20134, no pet.) ("we can only uphold the trial court's order on a basis that was properly pleaded and was found as a basis for termination in the judgment"). However, it is sometimes said that "in matters concerning support and custody of children the paramount concern is the best interest of the children and the technical rules of pleading and practice are not of controlling importance." *See Barrow v. Durham*, 574 S.W.2d 857, 861 (Tex. Civ. App.--Corpus Christi 1978), *aff'd*, 600 S.W.2d 756 (Tex. 1980). The Supreme Court said, in *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967):

> [W]e are of the view that a suit properly invoking the jurisdiction of a court with respect to

> custody and control of a minor child vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child. The courts are given wide discretion in such proceedings.... Technical rules of practice and pleadings are of little importance in determining issues concerning the custody of children.

Nonetheless, in *Flowers v. Flowers*, 407 S.W.3d 452 (Tex. App.--Houston [14th Dist.] 2013, no pet.), the appellate court reversed a trial court for removing a geographic restriction on the mother's right to determine the children's primary residence because the mother had not pled for that relief, and the issue was not tried by consent. The appellate court also reversed the trial court's reallocation of five specific parental rights for failure to plead for those changes.

In the case of *In re A.B.H.*, 266 S.W.3d 596, 600-01 (Tex. App.--Fort Worth 2008, no pet.), a divided court reversed a trial court for appointing a parent a sole managing conservator when he had pled only to be appointed the joint managing conservator with the exclusive right to establish the child's primary residence, and the issue of sole managing conservator was not tried by consent. The dissenting Justice said: "Because Cheryll and Scott both put the workability of the existing conservatorship arrangement at issue in their pleadings, I would hold that those pleadings were sufficient to support the trial court's order designating Scott as the sole managing conservator of the children." *Id.* at 602.

In the case of *King v. Lyons*, 457 S.W.3d 122, 126 (Tex. App.--Houston [1st Dist.] 2014, no pet.), the trial court included an injunctive order in an order modifying a prior SAPCR order. The appellate court posed the following questions:

> 1. "[M]ay a court impose an injunction in the absence of pleadings requesting that relief?"
>
> 2. "[M]ay injunctive relief in such a case be based solely on the best interest of the child or must there be a showing of the usual elements needed to prove entitlement to a permanent injunction, i.e., a wrongful act, imminent harm, irreparable injury, and the absence of an adequate remedy at law?"

Id. at 127. After thoughtful analysis of cases discussing the importance of pleadings in SAPCRs, and in injunction cases, the appellate court ruled: "Considering the aforementioned authorities, we conclude that in suits affecting the parent-child relationship, a trial court may not grant injunctive relief against a party unless that party had notice by way of the pleadings or the issue was tried by consent." *Id.* at 130-31. [Author's note: The pleading requirement for injunctive orders may be more stringent than rulings on custody, visitation and the rights and duties of parents.]

III. RULES OF EVIDENCE (THE VIEW FROM 10,000 FEET). The TRE apply in SAPCRs the same as in other civil cases. TFC § 104.004. The TRE were created and are presently written to set forth in straightforward terms what evidence is admissible and what evidence is not admissible, but in some instances discretion must be exercised to determine admissibility. This reflects an unresolved struggle between those who want a set of black-and-white rules that trial court must follow and those

who want the trial court to exercise more or complete discretion in admitting and excluding evidence.[1] The tendency of lawyers and courts is to view the rules of evidence as standards that either apply or don't apply to a piece of evidence. However, there are many instances where admissibility is not clear-cut, and an understanding of the principles underlying the evidentiary rules will help the court in exercising that discretion, and help lawyers to argue their respective positions. This article will take a moment to look at the "big picture" of the evidence rules, which helps to understand the way the rules work, and interact, and how discretionary decisions on admissibility can be made in light of the principles underlying the rules.

A. HISTORY OF EVIDENCE RULES IN THE U.S.A. The evidence rules we have today grew out of the common law process of British appellate courts publishing decisions that operated as binding precedent, augmented by occasional statutes issued by the monarch or enacted by Parliament. The American Law Institute promulgated a Model Code of Evidence in 1942, which was never adopted anywhere. The National Conference of Commissioners on Uniform State Laws promulgated Uniform Rules of Evidence in 1953, which were adopted in only three states: Kansas, New Jersey, and Utah.[2] A sustained effort to produce a comprehensive set of evidence rules for Federal courts began in 1961.[3] The United States Supreme Court promulgated the Federal Rules of Evidence ("FRE") on February 5, 1973, subject to the approval of the U.S. Congress. In 1974 the National Conference of Commissioners issued a new set of Uniform Rules based on the proposed Federal Rules of Evidence. Congress approved a modified set of evidence rules for Federal court proceedings, which became effective on July 1, 1975. By 1978, fourteen states had adopted rules of evidence based either on the uniform rules or the Federal Rules.[4]

B. HISTORY OF EVIDENCE RULES IN TEXAS. Prior to September 1, 1983, evidence law in Texas was an amalgamation of common law precedent and individual statutes of limited scope. On September 1, 1983, the Texas Supreme Court promulgated the Rules of Civil Evidence. The Court of Criminal Appeals adopted the Rules of Criminal Evidence in 1986. The two courts combined the two separate rule sets into one effective March 1, 1998. The TRE were structured like the FRE, but varied in a number of respects. The TRE were "restyled" by the Supreme Court in 2015 to modernize their structure and wording.

C. THE EVIDENCE RULES SUPPORT THE ADVERSARIAL PROCESS. The Anglo-American legal process is an adversarial process, as distinguished from the inquisitorial process found in other countries. In the adversarial process, opposing parties meet at trial, examine and cross-examine witnesses, offer exhibits, and argue their cases to a jury, which decides the outcome based

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[1] Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437 (Dec. 2000). <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1481&context=californialawreview>.

[2] L. Kinvin Wroth, *The Federal Rules of Evidence in The States: A Ten-Year Perspective* 30 Villanova L. Rev. 1315, 1317 (1985).

[3] Josh Camson, *History of the Federal Rules of Evidence* <https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html>.

[4] L. Kinvin Wroth, *p.* 1319.

on the evidence presented. Because the jury must rely totally on testimony and documentary materials admitted for their consideration, it is important to the integrity of the adversarial process that the testimony and documents be reliable. This quest for reliability is the underpinning of most of the rules of evidence. The following list of the evidentiary rules explores this perspective.

1. The Requirement of Proof. All legal claims must be supported by proof or they fail. Absent proof of a cause of action and related damages, the plaintiff recovers nothing from the defendant. Likewise, affirmative defenses require proof from the defendant or they fail to defeat liability. In an original SAPCR between parents, there is no clear-cut burden of proof, since both parents stand equally in the eyes of the law. If a non-parent is involved in an original SAPCR, the burden of proof will fall upon the non-parent as against the parent. In a SAPCR modification proceeding, the party seeking a court-ordered change has the burden of proof to support the modification. Where the State of Texas is wanting to remove a child from its family, the burden of proof to justify that action rests on the State.

2. The Burden of Proof. Law professors have written about this for decades, and it can probably best be said that the burden of proof involves two things: the burden to produce evidence, and the burden to persuade the fact finder (burden of production vs. burden of persuasion). These two burdens often rest on the same person, but not always. The burden of producing evidence can be seen as the burden to show that there should be a trial, or if in trial it is the burden to show that there is a disputed issue to be submitted to the jury. All parties seeking legal relief initially have the burden of producing evidence and persuading the fact finder, but in some instances the evidence produced can switch the burden of producing evidence to the other party, and in some cases it can even reverse the burden of persuasion. The assignment of these burdens is done through presumptions, and through the requirement that a jury find a "yes" answer by a preponderance of the evidence, or clear and convincing evidence, or evidence that is elimates any reasonable doubt, as the case may be.

3. Presumptions. Presumptions are a fertile topic for professorial writings, but a simple approach is to say that there are procedural presumptions and evidentiary presumptions. These presumptions can control, support, or shift during trial. A procedural presumption determines which party has the burden of producing evidence as an initial matter. That is typically the plaintiff. If the plaintiff makes enough of a case to go to the jury, then the defendant has the burden of proof on any defenses. These procedural presumptions normally remain in the case all the way to the jury charge, where they determine who has the burden of persuasion on various questions. However, certain evidence can cause the procedural presumption to shift to the opposite party. An evidentiary presumption arises when a jury is permitted or required to infer an unproved fact from other evidence presented. An evidentiary presumption allows a party to prove indirectly something that has not been proven directly. Some presumptions have the effect of reversing the underlying procedural presumption. Others do not shift the burden of proof but do constitute evidence the jury can consider. Some evidentiary presumptions are irrebuttable, and cannot be contradicted with contrary evidence. Other evidentiary presumptions permit but do not require the jury to conclude the inferential fact. Still other presumptions vanish in the face of contradictory evidence, and once refuted have no effect on the outcome of the case.

4. The Requirement of Oath. Traditionally, all testimony must be under oath, particularly before a jury. However, there are instances in the TFC where a court is allowed to receive unsworn

statements from children in chambers and rely on what s/he hears in deciding the case. See Section XIII below.

5. Judging Credibility. "Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom. " Rules of Evidence are used to control what evidence the jury hears. These rules are designed to increase the reliability of the evidence, and to diminish the chance that a jury will rule based on emotions and not on the law applied to the facts. However, some evidentiary rules exclude reliable evidence based on public policy. (e.g., privileged communications.)

6. "The Rule" of Witness Sequestration. TRE 614 requires the court, sua sponte or at any party's request, to order witnesses to be excluded from the courtroom and instructed not to discuss their or other witnesses' testimony. This rule of exclusion appeared as long ago as the third Century A.D., and the story of Susannah in the Book of Daniel attests to the common sense of the rule.[5] (Tex. Code Crim. Proc. art. 36.03 gives the court discretion to exempt from the rule a close relative of a victim unless the court determines that the testimony of the witness would be materially affected if the witness hears other testimony at the trial.) The rule exempts parties, a designated representative of an entity, and a person whose presence a party shows to be essential to presenting the party's claim or defense (typically an expert).

7. The Importance of Cross-Examination. Cross-examination is seen as being an important process for ensuring that the credibility of testimony and reliability of a witness is thoroughly tested before the jury. The Sixth Amendment to the U.S. Constitution says that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Mattox v. United States*, 156 U.S. 237 (1895), the Supreme Court listed three fundamental purposes for the requirement: to ensure that witnesses would testify under oath and understand the serious nature of the trial process; to allow the accused to cross-examine witnesses who testify against him; and to allow jurors to assess the credibility of a witness by observing that witness's behavior. In *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987), the Court narrowed the essential grounds to two: the right of a defendant physically to face those who testify against him, and the right to conduct cross-examination. The right to cross-examine is also an important justification for the requirement that lay witnesses testify only based on personal knowledge, and for the hearsay rule, which (subject to exceptions) excludes out-of-court statements of fact that are not subject to cross-examination.

8. The Requirement of Personal Knowledge. TRE 701 requires that the testimony of a witness not testifying as an expert must be "rationally based on the witness's perception." This requirement of personal knowledge increases the chance that facts will be reported accurately, and it ensures that the description of events can be tested by cross-examination of the "eye witness."

9. Voir Dire of the Witness. The right to interrupt the opposing party's examination in order to voir dire a witness, to determine if a proper predicate exists for the witness to testify, is an important tool for a lawyer to be sure that evidentiary standards are being met by the opposing attorney.

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[5]Book of Susanna (verses 48–64), Apocrypha of the Old Testament, Revised Standard Version, cited in Ralph Slovenko, *Sequestration of Lay Witnesses and Experts*, 32 Journal of the American Academy of Psychiatry and the Law 447-50 (2004) <https://pdfs.semanticscholar.org/14fd/c4f591f09188fbda7b652f76042edc607334.pdf>.

10. The Exclusion of Hearsay. Professor Wigmore dates the hearsay rule back to the 1500s, and its robust development to the 1700s, in England.[6] In concluding his history of the hearsay rule, Professor Wigmore called the hearsay rule "that most characteristic rule of the Anglo-American law of evidence, – a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure." The hearsay rule is essentially a specific application of the general requirement that witnesses testify based on personal knowledge. It should be noted that TRE 806 permits a party to attack or support the credibility of the out-of-court declarant just as if s/he had testified in the trial, where the hearsay is a statement made by the opposing party's representative or co-conspirator, or was made in a deposition.

11. Defining Away Hearsay. The hearsay rule is too broad to be practical at the extremes, and to reduce this problem certain hearsay has been defined not to be hearsay. This includes a testifying witness's prior sworn testimony; statements by the opposing party; and deposition testimony. TRE 801(e)(1). Note that the reliability of the first and third sources of "non-hearsay" are supported by being subject to oath at the time the testimony was given. The second source is supported by the opposing party's ability to contest making the prior statement or to explain the prior statement.

12. Exceptions to the Hearsay Rule. The hearsay rule would have to be abandoned if there weren't exceptions to the rule. TRE 803 contains 24 exceptions to the hearsay rule. TRE 804 sets out 3 more exceptions that apply when the original declarant is not available to testify in court.

13. The "Residual Hearsay Exception." The Federal Rules of Evidence contain an exception to the hearsay rule that has no counterpart in the TRE. It is Federal Rule of Evidence 807, which says:

> Rule 807. Residual Exception
>
> **(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.
>
> **(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

[6] John H. Wigmore, *The History of the Hearsay Rule*, 17 Har. L. Rev. 437, 437 (May 1904) <https://ia601907.us.archive.org/7/items/jstor-1323425/1323425.pdf>.

This exception is purely discretionary, which is its virtue and its vice. The Advisory Committee note indicates that the residual exception was not designed to give "unfettered exercise of judicial discretion" to trial courts, but was instead "designed to permit the admission of new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." There has been no suggestion made to or by the Texas Supreme Court's Rules Advisory Committee to adopt FRE 807 into Texas law.

14. Authenticity of Exhibits. TRE 901 tells how to meet the inferred requirement that evidence be identified or authenticated before it is admitted. The proponent must "produce evidence sufficient to support a finding that the item is what its proponent claims it is." Only a prima facie showing is required in order to merit admission. Actual authenticity is a matter for the fact finder to determine based on the burden of persuasion (preponderance, clear and convincing, beyond a reasonable doubt).

15. Authenticity of Recordings. We have come a long way since courts first had to grapple with the authentication of audio recordings. A lay witness can authenticate a recording based on personal knowledge, if s/he we present at the time the recording was made and can attest to its accuracy. TRE 901(b)(1). Trying to authenticate a recording without a sponsoring witness with personal knowledge requires the use of other forms of confirmation, which could include identifying the voices, or considering the content of the image or discussion, or expert testimony about the technical aspects of the recording.

16. Relaxed Restrictions on Experts. As discussed in Section XI.C.8 below, experts can testify to information and opinions that are not based on personal knowledge. If this was not allowed, experts would be unable to rely on interviews and records to help reconstruct past events or current conditions, and this would greatly limit their usefulness. As discussed in Section XI.C.9, experts are allowed to testify to inadmissible evidence, in explaining their opinions, which opens the door of the trial to hearsay and unauthenticated exhibits.

17. Insulating Children From the Litigation Process. The Texas Legislature has recognized that testifying in a courtroom can frighten or even harm a child, only made worse by the necessity of the child submitting to cross-examination. In *Coy v. Iowa*, 487 U.S. 1012 (1988), the Supreme Court reversed a conviction where a a screen was placed between the defendant and the girls who testified against him in a sexual abuse prosectuion. A key to the Majority Opinion and vote of two concurring Justices was the absence of a requirement that the trial judge determine that the child witness needed special protection. Two years late, in *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court said that, while the Confrontation Clause reflects a preference for face-to-face confrontation in the courtroom in criminal proceedings, that requirement can be compromised where public policy and the necessities of the case require it. In that case, the Supreme Court approved a court permitting a child alleged to be the victim of abuse to testify from the Judge's chambers by one-way closed circuit television, if the judge determines that a face-to-face cross-examination would result in serious emotional distress for the child.

The Confrontation Clause does not apply to civil proceedings. The Texas Legislature stepped into this space in TFC ch. 104, which contains several provisions that permit a court to temper or avoid having the child testify in a child abuse proceeding. TRC § 104.002 permits the court to admit a prerecorded

oral statement of a child 12 or younger, who is alleged to be abused, if: (i) no attorney for a party was present; (ii) the recording shows both sight and sound; (iii) the equipment was capable and the operator competent, and the recording is accurate and not altered; (iv) there are no leading questions; (v) each recorded voice is identified; (vi) the interviewer appears in court and is subject to cross-examination; and (vii) each party can examine the recording before it is offered into evidence.

TFC § 104.003(a) permits a court, upon motion of party, to cause the testimony of a child (no age specified) to be taken outside the courtroom later to be played to the factfinder and the parties. Under TFC § 104.003(b), only the parties' attorneys, an attorney ad litem, or other persons "whose presence would contribute to the welfare and well-being of the child," and equipment operators, can attend the taping session. TRC § 104.003(c) says that only the attorneys for the parties can question the child. It is not clear if this excludes the attorney ad litem. TFC § 104.003(d) says that the equipment operators must be hidden and the child kept unaware that recording is occurring. TFC § 104.003(e) requires the court to ensure that (i) the recording is both visual and aural and is recorded; (ii) that the recoding equipment was capable and the operator competent, and the recording accurate and not altered; (iii) that each recorded voice is identified; and (iv) each party is permitted to examine the recording before it is shown in the courtroom.

TFC § 104.004 permits the court in a SAPCR to have the testimony of a child 12 years or younger, who has allegedly been abused, presented outside the courtroom while being televised into the courtroom by closed-circuit equipment.

TFC § 104.005(a) says that, if the testimony of the child is provided in the manner described in Chapter 104, the child cannot be compelled to testify. Section 104.005(b) provides that the court can utilize the procedures under Chapter 104 if the child is incapable of testifying in open court due to a medical condition.

18. Science-Based Evidence. As the court system shifts away from reliance on eye-witness testimony and lay opinion and toward science-based evidence presented by expert witnesses, the requirement that data and methodology be reliable, coupled with the requirement that the expert opinion be ruled relevant to the matter in issue, are increasingly supplanting the requirement of personal knowledge as the fundamental safeguard of the soundness of evidence.

