

# 2019 Advanced Child Protection Law Course

## Evidence and Experts

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# **PLEADINGS AND RELEVANCY IN SAPCRs**

# Relevant Evidence

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

# Pleadings Determine The Issues

- The parties' pleadings define the scope of the claims and defenses, and thus are the measure of what evidence is relevant.
- Normally deviating from the pleadings is raised after trial, when the judgment issued by the court exceeds the scope of the pleadings.
- However, pleadings can become an issue during the evidentiary phase of the case, if the evidence offered is not relevant to the claims and defenses that have been pled.
- If this occurs, you must object to avoid trying an un-pled issue by consent.

# Relaxed Rules of Pleadings in SAPCRs

*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.”

# Relaxed Rules of Pleadings in SAPCRs (#2)

- 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 *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.

# Relaxed Rules of Pleadings in SAPCRs (#3)

➤ In *King v. Lyons*, 457 S.W.3d 122, 126 (Tex. App.–Houston [1st Dist.] 2014, no pet.), the court said:

“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.”

Take away - plead the relief you want, and be expansive

# Kinds of Evidence Relevant in SAPCRs

- Ability to meet the needs of the child
- Child's wishes
- Violence and sex crimes
- Past conduct as predictor of future conduct
- Splitting siblings
- Same-sex marriage?
- Sexual preference?
- Expert recommendations
- Psychological assessments (including testing)
- Mental illness (incl. undiagnosed mental illness)
- Substance abuse; criminal behavior



# TFC § 263.307 - 13 Factors to Consider DFCS as MC

- (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;

## **TFC § 263.307 - 13 Factors to Consider DFCS as MC (#2)**

- (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;

## **TFC § 263.307 - 13 Factors to Consider DFCS as MC (#3)**

- (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

## **TFC § 263.307 - 13 Factors to Consider DFCS as MC (#4)**

(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.

# Relevant Evidence in Parental Termination Suits

- In *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), the Supreme Court gave a list of relevant considerations in a parent-child termination suit:
  - 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.

# Going Behind the Prior SAPCR Decree

- *Modification Case. Ogletree v. Crates*, 363 S.W.2d 431, 434 (Tex. 1963): “A final judgment in a custody proceeding is res judicata of the best interests of a minor child as to conditions then existing.... To authorize a change of custody there must have been a material change of conditions since that date.” Courts prohibit evidence of events that predate the order to be modified. Except where similar behavior occurs after the prior order.
- *In a Parental Termination Case.* Under TFC § 161.004, a court may terminate the P-C 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 this Section, the court in a hearing can consider evidence presented at a prior hearing.

# Character; Evidence of Crimes or Other Acts

- TRE 404(a): “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.” Exceptions: relevant character traits are admissible if the party is accused of moral turpitude, in which case rebuttal evidence is permitted; a party accused of assaultive conduct can offer evidence of the alleged victim’s trait of violence, in which case rebuttal evidence is permitted.
- TRE 404(b): “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 405: To prove character, a witness can testify to reputation in the community or based on personal opinion. On cross-examination, can ask “have you heard” or “did you know” questions. If the character or trait is an essential part of a claim or defense, specific instances can be proved.

# Excluding Relevant Evidence That is Prejudicial, Confusing, Cumulative

## ➤ TRE 403:

“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.”

## ➤ Discretionary

## ➤ Balancing test



**RULES OF EVIDENCE ARE DESIGNED TO  
STRENGTHEN THE ADVERSARIAL PROCESS**

# Increasing the Reliability of the Adversarial Process

- Contested cases are decided based on evidence admitted by the judge.
- The (TRE) regulate the manner of presenting evidence and types of evidence to be admitted.
- Witnesses must be isolated from the testimony of other witnesses.
- Witnesses must testify under oath, under penalty of perjury.
- Witnesses must testify in court, to be observed by the jury.
- No leading questions on direct examination.
- Striking non-responsive answers.
- The witness must be subject to cross-examination.
- The witness must testify from personal knowledge. An examination can be interrupted (by voir dire) to verify this requirement.

