Trial Skills for Child Welfare Cases: Making and Responding to Objections Webinar Q&A

Q: Conservatorship (CVS) caseworkers sometimes attempt to testify as to information contained in the Child Protective Investigator's (CPI) sworn affidavit. How should I respond to the argument that the CVS worker has reviewed the agency's records and does not need to have personal knowledge of the information contained in the affidavit to testify as to its contents?

A: The CVS worker can testify as to the allegations that led to the investigation and, ultimately, the Department's legal intervention because the allegation is not offered for the truth of the matter asserted. The allegation simply formed the basis of the investigation. Additionally, the CVS worker should have a working knowledge of the reasons for removal contained in the affidavit because the CVS worker is required to develop the Family Plan of Service (FPOS) in conjunction with the parent. The FPOS must be narrowly tailored to address the specific reasons for removal. At the time of trial, the CVS worker is the Custodian of Record for the Department's records, so the CVS worker can provide the predicate testimony for the investigative summary or another part of the DFPS case file, subject to potential hearsay objections.

Q: Does the above scenario differ from situations where the CVS or CPI worker is unavailable and their supervisor is called to testify as to what the caseworker did, notated, or told the supervisor?

A: While the CPI or CVS supervisor may not be able to testify as to information specifically contained in the affidavit, the supervisor probably has some direct knowledge they can testify to. The supervisor should have personal knowledge of the steps their caseworker took during the case, services the parent was referred to, the status of those services, etc. Additionally, supervisors normally participate in family team meetings, family group conferences, the development of the FPOS, permanency planning meetings, etc. and may have been present when the parent made specific admissions. Supervisors are expected to have a working knowledge of each of the cases in their unit because it is essential to making decisions regarding case direction.

Q: How and when do hearsay exceptions as to a child's statements apply? What child statements can the CPI caseworker testify about regarding the removal of a child from their home?

A: The child's statements at the time of removal are hearsay unless one of the hearsay exceptions apply. Tex. Fam. Code Chapter 104 creates the vehicles to admit a child's statements and the necessary elements that need to be satisfied in order for the child's statements to be introduced. However, Tex. Fam. Code § 104.001 clearly states that the Rules of Evidence apply in SAPCR suits; thus, one of the exceptions in Tex. R. Evid. 803-804 to hearsay must apply for the statement to be admitted. For example, if a child experiences a triggering event and screams out to the CPI caseworker that something happened to them, then it can be considered an excited utterance by the child which is admissible under Tex. R. Evid. 803(2).

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Q: Can a court take judicial notice of testimony from a prior hearing if the reporter's record is not available at the current hearing?

A: The short answer is no. Look at *Davis v. State*, 293 S.W.3d 794, 798 (Waco 2009, no pet.) for lack of record. *Jackson v. State*, 139 S.W.3d 7, 20-21 (Tex.App.—Fort Worth 2004, pet. ref'd) provides that judicial notice does not extend to the truth of facts asserted in the record.

Q: Is there a way to object to evidence coming in through a business records affidavit?

A: Under Tex. R. Evid. 803(6), a record of an act, event, condition, opinion, or diagnosis may be admitted through a sworn business records affidavit if:

1) the record was made at or near the time of the event by, or from information transmitted by, a person with knowledge (the person with knowledge must have had a business duty to report);
2) the record is kept in the course of regularly conducted business activity; and
3) it is a regular practice of that business activity to make such record.

Aside from authentication issues, objecting to evidence through a business record is dependent on what is being offered. For example, a caseworker testifying off a document that was received from another source could be challenged because the caseworker "is not a qualified witness to testify about the record keeping of another entity." *Powell v. Vavro, et al*. 136 S.W.3d 762, 765 (Tex. App.—Dallas 2004, no pet.). If the record was created for trial, and not in the regular course of business, it is not admissible. *Ortega v. Cach, LLC.*, 396 S.W.3d 622; *Willis v. State*, 2 S.W.3d 397 (Tex. App.—Austin 1999). *See In re K.C.P.,* 142 S.W.3d 574 (Tex. App.—Texarkana 2004) and *Philpot v. State*, 897 S.W.2d 848 (Tex. App.—Dallas 1995) for case law related to admissibility of drug test results.

Q: What viable objections can be raised to an attempt to admit a respondent's drug test results? Do you always need to have someone to testify as to the testing protocol, chain of custody, and the results?

A: Common objections to drug testing results include chain of custody, hearsay, and lack of proper foundation.

In re K.C.P. held that attempts to admit drug test results using a business records affidavit are subject to a hearsay objection. The court found that an expert witness must be present to prove up not only the testing protocol and chain of custody, but also the test results. *See In re K.C.P*., 142 S.W.3d 574, 580 (Tex. App.-Texarkana 2004, no pet.). *See also Philpot v. State*, 897 S.W.2d 848, 852 (Tex. App.-Dallas 1995, pet. ref d).

However, subsequent case law has, to some degree, questioned whether there is a need for at least three separate individuals to testify to each step of the testing process. For example, it is permissible to have a litigation packet put together by the entity that employs the collection facility, the testing lab, and the medical review officer. Review *In re K.C.P.* and subsequent cases to get an overview of the process.

Some additional cases to review include, but are not limited to:

- *In re A.T.*, No. 02-04-00355-CV, 2006 WL 563565 (Tex. App.—Ft. Worth Mar. 9, 2006, pet. denied)(mem. op). (The court found that a drug screen completed by a hospital was admissible through business record because all pertinent information related to the test was laid out within the records; however, results from another lab included in the hospital records were not admissible.)
- *In re E.B.*, No. 11-19-00001-CV, 2019 WL 3955974 (Tex. App.—Eastland August 22, 2019, no pet.) (mem. op.). (The court held that a proper affidavit executed by the custodian of records that set out the chain of custody, testing procedures, and qualifications of the analysts satisfied Rules 803(6) and 902(10) of the Texas Rules of Evidence without the need for live testimony.).
- *In re K.R.K.-L.H.*, 671 S.W.3d 761 (Tex. App.—Beaumont 2023, pet. denied). (The court held that drug test results from a DHHS certified lab included in the records maintained by the custodian of record at a specimen collection facility were admissible through a properly executed business records affidavit. Once the department established that records were authentic, the burden of proof shifted to the parent to prove that the source of information, the method in which the records were prepared, or the circumstances behind them "indicate[d] a lack of trustworthiness.").

Q: What is the best way to object to written hearsay in a bench trial? Doesn't raising the objection require the judge to review the written hearsay to rule on the objection and negate the purpose of objecting?

A: You must be prepared to make a specific hearsay objection to the written document. A general hearsay objection to a written document is not sufficient. The party that is attempting to admit the evidence should prepare a redacted copy of the document in advance of the hearing and provide copies, along with a copy of the original, to opposing counsel. When possible, conferring about exhibits ahead of the hearing is advisable.

It does not defeat the purpose of objecting to potential hearsay contained within a document if the judge must review it to determine whether it is admissible. Judges have a duty to rely only on admitted evidence and cannot consider inadmissible material.

Q: What is the remedy if opposing counsel fails to advise their expert witness of matters prohibited by a Motion in Limine?

There are several remedies available if opposing counsel fails to advise their expert of matters prohibited by a Motion in Limine:

- Move for a mistrial.
- Ask for a limiting instruction.
- Ask that the witness' entire testimony be struck and the jury be told to disregard the testimony.
- Ask that the witness be struck and not be allowed to testify.

Be prepared to argue the actual harm to your client and put all of it on the record.