IV. EVIDENCE ISSUES IN SAPCRS. There are some recurrent evidentiary issues in SAPCRs relating to termination and child custody.

A. PRESUMPTIONS. There are several presumptions unique to SAPCRs.

1. The Parental Presumption. "The presumption that the best interest of a child is served by awarding custody to a natural parent is deeply embedded in Texas law." *Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex. 1990). "The parental presumption is based upon the natural affection usually flowing between parent and child." *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). TFC § 153.131 says:

§ 153.131. Presumption That Parent to be Appointed Managing Conservator

> (a) Subject to the prohibition in Section 153.004,[7] unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.
>
> (b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

Things to note about the parental presumption:

1. TFC §153.131 not only casts the burden of producing evidence and the burden of proof on the party seeking to keep a parent from being appointed managing conservator; it also alters the burden of persuasion from best interest to proving that the appointment of the parent as a managing conservator would significantly impair the child's physical health or emotional development. Several courts have called this a "heavy burden." *In re K.R.B.*, No. 02-10-00021-CV, *4 (Tex. App.--Houston [14th Dist.] Oct. 7, 2010, no pet.) (mem. op.); *Critz v. Critz*, 297 S.W.3d 464, 474-75 (Tex. App.--Ft. Worth 2009, no pet.). The court in *Critz* said: "Impairment must be proved by a preponderance of the evidence indicating that some specific, identifiable behavior or conduct of the parent, demonstrated by specific acts or omissions of the parent, will probably cause that harm. This is a heavy burden that is not satisfied by merely showing that the non-parent would be a better custodian of the child. 'Close calls' should be decided in favor of the parent." *Id.* at 474-75. [Footnotes omitted.] In *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.--Houston [1st Dist.] 2007, no pet.), the court said that the "evidence must support a logical inference that the parent's specific, identifiable behavior or conduct will probably result in the child being emotionally impaired or physically harmed. This link between the parent's conduct and harm to the child may not be based on evidence which merely raises a surmise or speculation of possible harm."

2. Under TFC § 153.373, the parental presumption vanishes where "the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent, a licensed child-placing agency, or the [DFPS] for a period of one year or more, a portion of which was within 90 days preceding the date of intervention in or filing of the suit," and the appointment of the non-parent, agency, etc. is in the best interest of the child.

3. The parental presumption does not apply in suits to modify a prior SAPCR order. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000).

2. Family Code Prohibitions/Presumptions Based on Violence or Sexual Crimes. TFC §153.004, entitled "History of Domestic Violence or Sexual Abuse," contains significant (if confusing) terms. Subsection (a) says: "In determining whether to appoint a party as a sole or joint

[7] TFC § 153.004 prohibits appointing as JMC a parent who has exhibited "a history or pattern of past or present child neglect, or physical or sexual abuse ... directed against the other parent, a spouse, or a child ...." The Section also denies access to a parent who has a history or pattern of family violence or sexual crimes.

managing conservator, the court shall consider evidence of the intentional use of abusive physical force, or evidence of sexual abuse, by a party directed against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit." It is doubtful that a court would not consider such evidence even without the statute. *See generally Lewelling v. Lewelling*, 796 S.W.2d 164, 167-169 (Tex. 1990).

Subsection (b) says that the court "may not" appoint a party as joint managing conservator if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent against the other parent, a spouse, or a child. How to implement this directive is somewhat unclear, because the prohibition appears to be triggered by a mere prima facie showing with credible evidence, which is a lower burden than actually convincing the fact finder that such behavior occurred. Does the language of the statute mean that instead of determining from a preponderance of the evidence whether violence or sexual crimes occurred, the court should instead determine whether the evidence presented was credible? If so, what does a court do if it finds that evidence credible but finds that contrary evidence outweighs it?

Subsection (b) also introduces a "rebuttable presumption" that it would not be in the best interest of a child for the court to appoint a parent as sole managing conservator or to give that parent the exclusive right to determine a child's primary residence, when "credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child." This language presents the same uncertainty regarding the difference between presenting credible evidence and convincing the finder of fact. Things are further complicated by providing a "rebuttable presumption," which is weaker than the outright prohibition ("may not appoint") that is contained in the previous term of Subsection (b). Also, if the presumption falls away in the face of contrary evidence (as suggested first by Professor Thayer and later by Professors Wigmore and McCormick, sometimes called the "bursting bubble" view of presumptions), then the rebuttable presumption can vanish as easily as it arose, and in a swearing match there would be no presumption. So it remains to be determined whether the statutory presumption merely shifts the burden of producing evidence to the alleged perpetrator, or whether it shifts the burden of persuasion as well, so that the alleged perpetrator must prove by a preponderance of the evidence that s/he did not do those things.

Subsection (c) says that the court "shall consider the commission of family violence or sexual abuse in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator." There is no outright prohibition ("the court may not"), nor is there a rebuttable presumption. Instead, there is just a requirement to consider certain evidence (which courts would almost certainly do even without the statute).

Subsection (d) prohibits a court from ordering access by a parent to a child for whom a preponderance of the evidence shows a history of family violence within two years, or criminal sexual conduct toward the child. This is a prohibition triggered by a finding upon a preponderance of the evidence–a burden of persuasion consistent with the rest of civil litigation.

Having said all that, Subsection (d-1) creates an exception to subsection (d) when the courts finds that access would not endanger the child's physical health or emotional welfare and would be in the

child's best interest, and the court renders an order the protects the child and others who were victims of violence. These protections include supervised access, exchanges of possession in protective circumstances, abstaining from drugs and alcohol, and attending violence preventions programs.

Subsection (e) gives us another rebuttable presumption that unsupervised visitation is not in the best interest if "credible evidence is presented" of a history or pattern of child neglect, abuse, or family violence. The court is directed to consider as possible "credible evidence" a protective order.

In *Watts v. Watts*, 396 S.W.3d 19, 22 (Tex. App.--San Antonio 2012, no pet.), the evidence showed that both spouses had engaged in family violence toward the other. The appellate court said that one or the other parent, but not both, had to be appointed sole managing conservator.

a. The Pattern Jury Charge Instructions on Violence and Sex Crimes. The State Bar of Texas Pattern Jury Charges PJC 215.3 suggests that the instruction to the jury that a parent who has committed family violence or sex crimes cannot be appointed as joint managing conservator should be given only if "credible evidence" is admitted on the subject. The Pattern Jury Charge ("PJC") Committee is thus expecting the trial court to make a preliminary determination whether evidence is credible. An argument can be made that the credibility determination should be made by the jury and not the judge. In that event, the instruction should go to the jury whenever *any* evidence is admitted showing violence or sex crimes. The poor wording of the statute causes this uncertainty, but when a jury is the fact finder it seems that the jury and not the judge should decide not only whether evidence of violence or sex crimes is credible, but more importantly whether it actually occurred. The PJC Committee advises that the instructions in PJC 215.2 (Evidence of Abusive Physical Force or Sexual Abuse) and PJC 215.4 (History or Pattern of Family Violence, History or Pattern of Child Abuse or Neglect, or Protective Order), are not properly submitted if there is no evidence of such behavior. It would be better to say that the instruction should be submitted if there is any evidence (legally sufficient, or more than a scintilla) that the behavior occurred. Note that these two instructions, coupled with the preponderance of the evidence burden in answering the custody questions, removes the issue from the realm of whether evidence is credible to the realm of whether the behavior actually occurred, thus curing the uncertainty created by the statutory language as to the burden of persuasion.

b. Protecting Personal Information. In connection with this discussion about violence, it should be noted that TFC § 153.012 permits the court to order the custodian of records to delete all references in the records to the place of residence of either party appointed as a conservator of the child before the release of the records to another party appointed as a conservator.

c. False Report of Child Abuse. TFC § 153.013 creates a sanction for a false report of child abuse. If a party who makes report of child abuse in a pending SAPCR knows that it lacks a factual foundation, the court "shall" deem is a knowingly false report. Evidence of the knowingly false report is admissible with regard to the *terms of conservatorship*. Note that the *determination of* managing conservatorship is not mentioned. Since the terms and conditions of conservatorship are not a jury question, query whether this rule of admissibility allows the information to go to the jury. In the event that the court finds a knowingly false report, the court "shall" impose a civil penalty not to exceed $500.

B. AUTHENTICATION. No evidence is admissible unless it has first been authenticated. TRE

901, Requirement of Authentication or Identification, provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." TRE 901(a). (In other words, the required showing is a prima facie showing, not a preponderance of the evidence.) The rule goes on to set out examples of authentication.

Typical forms of authentication are by testimony of a witness with knowledge, lay opinion on genuiness of handwriting, identification of a voice by someone who has heard the speaker speak, etc. TRE 901(b).

Some documents are self-authenticating: domestic government documents under seal, or if not under seal then attested to under seal by a public officer that the signer had the capacity and the signature is genuine; foreign public documents which are attested and certified as genuine; certified copies of public records; official publications; newspapers and periodicals; trade inscriptions showing ownership, control or origin; acknowledged documents; commercial paper; and business records accompanied by a "business records affidavit." TRE 902 ("Self-Authentication").

Under TRCP 193.7, documents produced by a party in response to written discovery are automatically authenticated against the producing party for pretrial purposes or trial, unless the producing party makes an objection with 10 days of notice that the document will be used.

It should be noted that merely authenticating a document does not guarantee its admissibility. *See Wright v. Lewis*, 777 S.W.2d 520, 524 (Tex. App.--Corpus Christi 1989, writ denied) (despite the fact that a letter was authenticated, the letter was not admissible because of the hearsay rule).

1. Authenticating Communications. TRE 901(b)(5) provides that a voice can be identified "whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker." TRE 901(b)(6) provides guidance for authenticating telephone conversations by evidence that a call was made to the number assigned at the time to a particular person or business, if:

> (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
>
> (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

Communications media have evolved considerably since TRE 901(b)(6) was promulgated, and courts are now faced with authenticating voice messages, emails, text messages, social network postings, and digitally-recorded voices and images. Since technology and communication practices are continuing to evolve, and "spoofing" is endemic, it is wise to revert to the general principal that a communication should be considered authenticated if the evidence is sufficient to support a finding that the communication is from the person it is purported to be from, allowing the fact finder to determine from a preponderance of the evidence whether the communication is really attributable to the alleged source. Such evidence could include the apparent source of the communication, the content of the message, etc. Truncation of the recording at the beginning or the end, or gaps in the

middle of the message, detract from authenticity.

2. Authenticating Photographic Images. Traditionally, photographs were authenticated by a witness with personal knowledge testifying that the photograph accurately depicted the scene in the photograph. That method should apply to digital images as well. TRE 1001(c) (A 'photograph' means a photographic image or its equivalent stored in any form). Unfortunately, digital images can easily be altered in a way that cannot be detected by the untrained eye. A computer expert can examine a digital image to look for signs of alteration.

C. BEST EVIDENCE RULE. The "best evidence rule" provides that ordinarily you must use the original writing, recording or photograph to prove its contents. TRE 1002. The rule governs (i) the use of copies, and (ii) the use of oral testimony to prove the contents of a writing. A duplicate may be used unless (1) a question is raised as to the authenticity of the duplicate, or (2) the use of the duplicate under the circumstances would be unfair. TRE 1003. An original is not required if: the original has been lost or destroyed (except by the offering party in bad faith), or the original cannot be obtained, or no original is in Texas, or the opponent, after having been put on notice of the need for the original, does not produce it. Also, the original is not required if the item relates only to collateral matters. TRE 1004.

1. Public Records. The contents of an original public record can be proved by a certified copy (see TRE 902), or by a copy authenticated by the testimony of any witness who has compared the copy to the original. TRE 1005. Only if neither of these sources is available can other evidence of contents can be given. TRE 1005. However, in a 5-4 decision, the Court of Criminal Appeals held that it was permissible for a trial court to admit a faxed copy of a certified copy of a judgment that was faxed by a county clerk to a district clerk. *Englund v. State*, 946 S.W.2d 64 (Tex. Crim. App. 1997). The faxed copy was treated the same as if it had been a photocopy. Presumably the same rule would apply to scanned images that are emailed.

2. Business Records. Copies of business records can be authenticated by the testimony of the custodian of the records or other qualified witness. See TRE 803(6). Authentication of business records can also be done by affidavit, as provided in TRE 902(10). Computer records have a specific provision: TRE 1001(d) provides that "[i]f data are stored in a computer or similar device, any print-out or other output readable by sight, shown to reflect the data accurately, is an 'original'."

3. Photographs. Photographs are subject to the best evidence rule, TRE 1002. The rule is easy to apply when a witness is asked to describe the contents of a photograph that has not been admitted into evidence. The application of the rule to a copy of a photograph is addressed in TRE 1001(d) which provides:

> (d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout—or other output readable by sight—if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

4. Summaries. A summary of information contained in other documents ordinarily would violate

the best evidence rule. TRE 1006 creates an exception to the best evidence rule to permit the use of summaries. Under TRE 1006, a summary of the contents of voluminous writings, recordings, or photographs, is admissible where those underlying items cannot be conveniently examined in court, and the underlying items are themselves admissible. However, the underlying items, or duplicates of them, must be made available to the opposing party, to examine or copy at a reasonable time and place. The court can order that the underlying items be produced in court. *See Aquamarine Assoc. v. Burton Shipyard, Inc.*, 659 S.W.2d 820 (Tex. 1983). If the underlying records are in evidence, the court can [but probably shouldn't] exclude the summaries as being cumulative. *Parker v. Miller*, 860 S.W.2d 452, 458 (Tex. App.--Houston [1st Dist.] 1993, no writ).

5. Cases. See *Ford Motor Company v. Auto Supply Company, Inc.*, 661 F.2d 1171, 1176 (8th Cir.1981) (trial court properly admitted into evidence a product line profitability analyses made annually and compiled from numerous "spread sheets"); *Rosenberg v. Collins*, 624 F.2d 659, 665 (5th Cir.1980) (trial court properly admitted a summary of the commodity firm's yearly trading activities); *Black Lake Pipe Line Co. v. Union Construction Co., Inc.*, 538 S.W.2d 80, 92 (Tex.1976) (a proper predicate, as business records, must be laid for the admission of the underlying records used to prepare a summary); *Curran v. Unis*, 711 S.W.2d 290, 295 (Tex. App.--Dallas 1986, no writ) (income tax returns are an annual summary of the profitability of the business); *c.f. McAllen State Bank v. Linbeck Construction Corp.*, 695 S.W.2d 10, 16 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.) (trial court admitted into evidence two computer printout summary breakdowns, each a summary of underlying labor and material records; the court held that the printouts were entitled to be treated as business records, and not just as summaries of business records).

If the underlying records are government records or business records, the underlying records must be properly authenticated before summaries of those records would be admissible. If the underlying records are hearsay, or contain hearsay, then the summary is admissible only if hearsay exceptions are met.

It should be noted that sometimes a business or public office may generate summaries in the normal course of their activities. In those instances, the summaries are admissible as business records or public records, and not under TRE 1006.

D. HEARSAY. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TRE 801(d). By special definition, a "prior [sworn] statement by witness," "admission of a party-opponent," and "depositions" in the same case are not hearsay. TRE 801(e). A "statement" is (i) an oral or written verbal expression or (ii) nonverbal conduct of a person that is intended to substitute for a verbal expression. TRE 801(a). A "declarant" is a person who makes a statement. TRE 801(b). Under TRE 802, hearsay is not admissible unless provided otherwise by statute, the Rules of Evidence, or other rule issued under statutory authority. There are a number of exceptions to the hearsay rule of exclusion, most of which are set out in TRE 803. The exceptions frequently encountered in SAPCRs are discussed below.

Inferred Hearsay. Sometimes a party will attempt to circumvent the hearsay rule by offering indirect proof of an out-of-court statement. In *Head v. Texas*, 4 S.W.3d 258 (Tex. Crim. App. 1999), the Court of Criminal Appeals held that the hearsay rule did not preclude a question as to whether certain out-of-court statements were consistent with a statement that had been admitted into evidence. The

Court analogized to an earlier decision regarding the offer of subsequent conduct based on an out-of-court statement. In the earlier case, a witness was asked what he did in response to a statement, and the witness said that he began looking for a black male, with a ski mask. Since the content of the out-of-court statement was an "inescapable inference" from the description of subsequent behavior, admitting the subsequent behavior transgressed the hearsay rule. Applying that rule to the *Head* case, the court determined that the content of the testimony that out-of-court statements were consistent with other evidence received by the jury did not produce an inescapable conclusion about the substance of the out-of-court statements.

1. State of Mind Exception. Under TRE 803(3), an exception to the hearsay rule exists for "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." Many statements by children could meet the state of mind exception to the hearsay rule, and it is often offered as a justification in SAPCRs to permit the admission of hearsay statements by children. *In Huber v. Buder*, 434 S.W.2d 177 (Tex. Civ. App.--Fort Worth 1968, writ ref'd n.r.e.), a witness was permitted to relate what three children said about which parent they wanted to live with. *Accord*, *Melton v. Dallas County Child Welfare Unit*, 602 S.W.2d 119, 121 (Tex. App.--Dallas 1980, no writ), which held that a child's preference on custody fits the state-of-mind exception to the hearsay rule. In *Ochs v. Martinez*, 789 S.W.2d 949, 959 (Tex. App.--San Antonio 1990, writ denied), out-of-court statements by a girl regarding sexual abuse by her step-father were held inadmissible since they related to past external facts or conditions rather than present state of mind. In *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585 (Tex. App.--Eastland 1990, writ denied), an adult was permitted to relate a comment she overheard a child make regarding sexual abuse. In *James v. Texas Dep't of Human Servs.*, 836 S.W.2d 236, 243 (Tex. App.–Texarkana 1992, no pet.), statements of a child about being sexually touchedg were improperly admitted under the state of mind exception. In *Baxter v. Texas Dep't. of Human Resources*, 678 S.W.2d 265 (Tex. App.--Austin 1984, no writ), a witness was permitted to relate a child's statements that he had been beaten and was afraid of more beatings, and further that he had seen his parents' pornographic materials. In *James v. Tex. Dep't Hum. Resources*, 836 S.W.2d 236, 243 (Tex. App.--Texarkana 1992, no writ), statements by the children indicating that they had been sexually abused did not meet the state of mind exception. Similarly, in *Couchman v. State*, 3 S.W.3d 155 (Tex. App.--Fort Worth, 1999, pet. ref'd), statements of a 5-year old girl, that a man had molested her, were inadmissible under the state of mind exception, but were admissible under the TRE 803(2) excited utterance exception. In that case, the excitement causing the utterance was the child's burning sensation when taking a bath after the fact, rather than the alleged incident itself. In *In re G.B.*, No. 07-01-0210-CV, *5 (Tex. App.--Amarillo Oct. 10, 2003, no pet.) (mem. op.), a psychologist was permitted under the state-of-mind exception to tell the jury that a child said "her mother's urinalysis was dirty and that this had ruined her birthday party. Apparently she was to go home and celebrate her birthday with her mother and because of the drug screen coming back, that she was unable to, and she was very angry, very hurt." *See generally Lehman v. Corpus Christi Nat. Bank*, 668 S.W.2d 687, 689 (Tex. 1987) (witness can not testify as to the state of mind of another person).

