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<td>8:30 to 9:00</td>
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Overcoming Evidentiary Objections
Advanced CAFA CLE
October 22, 2015

THE LAW OFFICE OF ELEANOR RUFFNER, P.C.

STRATEGY
• Know what evidence you need and why
• Anticipate the objections you are likely to face
• Prepare your response
• If you lose, have a backup plan
• Above all, prepare, prepare, prepare

CONSIDERATIONS
• Relevance
• Authentication
• Foundation
• Hearsay
EVIDENCE

• Business Records
• Police Testimony and Reports
• Photographs
• Social Media Postings
• Psychiatric/Psychological Evaluations
• Medical Records or Drug Testing Records
• Witness Testimony

BUSINESS RECORDS

• TRE 803(6) and 902(10)(b)
• 14 days before hearing or trial
• Affidavit should be limited to the requirements of the rules
• Ortega v. CACH, LLC: Third-party documents can become the business records of an organization . . . if they are (1) incorporated and kept in the course of the testifying witness’s business; (2) the business typically relies upon the accuracy of the contents of the documents, and (3) the circumstances otherwise indicate the trustworthiness of the documents.

POLICE TESTIMONY

• Typically a fact witness, but can sometimes qualify as an expert
• If not qualified as an expert, watch out for hearsay statements
• If not qualified as an expert, watch out for opinion testimony
POLICE REPORTS

• TRE 803(8) – Public Records and Reports
• Some courts will not allow in police reports as business records
• TRE 803(10) – Absence of Public Record or Entry
• If your police officer is qualified as an expert and you hit any hearsay objections, you can offer evidence that he relied upon or considered.
• TRE 1005 – Copies of public records can suffice as proof of their contents if a witness testifies that the copy is correct

PHOTOGRAPHS

• Foundation is key
• Accurate depiction of what it appears to depict
• Digital enhancement can render a photograph inadmissible (more than just zooming in)
• Foundation does not have to be laid by the person who took the photograph

SOCIAL MEDIA POSTINGS

• Authentication can be a challenge
• Foundation can be laid by anyone who viewed the page once authenticity is established
• Statements themselves are still hearsay until you establish otherwise
• Often constitute present sense impressions, excited utterances, or then-existing mental, emotional, or physical condition (TRE 803(1)-(3))
PSYCHIATRIC OR PSYCHOLOGICAL EVALUATIONS

• Get the treating psychiatrist or psychologist to appear if at all possible, and get him qualified as an expert
• If live testimony is not available, consider an oral deposition or a deposition on written questions

MEDICAL RECORDS & DRUG TESTING

• Treating physician or drug tester can almost certainly qualify as an expert
• Get the records proven with a business records affidavit
• Medical billing records – see TRE 902(10)(c)
• Statements made for the purpose of medical diagnosis or treatment – TRE 803(4)

WITNESS TESTIMONY

• Fact Witness – limited to personal knowledge
• Expert Witness – can offer opinions that are based on reliable
  • Child Witness – ensure the witness is competent under TRE 601(a)(2)
  • Child Abuse Victim – TX. FAM. CODE §104.006 can allow hearsay testimony in lieu of live testimony
  • “Rules Involving Children's Testimony in Family Court” by Greg B. Enos (available online)
**LITTLE-USED BUT HANDY**

- Verbal Act
- Excited Utterance
- Present Sense Impression
- Statement Against Interest
- Statement About Future Plans
- Summary/Compilation of Voluminous Data
- Recorded Recollection
- Judicial Admissions
- Stipulations or Pre-Admitted Exhibits

**BACK-UP PLANS**

- Can you call another witness to authenticate or lay foundation?
- Do you have other evidence to establish the same fact?
- Do you have an expert witness who may have relied upon the information in developing his opinion?
- Can you offer the evidence for a limited purpose?
- Can you impeach or use it to refresh a witness's recollection?
- Should you make an offer of proof?
Evidentiary Foundations

Tracy L. Harting
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Foundation

• The lowest load-bearing part of a building.
  Typically below ground level.
• An underlying basis or principal for something.
• Preliminary questions to a witness to establish
  admissibility of evidence.

Foundation
The base
A Foundation must be PROPERLY laid before a piece of evidence may be admitted.

