Rules Involving Children's Testimony in Family Court

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Index

Note: This paper addresses the primary rules and statutes that would apply to a child's testimony in a civil case under the Texas Family Code. Many of the evidence rules would apply in criminal cases but the Family Code provisions discussed below would not apply in a criminal case.

Special Thanks goes to the authors of one of the most comprehensive articles on this subject: Paula Larsen and Jan Marie DeLipsey, Ph.D., "The Child as a Witness" State Bar of Texas 2000 Advanced Family Law Seminar.

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When Should a Child Be Called as a Witness?

The general rule of thumb is that attorneys should not call children as witnesses in most divorce or child custody cases. Most parents and judges would think it harmful to a child to be called to testify in a case involving his or her parents. Children can be very unreliable witnesses and the prejudice against calling kids as witnesses can actually hurt the side who chooses that tactic.

A child, usually a teenager, might be called as a witness in these situations:

- A modification case involving a teenager who: wants to live primarily with a different parent, has changed her mind several times about which parent she wants to live with or has reasons for the change that might not appeal to the judge.

- A case in which one parent has made very serious accusations about the other parent about events that occurred in the home where the only witnesses to the events were the parents and the children.

- An enforcement action in which the only witness to the alleged violation (other than the respondent) is the child. This could occur in cases where a parent is alleged to have made disparaging comments about the other parent, failed to make the child available for a change of possession, or allegedly violated the so-called "morality" clause injunction.

In family cases involving allegations of sexual abuse, the child is much more likely to be called as a witness. If there is strong physical evidence of sexual assault or the mental health experts very strongly believe abuse occurred, the party seeking to prove the abuse may decide not to call the child as a witness, especially if there is a good CPS video or initial outcry witness. But, if there is little or no physical evidence, it may be necessary to call the child as the only eye witness to the assault. The party who is denying the abuse, might call the child to testify if he or she has provided implausible or inconsistent stories.

Attorneys must be very cautious about calling a child as a witness because most judges simply do not like to see it happen. The best practice is to bring up the issue with the judge in advance and explain why it is so vital that the child testify. This is an opportunity to gauge how the judge feels about it and to possibly put the blame on the other party for "forcing" the child to testify. A lawyer could, for example, explain to the judge that:

> *The only reason we feel compelled to call this 13-year-old child as a witness is this outrageous allegation the father is making against the mother that happened in the car with the child. The mother of course denies it ever happened, so the only other witness we can bring before you to confirm her story is the child and they know it! If he wants to admit his story is false, then we can avoid putting his daughter through the trauma of testifying*

As discussed below, there are a variety of alternatives to a child giving live testimony in court, so another reason to bring the matter of a child testifying up to the judge well before the hearing or trial is so there is time to take a deposition or arrange for an alternative to live testimony.

Subpoena a Child to Court?

How do you compel a child to appear in court? You could file a motion asking the court to order a parent or conservator to bring the child to court. Such a motion could state:

> *Petitioner moves the court to order Respondent to bring the child, Chloe Smith, age 14, to the hearing on temporary orders on January 15, 2014 at 9:00 for the following reasons....*

In re Z.A.T.,[1] says a lawyer should subpoena a child since TRCP 176.2(a) relates to a subpoena commanding a "person" to attend trial. The Code of Criminal Procedure Sec. 24.011(a) and the Juvenile Justice Code, Family Code Sec. 53.06(c), have specific provisions for a "subpoena directing a person having custody, care, or control of the child to produce the child in court." The Rules of Civil Procedure do not have any similar provision for getting children to court. The lead opinion in *Z.A.T.* suggests that a lawyer should serve a subpoena on the child. A concurring opinion suggests that if a child has an amicus attorney, the subpoena can be served on the amicus per TRCP 176.5(a), but how would the amicus attorney who does not have physical control of the child get the child to court?

However, if a subpoena is served on the child and the child does not appear in court, could a court hold the child in contempt or issue a writ of attachment? If the child is too young to drive, how is the child supposed to get to court on her own? Many lawyers serve subpoenas on the parent who has physical possession of the child and the subpoena directs the parent to bring the child to court. This procedure makes sense because parents have to be sued as next friends of their child and ordinarily children cannot file lawsuits in their own names because they are minors.

If there is time before the hearing or trial, it would seem that the best procedure is to file a motion with the court and obtain a court order that requires the child to be brought to court. The judge can provide specific guidance on who will bring the child, where the child will be at the courthouse and who can even talk to the child before his or her testimony.

The Alternatives to Live Testimony in Court

A child can tell his or her story to a judge or jury without having to testify live in court in front of the parents and an audience.

[1] *In re Z.A.T.*, 193 S.W.3d 197 (Tex. App.—Waco 2006, pet. denied).

Interview of a Child in Judge's Chambers

Section 153.009 of the Texas Family Code can be summarized as follows:

- A judge shall interview a child 12 years or older if requested by a party or amicus on the issue of which person shall determine the child's primary residence. One case noted that the duty to interview a child who is 12 and over is mandatory, but a judge's refusal to do so was not harmful error.[2]
- A judge may interview a child under age 12 about primary custody.
- A judge cannot interview a child in a jury trial on any issue that will be submitted to the jury.
- A judge may interview a child of any age on issues such as visitation, injunctions or other issues involving the child.
- A judge shall have a record made of an interview in chamber if a party or amicus requests it. Despite the use of "shall," it is not harmful error for a judge to refuse to have the interview recorded.[3]
- A judge may decide whether to allow attorneys, amicus attorney, guardian ad litem or attorney ad litem to be present in chambers for the interview.

[2] *In re C.B.*, No. 13-11-00472-CV (Tex. App.— Corpus Christi Oct. 10, 2012, no pet.)(memo. op.).

[3] *In re A.C.*, 387 S.W.3d 673, 676 (Tex. App.—Texarkana 2012, pet. denied).

- One unpublished appellate decision says the request to interview the child in chambers must be in writing. [4] Another unpublished case says Sec. 153.009 does not require the request for the interview to be in writing.[5]

The statute only requires a judge to interview a child twelve years or older about her, "wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence."[6] It is up to the judge to decide whether to interview a child under twelve on any subject or to interview a child twelve and over about any subject other than which parent decides the child's residence.[7] Appellate courts have held that it is not an abuse of discretion for a judge to refuse to interview a five year old[8] or to refuse to allow attorneys to be present when the child is interviewed.[9]

Each judge has a different style of interviewing children. Judges will typically decide whether to interview a child after they have heard most or all of the evidence in a case. Some judges do not like having the court reporter present because they often tell the child that the parents will never know what the child says. Sometimes those judges will exercise their right to not interview a child under twelve if a party insists on a record. A few judges want the amicus attorney to be present during the interview in chambers but not the attorneys representing the parents. Most experienced attorneys would strongly object to such a proposal. Attorneys in some courts can submit questions or outlines of suggested topics for the judge to discuss with the child.

Attorneys must check in advance on the procedures a particular court uses for interviews of children. In Harris County, children should never be brought to the courthouse without the advance approval of the judge. In Galveston County, the Associate Judge expects the child to be present already if he is expected to interview the child as part of a temporary orders hearing set that day.