2. Statement Made for Medical Diagnosis or Treatment. TRE 803(4) exempts from the hearsay bar a statement that (i) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and (ii) describes medical history; past or present symptoms or sensations; their inception; or their

general cause. The rule is not limited to medical doctors. In *Interest of J.H.*, No. 02-18-00249-CV at *5 (Tex. App.–Fort Worth Nov. 21, 2018, no pet.) (mem. op.), the appellate court ruled that a child's statements to ... a professional counselor, during his counseling sessions were pertinent to [the counselor's] treatment of [the child] and were not excludable as hearsay. In *In re M.G.*, No. 05-01-01961-CV, 2002 WL 31599020, at *9 (Tex. App.–Dallas Nov. 20, 2002, no pet.) (mem. op.), the court held that out-of-court statements, made by a child to a counselor, "if pertinent to diagnosis or treatment, will be admissible under Rule 803(4)."

3. Recorded Recollection. TRE 803(5) excludes from the hearsay bar a recorded recollection, described as being a record that (i) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (ii) was made or adopted by the witness when the matter was fresh in the witness's memory; and (iii) accurately reflects the witness's knowledge, unless the circumstances of the record's preparation cast doubt on its trustworthiness. If the record is admitted, it may be read into evidence but cannot be admitted as an exhibit unless it is offered by an adverse party. In child custody litigation, many times parties will keep a written record of visitations and other recurrent activities, which would qualify for admission under this rule. This hearsay exception does not apply where the witnesses' memory is refreshed by looking at a writing.

4. Records of a Regularly Conducted Activity. The TRE 803(6) business record exception to the hearsay rule is used to admit financial records, medical records, school records, police records, and many other kinds of information that can be offered in a SAPCR. Most often the business records are authenticated and the hearsay exception is met with a business record affidavit or deposition on written questions of the custodian of the records. However, the necessary predicate can be laid by the custodian of the records testifying live in court. The hearsay exception allows records to be admitted to prove an act, event, condition, opinion or diagnoses, including medical diagnoses. To meet this exception, the proponent must show that (i) the record was made at or near the time by--or from information transmitted by--someone with knowledge; (ii) the record was kept in the course of a regularly conducted business activity; and (iii) making the record was a regular practice of that activity. This must be proven by the testimony (or affidavit) of the custodian of the records or other qualified witness. The exception can be negated by a showing that the source of information or the method or circumstances of preparation indicate a *lack of trustworthiness*.

Proof by Witness. Proof that the records meet the TRE 803(6) exception can be made by "the testimony of the custodian or other qualified witness." TRE 803(6). *E.P. Operating Co. v. Sonora Exploration Corp.*, 862 S.W.2d 149, 154 (Tex. App.--Houston [1st Dist.] 1993, writ denied) (authenticity established by cross-examination of corporate employee who confirmed that the record was "one of you-all's internal documents at one of these various companies"). *See Sholdra v. Bluebonnet Savings Bank*, 858 S.W.2d 533, 534 (Tex. App.--Fort Worth 1993, writ denied) (records were not admissible where sponsoring witness failed to testify that records were made by persons with personal knowledge); *Texmarc Conveyor Co. v. Arts*, 857 S.W.2d 743, 748-49 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (record was admissible even though sponsoring witness admitted that he was not familiar with every detail of the record). There is no requirement that the custodian of the records be employed by the business at the time the record was made. *Dickey v. Club Corp. of America*, 12 S.W.3d 172, 176 (Tex. App.--Dallas 2000, pet. denied) ("The fact that Thornbrugh was not employed by the Club at the time . . . does not disqualify his knowledge of the Club's bylaws at that time. During employment, an employee may gain personal knowledge of regulations or

procedures that were instituted prior to the time he was hired."); *accord, Waite v. BancTexas--Houston, N.A.*, 792 S.W.2d 538, 540 (Tex. App.--Houston [1st Dist.] 1990, no writ); *Boswell v. Farm & Home Sav. Ass'n*, 894 S.W.2d 761, 768 (Tex. App.--Fort Worth 1994, writ denied) ("The fact that Mather was not employed by Farm and Home, at the time the attested events occurred, does not disqualify his testimony providing he gained knowledge of the facts during his employment.")

Proof by Affidavit. Proof that the records meet the TRE 803(6) exception can also be made by affidavit of the custodian or other qualified witness, where the terms of TRE 902(10) are met. TRE 902(10)(a) provides:

> **(10) Business Records Accompanied by Affidavit.**
>
> The original or a copy of a record that meets the requirements of Rule 803(6) or (7), if the record is accompanied by an affidavit that complies with subparagraph (B) of this rule and any other requirements of law, and the record and affidavit are served in accordance with subparagraph (A). For good cause shown, the court may order that a business record be treated as presumptively authentic even if the proponent fails to comply with subparagraph (A).
>
> **(A) Service Requirement**. The proponent of a record must serve the record and the accompanying affidavit on each other party to the case at least 14days before trial. The record and affidavit may be served by any method permitted by Rule of Civil Procedure 21a.
>
> **(B) Form of Affidavit**. An affidavit is sufficient if it includes the following language, but this form is not exclusive. The proponent may use an unsworn declaration made under penalty of perjury in place of an affidavit.. . . . [form affidavit omitted]

Business records which are to be offered under a self-authenticating affidavit must be delivered to each other party to the case at least 14 days prior to the date trial begins. The notice must identify the name and employer, if any, of the person making the affidavit. The records must be made available to other counsel for inspection and copying. TRE 902(10)(a).

When business records are admitted under this exception to the hearsay rule, they are admitted for the truth of the matter stated in the records. *Overall v. Southwestern Bell Yellow Pages*, 869 S.W.2d 629, 633 (Tex. App.--Houston [14th Dist.] 1994, no writ). However, if the business records contain hearsay statements, the hearsay with the business records must meet a hearsay exception or they must be redacted. See Section IV.D.8 below.

Prepared in Anticipation of Litigation. The U.S. Court of Appeals for the Fourth Circuit explained the basis for the business records exception to the hearsay rule, and raised a caution regarding business records prepared for litigation, in *Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200 (4th Cir. Nov. 2, 2000):

> Reports and documents prepared in the ordinary course of business are generally

presumed to be reliable and trustworthy for two reasons:

> "First, businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be accurate and none to be deceitful. Second, routine and habitual patterns of creation lend reliability to business records." *United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir. 1993) (citing *United States v. Rich*, 580 F.2d 929, 938 (9th Cir. 1978)). The absence of trustworthiness is clear, however, when a report is prepared in the anticipation of litigation because the document is not for the systematic conduct and operations of the enterprise but for the primary purpose of litigating. As *Blackburn*, 992 F.2d at 670, points out, the Advisory Committee's notes in § 803(6) provide in terms: "[a]bsence of routine raises lack of motivation to be accurate." *See also Palmer v. Hoffman*, 318 U.S. 109, 114 (1943);[fn3] *Scheerer v. Hardee's Food Sys. Inc.*, 92 F.3d 702, 706-07 (8th Cir. 1996) (stating that a report lacks trustworthiness because it was made with knowledge that incident could result in litigation).
>
> It was undisputed that Underwriters hired Geary to prepare the report specifically for this case. This admission reveals Underwriters's motivation for having the report prepared and precludes it from relying on the business record exception. Underwriters, however, argues that the prohibition against admitting records prepared in anticipation of litigation under the business record exception does not apply here because Underwriters, itself, did not prepare the report. Rather, it contracted an outside investigator (Geary) to prepare the report, and Geary regularly prepares and maintains a file of such reports as part of his ordinary course of investigating. We find this argument unpersuasive.

Third-Party Documents. There are circumstances in which the records of one business have been held to be business records of another business. For example, in *Cockrell v. Republic Mtg. Ins. Co.*, 817 S.W.2d 106, 112-13 (Tex. App.--Dallas 1991, no writ), the appellate court said that a document from one business can become a record of another business if the second business determines the accuracy of the information generated by the first business. And in *GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.3d 252 (Tex. App.--Houston [1st Dist. 1991, writ denied), the appellate court found invoices from outside vendors to have become business records of the receiving company, where they became assimilated into company's record-keeping system. *See Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 812-13 (Tex. 1982) (subcontractor's invoices became integral part of builder's records where builder's employees' regular responsibilities required them to verify subcontractors' performance and accuracy of the invoices). In *Harris v. State*, 846 S.W.2d 960, 963 (Tex. App.--Houston [1st Dist.] 1993, pet. ref'd), the manufacturer's certificate of origin from General Motors Corporation, relating to an automobile, was held to be admissible as a business record of the local automobile dealer. However, the principle was not applied in *Ambassador Dev. Corp. v. Valdez*, 791 S.W.2d 612, 626 (Tex. App.--Fort Worth 1990, no writ), where the court held that repair bills received by a business for repairs to its equipment were not business records of the business obtaining the repairs. The court in *Simien v. Unifund CCR Partners*, 321 S.W.3d 235, 240-241 (Tex. App.--Houston [1st Dist.] 2010, no pet.) announced this rule:

> A document authored or created by a third party may be admissible as business records of a different business if: (a) the document is incorporated and kept in the course of the

> testifying witness's business; (b) that business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document.

5. Public Records. Under TRE 803(8), a government record meets this exception to the hearsay rule if it is "[a] record or statement of a public office" and "(A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) the opponent fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness."

See Cowan v. State, 840 S.W.2d 435 (Tex. Crim. App. 1992) (the requirements for admissibility under "public records and reports" exception to the hearsay rule may be met by circumstantial evidence from the face of the offered document); *Wright v. Lewis*, 777 S.W.2d 520, 524 (Tex. App.--Corpus Christi 1989, writ denied) (letter from assistant U.S. attorney to Podiatry Board was not a government record of U.S. Attorney's office, because it was not generated as a document pursuant to the attorney's duties as an assistant U.S. attorney; it was not a record of the State Podiatry Board because it was a third party communication that happened to appear in the records of the Podiatry Board); *Texas v. Williams*, 932 S.W.2d 546 (Tex. App.--Tyler 1995), *writ denied*, 940 S.W.2d 583 (Tex. 1996) (disapproving lower court opinion on other grounds), held that a certified copy of a DPS trooper's accident report was properly admitted under the TRE 803(8) exception to the hearsay rule. A proponent cannot circumvent the restrictions of TRE 803(8)(A)(ii) & (iii) by offering the government record as a business record under TRE 803(6). *See Cole v. State*, 839 S.W.2d 798, 804-806 (Tex. Crim. App. 1990); *Perry v. State*, 957 S.W.2d 894, 897 (Tex. App.--Texarkana 1997, pet. ref'd); *Nevarez v. State*, 832 S.W.2d 82, 85 (Tex. App.--Waco 1992, pet. ref'd).

6. The "Absence of Public Record or Entry" Exception. TRE 803(10) provides an exception to the hearsay rule for--

> Testimony–or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:
>
> (A) the record or statement does not exist; or
>
> (B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

See Harris County v. Allwaste Tank Cleaning, Inc., 808 S.W.2d 149, 152 (Tex. App.--Houston [1st Dist.] 1991, writ dism'd w.o.j.) (affidavit of executive director of Air Control Board stating absence of any permit to operate a facility could not be used as vehicle to introduce the director's interpretation of records that were on file, since that use of the affidavit made it hearsay).

7. Statements in Learned Treatises, Periodicals, or Pamphlets. TRE 803(18) is the hearsay exception for statements in learned treatises, periodicals, or pamphlets. Such a statement is admissible if it is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, and the publication is established as a reliable authority by the expert's admission

or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit. This hearsay exception can be used with descriptions of mental disorders in the DSM-5, or peer-reviewed scientific articles on psychology, or encyclopedias or medical text books on human psychology and child development, or even Psychology Today magazine.

8. Hearsay Within Hearsay. TRE 805 provides that hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. In *Almarez v. Burke*, 827 S.W.2d 80, 82-83 (Tex. App.--Fort Worth 1992, writ denied), the court admitted an excited utterance within an excited utterance. Another example would be medical records, proved up by the hospital's custodian of the records under TRE 803(6). The medical records may meet the business-record exception to the hearsay rule, but hearsay contained in the medical records must meet an exception to the hearsay rule, or that hearsay must be redacted from the records. An example would be statements contained in medical records that were made for purposes of medical diagnosis or treatment, which is an exception to the hearsay rule under TRE 803(4).

9. Statement of Abuse by Child. TFC § 104.006, Hearsay Statement of Child Abuse Victim, provides:

> In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible as evidence if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and:
>
> > (1) the child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or
> >
> > (2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child.

The term "abuse" is given a definition in TFC § 261.001, for use in Chapter 261, Investigation of Report of Child Abuse or Neglect. How to determine reliability was examined in *In Interest of E.M.*, 494 S.W.3d 209, 219 (Tex. App.–Waco 2015, pet. denied), which said that "the focus of the inquiry must remain upon the outcry statement, not the abuse itself." The court considered Tex. Code Crim. art. 38.072(b)(2), which has been cited in hundreds of cases. In *In re Z.L.B.*, 102 S.W.3d 120, 121 (Tex. 2003), the Texas Supreme Court addressed a similar but different"'outcry' exception to the hearsay rule for the first report of sexual abuse that the child makes to an adult. Tex. Fam. Code § 54.031(b) (applicable in the trial of a juvenile); Tex. Code Crim. Proc. art. 38.072 § 2(a) (applicable in the trial of an adult).

E. OFFER OF EVIDENCE FOR A LIMITED PURPOSE. Limited admissibility is covered in TRE 105. The rule applies when evidence is admissible for some purposes but not others, or admissible against some parties but not all parties. Where evidence is admissible for some purposes,

but not generally, and the offer of the evidence is made generally, without limitation as to its use, the trial court should exclude the evidence. If the offer is made generally, opposing counsel should object to its admissibility on appropriate grounds. If the objection is sustained, the proponent should re-offer the evidence "for a limited purpose." *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 595 (Tex. App.--Texarkana 1992, writ denied) (party could not complain that excluded evidence met state-of-mind exception to hearsay rule when the party made only a general offer of the evidence, and not an offer for the limited purpose of showing state-of-mind). If accepted by the trial court for a limited purpose, the opponent should move the court for a limiting instruction, where upon the court should instruct the jury that it can consider that evidence only for a limited purpose, and no other. *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 642 (Tex. 1987) ("Where tendered evidence should be considered for only one purpose, it is the opponent's burden to secure a limiting instruction"); *see Rankin v. State*, 974 S.W.2d 707, 712 (Tex. Crim. App. 1998) (waiting until jury charge stage to instruct jury is too late; the court should instruct the jury at the time the evidence is received). If the opposing party does not seek such a limiting instruction, the evidence is received for all purposes, even if it was offered only for a limited purpose. *Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994); *Cigna Ins. Co. v. Evans*, 847 S.W.2d 417, 421 (Tex. App.--Texarkana 1993, no writ) (where document was read into evidence without a limiting instruction, it was in evidence for all purposes); *See Texas Commerce Bank v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 76 (Tex. App.--Corpus Christi 1993, writ denied) (evidence admitted for the limited purpose of punitive damages could not be used on appeal to support the verdict on actual damages).

Using hearsay as an example, the proper sequence is as follows:

> Proponent offers hearsay for all purposes.
> Opponent objects based on hearsay; objection is sustained.
> Proponent reoffers the hearsay for limited purpose, under an exception to the hearsay rule (such as state-of-mind, or supporting or challenging an expert's opinion).
> Opponent renews hearsay objection.
> Court overrules hearsay objection.
> Opponent requests limiting instruction.
> Court instructs the jury on limited use.

V. JUDICIAL NOTICE. TRE 201 governs the taking of judicial notice, which obviates the need to prove the judicially-noticed fact. A court may take judicial notice on its own motion. A party who requests judicial notice should supply the court with necessary information. The opposing party is entitled to be heard on opposing the taking of judicial notice. Upon taking judicial notice, the Court must instruct the jury to accept as conclusive any fact judicially noticed. TRE 201(b)(1) - (2) says:

> "The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

See Tschirhart v. Tschirhart, 876 S.W.2d 507, 509 (Tex. App.--Austin 1994, no writ) (trial court

cannot take judicial notice of sworn inventory and appraisement prepared by spouse in connection with divorce; inventory must be offered and received into evidence to be considered by the fact finder); *Wright v. Wright*, 867 S.W.2d 807, 816-17 n. 6 (Tex. App.--El Paso 1993, writ denied) (court of appeals took judicial notice of fact that San Antonio is 335 miles from Odessa); *Fields v. City of Texas City*, 864 S.W.2d 66, 69 (Tex. App.--Houston [14th Dist.] 1993, no writ) (upon request, appellate court can take judicial notice of city charter provisions).

VI. EVIDENCE OF CHARACTER. There are instances where character evidence is admissible and when it is not, and the method of proving character is governed by the TRE.