# Increasing the Reliability of the Adversarial Process

- A witness cannot prove a fact by relating out-of-court statements (hearsay).
- Some out-of-court statements are not hearsay (prior sworn testimony, statements by the opposing party, depositions).
- The TRE has 24 exceptions to the hearsay rule.
- The FRE have a “residual hearsay exception” for “trustworthy” evidence. Not in the TRE.
- An exhibit must be authenticated (it is what it is claimed to be).
- Authenticated business records are reliable hearsay.
- Authenticated government records are reliable hearsay, including findings.
- Documents and photos are the best evidence of what they contain, not verbal descriptions of their contents.
- Originals are preferred over copies, unless copies are authenticated.
- Summaries are permitted for voluminous records, but underlying records must be admissible.

# Protecting Young Children From the Rigors of Testifying

- A child is competent to testify unless s/he lacks sufficient intellect to testify concerning the matters at issue. TRE 601(a)(2).
- TFC § 153.009: court can interview a child in chambers in a non-jury hearing or trial, about desire regarding custody or primary residence.
  - Required upon request if 12 or older; discretionary if under age 12.
  - There is no provision for an oath.
  - There is no confrontation of witnesses.
  - There is no right to cross-examine.
  - Quasi-evidence with no guarantees of reliability.
  - Presence of lawyers or guardian ad litem discretionary.
  - Court reporter's record upon request.

# Protecting Young Children From the Rigors of Testifying

- TFC § 104.002 allows a prerecorded oral statement of child 12 or less to substitute for testimony 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.

# Protecting Young Children From the Rigors of Testifying

- TFC § 104.003--court can require the testimony of a child (no age limit) to be taken outside the courtroom to be played to the jury provided:
  - (i) 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;
  - (ii) only attorneys for the parties can question the child (ad litem?);
  - (iii) equipment operators must be hidden & the child unaware of the recording;
  - (iv) the recording is both visual and aural;
  - (v) the recording equipment was capable and the operator competent, and the recording accurate and not altered;
  - (vi) each recorded voice is identified; and
  - (vii) each party can examine the recording before it is shown in the courtroom.

# Protecting Young Children From the Rigors of Testifying

- TFC § 104.004 permits the court 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.
- In criminal cases, all of these measures are subject to scrutiny under the Sixth Amendment's Confrontation Clause. The right to confrontation and cross-examination in a civil case is not as sacrosanct.
- Even in criminal prosecutions, the U.S. Supreme Court has upheld protections of a child that are tailored to the needs of the specific child.

# **BURDEN OF PROOF; PRESUMPTIONS**



# Burden of Producing Evidence vs. Burden of Persuasion

- The burden of proof (B/P) to produce vs. persuade.
- The burden of producing evidence is the requirement to introduce evidence sufficient to present an issue of fact to be determined by the fact-finder.
- It requires a prima-facie-showing, i.e., evidence sufficient to support a favorable finding.
- The burden of persuasion is the requirement to secure a favorable finding when the decision is made.
- The burden of persuasion can be altered by certain evidence, or it can shift from one party to another during trial based on evidence introduced.

# Effect of Presumptions

- Distinguish procedural from evidentiary presumptions.
- A procedural presumption establishes the initial (and usually final) B/P.
- An evidentiary presumption says that evidence of fact X proves fact Y.
- Some evidentiary presumptions are irrebuttable; some the jury *can* but is not required to accept; some vanish in the face of contrary evidence.
- Certain evidence can shift the procedural B/P.
- When an evidentiary presumption shifts the procedural B/P, it changes the party who must obtain a “yes” answer from the jury.

# Burden of Proof in SAPCRs

- SAPCRs have various presumptions that affect the procedural B/P.
- In an original SAPCR, each parent has the burden to show best interest. There is a presumption in favor of JMC between parents.
- A party trying to keep a parent from being MC or JMC has the B/P to overcome the parental presumption that a parent should be appointed as MC or JMC. The burden of persuasion changes from best interest to a showing that appointment of parent at MC or JMC would “significantly impair the child’s physical health or emotional development.”
- In a SAPCR modification, there is no parental presumption. B/P is on the party seeking modification to show change and best interest.

# Shifting Presumptions in SAPCRs

- The parental presumption vanishes upon a finding of a history of family violence involving the parents or child.
- (Is this presumption removed as to both parents who live together when only one parent has a history of violence?)
- The parental presumption vanishes if the parent voluntarily relinquished actual care, control, and possession of the child to a licensed child-placing entity or DFPS for 1 yr. or more, any part of which was within 90 days of filing suit.
- The presumption of JMC vanishes upon a finding of a history of family violence.