Texas Family Code's Alternatives to Live Testimony

The Texas Family Code provides alternative ways to present a child's testimony other than taking the witness stand in the courtroom. These options are: playing a videotaped statement of a child under age thirteen made under certain conditions (i.e. a videotaped interview done by CPS), playing pre-recorded sworn testimony of a child recorded outside of the courtroom, or allowing the child to testify via close circuit television from a location other than the courtroom. If either of the latter two options for sworn testimony are used (pre-recorded video testimony or testimony via remote broadcast), then the child cannot be made to come to court to testify.[10] These options are available to the judge for a child of any age if the child's medical condition renders the child incapable of testifying in court.[11]

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[4] *In re S.L.L.*, No. 09-09-00429-CV (Tex. App.—Beaumont March 31, 2011, pet. denied)(mem. op.).

[5] *In re C.B.*, No. 13-11-00472-CV (Tex. App.—Corpus Christi 10/10/2012, no pet.)(memo. op.).

[6] Tex. Fam. Code Sec. 153.009(a).

[7] Tex. Fam. Code Sec. 153.009(a) and (b).

[8] *In the Matter of the Marriage of Stockett*, 570 S.W. 2d 151, 153 (Tex. Civ. App.— Amarillo 1978, no writ).

[9] *Kimery v. Blackstock*, 538 S.W.2d 503, 504 (Tex. Civ. App.—Waco 1976, no writ).

[10] Texas Family Code Sec. 104.005 provides:

> *§ 104.005. SUBSTITUTION FOR IN-COURT TESTIMONY OF CHILD. (a) If the testimony of a child is taken as provided by this chapter, the child may not be compelled to testify in court during the proceeding.*

[11] Tex. Fam. Code Sec. 104.005(b).

Recorded Interview of Alleged Abuse Victim Under Age 13

Section 104.002 of the Texas Family Code allows a videotaped statement of a child under age 13 made by CPS or the police to be played in court if certain conditions are met even though the child was not under oath and not subject to cross-examination. Sec. 104.002 says:

> *§ 104.002. PRERECORDED STATEMENT OF CHILD. 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.*

The Dallas Court of Appeals has held in a termination case, that Sec. 104.002 does not authorize the trial court to use the videotaped statement of the child but refuse to allow the child to testify.[12] A videotaped statement of a child was held to be inadmissible under a prior version of Sec. 104.002 because the interviewer used leading questions and because of the interviewer's suggestive non-verbal communication, such as approving, affectionate pats in response to desired answers and her active, demonstrative use of dolls coupled with her argumentative refusal to accept undesired answers from the child.[13]

Pre-Trial Videotaped Testimony of Child

The general rule concerning videotaped depositions would seem to apply as equally to child witnesses as it does to adult witnesses. Texas Rule of Civil Procedure 199.1(c) requires five days notice of a videotaped deposition and requires the party requesting the video deposition to make sure, "the recording will be intelligible, accurate and trustworthy." There is, however, a very specific statute on recording the videotaped testimony of a child that is, in many respects, different than a videotaped deposition. Section 104.003 requires a motion and court order and usually would keep the parents from being present unless the judge determines a parent is a "...person whose presence would contribute to the welfare and well-being of the child..." and Sec. 104.003(d) requires that the video operator be hidden. The statute states:

> *§ 104.003. PRERECORDED VIDEOTAPED TESTIMONY OF CHILD.*
> *(a) The court may, on the motion of a party to the proceeding, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court, the finder of fact, and the parties to the proceeding.*
> *(b) Only an attorney for each party, an attorney ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child, and persons necessary to operate the equipment may be present in the room with the child during the child's testimony.*
> *(c) Only the attorneys for the parties may question the child.*
> *(d) The persons operating the equipment shall be placed in a manner that prevents the child from seeing or hearing them.*
> *(e) The court shall ensure that:*
> *(1) the recording is both visual and aural and is*

[12] *In re: S.P.*, 168 S.W.3d 197, 209-210 (Tex. App.— Dallas 2005, no pet.).

[13] *James v. Texas D.H.S.*, 836 S.W.2d 236, 239-41 (Tex. App.—Texarkana 1992, no writ).

recorded on film or videotape or by other electronic means;
(2) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;
(3) each voice on the recording is identified; and
(4) each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom.

In contrast, a video deposition is simply noticed by one side and does not require a court order. A video deposition is usually done at a lawyer's office with a court reporter and a videographer who are very much visible to the witness. The parties are allowed to attend deposition whereas under Sec. 104.003(b), "[o]nly an attorney for each party, an attorney ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child, and persons necessary to operate the equipment may be present in the room with the child during the child's testimony."

As a practical matter, if one side in a custody case sent a notice of intent to conduct a videotaped deposition of a child, the other side would probably file a motion for protective order [from discovery] pursuant to Texas R. Civ. Proc. 192 and the deposition of the child would be automatically quashed pending a court hearing.

Remote Testimony by Closed Circuit Television

A specific statute allows for a child twelve or under who has been alleged to have been abused to testify remotely via closed circuit television. Texas Family Code Sec. 104.004 provides:

§ 104.004. REMOTE TELEVISED BROADCAST OF TESTIMONY OF CHILD.
(a) If in a suit a child 12 years of age or younger is alleged to have been abused, the court may, on the motion of a party to the proceeding, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the parties.
(b) The procedures that apply to prerecorded videotaped testimony of a child apply to the remote broadcast of testimony of a child.

In abuse cases, a trial court must balance the potential trauma to a child abuse victim testifying in open court against the right of the accused abuser to confront his accuser in court in deciding whether to allow testimony via closed circuit television under Sec. 104.004. The court should consider whether: (1) use of a video is necessary to protect the welfare of the child, (2) the trauma to the child comes from exposure to the abuser, rather than from the courtroom generally, and (3) the emotional distress to the child would be more than minimal.[14]

Other Technological Alternatives to Live Testimony

Advances in technology provide other alternatives to a child appearing live in court. For instance: a child could testify live via a videoconferencing program over the Internet, such as Skype; the child could be in her counselor's office with a notary who administers the oath; or the child could communicate with the judge via a webcam on the judge's computer so that the child cannot see the parents or the attorneys but can hear the questions asked by the lawyers. There is no specific rule that allows such a procedure, but if the parties agreed and a clear record was made, it is hard to imagine the child's testimony given in this fashion could be reversible error.

There are reported cases of telephonic testimony being used at trial, but presumably the parties agreed to that procedure.[15] One civil case involved a trial judge's refusal to allow a witness to testify in an injunction hearing by telephone, but there were many other reasons why the judge properly did not allow the witness to

[14] *In re R.V.*, 977 S.W.2d 777, 781 (Tex. App.—Fort Worth 1998, no pet.).