The foundation MUST establish that
1. Witness is competent (TRE 601)
2. Witness has personal knowledge (TRE 602)
3. Exhibit is relevant (TRE 401)
4. Exhibit is authentic (TRE 901)

Texas Rule of Evidence 601
Every person is presumed competent
UNLESS
they are insane, at the time of the event or the time of testifying
OR
they lack sufficient intellect.
The foundation MUST establish that

2. Witness has personal knowledge (TRE 602)

Texas Rule of Evidence 602
Evidence establishes that the witness has personal knowledge – this may be the witness’ personal testimony of their personal knowledge.

The foundation MUST establish that

3. Exhibit is relevant (TRE 401)

Texas Rule of Evidence 401
Evidence is relevant if it has a tendency to make a fact more or less probable that it would be without the evidence AND the fact is of consequence in determining the action.

The foundation MUST establish that

4. Exhibit is authentic (TRE 901)

Texas Rules of Evidence 901
Generally, the evidence/item must be supported evidence to support a finding that the item is what it claims to be.
Examples:
- a witness with knowledge
- Opinion about handwriting and voice
- Distinctive characteristics – appearance, content, substance, internal patterns
- Telephone conversations: # called, voice heard, business conducted
- Public records
- A process or a system
- Ancient documents (over 20 years)
- SELF-AUTHENTICATING (TRE 902)
A Foundation must be PROPERLY laid before a piece of evidence may be admitted.

Even if you laid a proper foundation a piece of evidence may not be admitted if it cannot overcome hearsay, unfair prejudice, or other valid objections.

The script...
- Gather your pre-marked exhibits
- Give a copy to opposing counsel
- Approach the witness (local rules ask to approach bench, not a witness)
- To the witness...
  - "I am showing you what has been marked at Respondent's 1"
  - "Do you recognize it?"
  - "What is it?"
  - "How do you know it is what you think it is?"
- If admitted ask to approach the bench and give Judge a copy and ask to publish to jury.
- Proceed with examination
The script...

“What is it?”

How do you know it is what you think it is…..

This varies from item to item so it is where people tend to get confused or lost

What is this?

A picture

Do you recognize it?

yes
What is it?
The front entrance of the Travis County Courthouse

Is it a true and accurate representation of the Travis County Courthouse?
yes

The script...photographs

"What is it?"
How do you know it is what you think it is ....

1) The witness SAW the subject of the photo at or near the time of the event at issue
2) The witness recognizes the exhibit as a representation of the subject
3) The exhibit is true and accurate representation of the subject as it appeared at the time
4) EXCLUDE – if probative value is substantially outweighed by the danger of unfair prejudice
The script…signatures/service plans

“What is it?”
How do you know it is what you think it is …..

1) Call the person who signed it to identify signature as their own
2) Call a witness who saw the person signing the document
3) Call a person familiar with the signer's signature
4) Call a handwriting expert

The script…website/printouts

“What is it?”
How do you know it is what you think it is …..

1) The printout must accurately reflect the content of the website and the image of the page on the computer
2) Authenticity generally proved through affidavit
3) Could also be authenticated by its distinctive characteristics - appearance, content, substance, patterns

The script…recording

“What is it?”
How do you know it is what you think it is …..

1) Device capable of taking testimony
2) Competent operator
3) Establish authenticity and correctness of recording
4) Show that changes, additions, or deletions have not been made
5) How was recording preserved
6) Identify speakers
7) Testimony elicited voluntarily and without any kind of inducement
The script…summary (visit attendance, prescription drugs)

"What is it?"
How do you know it is what you think it is …..

1) The chart or calculation is a summary of other records
2) The other records are ADMISSIBLE voluminous writings, records, or photographs
3) The other records cannot be conveniently examined in court
4) The other records are available to the other party for inspection and copying
5) NOTE – COURT MAY ORDER THAT OTHER RECORDS BE PRODUCED, so be prepared

The script…screen shot of text

"What is it?"
How do you know it is what you think it is …..

1) The witness SAW the subject of the photo at or near the time of the event at issue
2) The witness recognizes the exhibit as a representation of the subject
3) The exhibit is true and accurate representation of the subject as it appeared at the time
4) Device capable of making the recording
5) competent operator
6) establish authenticity and correctness of recording
7) show that changes, additions, or deletions have not been made
8) how was recording preserved
9) identity speakers
10) testimony elicited voluntarily and without any kind of inducement

PHOTOGRAPH + RECORDING = TEXT CONVERSATION???