# Effect of Violence, Neglect, Sex Crimes

- TFC §153.004(a)—regarding MC or JMC, the court must consider intentional use of abusive physical force, or sex abuse, against family member or any child, within 2 years of filing or during pendency.
- TFC §153.004(b)—if there is credible evidence of a history or pattern of child neglect, or physical or sexual abuse against a parent, spouse, or child, the court “may not” appoint JMC and it is rebuttably presumed that it would not be in the child’s best interest to appoint as sole MC, or give that party the right to establish primary residence. (Must the credible evidence be believed?)
- TFC §153.004(c)—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.”
- TFC §153.004(d)—court cannot order access if a preponderance of the evidence shows a history of family violence within two years, or criminal sexual conduct toward the child.
- TFC §153.004(e)—rebuttable presumption against access if credible evidence of history or pattern of child neglect of physical or sexual abuse directed to the other spouse or a child.

# **RULES ON ADMISSION & EXCLUSION OF EVIDENCE**

# Authentication

- TRE 901 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.” (Prima facie proof)
- TRE 901(b)(4)—An item can be authenticated by the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

# Self-Authentication

- TRE 902 lists documents that are self-authenticating (i.e., are accepted on their face as authentic):
  - Government documents under seal (if foreign, attested & certified)
  - Certified copy of public record
  - Official publications (of the government)
  - Newspapers and periodicals
  - Acknowledged documents (notarized)
  - Business records accompanied by proper affidavit



# Authenticating Verbal Communications

- TRE 901(b)(5) provides for voice authentication by a witness personally familiar with the voice. There are scientific methods to identify a voice. The fact-finder can judge a voice by comparison to exemplars.
- An audio recording of a conversation can be authenticated by a participant. Problems arise when there are stops and starts, and discontinuities in the recording.
- Audio recordings can be digitally modified, and to detect it may require science-based analysis.

# Authenticating Writings

Handwriting can be authenticated by:

- a witness familiar with the handwriting;
- an expert witness in handwriting comparison;
- the fact-finder, by comparing to proven exemplars; or
- admission by the writer.

Emails can be authenticated by:

- their indicated source;
- a copy on the sender's computer;
- contents, substance, internal patterns or other distinctive characteristics "together with all the circumstances";
- metadata; or
- admission by the author/sender.

# Authenticating Images

Pictures or digital images can be authenticated by:

- A witness with personal knowledge of the matter depicted;
- A copy on the owner/sender's computer;
- Metadata (GPS coordinates, time stamp);
- Contents, together with all the circumstances;
- Admission by the picture taker or sender.
- Danger of digital manipulation or fabrication, which may required scientific evidence to establish.

# Hearsay

- TRE 801(d) Hearsay means 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.

# Hearsay

## ➤ TRE 802. The Rule Against Hearsay

“Hearsay is not admissible unless any of the following provides otherwise: a statute, these rules, or rules prescribed under statutory authority.

Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.”

# Some Hearsay Exceptions

- Excited utterance
- State of mind (but not to prove historical fact)
- Statement made for medical diagnosis or treatment
- Recorded recollection
- Records of a regularly conducted activity
- Public records
- Statements in learned treatises, periodicals, or pamphlets
- Hearsay within hearsay
- Hearsay through expert witness

# Hearsay Through Experts

- TRE 705(a): “Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.”
- TRE 705(d): “If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect.”
- TRE 705(d): “If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.”

# Limited Admissibility

- TRE 105 governs evidence admissible against some parties or for some purposes but not others.
- Upon request, the court must instruct the jury on the proper scope of the evidence.
- Proper sequence regarding limited admissibility (using hearsay example)
  - 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.
  - Opponent renews hearsay objection.
  - Court overrules hearsay objection.
  - Opponent requests limiting instruction.



# Physician-Patient/Mental Health Privileges

- Under TRE 509(b), confidential communications between a physician and a patient, relating to professional services rendered by the physician, are privileged. The privilege extends to “a record of the patient’s identity, diagnosis, evaluation, or treatment created or maintained by a 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.”
- *R.K. v. Ramirez*, 887 S.W.2d 836, 842 (Tex. 1994): “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, “[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.” 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.”