[15] *In re E.N.C.,* 384 S.W.3d 796 (Tex. 2012) (parent deported to Mexico testified via telephone in the parental rights termination trial); *Brown v. State*, 393 S.W.3d 308 (Tex. App.—Houston [1 Dist.] 2012, no pet.) (psychologist testified by telephone in a criminal case).

testify.[16] In civil cases involving inmates, the Texas Supreme Court has directed trial courts, in deciding whether the inmate must be brought to court, to consider whether an alternative means of testimony, such as testimony by telephone or "some other means" could be used. [17] The fact that the Supreme Court is telling trial judges to consider telephonic testimony by the inmate implies that it would be permissible, even when the inmate objects and insists on appearing live in court.

The Amicus Attorney as an Alternative to a Child Testifying

Appointment of an amicus attorney can provide an alternative to a child testifying in court. An amicus attorney appointed to represent a child cannot testify[18] but is given the duty to advocate the child's best interests in court.[19]

An amicus attorney can let the judge know indirectly what the child has to say via questions asked of the parents and other witnesses. Here is an example of the sort of questioning by an amicus attorney which clearly tells the judge what the child says about a particular incident:

Q [by amicus]: Sir, you understand I met with both of your children right after this incident at the baseball field, correct?

A: Yes I do.

Q: In fact, I visited both boys at your house on the Tuesday right after the incident, correct?

A: That's right.

Q: And I then talked to you about what happened that same evening I interviewed the children, right?

A: Yes.

Q: And you know full well that Billy's recollection of what happened at the ball field pretty well matches what his mother told the police officer and what she testified to yesterday, right?

A: That is what I understand.

Q: So, if Billy was sitting in the bleachers with his mother that Monday when you came up, he would have been in a position to see and hear what you each said to each other correct?

A: Yes.

Q: And he was there, right – Billy was sitting next to his mother in the bleachers?

A: Well, he was on the row behind her but he was right next to her, that's right.

Q: So, let me look at my notes of what Billy told me. Okay, here we go. So, you walked up to Mrs. Faulk and asked her to stop sending you the "damn e-mails over and over about the late child support," right?

A: I think I said hello to her and Billy first, but yes the issue of the e-mails and child support did come up.

Q: Well, you did mention the e-mails about child support first and you used curse words about those e-mails, loud enough for Bill sitting right there to hear, right?

A: Yeah, I probably did.

....

This example shows that an amicus attorney can use his or her questions of the witnesses to let a judge know precisely that the child has said without the amicus or child testifying. A lawyer for a parent could object to the amicus attorney testifying or in effect sharing the child's hearsay statements if the amicus goes to far. However, most judges will allow this sort of questioning by amicus attorneys.

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[16] *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.).

[17] *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003).

[18] Tex. Fam. Code Sec. 107.007(a)(4). An amicus may testify as to attorney's fees.

[19] Tex. Fam. Code Sec. 107.005(a).

An amicus attorney serves as an attorney for the child and an amicus,"...may not disclose confidential communications between the amicus attorney and the child unless the amicus attorney determines that disclosure is necessary to assist the court regarding the best interests of the child."[20]

The Custody Evaluation as an Alternative to Live Testimony

A court appointed custody evaluator gets to meet with the children and is almost always allowed by the judge to repeat in court what the children said to the evaluator. If the parties can afford a custody evaluation, it can provide a very powerful alternative to a child testifying in court.

Local Court Rules Concerning Child Witnesses

Lawyers should be familiar with both the local rules and the particular judge's policies before bringing a child to court to testify. For example, the Rules of the Judicial District Courts of Harris County, Texas Family Trial Division (amended effective October 31, 2003) provide:

> *3.5 Interview of Child / Child's Testimony. In all cases in which the court deems testimony of a child to be necessary or required by statute, the attorney wishing to have the child interviewed shall arrange a specific time through the court coordinator for the court to interview the child. No party is to bring a child to the courthouse to testify without prior arrangement pursuant to this rule, unless the child's attendance is required by court order including a writ of habeas corpus or attachment. The attorney or pro se party who is responsible for the child's attendance at court shall immediately notify the court coordinator of the child's presence in the courthouse. The child shall not be brought into the courtroom without the express consent of the judge or associate judge.*

Clearing the Courtroom When a Child Testifies

Texas Family Code Sec. 105.003(b) states, "On the agreement of all parties to the suit, the court may limit attendance at the hearing to only those persons who have a direct interest in the suit or in the work of the court." There is no clear statutory authority for a trial judge to clear the courtroom over a party's objection if a child testifies. However, it is hard to imagine a parent actually insisting on an audience if his or her child is required to testify in open court. It is also hard to see how it could be harmful error in a child custody case for a judge to clear the courtroom while a child testifies even if one parent objects.

Competency of a Child to be a Witness

A child, like any witness, must be competent in order to be allowed to testify. Texas Rule of Evidence 601(a) states in part:

> *RULE 601. COMPETENCY AND INCOMPETENCY OF WITNESSES*
> *(a) General Rule. Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:*
> *...*
> *(2) Children. Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.*

There is no precise age under which a child is automatically deemed incompetent to testify.[21] Children as young as three have been found competent to testify.[22]

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[20] Tex. Fam. Code Sec. 107.005(c).

[21] *Fields v. State*, 500 S.W.2d 500, 502 (Tex. Crim. App. 1973).

[22] *Clark v. State*, 659 S.W.2d 53 (Tex. App.—Houston [14th Dist.] 1983, no pet.).

In another case, a three-year-old was found to have insufficient intellect to relate events and was deemed incompetent to testify.[23]

In *Reyna v State*, the court said "Three elements should be considered by the court in determining whether a witness is competent to testify: (1) the competence to observe intelligently the events in question at the time of their occurrence, (2) the capacity to recollect the events, and (3) the capacity to narrate them, which involves the ability to understand the questions asked and to frame intelligent answers, and the ability to understand the moral responsibility to tell the truth."[24]

Inconsistencies or conflicts in a child's testimony do not render the child incompetent to testify but rather go to the probative value of the child's testimony.[25] An excellent 2000 State Bar of Texas Seminar paper stated:

> *Traditionally, inconsistencies in a child's testimony have been insufficient to render a finding that a young child is incompetent to testify. "Inconsistent statements" is a sweeping term and little attention has been devoted to understanding qualitative differences in "inconsistent statements." Inconsistent testimony regarding the number of times a child alleges to have been sexually abused is qualitatively different from inconsistent testimony regarding who allegedly committed the acts Nevertheless, the current practice in Texas appears to be to approach inconsistencies in statements similarly, preferring to address the issue in terms of weight afforded to the given testimony The soundness of continuing this practice should be re-examined given the research regarding contextual vulnerability of young children to suggestive influences Even if testimony cannot be excluded on inconsistent statements alone, this issue is at least probative when considering the competency question.*[26]

A child's ability to understand what telling the truth means is often caught up in the question about competency,[27] although that really seems to be an inquiry under Tex. R. Evid. 603 instead of 601. Texas Rule of Evidence 603 regarding oath and affirmation says, "Before testifying, every witness shall be required to declare that the witness testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."