The script…

"What is it?"
How do you know it is what you think it is …..

THINK

When offering the evidence.
What would you be doing if the opposing counsel was trying to get this in?
Would a “weight of the evidence” vs. “admissibility” argument get it in and at least let you argue it to the fact finder?
The script…

“What is it?”

How do you know it is what you think it is…..

THINK

When opposing the evidence.

Take a breath and if your mind is screaming “b___ s___!” then you should be standing up and saying “objection – improper foundation!” Why?

Because part of every foundation is authenticity and if you don’t believe it is authentic or relevant, it may not be.

Remember…

Just because you have laid a foundation it does not mean that the item is necessarily admissible.

Don’t forget about relevancy, hearsay and hearsay within hearsay.
PRESERVING ERROR IN CPS TERMINATION TRIALS

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October 22, 2015
Thompson Conference Center
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PROFESSIONAL ACTIVITIES

JORGESON PITTMAN LLP – Partner/Founder (November 2009 – Present)
The firm’s practice includes family law, divorce, child custody, adoption, CPS representation, child support, mediation, LGBT-focused family law, family-based immigration, and simple estate planning.
Admitted to Practice Law in the State of Texas, November 2009
Qualified Mediator - 2007; Family Law Mediation Specialist - 2015

LEADERSHIP POSITIONS

Past Chair, Austin Bar Association CAFA Section (June 2015 – Present)
Chair, Austin Bar Association CAFA Section (June 2014 – June 2015)
Travis County OPR/OCR Oversight Committee (May 2013 – May 2015)
Chair Elect, Austin Bar Association CAFA Section (June 2013 – June 2014)
CLE Chair, Austin Bar Association CAFA Section (June 2012 – June 2013)
AYLA Leadership Academy 2013 Class

MEMBERSHIPS

Community for CASA (founding member)
Texas Young Lawyers Association
Austin Young Lawyers Association
State Bar of Texas Family Law Section
Austin Bar Association Family Law Section
State Bar of Texas LGBT Law Section
Austin LGBT Bar Association
American Bar Association LGBT Bar Section

EDUCATION

University of Texas School of Law, J.D. 2009
The University of Texas at Austin, Graduate Portfolio in Dispute Resolution, 2009
The University of Texas at Austin, B.A. (With Special Honors in Government) 2005

PUBLICATIONS

The Decider: A Case for Texas-style Child Custody Arbitration, State Bar of Texas Family Law Section Report, Summer 2009

SELECTED SPEECHES AND PRESENTATIONS

Life After Marriage – LGBT Legal Issues Post-Windsor, February 2015
Professionalism and Court-Appointed Representation, June 2013
Ethical Considerations for Court-Appointed Attorneys, October 2012
Succeeding at the Practice of Law, March 2011
PRESERVING ERROR IN CPS TERMINATION TRIALS

I. Introduction

You’ve tried everything. You’ve attempted mediation, you’ve put forth family members for the Department to consider, and you’ve done your best to impress upon your client the importance of completing ALL of his or her services. But it’s not enough, and the Department announces its intent to move forward with a final trial to terminate your client’s parental rights.

Ok, it’s happening. What now? Let’s be honest with ourselves, if you are going to trial, the Department has some grounds for termination. They might not be the strongest grounds, but there is a strong likelihood that no matter how great of an attorney you are, the Department is going to put on enough evidence to terminate your client’s rights. However, you don’t have to make their job easy. In fact, I would argue (and I usually tell anyone who will listen), that your main job as a parent’s attorney is not to win at trial – the reality is your client usually wins or loses the trial months before it usually starts.

Your main job is to make sure that if the State is going to terminate your client’s parental rights, that the State puts on all the evidence that is required by statute and case law, and that the State can overcome the very strong burdens and presumptions in favor of not terminating your client’s parental rights. In order to do this, your job, as an attorney for a parent who is facing the termination of a constitutionally protected right – is to make sure that the Department isn’t allowed to rely on experts who aren’t qualified, that they aren’t allowed to introduce inadmissible evidence, and that they have to answer the tough questions that show that your client – while maybe not a candidate for “World’s Greatest Parent” (or even “World’s Okayest Parent”), might still qualify to be a legal parent with some parental rights intact – even if the finder of fact at the trial court level doesn’t agree with you.