# Mental Health Privileges

- Under TRE 510, mental health information (communications and records) is privileged.
- Exception exists for 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.
- An exception exists "[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).

# Application of Privileges in SAPCRs

- Prior to 3-1-1998, there was an unqualified exception to physician-patient and mental health privileges in SAPCRs. In rescinding that exception, the Supreme Court said in the Official Comment:

“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.”

# **EXPERT WITNESSES**

# Special Rules for Experts

- Experts get special exemptions, but have special requirements.
- Expert opinions are not limited to personal knowledge.
- Experts can relate otherwise inadmissible evidence to the jury.
- Experts can opine on the ultimate issues.
- But experts must:
  - Have knowledge, skill, experience, training, or education and the expert's scientific, technical, or other specialized knowledge must help the trier of fact understand the evidence or determine a fact in issue.
  - The underlying facts or data must provide a sufficient basis for the expert's opinion.
  - The methodology used to assess the data or arrive at the opinion must be reliable.

# Facts, Lay Opinion, Expert Opinion

- Under TRE 602, a lay witness can testify only based on personal knowledge.
- Under TRE 701, a witness can testify to a lay opinion if (i) rationally based on the perception of the witness and (ii) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.
- Under TRE 702, a witness qualified as an expert by knowledge, skill, experience, training, or education, can testify to expert opinions if it will help the trier of fact to understand the evidence or determine a fact in issue. The expert need not have personal knowledge of the facts. The expert can rely on inadmissible evidence if reasonably relied upon by experts in the field.
- An expert can testify to facts based on personal knowledge (TRE 602); or to a lay opinion rationally based on the witness's perception (TRE 701); or expert testimony (TRE 702), or any combination of the three.

# Expert's Qualifications

- 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.”

- “Helping the trier of fact” requires that the witness’s expertise go to the very matter on which the expert’s opinion is offered. *Broders v. Heise* (Tex. 1996). A witness may have expertise in the general area but not specific to the matter in question.

# Underlying Facts or Data

Rule 703. Bases of Expert's Opinion Testimony.

“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(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.”



# Reliability of Methodology

*E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

- (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.

# Reliability of Methodology (#2)

*Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 725-26 (Tex. 1998).

“[W]hether 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.’”**

*Taylor v. Texas Dept of Protective & Regulatory Servs.*, (Tex. App.–Austin 2005, pet. denied).

“[S]ome 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.”

# Court-Appointed Participants

- Family counselor
- Guardian ad Litem
- Attorney ad Litem
- Amicus attorney
- Doctor or psychologist (performing court-ordered physical or mental examination)
- Child custody evaluator
- Parenting coordinator
- Parenting facilitator

# 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.
- The TFC does not preclude the family counselor from testifying as a lay witness based on personal knowledge.
- The TFC does not say that a family counselor can make forensic recommendations, but does not preclude a family counselor from testifying as an expert.
- There may be an issue regarding the mental health privilege (not a court-ordered examination), unless waived.

# Guardian Ad Litem

- Under TFC §107.001(5), a guardian ad litem (GAL) is “a person appointed to represent the best interests of a child. A GAL can be:
  - (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;
  - (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;
  - (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
  - (D) an attorney ad litem appointed to serve in the dual role.”
- 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. TFC § 107.002(h). Expert opinions should meet TRE 702, 703, & 705.

# Attorney Ad Litem

- TFC §107.001(2): an attorney ad litem (AAL) is “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 AAL must interview the child if age 4 or older, interview “each person who has significant knowledge of the child’s history and condition,” interview the parties to the suit, seek 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 AAL “must be trained in child advocacy or have experience determined by the court to be equivalent to that training.” TFC §107.003(a)(2).
- The AAL should not testify on the merits, or it would violate Tex. Disc. R. of Prof. Conduct 3.07, Lawyer as Witness.
- The court could limit the AAL’s jury argument to recounting the facts, and not advocating an outcome.

# Amicus Attorney

- TFC §107.001(1): an “amicus attorney” is “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.”
- Amicus attorney has duties similar to an AAL regarding interviewing, 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 amicus attorney should not testify on the merits, or it would violate Tex. Disc. R. of Prof. Conduct 3.07, Lawyer as Witness.
- The court could limit the amicus attorney’s jury argument to recounting the facts, and not advocating an outcome.