There is no set procedure in court for determining whether a child is competent. Rule 601(a) presumes that every person is competent to be a witness. The burden of proof is on the person alleging a witness is not competent.[28] Nonetheless, at trial, the attorney who calls the child as a witness will usually begin with questions designed to show the child is competent. In some courts, the judge prefers to conduct the questioning of a child to establish competency. The party who opposes the child's testimony could file a pre-trial motion to strike the child's testimony so that the matter could be resolved before trial begins.

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[23] *Rhea v. State*, 705 S.W.2d 165 (Tex. App. —Texarkana 1985, pet. ref'd).

[24] *Reyna v. State*, 797 S W 2d 189, 191-192 (Tex. App.—Corpus Christi 1990, no pet.).

[25] *Fields v. State*, 500 S.W.2d 500, 503 (Tex. Crim. App. 1973).

[26] Paula Larsen and Jan Marie DeLipsey, Ph.D., "The Child as a Witness" State Bar of Texas 2000 Advanced Family Law Seminar, page 4.

[27] E.g., *Hollinger v. State*, 911 S.W.2d 35, 39 (Tex. App.—Tyler 1995, pet. ref'd). (a three-year-old child was allowed to testify even though he was confused about color and indicated he would not get in trouble for lying, because he has found to have sufficient intellect and knew the difference between telling lies and telling the truth).

[28] *Handel v. Long Trusts*, 757 S.W.2d 848, 854 (Tex. App.— Texarkana 1988, no writ).

Questions directed to a child to establish the child's competency (or lack thereof) should address all of these topics:

- Does the child right now understand the difference between telling the truth and lying as well as fantasy versus reality?
- At the time the events occurred was the child competent to observe the events intelligently?
- Does the child currently have the capacity to recollect the events?
- Does the child currently have the capacity to narrate the events in court? This question involves the ability to understand the questions asked and to frame intelligent answers.

To establish the child's competency, a mental health worker, parent, or teacher might be called to testify about each of these topics before the child is called as a witness.

Experts Repeating What The Child Said

One possible way to get around the need to call a child as a witness in court is to have an expert witness, usually a psychologist or professional counselor, testify about what the child told the expert. This could be allowed because of an exception to the hearsay rule (see discussion below) or because of Texas Rule of Evidence 705, which states:

> *RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION*
>
> ***(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.***
>
> . . . .
>
> ***(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.***

Consider, for example, a psychologist who believes a young child was molested. If the psychologist talked to the child's teacher who related comments the child made, those comments from the child to the teacher would ordinarily be inadmissible hearsay. However, Rule 705(a) says that the expert may on direct examination disclose the facts that support her opinion. Rule 705(d) says otherwise inadmissible facts shall be excluded if the court finds that child's comments to the teacher are being used for a reason other than explanation or if the value of the comments are unfairly prejudicial in a way that outweighs their value as support for the expert's opinion. In family court where judges tend to "err on the side of caution" in protecting children and there is a general understanding that rules of evidence are relaxed in cases involving children, Rule 705 is going to, more often than not, allow the expert to repeat otherwise inadmissible hearsay and other information if it supports the expert's opinion.

The argument against allowing the expert to disclose the underlying, inadmissible facts she relied on was made by Justice Frank Maloney, who wrote, "One of the greatest dangers in allowing otherwise inadmissible evidence under Rule 705 is that the jury will consider the facts and data as substantive evidence rather than as merely constituting the underlying basis for the expert's opinion."[29]

One example of an expert repeating out of court hearsay he relied on to reach his opinions involved a medical malpractice case. There, the defense expert was a pediatrician who had a radiologist examine the child's CT scan and the radiologist thought it was normal. The expert in court testified that he normally had radiologists

[29] *Cole v. State*, 839 S.W.2d 798, 815 (Tex. Crim. App. 1990)(Maloney, J. concurring on rehearing).

review CT scans and said he relied on the radiologist's finding in order to reach his opinion being offered in court. The plaintiff objected to this portion of the expert's testimony as hearsay, and the trial court overruled his objection. You can imagine the plaintiff's attorney arguing how unfair it would be allow the radiologist's opinion in to evidence since the radiologist was not on the stand, his credentials, experience and methodology were not known and he was not subject to cross examination. The out of court radiologist relied on by the pediatrician expert had not been designated as an expert and his report had never been produced. Nonetheless, the Court of Appeals affirmed and said:

> *Although there is some disagreement among the authorities concerning the extent of Evidence Rules 703 and 705, we believe the correct view is that those rules, as amended, now allow a testifying expert to relate on direct examination the reasonably reliable facts and data on which he relied in forming his opinion, subject to an objection under TEX. R. EVID. 403 that the probative value of such facts and data is outweighed by the risk of undue prejudice..... The trial court, in the exercise of its sound discretion, may exclude evidence of those facts and data if, for any reason, those facts and data are more prejudicial than probative. The details of those facts and data may be brought out on cross-examination pursuant to TEX. R. EVID. 705(a), 705(b), and 705(d). Moreover, the opponent of such evidence may ask for a limiting instruction if he fears the evidence may be used for a purpose other than support for the testifying expert's opinion. TEX. R. EVID. 705(d); see also TEX. R. EVID. 105.*
>
> *The evidence of Dr. Wagner's underlying opinion was admissible because Dr. Harberg testified that he relied on Dr. Wagner's opinion in forming his own opinion. The trial court was not required to make a formal balancing test under TEX.R. EVID. 403 because Stam did not make a Rule 403 objection.* [30]

On the other hand, appellate courts have noted that the use of the permissive word "may" in rule 705 does not indicate an absolute right of the expert to disclose all of the facts and underlying data under all circumstances.[31]

In an asbestos injury case, for example, a trial court was upheld when it would not allow a defense expert to describe a negative pathology report he had read since the report was not in evidence and the pathologist was not a witness at trial.[32] As one court of appeals said:

> *Appellants are correct that some of Dr. Leonard's testimony concerning the review of the ten-slide group by persons in his lab was based on hearsay. "The testimony of an expert may be admissible while at the same time the facts or data underlying that testimony may be inadmissible.... [T]he use of the permissive word 'may' [in TRE 705] does not indicate an absolute right of the expert to disclose all of the facts and underlying data under all circumstances." **While such supporting evidence is not automatically admissible because it is supporting data to an expert's opinion, neither is it automatically excludable simply because it is hearsay.** The decision whether to admit or exclude evidence is one within the trial court's sound discretion.*[33]

A lawyer should always object under Rules 403 and 705(d) if the other side tries to admit otherwise inadmissible evidence through an expert witness and argue to the trial judge. In jury trials, a lawyer should request a limiting instruction if the expert is allowed, over objection, to repeat hearsay upon which her opinions are based.

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[30] *Stam v. Mack*, 984 S.W.2d 747, 750 (Tex. App.—Texarkana, 1999 no pet.)(citations omitted).

[31] *North American Refractories Company v. Easter*, 988 S.W.2d 904, 916 (Tex. App.—Corpus Christi 1999, pet. denied).

[32] Id..