A. EVIDENCE OF CRIMES OR OTHER ACTS. TRE 404(a) precludes evidence showing a person's character or character trait in order to show that s/he acted in accordance with that character on a particular occasion. TRE 404(b) precludes evidence of "a crime, wrong, or other act" "in order to show that on a particular occasion the person acted in accordance with the character." Under the pre-Rules case law this was called the doctrine of res inter alios acta, which held that each act or transaction sued on must be established by its own particular facts and circumstances. *State v. Buckner Construction Co.*, 704 S.W.2d 837, 848 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). It was stated in *Klorer v. Block*, 717 S.W.2d 754, 763 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.):

> The general rule in Texas is that prior acts or transactions by one of the parties with other persons are irrelevant, immaterial and highly prejudicial and in violation of the rule that res inter alios acts are incompetent evidence, particularly in a civil case. *Texas Farm Bureau Mutual Insurance Company v. Baker*, 596 S.W.2d 639, 642 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.). The doctrine of "res inter alios acta" is based on the principle that each act or transaction sued on should be established by its own particular facts and circumstances, 23 Tex. Jur.2d Evidence Sec. 187 (1961) (see cases cited).

Exceptions to this rule exist: in a civil case, a party accused of conduct involving moral turpitude can offer evidence of his/her pertinent trait, which then permits the other party to offer counter-evidence. TRE 404(3)(b). And a party accused of assaultive conduct may offer evidence of the victim's trait of violence to prove self-defense. Admission of this evidence permits counter-evidence of the victim's trait for peacefulness. TRE 404(3)(c).

Pre-Rules case law held that prior acts or transactions with other persons are admissible to show that party's intent where material, if they are so connected with the transaction at issue that they may all be parts of a system, scheme or plan. *See, e.g., Texas Farm Bureau Mutual Insurance Co. v. Baker*, 596 S.W.2d 639, 642-43 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.); *Payne v. Hartford Fire Ins. Co.*, 409 S.W.2d 591, 594 (Tex. Civ. App.--Beaumont 1966, writ ref'd n.r.e.); *Texas Osage Co-Operative Royalty Pool, Inc. v. Cruze*, 191 S.W.2d 47, 51 (Tex. Civ. App.--Austin 1945, no writ). *Accord, Underwriters Life Ins. Co., v. Cobb*, 746 S.W.2d 810, 815 (Tex. App.--Corpus Christi 1988, no writ).

TRE 404(b)(1), Crimes, Wrongs, or Other Acts, provides:

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in

> order to show that on a particular occasion the person acted in accordance with the character.

TRE 404(b)(2) provides exceptions:

> This evidence may be admissible for another purposes, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or lack of accident.

In *In re C.Q.T.M.*, 25 S.W.3d 730, 735 (Tex. App.–Waco 2000, pet. denied), the appellate court approved the admission of the step-parent's contempt adjudication and relinquishment of parental rights against a claim of res inter alios, saying that the evidence was relevant to best interest and positive improvement, and that "]b]ecause the evidence in question is relevant to these issues, we believe the general rule prohibiting the admission of res inter alios acts must bow in suits affecting the parent-child relationship, particularly insofar as the best interest of the child is at stake." *Id.* at 736.

B. PROVING CHARACTER. Where character evidence is permitted, it can be proved by testimony of reputation or by the witness's opinion. However, on cross-examination the character witness can be confronted with relevant specific instances of conduct – "have you heard" questions for the reputation witness, and "did you know" questions for the opinion witness. The trial court should insure that there is a reliable basis for such questions.

VII. REFRESHED RECOLLECTION. TRE 612 "gives an adverse party certain options when a witness uses a writing to refresh memory…." If the witness uses the writing to refresh his/her memory while testifying, the opposing party is entitled to see the writing and cross-examine based on it. TRE 612(a)(1) & (b). If the witness uses the writing to refresh his/her memory before testifying, the opposing party is entitled to see the writing only if the court decides that justice requires it. TRE 612(a)(2) & (b). If the producing party claims privileged information, the court must examine the writing in chambers and remove the privileged portion, which must be preserved for appeal. TRE 612(b). Failure to produce the writing allows the court to "issue any appropriate order." In a criminal case, the court must strike the witness's testimony or, if justice requires it, grant a mistrial. TRE 612(c). Those options exist in a civil case as well.

VIII. IMPEACHMENT OF WITNESSES. "Impeachment" is presenting evidence that disproves a witness's testimony or discredits his/her credibility. In the pre-Rule era, a party could not impeach his own witness. However, TRE 607 permits any party to impeach any witness.

A. CHARACTER FOR TRUTHFULNESS. The credibility of a witness can be attacked by evidence that s/he has a reputation as a liar (character for untruthfulness). TRE 608. This does not include evidence of specific instances of telling a lie. TRE 608(b). If a witness's reputation for truthfulness is attacked, the opposing party can offer evidence of a truthful character, but not otherwise. TRE 608(a). Specific instances of conduct cannot be used to attack or support the witness's character for truthfulness. A special rule applies to criminal convictions.

B. IMPEACHMENT BY PRIOR CONVICTION. Evidence that a witness has been convicted of a crime is admissible to attack credibility, if the crime was a felony or misdemeanor of moral

turpitude,[8] the judge does not exclude the evidence as unduly prejudicial, and the conviction is admitted by the witness or proved "by public record." (Proving a conviction in a foreign country by public record can be a problem.) However, if more than ten years have expired since the conviction or release from prison, then the evidence of conviction is admissible only if the probative value, "supported by specific facts and circumstances, substantially outweighs its prejudicial effect." If the witness is a party or is associated with a party, impeachment by prior conviction can have an ulterior motive, which is to make the witness look like a bad person (not just a liar). For details like a pardon, pending appeal, juvenile adjudications, and more, see TRE 609.

C. BY PRIOR INCONSISTENT STATEMENT. The procedure for impeaching a witness with a prior inconsistent statement is set out in TRE 613:

> **(a) Witness's Prior Inconsistent Statement.**
>
> > **(1) Foundation Requirement**. When examining a witness about the witness's prior inconsistent statement—whether oral or written—a party must first tell the witness:
> >
> > (A) the contents of the statement;
> > (B) the time and place of the statement; and
> > (C) the person to whom the witness made the statement.
> >
> > **(2) Need Not Show Written Statement.** If the witness's prior inconsistent statement is written, a party need not show it to the witness before inquiring about it, but must, upon request, show it to opposing counsel.
> >
> > **(3) Opportunity to Explain or Deny.** A witness must be given the opportunity to explain or deny the prior inconsistent statement.
> >
> > **(4) Extrinsic Evidence.** Extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.
> >
> > **(5) Opposing Party's Statement.** This subdivision (a) does not apply to an opposing party's statement under Rule 801(e)(2).

Thus, under TRE 613(a), prior to examining a witness about a prior inconsistent statement, counsel must tell the witness the contents of the statement, and the time and place and to whom the statement was made, and must afford the witness an opportunity to explain or deny the statement. Extrinsic evidence of the prior statement is admissible only if the witness does not unequivocally admit making the statement. Contrary to popular belief, the questioner need not show the statement, if in writing, to the witness. However, the other attorney is entitled to see it in writing.

If the prior inconsistent statement is that of the opposing party, then the TRE 613 procedure does not

[8] "Moral turpitude" cannot be precisely defined. *See* Brown & Romdon, TEXAS RULES OF EVIDENCE HANDBOOK, pp. 611-13.

apply.

See U.S. v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994), *cert. denied* 115 S. Ct. 1969 (1995) (where witness testified differently from a prior statement, the prior inconsistent statement was admissible as substantive evidence, despite the fact that it is hearsay). *See Chance v. Chance*, 911 S.W.2d 40, 54 (Tex. App.--Beaumont 1995, writ denied) (where witness made 16 denials of prior statements, it was proper to play a tape of the conversation for rebuttal and impeachment purposes).

D. VERBOTEN IMPEACHMENT. There are certain attacks on credibility that are not allowed. TRE 610 says that "Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility." There are other categories of attack on credibility that probably are not allowed. The Texas Equal Rights amendment prohibits discrimination based on sex, race, color, creed, or national origin, but does not mention sexual preference. Texas Disciplinary Rule of Professional Conduct 5.08 prohibits a lawyer from manifesting bias or prejudice based upon, among other things, sexual orientation. Rule 5.08(b) allows mention of advocacy regarding sexual orientation if that advocacy "(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure."

IX. THE RULE OF OPTIONAL COMPLETENESS. The Rule of Optional Completeness, TRE 106, says that, when one party introduces part of a writing or recorded statement, the adverse party may then or later introduce any other part or any other writing or recorded that in fairness ought to be considered contemporaneously. *Azar Nut Co. v. Caille*, 720 S.W.2d 685 (Tex. App.--El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987), extends the application of the doctrine to a letter written in response to another letter which was admitted into evidence. TRE 106 specifically applies the rule to depositions. Chief Justice Nathan Hecht, in Hecht, *Common Evidence Problems*, State Bar of Texas Advanced Evidence and Discovery Course pp. DD 4-6 (1990), suggested that the rule does not apply to ordinary oral testimony.

X. PRIVILEGES IN SAPCRS. All privileges apply to SAPCR proceedings, but two in particular arise with some frequency: the physician-patient privilege and the mental health privilege.

A. PHYSICIAN-PATIENT PRIVILEGE. Confidential communications between a physician and a patient, relating to professional services rendered by the physician, are privileged. TRE 509(b). The privilege extends beyond communications to include "a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician." To be confidential, the communication must not be intended for disclosure to third persons other than those present "to further the patient's interest in the consultation, examination, or interview" or persons "reasonably necessary to transmit the communication." *Id.* There are various exceptions to the rule, including instances when court or administrative proceedings are brought by the patient against the physician. TRE 509(e)(4) creates an exception to "if any party relies on the patient's physical, mental or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition." In *Gustafson v. Chambers*, 871 S.W.2d 938, 943 (Tex. App.--Houston [1st Dist.] 1994, no writ), the appellate court held that where the

patient alleged that the doctor was unfit to perform surgery due to alcohol and substance abuse, then the *defendant doctor's* own medical records were discoverable, since they were relevant to a claim or defense in the case. In *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994), the Supreme Court endorsed this view of the exception to the doctor-patient privilege, saying that "the patient-litigant exception to the privileges applies when a party's condition relates in a significant way to a party's claim or defense." However, the Court stated that "[c]ommunications and records should not be subject to discovery if the patient's condition is merely an evidentiary or intermediate issue of fact, rather than an 'ultimate issue' for a claim or defense, or if the condition is merely tangential to a claim rather than 'central' to it." *Id*. at 842. In other words, before discovery is permitted, it is required "that the patient's condition, to be a 'part' of a claim or defense, must itself be a fact to which the substantive law assigns significance." *Id*. at 842. See the discussion of *Easter v. McDonald*, in the following section.

The medical records of non-parties were held to be discoverable in the medical malpractice case of *In re Whitley*, 79 S.W.3d 729 (Tex. App.–Corpus Christi 2002, orig. proceeding). The defendant physician claimed that he had conducted a certain type of knee operation successfully numerous times. The appellate court held that the doctor relied upon the other surgeries as part of his defense, and that the medical records of the 200 other patients were relevant, and thus discoverable. All identifying information and other non-relevant information were to be redacted.

Prior to March 1, 1998, TRE 509 contained parent-child relationship suit exception to the physician-patient privilege. The exception was eliminated in a change to TRE 509, effective March 1, 1998. At the time of the rule change, the Supreme Court appended a new substantive comment to Rule 509, regarding the role of the privilege in SAPCRs. The comment reads:

> Comment to 1998 change: This comment is intended to inform the construction and application of this rule. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. This rule governs disclosures of patient-physician communications only in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (e)(4) of the new rule (formerly subparagraph (d)(4)), as construed in *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (e) of the new rule does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

This comment has a significant impact on how the relevancy exception is applied to SAPCRs. Note that confidential medical records that are personal to an expert witness cannot be reached.

B. MENTAL HEALTH INFORMATION PRIVILEGE. Under TRE 510, mental health information (communications and records) is privileged. One exception is communications made to a professional during a court-ordered examination. TRE 510(d)(4). However, the patient must first be informed that the examination is not confidential, the communication must be offered to prove an issue involving the patient's mental or emotional health, and the court must impose "appropriate safeguards" against unauthorized disclosure. TRE 510(d)(4)(A), (B) & (C). Another exception to the mental health information privilege is "[i]f any party relies on the patient's physical, mental or emotional condition as a part of the party's claim or defense, and the communication or record is relevant to that condition." TRE 510(d)(5). *See R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994) [discussed in preceding paragraph], in a case involving the similarly-worded exception to the doctor-patient privilege.

In *Easter v. McDonald*, 903 S.W.2d 887 (Tex. App.--Waco 1995, orig. proceeding) (leave denied in Texas Supreme Court), the appellate court permitted a child to obtain mental health records of her step-father in a suit against a psychologist for negligence. The Court of Appeals read *R.K.* to hold that the privilege is overcome where the information relates to factual issues a jury would have to decide in answering jury questions. The Court of Appeals rejected the view that under *R.K.* discovery was permitted only where the privileged information involved the very questions to be submitted to the jury. *Id*. at 890.

Formerly, TRE 510 contained an exception to the mental health privilege in SAPCRs. The exception was removed by an amendment to the rule effective March 1, 1998. In deleting the SAPCR exception, the Court issued a comment, quoted in the preceding section, saying that the relevancy exception applies in SAPCRs, but that confidential mental health records of expert witnesses cannot be reached. When the trial court is asked to "ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege," the court and counsel should examine *Jaffee v. Redmond*, 518 U.S. 1, 135 L.Ed.2d 337, 116 S.Ct. 1923 (1996), where the U.S. Supreme Court for the first time recognized a federal common law mental health privilege. The Court described the legitimacy privacy interests protected by the privilege in the following way:

> Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." *Trammel*, 445 U.S. at 51. treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a

> psychiatrist's ability to help her patients is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult, if not impossible, for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment.
>
> Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)). By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests. [Footnote omitted.]

Jaffe v. Redmond, 135 L.Ed.2d at 345.

XI. LAY AND EXPERT TESTIMONY. It is important to understand the Rules of Evidence that apply to lay testimony and expert testimony.

A. FACT WITNESS. A non-expert witness can testify only to facts based upon personal knowledge. TRE 602, Lack of Personal Knowledge, provides:

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

A predicate must be laid to show that the witness is testifying based on personal knowledge. If the proper predicate is not laid, the opposing party should object: "Your Honor I object because there is no showing of personal knowledge." The opponent can even try to seize the intiative by asking to take the witness on "voir dire" to demonstrate a lack of personal knowledge.

B. LAY OPINIONS. The rule that a fact witness can testify only based upon personal knowledge does not prohibit the witness from giving opinion testimony. Lay opinion testimony is permissible within limits. TRE 701 says:

> Rule 701. Opinion Testimony by Lay Witnesses
>
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception; and
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

Subparagraph (a) precludes a lay opinion based on hearsay or assumptions of hypothetical facts, which distinguishes it from expert opinions under TRE 702. Subparagraph (b), which has a

counterpart in the expert witness rule TRE 702, is essentially a relevancy standard coupled with an assessment by the judge that the lay opinion helps to explain the lay witness's testimony.

It should be noted that an expert may give a lay opinion under TRE 701, where the opinion is based on personal knowledge (i.e., the five senses) and does not involve scientific, technical, or other specialized knowledge that are properly the province of TRE 702.

C. EXPERT TESTIMONY. In this day and time, parental termination and child conservatorship cases often involve a mental health expert. It should be noted that an expert can testify as a lay witness, when s/he is relating facts personally observed. The expert also can testify to a lay opinion, where the opinion is rationally based on the witness's perception and is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Or the expert can testify to expert opinions, under TRE 702. This was explained by Dean Sutton back when the Texas Rules of Evidence were first adopted:

> A witness who is qualified as an expert may testify in three different ways: he may testify to his personal knowledge of the facts in issue, in which case he testifies to opinions under Rule 701; he may provide the factfinder with general back-ground information regarding the theory and principles relative to his field of expertise; and he may evaluate specific data and facts in issue in light of his experience in a particular specialized field, in which case he testifies to opinions under Rule 702. A witness with specialized training or experience is not limited to giving opinion testimony as a Rule 702 "expert." If his opinion rests on firsthand knowledge--that is, if it is rationally based on his own perceptions--then testimony under Rule 701 is also permissible. The greater his experiential capacity, the more likely his opinions will "help" the trier of fact under Rule 701, and the greater the likelihood that his testimony will "assist" the jury under Rule 702.... An arbitrary and artificial distinction between lay and expert witnesses should not prompt exclusion of relevant, helpful information from witnesses with adequate experiential qualifications. [Footnotes omitted]

Sutton, John F., Jr., *Article VII: Opinions And Expert Testimony*, 30 HOUS. L. REV. 797, 819-20 (1993). [Author's note: Professor Sutton taught the author's 4-hour law school class on evidence, and Professor Sutton's dignified persona and knowledge of the subject imbued the author with a career -long interest in the law of evidence.]

1. Qualifications. TRE 702 governs expert testimony.

> Rule 702. Testimony by Expert Witnesses
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Whether an expert is qualified to testify under Rule 702 involves two factors: (1) whether the expert has the required knowledge, skill, etc.; and (2) whether that expertise will assist the trier of fact to understand the evidence or to determine a fact in issue in the case.

Courts sometimes evaluate the first prong, of adequate knowledge, skill, etc., by asking whether the expert possesses knowledge and skill not possessed by people generally. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). *See Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim. App. 1990) ("The use of expert testimony must be limited to situations in which the issues are beyond that of an average juror"); John F. Sutton, Jr., *Article VII: Opinions and Expert Testimony*, 30 HOUS. L.REV. 797, 818 (1993). "Rule 702 authorizes an expert to give an opinion based on practical experience." *Mega Child Care, Inc. v. Texas Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 310 (Tex. App.–Houston [14th Dist.] 2000, no pet.)

The second prong, assisting the trier of fact, requires that the witness's expertise go to the very matter on which the expert is to give an opinion. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996), citing *Christopherson v. Allied Signal Corp.*, 939 F.2d 1106, 1112-1113 (5th Cir.), *cert. denied*, 503 U.S. 912 (1992). The test then for whether an expert is qualified to testify in a SAPCR is whether the expert has knowledge, skill, experience, training or education regarding the specific issue before the court, that would assist the jury in deciding custody or termination. *See Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996).