Why is this important? Because even if you lose at trial, if you do your job as an attorney correctly, you may be able to help an appellate attorney overturn all or part of the trial court’s decision, and potentially keep intact some sort of relationship with your client and his or her child. This paper isn’t meant to help you win at trial – like I said, the reality of these types of cases is that your client will win or lose a CPS case months before it ever goes to trial – this paper is meant to help you lose the battle, but give your client a chance to win the war.

II. What this paper WON’T tell you.

a. Preserving Pretrial Error

This paper focuses on preserving error at trial. However, I would be remiss if I didn’t at least mention that it is possible – and probably, likely – that you can also help to preserve error before the trial even starts. I will touch on that briefly:

1. File an answer that includes a counterpetition. If you don’t have a request for your client to be named a conservator, and you prove to the Court that the State has not met its burden to show that your client should have his or her parental rights terminated, you could leave him or her in the purgatory of not having his or her rights terminated and also not being appointed a conservator of his or her child. This is explicitly
allowed by the family code, and it likely won’t be reversible error if you don’t even have a request in the record (it’s hard to show a court abused its discretion if you didn’t even give it the option to do what you want it to do).

2. **Ask that your client be named a temporary possessory conservator as early in the case as possible.** This means that a temporary managing conservator (i.e., the State in CPS Cases) is obligated to inform your client of significant information concerning the child’s health, education, and welfare. If the State doesn’t do this, it will allow you to build evidence at trial that a court of appeals may find persuasive.

3. **If the Department doesn’t comply with the discovery control plan, make a fuss.** Seriously, this one is important, and many of us will neglect the pretrial discovery phase because we are trying everything in our power to get the case settled without trial. But if the Department doesn’t announce its experts, or identify the required documentary evidence in the timelines set out in the discovery control plan, file a motion in limine to exclude any evidence or experts that doesn’t comply.

4. **Pretrial Motions, generally.** Lots of CPS attorneys go to trial without a single pretrial motion. I’ve done it, when I had a client whose only shot at preserving error wouldn’t have been served by pointing out the Department’s mistakes prior to trial (and instead, trying to show that they didn’t make best efforts to place the child with a relative). But if you are going to trial, you should probably have, at the VERY LEAST, a motion on file challenging at least one (if not most) of the Department’s “experts.” I put experts in quotes, because the people the Department routinely identifies as experts – investigators, supervisors, transporters, caseworkers, etc. – are all fine fact witnesses, but they aren’t experts in the legal sense of the word. But if you don’t have any thing challenging that designation, it is very hard to argue on appeal that they gave impermissible opinion testimony. Other motions to consider are the previously mentioned motion in limine, motion to compel discovery, special exceptions, and motion for no-evidence summary judgment. **NOTE** – these are NOT appropriate in every case, so use your professional judgment.

**b. Preserving post-trial error**

If, like me, you read online forums, sometimes you will see the acronym IANAL. No, this is not some sort of kink designation – it means “I AM NOT A LAWYER” – and is usually followed by a lot of specious “legal advice.” I should probably preference this subsection with “IANAAL” – I am not an appellate lawyer. With that said, I have a few appeals under my belt, but never an accelerated appeal of the kind that you’ll find in CPS cases. That’s why this paper doesn’t focus on preserving post-trial error.

But I will say this – if you are going to trial on a CPS case in Travis County, talk to one of the CAFA attorneys who is familiar with accelerated appeals in CPS cases. See if they have time and the space in their
caseload to become the attorney of record for an appeal if it becomes necessary. If they don’t have the time or the bandwidth, ask whom they recommend, and get an appellate attorney on board to appeal your client’s case if the trial goes against your client. I’m not saying it’s malpractice to not talk to an appellate attorney in order to have one “on deck” to appeal the nearly-inevitable order terminating your parent’s rights – but I wouldn’t go to trial without one.