[33] *Kramer v. Lewisville Memorial Hosp.*, 831 S.W.2d 46, 49 (Tex. App.—Fort Worth 1992), *aff'd* 858 S.W.2d 397 (Tex. 1993) (citations omitted)(emphasis added)**.**

Oddly enough, Rule 705 may also allow a lawyer to bring out inadmissible hearsay by questioning an expert about information she did not consider in reaching her opinions. In *Wheeler v. State*, the defense called a CPS worker, Ms. Brumley, who had performed a risk assessment on the defendant and concluded he was not a danger to his own children. The prosecutor was allowed to treat the CPS worker as an expert and question her about hearsay evidence she did not consider in reaching her conclusion:

> *However, the defense presented Ms. Brumley as a species of expert witness, one who had conducted a CPS investigation and "did not find any risk of abuse or neglect in the home." Therefore, the State was entitled to cross-examine Ms. Brumley as it did for two independent but related reasons. First, the opposing party is always entitled to cross-examine an expert witness concerning the facts and data upon which that expert relied in forming her conclusion or opinion. Once Ms. Brumley testified to her "determination," the State was entitled to inquire into the circumstances of that investigation, the mode under which she conducted her inquiry, the people she interviewed, and the materials upon which she relied.* ***The State was also entitled to question Ms. Brumley about information of which she was aware, but upon which she did not rely.***
>
> *In the present case, the State specifically asked Ms. Brumley what information she relied on for her official report. She responded, inter alia, that appellant told her "that he love[d] both of his children very much and would never hurt them or anyone else." When asked whether she had received information that appellant may have molested his niece several years earlier, Ms. Brumley stated that a law enforcement officer had told her "something like that," but it was hearsay. She stated that she might have asked appellant or his wife about it, but she made no attempt to investigate that incident or contact the child. She closed her file. When asked if she would have changed her opinion had she been able to verify the earlier molestation, Ms. Brumley stated that she "possibly" would change her opinion that appellant was not a risk.*
>
> *This was permissible cross-examination into the basis for an expert witness's opinion. An opposing party is entitled to ask an expert witness if her opinions or determinations would change if the data upon which she relied changed. Thus, the trial court did not abuse its discretion in permitting the State to inquire fully into the basis of Ms. Brumley's professional opinion. It is true that this cross-examination would not, by itself, have opened the door to extrinsic evidence of the extraneous misconduct, but it certainly did allow a full inquiry into facts and data upon which Ms. Brumley relied and her explanation as to why she did not rely upon other information.* [34]

In this criminal case, Rule 705 allowed the State to bring out the otherwise inadmissible allegation that Mr. Wheeler had allegedly molested his niece years before by questioning the defense expert about the data she did not consider or rely on. In a child custody case, one could imagine the mother's attorney questioning the court appointed psychologist about all of the hearsay allegations she did not consider in concluding the father should have primary custody of the child.

Hearsay

Unfortunately, perhaps the least understood rule of evidence involves the general rule that hearsay is not admissible. Some lawyers and judges think a witness in court can never repeat what someone outside of court and said — which is simply not true.

Rule 801 defines hearsay and provides a list of different types of out-of-court statements that are not considered hearsay. Rule 803 provides a long list of circumstances under which hearsay is still permitted into evidence. The truth is, a lawyer who is familiar with the hearsay rules should usually get an out of court statement admitted. The problem often involves educating the judge about the hearsay rules.

Is The Statement Hearsay as Defined by Rule 801(d)?

"Hearsay" is defined as, "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

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[34] *Wheeler v. State*, 67 S.W.3d 879, 883 (Tex. Crim. App. 2002).

matter asserted."[35] Consider a ten-year-old who returns home from a weekend visit with his father and tells his mother, "I don't have to listen to you because when I turn 12 I can decide to live with my Dad." If the mother testifies about what the child said, that is not hearsay because the mother is not trying to prove the child does not have to listen to her or that the child can decide to live with his father when he turns 12. The out-of-court statement is not being offered to prove the truth of the matter asserted, therefore it is not hearsay.

Nonverbal conduct can be hearsay if it is intended to be an assertion.[36] For example, a police officer's testimony that the shooting victim, when shown a photograph of the defendant, made a shooting motion by cocking her thumb with her finger pointed out was held to be inadmissible hearsay because it involved a nonverbal assertion.[37] A child's nod "yes" or pointing at the perpetrator would be considered hearsay.

Is the Statement Not Considered Hearsay under Rule 801(e)?

Rule 801(e) paradoxically says what hearsay statements are not considered hearsay:

- Rule 801(e)(1)(D): A prior recorded statement of a child taken and offered in accordance with Code of Criminal Procedure 38.071. This exception applies only in criminal cases and it allows admission of an oral statement made by a child victim under the age of thirteen before an indictment is returned if the court determines that the statement was taken by a neutral individual and the interview explored the factual issues of identity or occurrence of the event fully and fairly.

- Rule 801(e)(1)(B): A prior statement that is consistent with the declarant's testimony which is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. If for example, a child told a teacher in February about the mother passing out drunk and then was interviewed by CPS in July, the earlier statement to the teacher may well be admissible to show the child did not make up the story told to CPS that summer. This is one very confusing aspect of the hearsay rules, since the statement to the teacher is hearsay under Rule 801(d) but then it is magically made not hearsay under Rule 801(e) simply because of the context or reason that statement was made.

- Rule 801(e)(1)(A); A prior statement under oath that is inconsistent with the witnesses' testimony. If the child has testified under oath before appearing in court to testify, her prior testimony could be used if it is inconsistent with what she testifies to in court. Since children rarely testify before appearing in court, this is not a very likely scenario.

- Rule 801(e)(1)(C): A statement of identification of a person made after perceiving the person. A teacher would be allowed to testify that when the uncle walked into the classroom, Sally said, "that's my uncle who plays the tickle game."

Even If the Statement Is Hearsay, Does an Exception Apply?

There are many exceptions to the rule that hearsay is not admissible. Those exceptions which most frequently apply to cases involving allegedly abused children are:

Hearsay Statement of Child Abuse Victim

A statement made by a child under age 13 that describes abuse is admissible if the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and either the child is available to testify in court or the use of the statement instead of the child's testimony is necessary to protect the welfare of the child Texas Family Code Sec. 104.006 provides:

> ***§ 104.006. HEARSAY STATEMENT OF CHILD ABUSE VICTIM.***
> *In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or*

[35] Tex. R. Evid. 801(d).

[36] Tex. R. Evid. 801(a).

[37] *Graham v. State*, 643 S.W.2d 920, 926-7 (Tex. Crim. App. 1981).