2. Assisting the Trier of Fact. Rule 702 requires that the expert's testimony "assist the trier of fact." There are some issues where the jury is capable of making its own determination, without the assistance of expert testimony. In those instances, expert testimony is not admissible. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) ("When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony"). Considering that all jurors were children and most jurors are parents suggests that the role of experts in custody and parental termination cases could be quite limited, and most valuable in difficult situations. However, for better or worse, American society has become increasingly reliant on experts to digest facts and regurgitate them for decision-makers, and the law is no exception.

3. Reliability of Underlying Data. Unlike witnesses relating lay opinions, experts are permitted to rely on information that is not within their personal knowledge in arriving at expert opinions. This usually means hearsay. TRE 703 says:

> Rule 703. Bases of Opinion Testimony by Experts
>
> An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

TRE 705(b) provides in part:

> (c) Admissibility of Opinion. An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.

Thus, the trial court must perform a gate-keeping function by evaluating the sufficiency of the expert's underlying data in deciding whether to admit expert testimony.

The TFC provides the basic factual foundation that is required of an evaluator providing a child custody evaluation. TFC §§ 107.108 & 107.109. The court can add more elements, including interviews, observations, psychometric testing, joint interviews, or the review of other information the court determines is relevant. TFC § 107.109(d). The TFC provisions are guidelines for what constitutes an essential information base for an expert to testify to child custody opinions. These standards can be adapted to the question of parental termination or alternative arrangements.

4. Reliability of Methodology. In the case of *Daubert v. Merrell Dow Pharmaceuticals,* Inc., 509 U.S. 579 (1993), the U.S. Supreme Court held that FRE 702 overturned earlier case law requiring that expert scientific testimony must be based upon principles which have "general acceptance" in the field to which they belong. *See Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) (establishing the "general acceptance" test for scientific expert testimony). Under FRE 702, the expert's opinion must be based on "scientific knowledge," which requires that it be derived by the scientific method, meaning the formulation of hypotheses which are verified by experimentation or observation. The Court used the word "reliability" to describe this necessary quality. The U.S. Supreme Court's opinion in *Daubert* applies in all federal court proceedings.

In *Daubert*, the Supreme Court gave a non-exclusive list of factors to consider on the admissibility of expert testimony in the scientific realm: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. These standards are oriented toward science-based opinions.

In *Kumho Tire Co. v. Carmichael*, 526 U.S.137 (1999), the Supreme Court said that the reliability and relevancy principles of *Daubert* apply to all experts, not just scientists, and where objection is made the court must determine whether the expert's opinion has "a reliable basis in the knowledge and experience of [the relevant] discipline." The trial court has broad discretion in determining how to test the expert's reliability. *Id. Kuhmo Tire* acknowledged that the list of factors in *Daubert* do not apply well to certain types of expertise, and that other factors would have to be considered by the court in such instances.

The Texas Supreme Court adopted the *Daubert* analysis for TRE 702, requiring that the expert's underlying scientific technique or principle be reliable, in *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court listed slightly different factors for the trial court to consider: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557. In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 725-26 (Tex. 1998), the Texas Supreme Court extended the reliability and relevance requirements of *Robinson* to all types of expert testimony:

> We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the

> methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline." [Footnote omitted.]

After *Gamill, Daubert*/*Robinson* challenges to testimony lying outside of the physical sciences involves two prongs: (1) establishing the "applicable professional standards outside the courtroom" and (2) proving that these standards were met by the expert in this instance.

In *Taylor v. Texas Dept of Protective & Regulatory Servs.*, 160 S.W.3d 641, 650 (Tex. App.--Austin 2005, pet. denied), the court said that "some cases involve situations that are not susceptible to scientific analysis, and the *Robinson* factors are not appropriate and do not strictly govern in those instances." The court used instead the standards established by the Texas Court of Criminal Appeals in *Nenno v. State*, 970 S.W.2d 549, 560 (Tex. Crim. App. 1998) (in fields other than hard sciences, such as the social sciences, factors like an expert's education, training, and experience are more appropriate factors in testing reliability than the scientific method), *overruled on other grounds* by *State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999). The *Taylor* court ruled that a social study prepared by a social worker was admissible under *Nenno* standards.

In *In re A.J.L.*, 136 S.W.3d 293, 301 (Tex. App.--Fort Worth 2004, no pet.), the appellate court affirmed allowing a licensed professional counselor who interacted with the child using puppets in a play-acting scenario to determine that the child felt that he needed to protect his baby sister and that he had been traumatized at home. The expert testified that she had a master's degree in counselor education and that she had attended many seminars on play therapy. The court said:

> Play therapy uses toys as "therapeutic metaphors" to help children express themselves and their feelings. Iafrate described the types of play therapy that she used. First, she built a safe environment and rapport with the child using the client-centered method. Eventually she switched to the more directive Alderian (sic, Adlerian) method where the therapist is more interactive in helping the child identify important aspects of their environment. She used these techniques in a manner consistent with her training during her fourteen counseling sessions with A.J.L.

Id. at 299. The expert's defense of the methodology was not scientifically rigorous, and the appellate court's analysis was superficial. A better decision would have resulted if the opponent had used a behavioral scientist (i.e., a psychologist) to explore the reliability and validity studies of this particular methodology.

In *In re G.B.*, No. 07-01-0210-CV, *4 (Tex. App.--Amarillo Oct. 10, 2003, no pet.) (mem. op.), the trial court was affirmed in letting a licensed professional counselor testify to best interest and the mother's parenting abilities based on "the SASSI, STAXI, the CAP and the Circumplex" tests, which the counselor testified were "widely used and accepted in the field of licensed professional counselors." Not addressed was the validity and reliability of these tests *for use in a forensic context*, as opposed to their use in a counseling context.

In *In re J.B.*, 93 S.W.3d 609, 625 (Tex. App.--Waco 2002, pet. denied), a divided court of appeals

reversed a judgment terminating parental rights on the grounds that the psychologist expert who testified to conducting a parental assessment did not meet *Robinson* reliability standards with regard to the testing. The Waco Court of Appeals subsequently adopted the more lenient *Nenno* approach: "[A] fair reading of this Court's more recent pronouncement in *S.R.* yields a finding that we apply the *Nenno* factors to evaluate soft-science testimony in civil cases." *In re J.R.*, 501 S.W.3d 738, 747 (Tex. App.--Waco 2016, no pet.).

A licensed psychologist "may not offer an expert opinion or recommendation relating to the conservatorship of or possession of or access to a child unless the licensee has conducted a child custody evaluation." 22 Tex. Admin. Code § 465.18. So the professional standards for a psychologist conducting a child custody evaluation refer back to the Family Code provisions on child custody determinations.

5. Nexus Between Data, Methodology, and the Legal Issue. *Daubert* contains a relevancy requirement, to be applied to expert evidence. As explained in *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998):

> The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702's requirement that the testimony be of assistance to the jury. It is thus inadmissible under Rule 702 as well as under Rules 401 and 402.

Some courts and commentators call this connection the "fit" between the evidence and the issues involved in the case.

6. Interviewing a Child. In *Ochs v. Martinez*, 789 S.W.2d 949, 955-56 (Tex. App.--San Antonio 1990, writ denied), the court of appeals reversed a judge for allowing the jury to view a videotape of an interview with a child under age 12 where the examiner asked leading questions. The ruling was based on the then-effective TFC § 11.21, which permitted a video recording of a child's statements to be introduced into evidence provided there were no leading questions. Nowadays TFC § 104.002 governs the playing of video recordings of a child under age 12 in child abuse litigation, and says:

> If a child 12 years of age or younger is alleged in a suit under this title to have been abused, the recording of an oral statement of the child recorded prior to the proceeding is admissible into evidence if:
>
> (1) no attorney for a party was present when the statement was made;
>
> (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
>
> (3) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

> (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
>
> (5) each voice on the recording is identified;
>
> (6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and
>
> (7) each party is afforded an opportunity to view the recording before it is offered into evidence.

So the bar against using leading questions in a sound and video recording still remains in the Family Code. This is a strong indication that other forms of hearsay statements of a child (such as repetition by an investigator or therapist in court) should be prohibited if tainted (or possibly tainted) by leading questions. TFC § 261.302 governs the conduct of investigations of abuse or neglect of a child, and requires that the DFPS audiotape or videotape an interview with a child discussing the allegations under current investigation, unless the equipment malfunctions, or the child is unwilling to be recorded, or due to departmental lack of equipment. If an agency other than DFPS is conducting the interview, it must be audiotaped or videotaped except for good cause, explained in the statute. TFC § 261.310 provides that the DFPS executive commissioner must promulgate standards for child abuse investigations that–

> (1) recommend that videotaped and audiotaped interviews be uninterrupted;
>
> (2) recommend a maximum number of interviews with and examinations of a suspected victim;
>
> (3) provide procedures to preserve evidence, including the original recordings of the intake telephone calls, original notes, videotapes, and audiotapes, for one year; and
>
> (4) provide that an investigator of suspected child abuse or neglect make a reasonable effort to locate and inform each parent of a child of any report of abuse or neglect relating to the child.

A hard question arises about what the court should do when the investigator or therapist not operating under the auspices of DFPS standards did not record or keep a record of the questions asked, so that it can't be determined whether or not leading questions were asked.

7. Expert on Child Abuse. "A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and be based on a reliable foundation." *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001). The Court continued:

> In *Robinson*, we identified six nonexclusive factors to determine whether an expert's testimony is reliable and thus admissible. *Robinson*, ... at 557. But in *Gammill* we recognized that the *Robinson* factors may not apply to certain testimony. *Gammill*, ... at 726. In those instances, there still must be some basis for the opinion offered to show its reliability, and,

> ultimately, the trial court must determine how to assess reliability. *Gammill*, ... at 726. If an expert relies upon unreliable foundational data, any opinion drawn from that data is likewise unreliable. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). Further, an expert's testimony is unreliable even when the underlying data is sound if the expert's methodology is flawed.

Id. at 499.

A common problem with child abuse experts is the question of whether the expert is essentially testifying whether the child who reports suffering abuse is telling the truth or not. Texas courts have ruled that an expert cannot testify about another person's propensity to tell the truth. *Ochs v. Martinez*, 789 S.W.2d 949, 957 (Tex. App.–San Antonio 1990, writ denied) ("Credibility of witnesses is within the exclusive province of the jury"). In *Yount v. State*, 872 S.W.2d 706, 710 (Tex. Crim. App. 1993), the Court of Criminal Appeals said:

> While a witness may possess "scientific, technical, or other specialized knowledge" concerning sexually abused children, we seriously question whether any such person also possesses "scientific, technical or other specialized knowledge," beyond the realm of the jury, regarding the truthfulness of those children. As stated by one court, "Psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patients' credibility." *State v. Moran*, 151 Ariz. 378, 728 P.2d 248, 255 (1986); see also *United States v. Azure*, 801 F.2d 336, 340 (8th Cir.1986) ("[n]o reliable test for truthfulness exists and [expert on child abuse] was not qualified to judge the truthfulness of that part of [the child complainant's] story"). Likewise, another commentator has observed:
>
> > Experts on child sexual abuse are not human lie detectors. Nor are they clairvoyant. Nothing in the literature suggests that experts can or should replace the jury as the ultimate arbiters of credibility.
>
> John E.B. Meyers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 121 (1989).

In *Yount v. State*, the Court also addressed whether an expert to testify to the truthfulness of a class of persons, and said: "An expert who testifies that a class of persons to which the victim belongs is truthful is essentially telling the jury that they can believe the victim in the instant case as well. This is not 'expert' testimony of the kind which will assist the jury under Rule 702." *Id* at 711. In *In re G.M.P.*, 909 S.W.2d 198, 206 (Tex. App.–Houston [14th Dist.]1995, no pet.), the court said that "[a] determination of who is telling the truth is the sole province of the jury," and reversed an adjudication of juvenile delinquency for allowing a police officer to testify that a child who reported being the victim of sexual assault was telling the truth.

8. Expert's Reliance on Hearsay. Lay witnesses can express opinions, but they cannot rely upon hearsay in formulating those opinions. TRE 701. Experts, on the other hand, can rely upon hearsay in formulating opinions, as long as the hearsay is of a type reasonably relied upon by experts in the particular field. TRE 703.

9. Disclosure of Hearsay Through Expert Testimony. The introduction of hearsay into evidence, through expert testimony, is an important issue in SAPCR litigation. Frequently experts become a conduit for the admission of statements by the children who are the subject of the SAPCR. Many psychologists and counselors keep "progress notes" of what the children tell them, and these progress notes, and the expert's testimony as to what the children said, when admitted, convey that hearsay to the jury. In that instance TRE 705 applies.

> **Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**
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> **(a) Disclosure of Facts or Data**. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.
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> **(b) Voir dire.** Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.
> * * *
> **(d) Balancing test; limiting instructions.** When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Author's Comment: while hearsay is an anathema in Anglo-American jurisprudence, weighing the benefits of a professionally-trained witness recounting what children said against the negative consequences of calling the children as witnesses tilts in favor of allowing experts to be the conduit for the children's out-of-court statements. However, caution must be exercised to ensure that this exception does not swallow the hearsay rule and allow unreliable evidence before the jury. The child's statement should not be used to establish otherwise unproven historical events. Certain portions of the child's statements could be selectively excluded, and a limiting instruction can be given to the jury about the proper use of the hearsay statements. An important consideration is the reliability of the hearsay being offered. Reliability standards are applied in criminal proceedings where a defendant has raised the right to confront witnesses. In *Norris v. State,* 788 S.W.2d 65, 71 (Tex. App.–Dallas 1990, pet. ref'd), the court said:

> Indicia of reliability that the trial court may consider include (1) whether the child victim testifies at trial and admits making the out-of-court statement, (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate, (3) whether other evidence corroborates the statement, (4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults, (5) whether the child's statement is clear and unambiguous and rises to the needed level of certainty, (6) whether the statement is consistent with other evidence,

(7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate, (8) whether the child behaves abnormally after the contact, (9) whether the child has a motive to fabricate the statement, (10) whether the child expects punishment because of reporting the conduct, and (11) whether the accused had the opportunity to commit the offense.

10. Expert Opinions or Diagnoses Within Business Records. TRE 803(6) includes, as part of the hearsay exception, "opinions or diagnoses" contained in business records.

a. Reasonable Medical Certainty or Probability. Under the statute that preceded TRE 803(6), opinions and diagnoses in medical or hospital records were often excluded. *Loper v. Andrews*, 404 S.W.2d 300 (Tex. 1966). In *Loper*, the Court held that medical opinions and diagnoses in business records were not admissible unless otherwise shown to be based upon a reasonable medical certainty. However, by adding "opinions" and "diagnoses" to the business records exception in TRE 803(6), the Texas Supreme Court eliminated *Loper*'s "reasonable medical certainty" requirement. See *Comment* to TRE 803(6), effective September 1, 1983.

b. Medical Causation. A plaintiff must establish two distinct causal nexuses to recover damages in a personal injury case:

(1) a causal nexus between the conduct of the defendant and an event; and
(2) a causal nexus between the event and the plaintiff's injuries.

Blankenship v. Mirick, 984 S.W.2d 771, 775 (Tex. App.–Waco 1999, pet. denied) (citing *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984)); *see also General Motors Corporation v. Harper*, 61 S.W.3d 118, 130 (Tex. App.–Eastland 2001, pet. denied) (to establish liability for a design defect, a plaintiff must prove that the defendant's conduct must have been a substantial factor in bringing about the injury and that the injury would not have occurred but for the defendant's conduct); *Cruz v. Paso Del Norte Health Foundation*, 44 S.W.3d 622, 629-630 (Tex. App.--El Paso 2001, pet. denied) (the causal link requirement in a medical malpractice action is satisfied when plaintiff presents proof that establishes a direct causal connection between the damages awarded, the defendant's actions, and the injury suffered).

To constitute evidence of causation, an expert opinion, whether expressed in testimony or in a medical record, must rest in "reasonable medical probability." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex. 1995). This requirement helps avoid opinions based on speculation and conjecture. *Id.* "The term "reasonable medical probability" relates to the question of whether 'competent evidence' on the issue of causation has been shown and not to the standard by which an expert witness must testify." *Blankenship*, 984 S.W.2d at 775 (emphasis added); *see also Cruz*, 44 S.W.3d at 632 (the rule of "reasonable medical probability" relates to the showing that must be made to support an ultimate finding of fact and not to the standard by which the medical expert must testify). "Reasonable medical probability is determined by the substance and context of the opinion, and does not turn on semantics or on the use of a particular term or phrase." *Id.* (citing *Insurance Co. of North Am. v. Myers*, 411 S.W.2d 710, 713 (Tex. 1966)). "The effect of the reasonable medical probability standard is to allow recovery only where the measure is 'something more than a fifty percent chance.'" *Marvelli, M.D. v. Alston*, 100 S.W.3d 460, 479 (Tex. App.--Fort Worth 2003, pet. denied).

A mere assertion by an expert that an opinion is based on reasonable medical probability does not meet the factors set forth in *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, 558 (Tex. 1995); *Weiss v. Mechanical Associated Services, Inc.*, 989 S.W.2d 120, 125-126 (Tex. App.--San Antonio 1999, pet. denied); *see also Black v. Food Lion, Inc.*, 171 F.3d 308, 310 (5th Cir. 1999) (in a slip and fall action, the plaintiff's burden under Texas law was to prove, based on a reasonable medical probability and scientifically reliable evidence, that her fall at the store caused her injuries).

In *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591 (Tex. App.--Houston [1st Dist.] 2002, pet. denied), that court discussed in detail the standard for expert testimony, including that found in medical records. In *Coastal*, the administratrix of a deceased's estate brought a personal injury action for unseaworthiness and negligence against the deceased's former employer alleging that the deceased contracted pneumonia while working as a crew member on the employer's ship. The court reviewed whether the trial court abused its discretion in finding the expert testimony reliable under TRE 702. The evidence of causation analyzed included expert testimony as well as physician statements in medical records. Coastal objected to the testimony of plaintiff's sole testifying expert witness and to the medical records to the extent they included opinions regarding medical causation. The majority ultimately found that the expert testimony was not sufficient to meet the *Daubert*/*Robinson* requirements as it could not show general causation. Additionally, the court found that the medical records and other evidence of general causation, aside from the expert testimony, were not legally sufficient to support a verdict as that evidence was not sufficient to meet the *Daubert/Robinson* inquiry as to general causation.