# Child Custody Evaluator

## TFC § 107.104 Child Custody Evaluator: Minimum Qualifications.

- master's degree; and
- licensed as a social worker, professional counselor, marriage and family therapist, psychologist, or board certified MD psychiatrist; and
- 2 years supervised experience evaluating physical, intellectual, social, and psychological functioning and needs; and
- minimum 10 court-ordered child custody evaluations made under supervision; or
- doctoral degree, licensed in human services field, with coursework and practical experience in child custody evaluations.
- All of the above must have 8 hours of family violence training.



# Child Custody Evaluator (#2)

- 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.”
- In 22 Tex. Admin. Code §465.18, the Board of Psychological Examiners determined that, without regard to other statutes, a licensed psychologist is qualified to conduct a child custody evaluation if s/he has:
  - (i) 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) 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.

# Underlying Facts or Data for a Custody Evaluation

TFC §§ 107.108 & 107.109 set out the basic elements required in a child custody evaluation:

- Conformity to the professional standard of care applicable to the evaluator's licensure and any administrative rules, ethical standards, or guidelines adopted by the licensing authority;
- Evidence-based practice methods and making use of current best evidence;
  - (i) personal interview with the parties seeking court-ordered relationship; (ii) interviews with the children; (iii) observation of the children with each party; (iv) observation and interview with another child who lives full-time in the home but is not subject to the suit; (v) information from collateral sources; (vi) criminal history of household residents; and (vii) an assessment of the relationship between each child and each party seeking a court-ordered relationship. If any basic element is missing, the evaluator must disclose what and why, and discuss the effect of omission. TFC §107.109(b).
- The court can order psychometric testing. TFC §107.110.

# Custody Evaluation Required/Not Required

- TFC § 104.008(a) says: “[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 ....”
- However, 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, 22 Tex. Admin. Code § 465.18 says that a licensed psychologist cannot make a recommendation on conservatorship, possession, or access without first conducting a child custody evaluation.
- Even though a child custody evaluation is not required to render an opinion in a DFPS case, the criteria could be applied by the court in its gatekeeping function under TRE 702, 703 & 705.

# Hearsay/Child Custody Evaluation Reports

- TFC § 107.114 provides that “[d]isclosure to the court or the jury of the contents of a child custody evaluation report...is subject to the rules of evidence.”
- Is a court-ordered custody evaluation report a public record under TRE 803(8), because it is filed with the court clerk and contains factual findings resulting from an investigation made pursuant to authority granted by law?
- Hearsay contained within the custody evaluation report could be admitted under an exception to the hearsay rule, like state-of-mind exception, or as underlying data admitted to help the jury evaluate the expert’s opinion under TRE 705(d).
- Inadmissible portions should be redacted.

# Psychiatric Diagnoses (DSM-5)

- Diagnostic and Statistical Manual of Mental Disorders (5th Ed.).
- Published by the American Psychiatric Association.
- Created by psychiatrists, largely to the exclusion of psychologists.
- Based on patients' self-reporting their own mental and emotional states.
- Based on inter-rater reliability, not validity.
- There is little to support for translating mental disorders into custody recommendations.
- Cautionary Statement for Forensic Use of DSM-5 speaks of “dangers arising because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.”

# Example of High Inter-Rater Reliability

## Diagnostic Criteria (7 out of 10 required)

1. Female.
2. Thin.
3. Over age 40.
4. Lives alone or with unmarried sister(s).
5. Home located near the outskirts of the town.
6. No friends among local religious authorities.
7. Owns a broom.
8. Keeps a cat, not a dog.
9. Seen boiling ingredients in a cauldron.
10. Unexplained illness in the village.

Traditional Diagnosis: \_\_\_\_\_

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Traditional Diagnosis: **A witch!**

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Modern Diagnosis: **Schizotypal Personality Disorder**



# Mental Illness

- *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(c): if a custody evaluator observes a potentially undiagnosed "serious mental illness," as that term is defined in Ins. Code § 1355.001, 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."
- Ins. Code § 1355.001 lists as "serious mental illnesses" the following DSM disorders: (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.

**FINIS**