> *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.*

One Court of Appeals has held that Sec. 104.006 allows a videotape in lieu of a child's testimony only if the trial court hears.... "evidence regarding the specific child witness, that child's welfare at the time of trial, and the circumstances making it necessary to use the statement rather than the child's testimony in court or by alternative means such as closed circuit television."[38]

Another decision said Family Code Sec. 104.006 should be applied much like Code of Criminal Procedure art. 38.072 and stated:

> *Similarly, article 38.072 of the code of criminal procedure provides a mechanism that requires that the trial court determine on a case-by-case basis if outcry testimony reaches the level of reliability required to be admissible as an exception to the hearsay rule. Indicia of reliability that a trial court may consider under 38.072 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 the 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.* [39]

The reported cases on Sec. 104.006 can be summarized as follows:

- It is mandatory that the court conduct the hearing to determine if the statement is reliable and if the child is available to testify or whether the use of the statement is necessary to protect the welfare of the child.[40]

- In a bench trial, the court can hear all or most of the evidence at trial including the statement and then decide if it is reliable. If it is found to be unreliable, the trial judge can exclude it as hearsay and not consider it. In other words, there is no absolute requirement in a bench trial that there first be a hearing in the middle of a trial to determine if the statement should be admitted.[41]

- Sec. 104.006 requires the court to find that the statement is reliable and either (1) the child testifies or is available to testify, 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

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[38] *In re S.P.*, 168 S.W.3d 197, 208 (Tex. App.—Dallas 2005, no pet.).

[39] *In re M.R.*, 243 S.W.3d 807, 813 (Tex. App.—Fort Worth 2007, no pet.).

[40] *In re K.L.*, 91 S.W.3d 1,16 (Tex. App.—Fort Worth 2002, no pet.); *In re E.A.K,* 192 S.W.3d 133, 146 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

[41] *In re K.L.*, 91 S.W.3d 1,16 - 17 (Tex. App. —Fort Worth 2002, no pet.).

child. If the child is available to testify, the court does not need to find that use of the statement is necessary to protect the child's welfare.[42]

- Sec. 104.006 applies to statements made when the child was twelve years of age or younger. It does not matter that the child is over age twelve when the case goes to trial.[43]

- A written report setting forth an interview of a child is not considered reliable if the report shows it was prepared by one CPS worker but another CPS employee actually did the interview, if the report says the interview was videotaped but no such tape was offered, the report does not say who was present, the report does not set forth what the questions were or whether it was determined whether the child knew the difference between the truth and lies.[44]

- In a termination case where CPS said it knew where the child in its custody was but did not offer to make her available to testify and both parents asked for the child to be present for questioning, it was error to admit the videotape of the child without evidence that use of the tape was necessary to protect the welfare of the child.[45]

- A trial court erred in admitting a recorded video of the child who was seven years old at the time the statement about sexual abuse was made because the trial court heard no evidence about the child's welfare at the time of trial (16 months after the video was made) or her ability to testify at trial. The only reason CPS had to use the video was the child's age. The fact that the judge had a child of his own that was seven was no evidence of this particular child's welfare or her ability to testify. The Court of Appeals reversed the termination of the parental rights of both parents based on the error made in admitting the child's videotaped statement.[46]

- There were sufficient indications a child's statement was reliable where the child knew the difference between the truth and lies, many of his statements about sexual abuse were volunteered, and the child described sexual acts a five year old is unlikely to know anything about. Additional indications of reliability included the fact that the two siblings told similar stories, and there was physical evidence of anal injury, and there was no motive for the child to lie or fabricate the abuse. [47]

- Another case provides examples of indications that a child's statement were reliable: the child's counselor testified that statements were consistent as told on multiple occasions and the children had not seen each other for extended periods of time; the stories told by the children disclosed information about sex that children of this age would not normally know; the stories told by the children were consistent with the physical findings made by the SANE nurse and the children were acting out sexually after their removal from their parents.[48]

Present Sense Impression

Rule 803(1) provides a exception to the hearsay rule:

> *(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.*

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[42] *In re K.L.*, 91 S.W.3d 1,16 (Tex. App.—Fort Worth 2002, no pet.).

[43] *In re K.L.*, 91 S.W.3d 1,16 (Tex. App.—Fort Worth 2002, no pet.).

[44] *In re EAK*, 192 S.W.3d 133, 147 (Tex. App.—Houston [14th Dist.] 2006).

[45] *In re S.P.*, 168 S.W.3d 197 (Tex. App.—Dallas 2005, no pet.).

[46] *In re S.P.*, 168 S.W.3d 197 (Tex. App.—Dallas 2005, no pet.).

[47] *In re P.E.W.,* 105 S.W.3d 771 (Tex. App.—Amarillo 2003, no pet.).

[48] *In re D.D.D.K.*, No. 07-09-0101-CV (Tex. App.—Amarillo Dec. 1, 2009, no pet.)(mem. op.).

An example of a statement that would almost surely fall within the present sense impression statement would be a statement by a child who is talking on the phone with her mother that,"silly Daddy is walking around naked."

Most appellate cases that address the application of the various hearsay rules are criminal cases. The Court of Criminal Appeals has frequently addressed the "present sense impression" hearsay exception. In one case, the court explained the rationale for the rule as follows:

> *The rule is predicated on the notion that "the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes." It is "instinctive, rather than deliberate." If the declarant has had time to reflect upon the event and the conditions he observed, this lack of contemporaneity diminishes the reliability of the statements and renders them inadmissible under the rule. Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious "thinking-it-through" statements enter the picture, the present sense impression exception no longer allows their admission. "Thinking about it" destroys the unreflective nature required of a present sense impression*.[49]

A statement as late as 30 minutes after the event that was witnessed can fall under this exception.[50]

Statements of opinion can also fall within the "present sense impression" hearsay exception. For example, one of the first Texas cases to recognize the "present sense impression" exception to the hearsay rule was *Houston Oxygen Co. v. Davis*.[51] There, the passenger of a car going down the highway testified that he saw another car pass by going "sixty to sixty-five miles" an hour and that it was "bouncing up and down in the back and zig zagging." The passenger then testified that the driver of the car turned to him and said that "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up." Sure enough, five miles down the road the speeding car hit another vehicle and caused the plaintiff's injuries. The Texas Supreme Court held that the passenger's recitation of what the driver said to him at the time the speeding car passed them (even though it was clearly an opinion and not an observation of fact) was admissible as a present sense impression because "[i]t is sufficiently spontaneous to save it from the suspicion of being manufactured evidence. There was no time for a calculated statement."[52]

Excited Utterance

Rule 803(2) sets forth yet provides another hearsay exception:

> *(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.*

An example of an admissible "excited utterance" of a child would be a grandmother's testimony that an agitated, crying child said, "This summer I saw mommy slap Billy really hard and then laugh at him when he cried."

Appellate cases and authors on the subject agree that the excited-utterance exception is broader than the present-sense-impression exception; and that, under the excited-utterance exception, the startling event may trigger a spontaneous statement that relates to a much earlier incident.[53]

For the excited-utterance exception to apply, three requirements must be shown: (1) the statement must be the product of a startling occurrence that produces a state of nervous excitement in the declarant and renders

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[49] *Fischer v. State*, 252 S.W.3d 375, 381 (Tex. Crim. App. 2008).

[50] A statement made 30 minutes after a burglary was deemed admissible under Rule 803(1) in *Harris v. State*, 736 S.W.2d 166, 167 (Tex. App.—Houston [14th Dist.] 1987, no pet.).