Justice Brister, in his Concurring Opinion in *Coastal Tankships*, commented on the admissibility of the medical records containing the expert opinions. He noted that the primary issue the parties briefed and argued was whether, even without the physician's testimony, the references in the medical records and the product sheet about the disease were enough to establish causation. Justice Brister believed that the documents could not establish causation because they could not independently meet the *Daubert* and *Havner* factors that serve as a predicate for reliability. Justice Brister noted that none of the notations in the records indicated the methodology used, support from medical studies or general acceptance in the medical community, and only one record indicated how or why the author reached his conclusion. He listed three reasons why documents cannot replace an expert:

- First, none of the records were under oath. Justice Bristor found it difficult to believe that sworn doctor's opinions would be required to support a trial continuance due to health problems, but not for a doctor's opinion on causation, the critical issue supporting a million-dollar verdict.

- Second, "it is too easy to reach the wrong conclusion by picking and choosing parts of a document and using them out of context."

- Third, because of the 'wisdom of the rule' that bars admission of 'learned treatises' in place of expert testimony.

The Dissent, comprised of three Justices, agreed with the Majority's ruling as to the expert testimony; however, dissented from the findings with regard to the medical records and other evidence of

causation. The dissenting Justices believed that Coastal did not sufficiently object under *Robinson* and *Daubert* to the medical records. Specifically, they argued that Coastal's general objection to the medical records "to the extent they include opinions regarding medical causation for the reasons that we have previously discussed" was too broad. The dissent found that the "reasons previously discussed" related to plaintiff's testifying expert, not the physician whose opinions were contained in the medical records. Additionally, the dissent argued that Coastal should have objected specifically, noting the objectionable pages of the records. As the dissent believed that Coastal did not properly object, they found the records were some evidence of general causation.

c. Cases.

• *Gutierrez v. Excel Corporation*, 106 F.3d 683, 689 (5th Cir. 1997) (opinions in medical records did not support causation in reasonable medical probability, therefore, did not establish causation for cumulative trauma disorder).

• *Fowler v. Carrollton Public Library*, 799 F.2d 976 (5th Cir. 1986) (medical records from hospital stay with no accompanying expert explanation of their significance or testimony on causation were inadmissible as they could have led only to unwarranted speculation by the jury, inferences in favor of claimant, and a prejudicial impact outweighing the benefit of these records).

• *Burroughs Wellcome Company v. Crye*, 907 S.W.2d 497 (Tex. 1995) (as hospital admission records indicated that admitting diagnosis was merely recitation of medical history or opinion as to causation provided by other records, patient herself, or her treating physician, and records did not reveal independent expert opinion concerning causation, they were no evidence that plaintiff's use of the spray caused a frostbite injury).

• *Pack v. Crossroads, Inc.*, 53 S.W.3d 492 (Tex. App.–Fort Worth 2001, pet. denied) (because the doctor had no information how long the decedent had stayed at nursing home, what conditions he suffered from before he entered nursing home, or the physician's orders while decedent was at the nursing home, there was no evidence upon which doctor testify as to causation; therefore, hospital records and doctor's testimony as to causation were speculative, inflammatory and not admissible).

• *Glenn v. C & G Electric, Inc.*, 977 S.W.2d 686, 689 (Tex. App.–Fort Worth 1998, pet. overruled) (a challenge to business records as being testimony by undisclosed experts did not somehow trigger an automatic metamorphosis of the business records into the testimony of experts who are testifying at trial, thus requiring their disclosure pursuant to interrogatory requesting identification of each expert witness to testify at trial and each consulting expert).

• *Luxton v. State*, 941 S.W.2d 339, 342 (Tex. App.–Fort Worth 1997, no pet.) (TRE 705 does not allow a party to conduct voir dire of an expert whose observations, diagnoses, or opinions are offered as part of a business record).

• *March v. Victoria Lloyds Insurance Company*, 773 S.W.2d 785, 789 (Tex. App.--Fort Worth 1989, writ denied) (blood alcohol content report admissible without analysis under TRE 701-703 because no expert interpretation of the results was needed to understand that it was evidence that there was alcohol in March's bloodstream at the time of the accident).

Other jurisdictions have drawn similar conclusions -- specifically, that opinions or diagnoses contained in medical records must meet admissibility standards of expert testimony:

- *Clark v. City of Los Angeles*, 650 F.2d 1033 (9th Cir. 1981) (expressions of opinion or conclusions in business record are admissible only if subject matter calls for expert or professional opinion and is given by one with required competence).

- *Kohl v. Tirado*, 569 S.E.2d 576 (Ga. App. 2002) (medical record containing diagnostic opinions and conclusions may be admitted into evidence if proper foundation is laid; i.e. person who entered such diagnostic opinions and conclusions upon the record must qualify as an expert and relate facts upon which the entry was based).

- *Brooks v. Friedman*, 769 N.E.2d 696 (Ind. App. 2002) (medical opinions and diagnoses in hospital records must meet the requirements for expert opinions in order to be admitted into evidence).

- *Kohn v. La Manufacture Française Des Pneumatiques Michelin*, 476 N.W.2d 184 (Minn. App. 1991) (in tire design defect case, results from tests conducted by university research institute were admissible as business records, where expert testified that he was familiar with the results of the tests and how they were conducted, the tests were existing documents not prepared for the litigation and it was the function of the institute to conduct tests and prepare reports directly related to transportation research).

- *Cabinet for Human Resources v. E.S.*, 730 S.W.2d 929 (Ky. 1987) (social worker's opinions and conclusions entered in the case record were expert testimony and, since no evidence was offered to establish her qualifications to express those opinions and conclusions, they were inadmissible without regard to whether other requirements for admission under the business records exception to the hearsay rule were met).

- *Lindsey v. Miami Development Corp.*, 689 S.W.2d 856 (Tenn. 1985) (expert opinions contained in medical records must meet the same requirements for admissibility as though the physician offered testimony identical to the information contained in the records).

- *McCable v. R.A. Manning Construction Company, Inc.*, 674 P.2d 699 (Wyo. 1983) (where a business record contains opinions it is subject to rules governing expert opinion testimony).

- *Keating v. Eng*, 377 N.Y.S.2d 928 (N.Y.A.D. 2 Dept. 1975) (even complete hospital records alone, without expert opinion and explanatory testimony, would require too much speculation by the jury to permit their introduction, in trial limited to issue of liability for personal injuries).

Some cases have held that, notwithstanding the business record exception to the hearsay rule, expert opinions recorded in business records by a declarant who is not available for cross-examination may be excluded as substantive proof if the opinions relate to diagnoses of complex medical conditions difficult to determine or substantiate. *Lazorick v. Brown*, 480 A.2d 223 (N.J. Super. A.D. 1984); *Duquesne Light Co. v. Woodland Hills School Dist.*, 700 A.2d 1038 (Pa. Cmwlth. App. 1997); *Ganster v. Western Pennsylvania Water Co.*, 504 A.2d 186 (Pa. Super. 1985).

11. Expert Reports. Are the written reports of testifying experts admissible into evidence, to be carried by the jury into the jury room?

a. Reports Are Hearsay. Hearsay is defined as "a statement, that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." TRE 801(d). As such, it appears that reports prepared by experts meet this definition and should be excluded. However, the issue is more complex than this.

b. Treating an Expert Report as a Business Record. The operative language in TRE 803(6) when determining the admissibility of expert reports under the business records exception to the hearsay rule is: "...kept in the course of a regularly conducted business activity, [and] making the record was a regular practice of that activity...." If expert reports are made specifically for litigation, unlike invoices, contracts, records, etc. made in the regular course of business, they do not come within the ambit of TRE 803(6). *See State v. Tomah*, 736 A.2d 1047 (Maine 1999) (forensic report of expert on blood spatter patterns, prepared specifically for trial, was not admissible in murder prosecution under business records exception to hearsay rule); *People v. Huyser*, 561 N.W.2d 481 (Mich. App. 1997) (report generated by prosecution's medical expert was not admissible under business records exception to hearsay rule, where medical expert did not treat child but examined her solely for litigation, and where expert's findings could not be duplicated in subsequent medical examination); *Kundi v. Wayne*, 806 S.W.2d 745 (Mo. App. E.D. 1991) (written reports of evaluations by expert witness were not admissible as business records); *Powell v. International Paper Company*, 1997 WL 137418 (Tex. App. – Beaumont 1997, writ denied) (expert reports prepared specifically for litigation are inadmissible under business records exception to hearsay rule).

c. Treating an Expert Report as a Pubic Record. TRE 803(8) treats public records as an exception to the hearsay rule. To be a public record, the document must be a record or statement of a public office, setting out the office's activity, or a matter observed while under a legal duty to report, or in a civil case, factual findings from a legally authorized investigation. A custody evaluation, filed with the clerk of the court could meet the "factual findings" portion of TRE 803(8).

d. Parentage Testing Report. Parentage testing reports are admissible even without the establishment of the business records exception under TFC §160.109(b) which provides: "[a] verified written report of a parentage testing expert is admissible at the trial as evidence of the truth of the matter it contains." There is no need to lay the business records predicate; all the offering party need offer is a report that is verified, in writing, and made by a paternity testing expert. *See In the Matter of J.A.M.*, 945 S.W.2d 320, 322 (Tex. App.–San Antonio 1997, no pet.); *De La Garza v. Salazar*, 851 S.W.2d 380, 382 (Tex. App.–San Antonio 1993, no writ).

12. Court-Ordered Child Custody Evaluation Reports. The admissibility of what used to be called "social studies" and are now called "child custody evaluation reports" is problematic. Years ago, one court of appeals said simply that "[court-ordered social studies] are generally inadmissible hearsay." *Rossen v. Rossen*, 792 S.W.2d 277, 278 (Tex. App.--Houston [1st Dist.] 1990, no writ). The issue is more complicated than that nowadays.

TFC § 107.114 provides that "[d]isclosure to the court or the jury of the contents of a child custody evaluation report prepared under Section 107.113 is subject to the rules of evidence." The reference

to "disclosure to the court" is somewhat odd, since the court must judge which portions of the report are admissible into evidence and which portions are not, and in the process of doing so the court will by necessity look at all portions of the report. In *Green v. Remling*, 608 S.W.2d 905 608 S.W.2d 905, 907-8 (Tex. 1980), the Supreme Court ruled it was proper for a trial court to consider a social study in an adoption proceeding, even though the social study was not introduced into evidence. The version of the Texas Family Code then in effect, Section 11.12(c), provided that where a social study has been prepared as part of a SAPCR "[t]he report shall be made a part of the record; however, the disclosure of its contents to the jury is subject to the rules of evidence." The Supreme Court concluded that "only those portions of the study which are admissible under the rules of evidence may be disclosed to the jury." *Id.* at 909-910. It thus appears that the Legislature intended for custody evaluation reports to be admitted into evidence, provided that the Rules of Evidence are applied to the contents of the report.

Turning then to a jury trial, we should consider what rules of evidence apply to the admission of a child custody evaluation report.

Many child custody evaluation reports consist of three parts: (i) the general description of the parties and children; (ii) specific findings and recommendations of the investigator; (iii) selective recitations of what various collateral contacts said to the investigator. A trial court could logically justify letting in category (ii) findings and recommendations, but not (i) or (iii). A trial court could logically justify letting in category (i) and (ii), but not category (iii). What about the admission of category (iii), reports of collateral witnesses?

To begin with, one could ask whether a court-ordered custody valuation report constitutes a public record under TRE 803(8), because it is filed with the court clerk and contain factual findings resulting from a legally authorized investigation. A court-ordered report, filed with the clerk of the court, would seem to fit the description of a public record, making the factual findings contained in the report (but not other parts of the report) admissible under the public record exception to the hearsay rule. TFC § 107.114 seems to push past this issue, suggesting that more than just factual findings in the report can be admitted.

Other parts of the custody evaluation report might be admissible under an exception to the hearsay rule, such as the state-of-mind exception, or statements made for medical diagnosis or treatment, or reputation concerning character, or statements against interest. Or they could be excluded from the hearsay rule as an opposing party's statement under TRE 801(e)(2).

See All Saints Episcopal Hosp. v. M.S., 791 S.W.2d 321, 322 (Tex. App.--Fort Worth 1990) (although report by DHS social worker met the public records hearsay exception of TRE 803(8), parts of report containing third party hearsay was not admissible), *vacated pursuant to settlement*, 801 S.W.2d 528 (Tex. 1991); *Bounds v. Scurlock Oil Co.*, 730 S.W.2d 68, 71 (Tex. App.--Corpus Christi 1987, writ ref'd n.r.e.) (portions of officer's accident report not admissible since they were hearsay descriptions of the accident by occupants of two vehicles involved in the accident).

Even where hearsay in a child custody evaluation report does not meet an exception to the hearsay rule, the evidence may be admissible under TRE 705(d), if the information constitutes fact or data underlying the expert's opinion and their probative value is not outweighed by their prejudicial effect.

See Section XI.C.9 above.

The same issues arise in connection with a report by a guardian ad litem, the disclosure of which to the jury is subject to the TRE. TFC § 107.002(h).

XII. COURT-APPOINTED PARTICIPANTS. The TFC has a number of provisions authorizing the court to appoint persons to participate in the litigation process. The involvement of these participants causes evidentiary issues.

A. CHILD CUSTODY EVALUATOR. Under TFC ch. 107, subch. D, the court can order a child custody evaluation. TFC § 107.113 requires that the evaluator prepare a report which must be filed with the court and served on the parties. TFC § 107.114 provides that "[d]isclosure to the court or the jury of the contents of a child custody evaluation report prepared under Section 107.113 is subject to the rules of evidence."

1. Qualifications of a Custody Evaluator. The Legislature has given us some criteria by which to gauge the qualifications of an expert *on child custody*. TFC § 107.104, Child Custody Evaluator: Minimum Standards, requires an expert who is to perform a child custody evaluation to have: a master's degree; license as a social worker, professional counselor, marriage and family therapist, psychologist, or board certified MD psychiatrist; 2 years of supervised experience evaluating physical, intellectual, social, and psychological functioning and needs; at least 10 court-ordered child custody evaluations made under the supervision; or a doctoral degree licensed in a human services field with course work and practical experience in child custody evaluations; plus 8 hours of family violence training. Compliance with these standards is mandatory. TFC § 107.105 adds that the evaluator "must demonstrate, if requested, appropriate knowledge and competence in custody evaluation services consistent with the professional models, standards and guidelines." A statutory exception to these minimum standards is allowed for counties with population under 500,000. TFC § 107.106.

The Texas Administrative Code sets out alternative qualifications for a licensed psychologist to conduct a child custody evaluation. Title 22, Tex. Admin. Code § 465.18, says:

> Notwithstanding any other grounds for qualification, the Board has determined that a licensed psychologist is qualified to conduct child custody evaluations if the licensee:
>
> > (i) has obtained a minimum of 8 professional development hours directly related to the performance of child custody evaluations since becoming a licensed psychologist, and is board certified in forensic psychology by the American Board of Professional Psychology (ABPP); or
> >
> > (ii) has obtained a minimum of 40 professional development hours directly related to the performance of child custody evaluations since becoming a licensed psychologist, and has conducted at least three child custody evaluations under the supervision of a qualified licensee.

Title 22, Tex. Admin. Code § 465.18.

TFC § 104.008(a) says that "[a] person may not offer an expert opinion or recommendation relating to conservatorship of or possession of or access to a child at issue in a suit unless the person has conducted a child custody evaluation relating to the child under Subchapter D, Chapter 107." TFC § 104.008(c) says: "This section does not apply to a suit in which the Department of Family and Protective Services is a party.' However, the fact that a custody evaluation is not statutorily required, before a witness can make a custody or possession recommendation in a DFPS proceeding, does not mean that the criteria for custody evaluators and custody evaluations have no application. They are perfectly fine criteria for the court to use in performing its gatekeeping function regarding the reliability of an expert's data and methodology. And the exemption for suits in which the DFPS is a party does not supplant the provision in 22 Tex. Admin. Code § 465.18, saying that a licensed psychologist cannot make a recommendation on conservatorship, possession, or access without first conducting a child custody evaluation. See Section XI.C.4 above.

A custody evaluation is not necessarily the same thing as a recommendation that the parent-child relationship be terminated. This raises the question of whether TFC § 107.104 and Administrative Code §465.18 apply to an expert who is recommending that the parent-child relationship be terminated?

The problem with drawing a hard line between a child custody evaluation and a parental termination evaluation is that the distinction can collapse in some situations and sound foolish in others. Under a strict interpretation, a witness could be qualified to recommend for or against custodial placement with the parents or within the family or with the DFPS, but would not be qualified to recommend permanent termination of the parent-child relationship. However, a recommendation for or against termination inherently involves embracing or rejecting custody arrangements that fall short of permanent termination. A better and more practical approach would be to use the TFC and Administrative Code standards for custody evaluations as a model for termination recommentations, but requiring that the mental health professional have continuing professional education regarding parental termination and alternative arrangements, and have conducted the required number of supervised evaluations of parental termination disputes.

2. Underlying Data and Methodology. TFC § 107.109 sets out the "basic elements" of a child custody evaluation. They include (i) a personal interview with the parties seeking court-ordered relationship with the child; (ii) interviews with the children; (iii) observation of the children with each party; (iv) observation and interview with another child who lives on a full-time basis in the home but is not subject to the suit; (v) information from collateral sources; (vi) criminal history of residents of the household; and (vii) an assessment of the relationship between each child and each party seeking a court-ordered relationship. If any of these basic elements is missing, the evaluator must disclose what and why, and discuss the effect of its omission. TFC § 107.109(b). The Court can order psychometric testing. TFC § 107.110.

B. FAMILY COUNSELOR. TFC § 153.010 authorizes a court to order a party to participate in counseling with a mental health professional who (i) has a background in family therapy; (ii) has a mental health license that requires as a minimum a master's degree; and (iii) has training in domestic violence if the court determines that the training is relevant to the type of counseling needed. If no one in the county can meet the foregoing criteria, the court can appoint a person whom the court believes is qualified to conduct the counseling. A referral to counseling must be predicated on a

determination that the parties have a history of conflict in resolving an issue of conservatorship or possession of or access to the child. The statutory role does not contemplate the family counselor making forensic recommendations, but nothing seems to preclude the family counselor from testifying as a lay witness based on personal knowledge.