III. Preserving Error at Trial – Keeping it out, getting it in. That’s all there is to it.

Fundamentally, there are two different ways to preserve error at trial. The first, and the most intuitive, is to object to inadmissible evidence. This is “keeping it out.” But, that’s obviously not as easy as it may seem, or else we wouldn’t be 1,500 words into a 16-page CLE paper about preserving error. The second, and therefore less intuitive, is to make sure evidence that you want on the record is actually on the record, even if the Department (or an attorney ad litem or intervenor’s attorney, those dastardly fellows) successfully objects to its admissibility.

Why all this fuss about preserving error? Well, I’ll let Chief Justice Anne Crawford McClure of the El Paso Court of Appeals, and Chris Nickleson, an appellate attorney from Fort Worth, explain: “Texas courts have set out general guidelines for preserving error both in rules and in case law. See Tex.R.App.P. 33.1. Though less cited, Texas Rule of Evidence 103 also provides a general rule for preserving error. Tex.R.Evid.103. Following these rules, to preserve the record a party must make a valid, timely, and specific request, motion, or objection and obtain a ruling. The objection must be timely, i.e., it must be brought within the time permitted by the rules and decisions. Further, in order to be timely, a complaint must be raised at a time when the trial court has the power and opportunity to correct the error alleged. An objection is timely if made ‘as soon as the ground of objection becomes apparent.’ A party cannot make an objection for the first time on appeal—the objection at trial must be consistent with the complaint.’”

a. Keeping it Out – Objections

The first way to preserve error at trial is to object. Ideally, your objection is legally correct, and the judge agrees with you, excluding the evidence from the record entirely. However, even if your absolutely correct objection is overruled, making the objection preserves that error for appeal – assuming you do it correctly, and keep doing it correctly.

1. When Objection is Required

In order to preserve error complaining that improper or inadmissible testimony was admitted during the course of the trial, an objection must be made at the time the testimony is offered. Tex.R.App.P. 33.1 provides the general rule that in order to preserve error for review on appeal, a party must present to the trial court a timely request, objection or motion stating the specific grounds for the ruling it desired the court to make if the specific grounds were not apparent from the context. The rule further states that it is necessary for the complaining party to obtain a ruling from the court to the party's objection. If the trial court refuses to rule, an objection to the
court's refusal is sufficient to preserve the complaint.

Rule 103(a) of the Texas Rules of Evidence provides:

a. *Effect of Erroneous Ruling*

   Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*

   In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating the objection.

(2) *Offer of Proof*

   In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

   In *Hollon v. Rethaber*, 643 S.W.2d 783 (Tex.App.—San Antonio 1982, no writ), the managing conservator complained on appeal that evidence was admitted during a modification proceeding which related to events occurring prior to the entry of the divorce decree. The court of appeals held that she could not for the first time on appeal urge alleged errors not raised at trial. Because no objection had been lodged against the testimony, error was not preserved.

2. *Requisites of a Proper Objection*

   i. *Objection must be timely*

   The window of opportunity for objections to evidence at trial slams shut not long after the jury is exposed to it. A timely objection, therefore, is one made either when the evidence is offered, *St. Paul Medical Center v. Cecil*, 842 S.W.2d 808, 816 (Tex.App.—Dallas 1992, no writ), or before the evidence is admitted. *Perez v. Bagous*, 833 S.W.2d 671, 674 (Tex.App.—Corpus Christi 1992, no writ). Testimonial evidence should be challenged when the question calling for objectionable testimony is asked, or if the question is not defective, when the witness begins giving objectionable testimony. A few moments after the jury is exposed, the opportunity is lost, and a motion for mistrial cannot resurrect the point. *Top Value Enterprises, Inc. v. Carlson Marketing Group, Inc.*, 703 S.W.2d 806, 811 (Tex.App.—El Paso 1986, writ ref'd n.r.e.).