[51] 139 Tex. 1, 161 S.W.2d 474 (1942) .

[52] *Id*. at 6, 161 S.W.2d at 476 .

[53] *McCarty v. State*, 257 S.W.3d 238, 240 (Tex. Crim. App. 2008).

the utterance spontaneous; (2) the state of excitement must still so dominate the declarant's mind that there is no time or opportunity to contrive or misrepresent; and (3) the statement must relate to the circumstances of the occurrence preceding it.[54]

The reason for this hearsay exception has been explained as follows:

> *The excited utterance exception to the hearsay rule is founded on the belief that a statement made as a result of a startling event or condition is involuntary and does not allow the declarant an adequate opportunity to fabricate, thereby ensuring the trustworthiness of the statement. In other words, the statement is trustworthy because it represents an event speaking through the person rather than the person speaking about the event. . . . . Factors the court may consider to determine whether a statement qualifies as an excited utterance are the lapse of time between the event and declaration, and whether the statement is made in response to a question. However, these factors are not dispositive. The critical factor is whether the emotions, excitement, fear, or pain of the event still dominated the declarant at the time of the statement. If the statement is made while the declarant is still in the grip of emotion, excitement, fear, or pain and the statement relates to the exciting event, it is admissible even after an appreciable amount of time has elapsed.*[55]
>
> (Citations omitted)

The many cases applying Rule 803(2) seem to put more emphasis on whether the speaker was still upset rather than on how much time had passed since the event. For example, a victim's statement that the defendant was going to kill her was deemed admissible even though the statement was made sixteen hours after the assault because the victim "broke down" and was crying when asked what had happened.[56] In another case, the passage of four days between a knife attack and the victim's statement was held admissible as an excited utterance since the victim was in and out of consciousness.[57] The court stated,"Accordingly, we hold that the underlying theory of an excited utterance's reliability--inability to reflect or fabricate--is the principle to apply, rather than a rigid requirement that the excitement be continuous under all circumstances."[58]

The Texas Court of Criminal Appeals explained Rule 803(2) as follows:

> *The basis for the excited utterance exception is "a psychological one, namely, the fact that when a man is in the instant grip of violent emotion, excitement or pain, he ordinarily loses the capacity for reflection necessary to the fabrication of a falsehood and the 'truth will come out.'" In other words, the statement is trustworthy because it represents an event speaking through the person rather than the person speaking about the event.*
>
> *In determining whether a hearsay statement is admissible as an excited utterance, the court may consider the time elapsed and whether the statement was in response to a question. However, it is not dispositive that the statement is an answer to a question or that it was separated by a period of time from the startling event; these are simply factors to consider in determining whether the statement is admissible under the excited utterance hearsay exception.*
>
> *The critical determination is "whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event" or condition at the time of the statement. Stated differently, a reviewing court must determine whether the*

[54] *Kesaria v. State*, 148 S.W.3d 634, 642 (Tex. App.—Houston [14th Dist.] 2004, pet. filed).

[55] *Oveal v. State*, 164 S.W.3d 735, 739 - 740 (Tex. App.—Houston [14th Dist] 2005, pet. ref'd).

[56] *Jaggers v. State*, 125 S.W.3d 661, 671 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

[57] *Apolinar v. State*, 106 S.W.3d 407 (Tex. App.—Houston [1st Dist.] 2003), *aff'd on other grounds*, 155 S.W.3d 184 (Tex. Crim. App. 2005).

[58] *Id*. at 418.

statement was made "under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection."[59]

In a case involving sexual abuse of a very young child, an aunt told the child in the bath tub to wash the rest of her body. The child became upset and refused to wash her genital area, saying it hurt and burned. When the aunt asked why she was hurting, the child pointed to her genitals and said the alleged perpetrator had touched her and stuck his finger inside her. The aunt testified that she removed the child from the bathtub and laid her on the bed. She examined the child's genitals, which appeared red, swollen, and irritated. When the aunt tried to question the child about the pain, the child was so upset that she could not speak. The child eventually calmed down enough to talk, but the child remained "scared, crying[,] and upset."

The Court of Appeals held:

The plain language of Rule 803(2) provides that either a startling event or condition may provoke a statement that is admissible as an excited utterance. See Tex.R. Evid. 803(2). Under the circumstances, the startling condition that evoked A.T.'s statements could have been the pain she was experiencing. At the time of A.T.'s statements, she was only four years old. Undoubtedly, some events or conditions that may not be startling to an adult may be overwhelming for a child. It would be reasonable to infer that a four year-old child would be scared and upset by a burning sensation in her female sexual organ.

The record also reflects that A.T. was still "scared, crying[,] and upset" when she told her aunt and father about the abuse. Because the child was still dominated by the emotions arising from the frightening condition, her statements were made before she had a chance to fabricate and are thus sufficiently trustworthy.[60]

Then Existing Mental, Emotional or Physical Condition

Texas Rule of Evidence 803(3) states:

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, 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 execution, revocation, identification, or terms of declarant's will.

As one commentator wrote:

...the statement "My tooth hurts" is admissible while the statement "Yesterday, my tooth hurt" is not. The rule does not permit the admission of statements offered to prove the cause of a physical ailment or condition. Thus, if the declarant tells his wife "My tooth hurts because Joe kicked me in the mouth," only the first phrase is admissible.[61]

In one case, a woman watching her four-year-old son play with a girl overheard the girl say, "[G]ive me your doll, and I'll show you with mine how daddies sex their little girls." The Court of Appeals upheld admission of the statement based on Rule 803(3) stating:

This testimony was not offered to prove the truth of the declarant's statement as to how daddies "sex their little girls." Rather, it was offered to show that J. made the statement which was relevant to the issue of her emotional well-being and state of mind. Hence, the statement clearly falls within the hearsay exception, TEX. R. CIV. EVID. 803(3), as it was a statement of J.'s then existing emotional condition and state of mind. [62]

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[59] *Zuliani v. State*, 97 S.W.3d 589, 595-6 (Tex. Crim. App. 2003).

[60] *Couchman v. State*, 3 S.W.3d 155, 159-160 (Tex. App.—Forth Worth 1999, pet. ref'd).

[61] Cochran, Texas Rules of Evidence Handbook, Sixth Edition 2005-06, page 829.

[62] *Posner v. Dallas County Welfare*, 748 S.W.2d 585, 587 (Tex. App.—Dallas 1980, no writ).