C. GUARDIAN AD LITEM. A "guardian ad litem" ("GAL") is defined in TFC §107.001(5) as "a person appointed to represent the best interests of a child. The term includes:

> (A) a volunteer advocate from a charitable organization described by Subchapter C who is appointed by the court as the child's guardian ad litem;
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> (B) a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests;
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> (C) an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or
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> (D) an attorney ad litem appointed to serve in the dual role."

These loose standards address qualifications, but not methodology.

The powers and duties of a GAL are described in TFC § 107.006. They include the duty to interview the child if age 4 or older, to interview each person with significant knowledge of the child's history and condition, to interview the parties to the suit, and to consider the child's desires without being bound by them. The GAL is not bound to advocate the desires of the child. The GAL is not allowed to call or question witnesses, unless the GAL is an attorney appointed in a dual role. TFC § 107.002(c)(4). The GAL can be called as a witness. TFC § 107.002(d) & (e). The GAL can submit a report, but the disclosure of the contents to the jury is subject to the Texas Rules of Evidence. "A GAL's representation is limited to matters related to the suit for which he was appointed." *Durham v. Barrow*, 600 S.W.2d 756, 761 (Tex. 1980). The Family Code does not make clear whether a GAL's custody recommendations must meet the criteria of TFC § 107.109 for custody evaluations. It seems certain however, that if the GAL's report can be disclosed to the jury only subject to the TRE, then the GAL's testimony must likewise be subject to the Rules of Evidence, including TRE 701, 702, 703, 704, and 705.

D. ATTORNEY AD LITEM. "The role of an attorney ad litem is, like every attorney, to pursue, protect, and defend the interests of his or her client." *Harris Cty. Children's Protective Servs. v. Olvera*, 77 S.W.3d 336, 341 (Tex. App.--Houston [14th Dist.] 2002, pet. denied). An "attorney ad litem" is defined in TFC §107.001(2) as "an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation." The duties of an attorney ad litem are set out in TFC § 107.003. These duties include interviewing the child if age 4 or older, interviewing "each person who has significant knowledge of the child's history and condition," interviewing the parties to the suit, seeking the child's objectives, considering the impact on the child of the attorney's advocacy, investigating facts, obtaining records, and participating fully in litigation. The attorney ad litem "must be trained in child advocacy or have experience determined by the court to be equivalent to that training." TFC

§ 107.003(a)(2). Additionally, the attorney ad litem must investigate the medical care for the child, and if the child is age 16 or older, be sure the child has a birth certificate, social security card, driver's license, and other document determined by DFPS to be appropriate. TFC § 107.003(b). Additionally, the attorney ad litem must advise the child, represent the child's "expressed objectives of representation," and be familiar with the American Bar Association's standards of practice for attorneys representing children. TFC § 107.004. The attorney ad litem must complete at least three hours of continuing legal education in representing children in child protection. TFC § 107.004(b). Additional responsibilities are spelled out in TFC §107.004.

1. Can the Attorny Ad Litem Testify? The attorney ad litem should not be allowed to testify on the merits, for to do so would violate Tex. Disc. R. of Prof. Conduct 3.07, Lawyer as Witness.

2. Can the Attorney Ad Litem Make a Recommendation? While a lawyer can make arguments to the jury based on the evidence, the common perception that an attorney ad litem is a "neutral" between two warring parties could give the attorney ad litem's "recommendation," delivered in closing argument, undeserved weight with a jury. The court should consider restricting the attorney ad litem's argument to recounting the facts, and not advocating an outcome.

E. AMICUS ATTORNEY. An "amicus attorney" is defined in TFC §107.001(1) as "an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child." The duties of an amicus attorney are set out in TFC § 107.003, and overlap those of an attorney ad litem as to interviewing the child if age 4 or older, interviewing "each person who has significant knowledge of the child's history and condition," interviewing the parties to the suit, seeking the child's objectives, considering the impact on the child of the attorney's advocacy, investigating facts, obtaining records, and participating fully in litigation. Additional duties are spelled out in TFC § 107.005.

1. Can an Amicus Attorney Testify? Tex. Disc. R. of Prof. Conduct 3.07 would seem to preclude an amicus attorney from testifying.

2. Can an Amicus Attorney Make a Recommendation? If an amicus attorney is allowed to participate in the trial, the prospect that the attorney's closing argument would be given unwarranted weight by the jury suggests that the court should prohibit the amicus attorney from making a recommendation in closing argument as to the outcome.

F. PHYSICAL OR MENTAL EXAMINER. TRCP 204 permits a court, upon motion and notice, to order a party (or a person in a party's custody or control) to submit to a physical or mental examination by a physician or psychologist. Good cause must be shown, meaning either the mental or physical condition is in controversy, or where the party in question has designated a psychologist as a testifying expert or disclosed a psychologists's records for possible use at trial. TRCP 204.1 (a) & (c). The party examined can require the evaluator to prepare a report. TRCP 204.2. TRCP 204.3 permits the court, in a SAPCR, to order one or more psychologists or psychiatrists to examine the children or other parties. The normal rules of evidence apply to the expert's report, including TRE 701, 702, 703, 704, 705, and 803(8).

G. PARENTING COORDINATOR. A "parenting coordinator" is an impartial third party: (A) who, regardless of the title by which the person is designated by the court, performs any function described by Section 153.606 in a suit; and (B) who: (i) is appointed under this subchapter by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through confidential procedures; and (ii) is not appointed under another statute or a rule of civil procedure. TFC § 153.601(3). The court cannot appoint a parenting coordinator except upon a finding that the case is a "high-conflict case" or there is good cause and the appointment would be in the child's best interest. TFC § 153.605(b). The parenting coordinator cannot act as amicus attorney, guardian ad litem, or child custody evaluator, friend of the court, or parenting facilitator. There is a list of duties of parenting coordinators in TFC § 153.606, such as identifying disputed issues, reducing misunderstandings, clarifying priorities, exploring possibilities for problem solving, etc. The parenting coordinator "shall" submit a written report to the court and parties as often as the court orders. However, the report is limited to a statement of whether the parenting coordinator should continue. TFC § 153.608. Given the statutory limitations on the parenting coordinator's report, it is doubtful that a parenting coordinator could testify to recommendations in hearings or at trial. But there is no obvious barrier to a parenting coordinator testifying as a fact witness based on personal knowledge.

H. PARENTING FACILITATOR. A "parenting facilitator" is "an impartial third party: (A) who, regardless of the title by which the person is designated by the court, performs any function described by Section 153.6061 in a SAPCR; and (B) who: (i) is appointed by the court under subchapter of Chapter 153 on its own motion or on a motion or agreement of the parties, to assist parties in resolving parenting issues through procedures that are not confidential; and (ii) is not appointed under another statute or a rule of civil procedure." TFC § 153.601(4). The parenting facilitator has the same duties as listed for parenting coordinators, plus monitoring compliance with court orders. TFC § 153.6061. The parenting facilitator "shall" submit a written report to the court and parties as often as the court orders. The report may contain a recommendation of settlement, and other matters specified by the court, but may not include recommendations as to conservatorship, possession, or access. TFC § 153.6081. However, it is clear that a parenting facilitator cannot testify to recommendations. The statute does not preclude a parenting facilitator from testifying as a fact witness.

I. REPORT OF JOINT PROPOSAL OR JOINT STATEMENT. If the court orders parties to work with a parenting coordinator or parenting facilitator to settle parenting issues, the coordinator or facilitator "shall" submit a written report describing a joint proposal or statement of the parties. This written report does not constitute an agreement unless it is prepared by the parties' attorneys in the form of a Rule 11 agreement, an MSA, a collaborative law agreement, or a settlement agreement under Tex. Civ. Prac. & Rem. Code § 154.071. TFC § 153.6082. The report clearly would not be admissible in a contested hearing or trial.

XIII. TYPES OF RELEVANT EVIDENCE.

This part of the Article discusses the types of evidence that are admissible in a SAPCR.

A. GOING BEHIND THE PRIOR DECREE IN A SUBSEQUENT TRIAL.

1. Modification. In *Ogletree v. Crates*, 363 S.W.2d 431, 434 (Tex. 1963), the Supreme Court wrote:

"A final judgment in a custody proceeding is res judicata of the best interests of a minor child as to conditions then existing.... The judgment of the Domestic Relations Court of Harris County was thus res judicata of the best interests of the child as to conditions existing on July 15, 1960. To authorize a change of custody there must have been a material change of conditions since that date." In *Wilson v. Elliott*, 73 S.W. 946, 947 (Tex. 1903), the Court wrote:

> The question upon the first trial in a case of a character of this is, which is the more suitable party to be intrusted with the care of the child at that time? The question in the subsequent proceeding is, which is the more suitable at the time of that trial? Since, in determining the second question, the first cannot be agitated, it follows that evidence of prior conduct of either party cannot be introduced except to corroborate some evidence of similar conduct which was developed since the original decree. As just intimated, we think, however, where testimony upon the second trial tends to show conduct on part of the one to whom the custody has been previously committed, and that he or she, since the first, has become a person not suitable for so important a charge, the rule of res adjudicata would not preclude the introduction of evidence of conduct previous to the first decree, provided it tended to corroborate the evidence of subsequent conduct of a like nature.

Subsequent courts have followed this rule of exclusion. *In re J.G.W.*, No. 06-00-00170-CV, *6 (Tex. App.--Texarkana, Aug. 23, 2001, no pet.) (unpublished) ("Evidence of misconduct before the original custody decree should be excluded in a subsequent proceeding for custody"); *In re B.S.L.*, 579 S.W.2d 527, 529 (Tex. Civ. App.--San Antonio 1979, writ ref' n.r.e.); *Green v. White*, 203 S.W.2d 960, 962 (Tex. Civ. App.--Paso 1947, no writ). In *In re C.Q.T.M.*, 25 S.W.3d 730, 735 (Tex. App.–Waco 2000, pet. denied), the court ruled that res judicata did not bar evidence about the behavior of a parent's boy-friend, occurring prior to the last trial, where the boy-friend was not a part to the prior case.

Apart from the exception allowing pre-decree behavior to be introduced where there is similar post-decree behavior, a court will encounter a need for mental health professionals to go behind the prior decree in explaining their psychological assessment, which requires the clinician to consider the individual's psychological and behavioral history at least back to adolescence as a component of an assessment.

2. Termination. TFC § 161.004 provides that a court may terminate the parent-child relationship after rendering a prior order denying termination if: (1) the new petition is filed after the order denying termination was rendered; (2) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the earlier rendition; and (3) the parent committed the act supporting termination prior to rendition of the order denying termination; and (4) termination is in the child's best interest. Under the statute, the court in a hearing can consider evidence presented at a prior hearing.

Section 106.004 abrogates the doctrine of res judicata. However, the Section 161.004 exception to the res judicata rule applies only when a material and substantial change has occurred. A court could refuse to admit evidence pre-dating the prior order until a material and substantial change has been shown, or the court could permit such evidence to be admitted subject to later proof of material and substantial change (sometimes called "tying up later"). *See In re H.M.O.L.*, No. 01-17-00775-CV *10 (Tex. App.–Houston [1st Dist.] April 6, 2018, pet. denied) (mem. op.) (to go behind prior decree,

DPFS must prove the elements of Section 161.004 by clear and convincing evidence; appellate court evaluated evidence of material and substantial change); *In re H.L.H.*, No. 10-16-00254-CV *13-14 (Tex. App.–Waco March 14, 2018, no pet.) (mem. op.) (Using section 161.004 is nevertheless the only way that a trial court can terminate a parent's parental rights to a child based on evidence presented in a prior termination hearing); *In re D.N.*, 405 S.W.3d 863, 869 (Tex. App.–Amarillo 2013, no pet.) (under Section 161.001, termination can be supported by acts post-dating the prior order denying termination; to rely upon acts pre-dating the prior order, there must be sufficient evidence of all the elements of Section 161.004, including material and substantial change of circumstances); *In re J.R.*, No. 07-12-00003-CV * 4-6 (Tex. App.–Amarillo May 8, 2012, no pet.) (mem. op.) (appellate court determined first whether Section 161.001's "predicate facts" had been established, then went on to look at the evidence supporting termination); *In re N.R.T.*, 338 S.W.3d 667, 679 (Tex. App.--Amarillo 2011, no pet.) ("there are no definite guidelines as to what constitutes a material and substantial change in circumstances under § 161.004 .... Rather the determination is made by the facts of each case.").

B. BEST INTEREST. In 1968, the Tyler Court of Civil Appeals wrote: "It has been repeatedly held in this state that a child of tender years should be with the mother if she is at all a fit person therefor. *Grimes v. Knowles*, 431 S.W.2d 602, 606 (Tex. Civ. App.--Tyler 1968), *rev'd*, 437 S.W.2d 816 (Tex. 1969). The court cited *Beasley v. Beasley*, 304 S.W.2d 158, 161 (Tex. Civ. App.--Dallas, 1957, writ ref., n.r.e.). In *Spitzmiller v. Spitzmiller*, 429 S.W.2d 557, 561 (Tex. Civ. App.--Houston [1st Dist.] 1968, writ refused n.r.e.), the court said that "[t]he rule of law giving the mother the preference in awarding the custody of young children has been forcefully laid down in many Texas cases. See those cited in *Longoria v. Longoria*, 324 S.W.2d 244 (San Antonio Civ. App. 1959, writ dism., w.o.j.)." In *Brown v. Brown*, 500 S.W.2d 210, 217 (Tex. Civ. App.--Texarkana 1973, no writ), the court said that "the rule is that all things being equal, children of tender age should be placed in the custody of the mother.... This is not a hard and fast rule to be applied as a matter of law, but the controlling issue is always the best interests of the children."

This changed when Title 2 of the TFC was enacted in 1973, effective on January 1, 1974 when the "tender years presumption" was supplanted by the best interest test. Section 14.07 of the TFC said: "The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child."

Courts have avoided trying to articulate a bright line test for what constitutes best interest. "Suits affecting the parent-child relationship are intensely fact driven, which is why courts have developed best-interest tests that consider and balance numerous factors." *Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002).

The Legislature, in TFC § 153.134, listed the following factors to consider in determining joint managing conservatorship:

> (a) If a written agreed parenting plan is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors:
>
> (1) whether the physical, psychological, or emotional needs and development of the child will

benefit from the appointment of joint managing conservators;

(2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(3) whether each parent can encourage and accept a positive relationship between the child and the other parent;

(4) whether both parents participated in child rearing before the filing of the suit;

(5) the geographical proximity of the parents' residences;

(6) if the child is 12 years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and

(7) any other relevant factor.

The Texas Supreme Court gave a list of factors to consider on best interests, in a parental termination case, in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). The Court listed: the child's desires; the child's current and future physical and emotional needs; current and future emotional and physical danger to the child; parental abilities of the persons seeking custody; programs available to assist those persons seeking custody to promote the best interest of the child; plans for the child by the individuals or agency seeking custody; stability of the home or proposed placement; acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. This remains an authoritative statement of factors to consider in deciding whether to terminate the parent-child relationship.

The Legislature has given a list of factors to consider regarding best interest in connection with placing children under the care of the DFPS, in TFC § 263.307:

§ 263.307. Factors in Determining Best Interest of Child

(a) In considering the factors established by this section, the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.

(b) The following factors should be considered by the court and the department in determining whether the child's parents are willing and able to provide the child with a safe environment:

(1) the child's age and physical and mental vulnerabilities;

(2) the frequency and nature of out-of-home placements;

(3) the magnitude, frequency, and circumstances of the harm to the child;

(4) whether the child has been the victim of repeated harm after the initial report and

intervention by the department;

(5) whether the child is fearful of living in or returning to the child's home;

(6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;

(7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;

(8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;

(9) whether the perpetrator of the harm to the child is identified;

(10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

(11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

(12) whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:

(A) minimally adequate health and nutritional care;

(B) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;

(C) guidance and supervision consistent with the child's safety;

(D) a safe physical home environment;

(E) protection from repeated exposure to violence even though the violence may not be directed at the child; and

(F) an understanding of the child's needs and capabilities; and

(13) whether an adequate social support system consisting of an extended family and friends is available to the child.

In *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002) the Supreme Court said: "Evidence about placement plans and adoption are, of course, relevant to best interest."

C. COMPARING THE PARENTS. "Where two parties are competing for the custody of a child,

the comparative affection of such parties for the child, their willingness and ability to administer to its present and future material and moral welfare, are to be considered by the jury for what, under the evidence, they may deem them to be worth, in deciding the issue of the child's welfare." *Clayton v. Kerbey*, 226 S.W. 1117, 1119 (Tex. Civ. App.--Austin 1920, writ ref'd.). When Title 2 of the TFC was adopted, Section 14.07(b) said: "In determining the best interest of the child, the court shall consider the circumstances of the parents."

D. PARENTING ABILITIES. The parental abilities of the individuals seeking custody are relevant to best interest. *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976). Evidence regarding the conduct and abilities of a step-parent can be relevant and admissible in a suit seeking modification of conservatorship. *In re C.Q.T.M.*, 25 S.W.3d 730, 734 (Tex. App.--Waco 2000, pet. denied).

E. GENDER. Gender has recently come to the forefront of social and legal consciousness. Gender impacts child custody determinations in several ways.

1. Gender of Parent. Under the "tender years presumption" discussed above, gender was a significant determinant of child custody for young children. Texas voters adopted the equal rights amendment to the Texas Constitution on Nov. 7, 1972, which provides that "equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Tex. Const. Art. 1.§ 3a. TFC §153.003 bars consideration of gender and marital status in determining custody and the terms of conservatorship and possession:

> Sec. 153.003. NO DISCRIMINATION BASED ON SEX OR MARITAL STATUS.
>
> The court shall consider the qualifications of the parties without regard to their marital status or to the sex of the party or the child in determining:
>
> (1) which party to appoint as sole managing conservator;
>
> (2) whether to appoint a party as joint managing conservator; and
>
> (3) the terms and conditions of conservatorship and possession of and access to the child.