   The importance of timely objections is demonstrated by *Cactus Utility Co. v. Larson*, 709 S.W.2d 709 (Tex.App.—Corpus Christi 1986), rev'd on other grounds, 730 S.W.2d 640 (Tex. 1987). In Cactus, one party attempted to introduce into evidence a stock purchase agreement. The same agreement had been attached as an exhibit to the plaintiff's original petition. Special exceptions had been filed, along with other requests that the court not consider the agreement. The court had ruled it would carry the exceptions along with the trial.
During the trial, the agreement was offered into evidence and defendant's counsel made no objection, obviously believing that his objections to the document had been made and that the court was still considering those objections. The agreement was admitted. At the beginning of trial the next day, counsel introduced an objection into the record to clarify his position as to the document to ensure that error was preserved. The court of appeals ruled that the objection was untimely, inasmuch as an objection must be made when the evidence is offered, not after it has been received. Upon rehearing, the appellate court acknowledged that the defendant had made a lengthy formal objection at the beginning of trial the next day and that he had excepted to the document from the beginning. However, the court noted that the trial court never ruled upon his objection. The court concluded that an objection must actually be overruled before error is preserved. Fortunately for counsel and his malpractice carrier, the case was reversed on other grounds. See also, *Harry Brown, Inc. v. McBryde*, 622 S.W.2d 596 (Tex.Civ.App.–Tyler 1981, no writ).

ii. *Objection must be specific*

Objections must be sufficiently specific so that the trial court can understand the objection and make an intelligent ruling, affording the offering party the opportunity to remedy the defect if possible. *Campbell v. Paschall*, 132 Tex. 226, 121 S.W.2d 593 (1938); *Celotex Corp. v. Tate*, 797 S.W.2d 197, 205 (Tex.App. –Corpus Christi 1990, no writ). Objections which have been held to not be sufficiently specific include:

"I object", *Murphy v. Waldrip*, 692 S.W.2d 584, 590 (Tex.App.–Fort Worth 1985, writ ref'd n.r.e.);

"I object to the form of the question", *Scott v. Scruggs*, 836 S.W.2d 278, 280 (Tex.App.–Texarkana 1992, writ denied); "Objection, the evidence is irrelevant and immaterial", *Wilkins v. Royal Indemnity Co.*, 592 S.W.2d 64, 67 (Tex.Civ.App.–Tyler 1979, no writ);

"Objection, no predicate has been laid", *Waldon v. City of Longview*, 855 S.W.2d 875, 878 (Tex.App.– Tyler 1993, no writ);

"Objection, there are no underlying data for the report", *Smith Motor Sales, Inc. v. Texas Motor Vehicle Comm'n.*, 809 S.W.2d 268, 272 (Tex.App.– Austin 1991, writ denied); and

"Objection, the testimony is incompetent and hearsay", *Top Value Enterprises, Inc. v. Carlson Marketing Group, Inc.*, 703 S.W.2d 806, 811 (Tex.App.–El Paso 1986, writ ref'd n.r.e.).

Here are some rules to remember:

- A valid objection identifies a specific rule of evidence violated by the offered evidence. *Smith Motor Sales, Inc.*, 809 S.W.2d at 273; *United Cab Co. v. Mason*, 775 S.W.2d 783, 785 (Tex.App.–Houston [1st Dist.] 1989, writ denied); *Burleson v. Finley*, 581 S.W.2d 304 (Tex.Civ.App.–Austin 1979, writ ref'd n.r.e.).

- General objections amount to no objection at all. *Murphy v. Waldrip*, 692 S.W.2d 584 (Tex.App.–Fort Worth 1985, writ ref'd n.r.e.). See also, *In Interest of McElheney*, 705 S.W.2d 161 (Tex.App.–Texarkana 1985, no writ), a termination suit, in which the mother failed to preserve any error concerning the admission of evidence of her homosexual
preferences. The court of appeals determined that the objections which were raised at trial were in general terms and failed to state any grounds. Error was waived. And in *University of Texas System v. Haywood*, 546 S.W.2d 147 (Tex.Civ. App.–Austin 1977, no writ), an objection was made at a pre-trial conference but no objection was raised at trial. Because the objection did not specify a particular rule of evidence, it was considered too general and error was waived.

- An objection that the proffered testimony is "irrelevant and immaterial" is too general to preserve complaint on appeal. *Wilkins v. Royal Indemnity Company*, 592 S.W.2d 64 (Tex.Civ.App.–Tyler 1979, no writ). An objection as to irrelevancy does not enable the trial court to make an intelligible ruling or permit the offering party to remedy the defect. As such, it is insufficient to require consideration by an appellate court. *Mayfield v. Employer's Reinsurance Corp.*, 539 S.W.2d 398 (Tex.Civ.App.–Tyler 1976, writ ref'd n.r.e.). Relevance objections should incorporate the test contained in Rule 401 of the Rules of Evidence and identify the material fact issue to which the evidence is purportedly directed but irrelevant.