Statements for Purpose of Medical Diagnosis

Rule 803(4) provides an often surprising exception to the general rule that hearsay is not admissible:

> *(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.*

Rule 803(4) is premised on the declarant's desire to receive an appropriate medical diagnosis or treatment, and the assumption that the declarant appreciates that the effectiveness of the diagnosis or treatment may depend on the accuracy of the information provided.[63]

In a termination case, the children told a nurse that their father had sexually assaulted them and the court of appeals held that the statement was admissible under Rule 803(4).[64] Statements made by a child to a nurse conducting a sexual assault exam were found to fall under Rule 803(4) even though they are not medical doctors.[65]

Surprisingly, counselors and therapists have been included among those providing "medical diagnosis or treatment." Texas appellate courts have allowed licensed professional counselors and psychotherapists to testify under Texas Rule of Evidence 803(4). [66]

Taylor v. State involved statements made by a child to a psychologist about a sexual assault and the Houston First Court of Appeals held that Rule 803(4) applies to mental health professionals.[67]

The court in *Gohring v. State* applied Rule 803(4) and held, "the trial court could have reasonably determined from the evidence that a drama therapist working under the supervision of a licensed psychologist for the purpose of providing psychological treatment, was a 'medical person.' "[68] *Gohring* also noted the trial court did not err in admitting this evidence under Rule 803(4) because it would be a reasonable inference that the high school student would have understood she was seeing the drama therapist for the purpose of medical treatment in connection with the abuse, and that her statements to the therapist were made for the purpose of medical diagnosis or treatment.

Puderbaugh v. State involved a child who saw a social worker for therapy and Rule 803(4) was held to allow the social worker to relate the child's hearsay statements made for the purpose of "medical diagnosis."[69] A social worker/psychotherapist was allowed to repeat statements made by an adult victim of sexual harassment made during therapy under TRE 803(4) in another case.[70] In an unpublished decision from the Houston 14th Court of Appeals, a seven year old's statements made to her psychologist describing her abuse and

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[63] *Taylor v. State*, 263 S.W.3d 304 (Tex. App.—Houston [1 Dist.] 2007)*, aff'd*, 268 S.W.3d 571 (Tex. Crim. App. 2008)

[64] *In the Interest of L.S.*, 748 S.W.2d 571 (Tex. App.—Amarillo 1988, no writ).

[65] *Beheler v. State*, 3 S.W.3d 182 (Tex. App.—Fort Worth, 1999, pet. ref'd).

[66] *Taylor v. State*, 263 S.W.3d 304, 311 (Tex. App.—Houston [1 Dist.] 2007), *aff'd,* 268 S.W.3d 571 (Tex. Crim. App. 2008); *Wilder v. State*, 111 S.W.3d 249, 256-57 (Tex.App.—Texarkana 2003, pet. ref'd); *Puderbaugh v. State*, 31 S.W.3d 683, 685 (Tex. App.—Beaumont 2000, pet. ref'd); *Gohring v. State*, 967 S.W.2d 459, 461 (Tex. App.—Beaumont 1998, no pet.).

[67] *Taylor v. State*, 263 S.W.3d 304, 311 (Tex. App.—Houston [1 Dist.] 2007), *aff'd,* 268 S.W.3d 571 (Tex. Crim. App. 2008).

[68] *Gohring v. State*, 967 S.W.2d 459, 461 (Tex. App.—Beaumont 1998, no pet.).

[69] *Puderbaugh v. State*, 31 S.W.3d 683, 685 (Tex. App.—Beaumont 2000, pet. ref'd).

[70] *Syndex Corp. v. Dean*, 820 S.W.2d 869, 973-4 (Tex. App.—Austin 1991, writ denied).

identifying her abuser were held to be correctly admitted under Rule 803(4).[71]

How to Lay the Predicate for a Child's Hearsay Statement?

Most judges reflexively sustain "hearsay" objections as soon as a witness is asked,"what did the child say?" The best technique is to let the judge know in advance that a hearsay exception is coming up and, if needed, educate the judge about how that exception works. Here is an example:

Q: *What time did the kids get home from their father's house that Sunday evening?*

A: *About 6:20, even though it should have been 6:00, he was running late as usual.*

Q: *And did the children talk to you about their visit with their father once they returned?*

A: *Yes.*

Q: *Judge - I am getting ready to elicit that I think clearly falls within the excited utterance and present sense impression exceptions to the hearsay rule, and I am tendering to the court a very short trial brief on the subject which I shared with opposing counsel this morning.*

[Counsel approaches bench and hands two-page trial brief to the Judge.]

Q: *Ma'am, let me ask you specifically about your 11 year old daughter, Judy, the one you described as usually being quiet and withdrawn when she returned on visits from her father. How would you describe Judy's emotional state as soon as she walked in your front door that Sunday evening after her father returned her?*

A: *She was red faced, excited, furious, I would even say hopping mad.*

Q: *How could you tell that?*

A: *She really was red faced, she was shaking her head and had her fists clenched and she had a look on her faced that was both angry and pained and I would say even disgusted. She was agitated like I have never seen her.*

Q: *At this point, without telling the judge what Judy said, did she say something in that emotional state?*

A: *Yes.*

Q: *As far as you know, is the statement Judy repeated true?*

A: *No it is absolutely not true..*

Q: *Was Judy extremely upset when she made this statement?*

A: *Oh yes she was.*

Q: *And, again without saying what Judy told you, is what Judy said even a statement of fact or was it a question?*

A: *Actually, it was two questions asking me if something was true or not.*

Q: *So, what did Judy ask you in this emotional, upset state right after being returned home by her father?*

Q: *[Mr. Wright] Objection, Your Honor, they are clearly going into what the child said and that is hearsay.*

Q: *[Ms. Williams] Your Honor, I am only laying the predicate for what you can tell from my trial brief we contend is (1) not hearsay because it is not offered to prove the truth of the matter asserted, and (2) even if it is hearsay it falls under the excited utterance and present sense impression exceptions to the hearsay rule.*

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[71] *Hinkle v. State*, 2000 WL 490744 (Tex. App.—Houston [14th Dist.] 2000).

Court: Based on this predicate, and these cases Ms. Williams has cited, I am overruling that objection. You may answer.

A: Judy asked me, "What does it mean when Dad says you are a sloppy whore?" and she asked me,"Are you really sleeping with men all over town, even Billy's coach, Mr. Alvarez?"

Q: [Mr. Wright] Again, I have to object, that is clearly hearsay.

Q: [Ms. Williams] Your Honor, we are only trying to show that the child asked these questions of her mother right after she was returned by her father. I am obviously not trying to prove what the child asked about is true – it in fact is outrageously untrue. As to the child's statement that the father says the mother is a sloppy whore, to the extent that question from the child is offered to prove that the father made that statement, what the child said falls under the the excited utterance and present sense impression exceptions to the hearsay rule.

Court: Overruled.

The key is to lay the predicate for the hearsay exception, or the argument that the statement is not even hearsay, in advance before asking the witness to repeat what the child said. This requires the attorney to identify what might appear to be objectionable hearsay in advance of trial and prepare the witness to provide the predicate that will allow its admission. Reminding the judge about the hearsay exceptions or the definition of hearsay is also usually required. Sometimes, that may require a trial brief or sharing a copy of this article (minus the last two pages) but it can often be done with a statement, such as:

> *As I am sure the court knows all too well, a statement is hearsay if it is (1) an out of court statement, and (2) offered to prove the truth of the matter asserted. Judge, you know that Rule 801(d) makes it clear that an untrue statement cannot be hearsay and what this witness is about to tell us the child said was absolutely not true. We are offering this statement for another reason altogether and therefore it cannot possibly be hearsay.*