The State Bar of Texas' Pattern Jury Charges PJC 215.7 instructs the jury not to consider gender of the parties of the child in deciding managing conservatorship. Of course, simply saying that doesn't actually change what for many persons are life-long prejudices about children who are very young, and also children who have reached puberty. As the old division of labor between working father and stay-at-home mother continues to break down, judges and jurors will have to contend with "role reversals" (where mother works and father stays at home) or families where both parties work and child care is partially provided by relatives, hired "nannies," or commercial child care operations. This will naturally lead people away from gender stereotypes to more critical assessment of who has the ability, will take the time, and make the effort, to successfully raise the child to adulthood.

2. Same-Sex Marriage. In *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), the United States Supreme Court ruled that the Fourteenth Amendment to the U.S. Constitution requires states to permit same-sex marriages and to recognize same-sex marriages validly

performed elsewhere. However, in *Pidgeon v. Turner*, 538 S.W.3d 73, 86 (Tex. 2017), *cert. denied*, 138 S. Ct. 505, 199 L. Ed. 2d 385 (2017), the Texas Supreme Court endorsed the following statement: 'Whatever ramifications *Obergefell* may have for sexual relations beyond the approval of same-sex marriage are unstated at best....' *Coker v. Whittington*, 858 F.3d 304, 307 (5th Cir. 2017)." It cannot yet be determined whether the recognition of the constitutionally-required validity of same-sex marriage means that participation in a same sex marriage is not a factor that can properly be considered in deciding child custody.

3. Sexual Preference. The case of *In Interest of McElheney*, 705 S.W.2d 161, 162 (Tex. App.--Texarkana 1985, no writ), held that evidence of a parent's sexual preferences was admissible in a suit for custody or termination brought by the Department of Human Resources. That case has not been cited since it was decided, and no other cases on the topic were discovered in preparing for this article. The James Byrd, Jr. Hate Crimes Act of 2001, Tex. Code Crim. P. art. 42.014, relating to enhanced punishment for a hate crime, included in its list of targeted categories "sexual preference." Art. 42.014(c) defines "sexual preference" for purposes of the statute to mean heterosexuality, homosexuality, or bisexuality. Texas Disciplinary Rules of Professional Conduct 5.08 prohibits a lawyer from manifesting bias or prejudice based upon, among other things, sexual orientation. Rule 5.08(b) allows mention of advocacy regarding sexual orientation if that advocacy "(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure." The Texas Equal Rights amendment mentions "sex, race, color, creed, or national origin, but not sexual preference. So the propriety of arguing sexual preference as a factor in determining custody is uncertain.

F. ABILITY TO MEET THE NEEDS OF THE CHILD. In *Mumma v. Aguirre*, 364 S.W.2d 220, 223 (Tex. 1963), the Supreme Court talked about the trial court's opportunity to "observe and evaluate the personalities of the contending claimants, to weigh the credibility of their testimony, to assess the physical, mental, moral and emotional needs of the child, and to adjudge from personal observation which of the claimants can best meet the needs of the child."

G. CHILD'S WISHES. The impact of the child's wishes on a custody determination is somewhat complicated.

1. Interviewing the Child in Chambers. TFC § 153.009 provides for the court to interview the child in chambers. Section 53.009 provides:

> (a) In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child, the court shall interview in chambers a child 12 years of age or older and may interview in chambers a child under 12 years of age to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's own motion for a purpose specified by this subsection.

Subsection (b) allows for in camera interview at the instigation of the a party, the amicus attorney, the attorney ad litem for the child, but adds to them "on the court's own motion." Subsection (c) says that the interview does not diminish the trial court's discretion. Subsection (d) prohibits such an

interview in a jury trial with regard to any issues to be submitted to the jury. Subsection (e) permits the court to allow the attorney for a party, the amicus attorney, guardian ad litem, or attorney ad litem, to be present during the interview. Subsection (f) requires the court to cause a court reporter's record to be made of the interview where the child is 12 years or older, upon the motion of a party, the amicus attorney, or the attorney ad litem for the child, or on the court's own motion. The record is part of the reporter's record for appeal.

The child's stated preference for custodial parent can supplant the requirement of proving a material and substantial change as a condition to modifying a SAPCR order. TFC § 156.101(a)(2).

TFC § 153.009 does not assign any particular weight to what the child says in the in-chambers interview. But it impliedly authorizes the trial court to consider the statements of the child in deciding the case, even though they are unsworn and untested by cross-examination. The court in *In re A.C.*, 387 S.W.3d 673, 676 (Tex. App.--Texarkana 2012, pet. denied), said that the child's statements are "strictly supplemental to the evidence taken in court...." How the child's statements should figure into the trial court's decision and the appellate court's review of the sufficiency of the evidence remains unclear.

Things to remember about an in-chambers interview with a child:

1. The court is not required, but is permitted, to interview a child under age 12. If the child is 12 or older, the court is required to conduct the interview, if requested. If the trial court refuses to conduct the interview, the aggrieved party must make an "offer of proof" about what the child would have said. Whether the offer of proof would be through a question-and-answer session with the child on the witness stand (which defeats the purpose of an in-chambers interview); or through a summary by the proposing attorney; or by the testimony of a witness who talked to the child; or by letters, emails, and texts by the child; is not determined. Absent an offer of proof, the appellate court cannot determine whether the error in refusing to conduct an interview was reversible error. *In re T.A.L.*, No. 07-17-00274-CV (Tex. App.--Amarillo August 14, 2016 pet. denied.

2. Where the child is 12 or older, the court must upon request have a court reporter report the in-chambers interview. The requesting party must object if the court fails to accede to the request. However, without a record, it is difficult to make a case of harmful error. *See In re A.C.*, 387 S.W.3d 673, 676 (Tex. App.--Texarkana 2012, pet. denied).

2. The Child as a Witness. The TRE contemplate child witnesses. TRE 601(a) says that "[e]very person is competent to be a witness unless these rules provide otherwise." The criteria for allowing a child to testify is set out in TRE 601(a)(2), which declares as incompetent "[a] child–or any other person–whom the court examines and finds lack sufficient intellect to testify concerning the matters in issue." Some counties have adopted local rules that govern when a child can be brought to the courthouse to testify. It is possible that such a rule has not been approved by the Texas Supreme Court, in which event it is not effective, per TRCP 3a. Best idea is to follow the court's rule on bringing children to the courthouse.

H. VIOLENCE AND SEXUAL CRIMES. The impact of violent behavior and sexual crimes

radically alter the landscape of custody litigation. These issues are dealt with in detail in Section IV.A.2 above.

I. SPLIT CUSTODY. Split custody occurs when siblings have different managing conservators, or different primary residences, or have periods of possession that do not coincide.

1. Public Policy. TFC § 153.251, Policy and General Application of Guidelines, makes the comment in connection with periods of possession for the non-custodial parent: "It is preferable for all children in a family to be together during periods of possession." Because this policy statement is located in the subchapter relating to visitation guidelines, this rule will likely not be considered applicable to determinations of managing conservatorship. It does, however, reflect public policy in a general way.

2. Old Case Law. In *Coleman v. Coleman*, 109 S.W.3d 108, 112 (Tex. App.--Austin 2003, no pet.), the court wrote:

> There is a long line of jurisprudence in Texas supporting a preference that two or more children of a marriage should not be divided absent clear and compelling reasons. *See Zuniga v. Zuniga*, 664 S.W.2d 810, 812 (Tex. App.--Corpus Christi 1984, no writ); *O. v. P.*, 560 S.W.2d 122, 127 (Tex. Civ. App.--Fort Worth 1977, no writ); *Ex parte Simpkins*, 468 S.W.2d 908, 909 (Tex. Civ. App.--Amarillo 1971, no writ); *Griffith v. Griffith*, 462 S.W.2d 328, 330 (Tex. Civ. App.--Tyler 1970, no writ); *Huffman v. Huffman*, 408 S.W.2d 248, 250 (Tex. Civ. App.--Amarillo 1966, no writ); *Meyer v. Meyer*, 361 S.W.2d 935, 940 (Tex. Civ. App.--Austin 1962, writ dism'd); *Autry v. Autry*, 350 S.W.2d 233, 236 (Tex. Civ. App.--El Paso 1961, writ dism'd); *De Gaish v. Marriott*, 345 S.W.2d 585, 587 (Tex. Civ. App.--San Antonio 1961, no writ); *Beasley v. Beasley*, 304 S.W.2d 158, 161 (Tex. Civ. App.--Dallas 1957, writ ref'd n.r.e.); *Beadles v. Beadles*, 251 S.W.2d 178, 180 (Tex. Civ. App.--Texarkana 1952, no writ); *cf. Ditraglia v. Romano*, 33 S.W.3d 886, 890 (Tex. App.--Austin 2000, no pet.). Consistent with this jurisprudence, the legislature articulated Texas' preference that children be kept together in the family code. See Tex. Fam.Code Ann. § 153.251(c) (West 2002) ("It is preferable for all children in a family to be together during periods of possession.").

J. PAST CONDUCT. A court is free to use a parent's past conduct to measure that parent's likely future conduct. *In Interest of I.M.F.*, No. 14-17-00758-CV, *6 (Tex. App.--Houston [14th Dist.] Mar. 6, 2018, pet. denied) (mem. op.); *In re J.D.*, 436 S.W.3d 105, 119 (Tex. App.--Houston [14th Dist.] 2014, no pet.); *Castorena v. Texas Dep't of Protective & Regulatory Servs.*, No. 03-02-00653-CV, *10 (Tex. App.--Austin Apr. 29, 2004, no pet.) (mem. op.). However, in *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.--Houston [1st Dist.] 2007, no pet.), the court said: "An adult's future conduct may be somewhat determined by recent past conduct.... In and of itself, however, evidence of past misconduct may not be sufficient to show present unfitness." The Court in *In the Interest of M.W.*, 959 S.W.2d 661, 665 (Tex. App.--Tyler 1997, writ denied), said: "When determining fitness of a parent, the material time to consider is the present.... This concept is abrogated, however, by the fact that an adult person's future conduct may be somewhat determined by recent past conduct.... Nonetheless, evidence of past misconduct may not by itself be sufficient to show present unfitness." In *May v. May*, 829 S.W.2d 373, 377-78 (Tex. App.--Corpus Christi 1992, writ denied), the Court

said:

> In the present case, the only evidence offered to show that Robert's custody of the children would significantly impair their physical or emotional health, was that he used and sold drugs two years ago in the home where his children resided with him and their mother.... We conclude that the trial court may logically infer that serious violations of the law by the parent, such as the use and sale of drugs, especially when committed in the same home in which the children reside, would set an unacceptable standard for the children to follow and significantly impair their emotional development. In addition, we do not believe that the passage of two years since the last proven violation in the present case conclusively negates the inference that Robert's deliberate use and sale of drugs in the past is indicative of drug-related conduct which is likely to continue. There is some evidence to show that appointment of Robert as managing conservator would not be in the best interest of his children, because it would significantly impair their emotional development.

K. PSYCHOLOGICAL ASSESSMENTS. Many a custody case has been conducted using psychological test results for or against a party. If the expert is a psychologist, the evidence will invariably include psychological test results, because psychological testing is what psychologists are educated, trained, and licensed to do. The most prevalent psychological tests that appear in custody litigation are the Minnesota Multiphasic Personality Inventory-2 ("the MMPI-2"), the Millon Clinical Multiaxial Inventory-IV ("the Millon"), and the Rorschach Ink Blot test. Following behind in popularity are the House-Tree-Person Test (for children), and the Sentence Completion Test. We could go on for hours about the reliability and validity of these tests, but the reliability and validity measures for these tests really have little to do with the problem at hand. None of these tests were designed to evaluate parenting skills, and none were normed against persons going through custody litigation, and there is no theory or body of information suggesting how a custody evaluator can get from psychological test results to a conclusion about child custody. No reliability measures or validity measures have been established to show the usefulness of these tests in determining child custody or possession. At best these tests provide additional data that can supplement clinical observations and other information that is assembled to make a custody evaluation, but some studies have shown that additional data does not always improve the quality of a judgment and sometimes actually makes it worse.

L. PSYCHIATRIC DIAGNOSES. Another weapon in the SAPCR lawyer's arsenal is psychiatric diagnoses of mental disorders. The go-to authority on psychiatric diagnoses is the Diagnostic and Statistical Manual of Mental Disorders (5th Ed.), commonly called "DSM-5." The DSM series of books has been published by the American Psychiatric Association, a group of American M.D. psychiatrists. While the process of creating and testing the categories and diagnostic criteria of mental disorders was arduous and exacting, it focused on improving the reliability of getting the same diagnoses from different diagnosticians who were looking at the same data (inter-rater reliability), and not the underlying validity of the taxanomic categorization of distinct mental disorders. The value of the product is impaired by the fact that the edifice underlying the DSM-5 was created by psychiatrists, largely to the exclusion of psychologists, and relies on as primary inputs the kind of information a psychiatrist gets from talking to the patent in the office for several 50-minute sessions (i.e., self-reporting by the patient), without the benefit of psychological testing or (in most instances) the requirement of getting corroborating information from third parties. The Council for Evidence-Based

Psychiatry says on their web site: "Psychiatric diagnostic manuals such as the DSM and ICD (chapter 5) are not works of objective science, but rather works of culture since they have largely been developed through clinical consensus and voting. Their validity and clinical utility is therefore highly questionable, yet their influence has contributed to an expansive medicalisation of human experience." Apart from a taxonomy of mental disorders that was not originally founded on scientific observation, a perhaps even deeper problem is the concept of limiting the input for making psychiatric diagnoses to the most subjective of all sources (i.e., reliance on the patient's self-report of mental and emotional states). Carrying this over to custody evaluations, there is very little scientific basis, or even a non-scientific basis, for correlating diagnoses of mental disorders with parental termination, child custody, or possessory determinations. The DSM-5 has a one-page "Cautionary Statement for Forensic Use of DSM-5," where the Manual recognizes that using the DSM-5 in the courtroom presents a "risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." DSM-5, p. 25 (American Psychiatric Publishing, 2013). Another difficulty is that most of the diagnoses in DSM require the concurrence of several diagnostic criteria before a diagnoses of a specific mental disorder can be made, and many litigants meet some but not enough of the diagnostic criteria of one or more mental disorders to justify making a diagnosis. In that situation, the clinician can give a diagnostic label with the phrase "other specified disorder," or can diagnose an "unspecified [type] disorder." DSM-5 p. 15. Many people exhibit behaviors that are problematic, but are not manifested in enough different ways to meet the required number of diagnostic criteria to establish a mental *disorder*. Regardless of the reservations that may exist for the DSM framework, if you want to talk in concrete terms about mental disorders, DSM is the only game in town. But there is nothing in the DSM about translating the DSM categories to parental termination or custody recommendations. Regardless of the lack of confirmation of the validity of the DSM approach to diagnosing mental disorders, due to general acceptance of the DSM it is likely fruitless for a litigant to attack the DSM framework on *Daubert* reliability grounds, but there is much room still to attack any conclusions that draw on a DSM diagnosis to make a termination or custody recommendation.

The Legislature was alert to the possibility that undiagnosed mental disorders might surface in a child custody evaluation. TFC § 107.1101(c) says that, if a custody evaluator observes a potentially undiagnosed "serious mental illness," as that terms is defined in Section 1355.001, Insurance Code, then"[t]he child custody evaluation report must include any information that the evaluator considers appropriate under the circumstances regarding the possible effects of an individual's potentially undiagnosed serious mental illness on the evaluation and the evaluator's recommendations." Insurance Code Section 1355.001 describes "serious mental illness" as a specified list of mental disorders as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM). [See Section XIII.M below for the list of disorders.] This is a legislative endorsement of the DSM-5.

M. MENTAL ILLNESS. In *In re S.H*, No. 05-18-00733-CV, 2018 WL 6845314, *4 (Tex. App.--Dallas Nov. 16, 2018, n.p.h.) (mem. op.), the court said that "a parent's mental state may be considered in determining whether a child is endangered if that mental state allows the parent to engage in conduct that is detrimental to the child's physical and emotional well-being." The court in *In Interest of I.M.F.*, No. 14-17-00758-CV, *5 (Tex. App.--Houston [14th Dist.] Mar. 6, 2018, pet. denied) (mem. op.), wrote:

> A parent's mental illness alone does not necessarily demonstrate that a child's physical health or emotional development will be significantly impaired by parental custody. *In re L.D.F.*, 445 S.W.3d 823, 831 (Tex. App.--El Paso 2014, no pet.). Untreated mental illness, however, can endanger a child, and accordingly is a factor the court may consider. *See Id*. (considering father's diagnosis of bipolar disorder and his five hospitalizations in connection with that disorder); *see also In re A.L.H.*, 515 S.W.3d 60, 91 (Tex. App.--Houston [14th Dist.] 2017, pet. ref'd) (considering parent's persistent and untreated mental illness as evidence of endangerment for purposes of termination of parental rights); *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.--Houston [14th Dist.] 2003, no pet.) (considering parent's mental health and noncompliance with medication schedule as factors in endangering child for purposes of termination of parental rights).

TFC § 107.1101, Effect of Potentially Undiagnosed Serious Mental Illness, provides:

> (a) In this section, "serious mental illness" has the meaning assigned by Section 1355.001, Insurance Code.
>
> (b) If a child custody evaluator identifies the presence of a potentially undiagnosed serious mental illness experienced by an individual who is a subject of the child custody evaluation and the evaluator is not qualified by the evaluator's licensure, experience, and training to assess a serious mental illness, the evaluator shall make one or more appropriate referrals for a mental examination of the individual and may request additional orders from the court.
>
> (c) The child custody evaluation report must include any information that the evaluator considers appropriate under the circumstances regarding the possible effects of an individual's potentially undiagnosed serious mental illness on the evaluation and the evaluator's recommendations.

Insurance Code § 1355.001, Definitions, says:

> In this subchapter:
>
> (1) "Serious mental illness" means the following psychiatric illnesses as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM):
>
> (A) bipolar disorders (hypomanic, manic, depressive, and mixed);
> (B) depression in childhood and adolescence;
> (C) major depressive disorders (single episode or recurrent);
> (D) obsessive-compulsive disorders;
> (E) paranoid and other psychotic disorders;
> (F) schizo-affective disorders (bipolar or depressive); and
> (G) schizophrenia.

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