- Where a party seeks introduction of evidence without laying the proper predicate, it is insufficient to merely object that the predicate has not been laid. The complaining party must identify the portion of the predicate which is lacking. *See Seymour v. Gillespie*, 608 S.W.2d 897 (Tex. 1980); *In the Matter of Bates*, 555 S.W.2d 420 (Tex. 1977). Both cases involved the introduction of tape recordings over a general objection as to the predicate.

iii. *Objection must be ruled upon*


b. Getting it In – Offers of Proof

Where evidence is admitted over objection, the reporter’s record will provide the court of appeals with sufficient information to rule upon the point of error. So, as a proponent, the first procedural step in preserving evidentiary error is to offer the evidence. There is no refusal to admit evidence if there is no offer of that evidence. *Giles v. Cardenas*, 697 S.W.2d 422, 424 (Tex.App.–San Antonio 1985, writ ref’d n.r.e.). The burden is on the proponent to show the admissibility of evidence. *Ruth v. Imperial Ins. Co.*, 579 S.W.2d 523, 525 (Tex.Civ.App.–Houston [14th Dist. 1979, no writ]). Often the evidence itself reveals the basis for the offer, but if it is unclear, the proponent should insure that the record contains the rule of evidence under which the offer is made and sufficient facts to establish admissibility. *Vandever v. Goettee*, 678 S.W.2d 630, 635 (Tex.App.–Houston [14th Dist. 1984, no writ]).
Evidence may be admissible for a more narrow purpose when an objection is sustained to a general offer. The proponent bears the burden on appeal of showing that no basis existed to exclude the evidence. *Minnesota Mining & Mfg. Co. v. Nishika, Ltd.*, 885 S.W.2d 603, 630 (Tex.App.–Beaumont 1994), rev’d on other grounds, 953 S.W.2d 733 (Tex. 1997). This is avoided by narrowing the offer until the evidence is admissible. Failure to do so waives any complaint that the evidence was admissible given some more limited offer. *Brown v. Gonzalez*, 653 S.W.2d 854, 864 (Tex.App.–San Antonio 1983, no writ). In the same vein, when evidence is objectionable on some grounds, but admissible on other grounds, there is no error if the trial court sustains an objection to a general offer; the proponent must reoffer the evidence on some admissible ground. *Ferguson v. DRG/Colony North, Ltd.*, 764 S.W.2d 874, 882 (Tex.App.–Austin 1989, writ denied).

An offer of proof puts excluded evidence into the reporters record so that a Court of Appeals may review the evidence. An offer of proof is an informal bill of exception, and its purpose is two-fold: (1) to give the trial court a second chance to look at the evidence before finally ruling on its admissibility, and (2) to complete the record on appeal so that it is clear to the appellate court exactly what was excluded at trial.2

**ii. When to make an offer of proof?**

When all else fails. No, but really, you do it after your evidence or testimony is not allowed into the record.

**iii. How to make an offer of proof**

This should really be two sections, because there are two types of offers of proof. Personally, I prefer the informal variety, but there is a time and a place for the formal variety. And, if your opposing counsel requests a formal offer of proof, you are required to make one.

**A. Informal Offers of Proof**

I’ve heard it told (in other CLE presentations, drafted by judges) that judges seem to prefer the informal offer of proof. It is quick and usually doesn’t interrupt the flow of the trial. For tangible or documentary evidence, all that is required for the court of appeals to consider it on the record is to have it marked and request it’s inclusion on appeal. However, that won’t give you, the attorney, the chance to hear yourself speak – I mean, the chance to

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2 “The offer of Proof” Judge Bonnie Sudderth, 352nd District Court of Tarrant County, Texas, found online at https://judgebonniesudderth.wordpress.com/2011/10/01/the-offer-of-proof/
persuade the judge to change his or her ruling. So you should also have a short statement prepared that demonstrates to the court why the evidence is admissible, what it will show, and to re-urge its admissibility.

B. Formal Offers of Proof

Formal offers of proof are reserved for witnesses whose testimony is otherwise excluded. Often times, this is an expert witness who is not properly qualified as an expert (perhaps you didn’t designate an expert in the time required by the discovery control plan). Sometimes, it is simple lay testimony that the Court doesn’t believe is relevant or is repetitious. Whatever the case, you should inform the Court that you intend to make an offer of proof of the testimony, and go through with your normal question and answer. After your witnesses’ testimony is concluded, you must re-offer the testimony and get a ruling on your offer of proof. I find this tactic to be useful, because even if the entire line of questioning isn’t admitted, a judge may allow some of your witness’ testimony to be considered in evidence.

C. Complete you offer!

Why is re-urging (or re-offering) your evidence important? Because without it, the offer of proof is incomplete, and the record is not preserved for appeal. As Judge Sudderth says: “Always keep in mind that an offer of proof is just that – an offer. Therefore, at the conclusion of the recitation or presentation of the evidence, the proponent of the evidence should re-urge its admission. As with any other offer of evidence, a ruling must be secured in order to preserve error. In other words, after giving the court a second chance to consider the evidence, the attorney should secure a final ruling on admissibility.”

The Courts of Appeal also show us out importance of making a COMPLETE offer of proof. In a 2011 decision out of Texarkana, an appellant claimed that the trial court erred in refusing to admit testimony from two witnesses. In re N.V., No. 06-11-00079-CV, 2011 WL 6125193 at *1 (Tex. App.—Texarkana Dec. 9, 2011, no pet. h.). The court of appeals noted that the appellant had made an offer of proof in the trial court, but failed to ask the trial court to admit the testimony. The only statement from the trial court at the end of the offer of proof was "the offer of proof is concluded." Because the appellant did not make a specific request to admit the testimony, the appellant did not obtain an adverse ruling, and the record was not preserved for appeal.

In Lone Starr Multi-Theatres, Ltd. v. Max Interests, Ltd., the appellant complained that the trial court improperly excluded damages testimony. No. 01-10-00708-CV, 2011 WL 6938527, at * 12 (Tex. App.—Houston [1st Dist.] Dec. 29, 2011, no pet. h.). The appellee had objected that the witness had not been designated as an expert. The court of appeals noted that a lay witness with personal knowledge can testify about costs of repair. But although the offer of proof included the proposed damages testimony, it did not show the basis of the opinions or that the witness had the necessary personal knowledge. Therefore, the court of appeals held that the appellant had not preserved error in the exclusion of the testimony.

In light of these cases, it would be a good idea for those CAFA attorneys who have made it this far into this paper to use a

3 Id.
checklist when you anticipate making an offer of proof at trial. The checklist would include at least (1) basis of admissibility; (2) the evidence that the party seeks to introduce; and (3) a specific request to admit the evidence.

IV. Don’t Blow It! – Waiver of error, or How I Learned to Stop Worrying about what Judges Say During Trial When I Make the Same Objection Over and Over and Love the Rules of Procedure

Alright, not only have you made it to the trial and you’ve objected to everything and made your offers of proof, but you’ve also read this far in this paper! Good for you. But don’t blow it! Here’s a few more things to remember to not inadvertently waive error, and undo all your hard work up to this point. And remember, you aren’t doing this to win the case at this point, and you aren’t doing this to make the Department’s attorney, or the Attoreny ad Litem, or even your client, like you. You are doing this to preserve the record so that, on appeal, your client has a chance (note – not a good one) at keeping his or her parental rights.

Another note: the rest of this paper (well, until the conclusion) is taken in totality from the Preserving Error paper written by Justice Ann Crawford McClure and Chris Nickelson (seriously, I can’t make this any better, and they were gracious enough to give me permission to reproduce it so that I could spend more time with my newborn and less time writing this paper).

a. Similar evidence admitted without objection

Objections to evidence are unavailable when similar evidence to the same effect is offered and received without objection. The Supreme Court has considered this issue in Bushell and Sydex Corporation v. Dean, 803 S.W.2d 711 (Tex. 1991). Dean had sued her employer and former manager for sexual harassment. During the course of the trial, she offered the testimony of an expert witness who indicated that he would be able to give a "working definition" of sexual harassment, including "general things that are true about a person who harasses." Counsel for Sydex objected to the testimony of the witness as a whole to the extent that it went to the "profile" of a harasser. The trial court determined that the witness had not yet crossed the line but that at some point the evidence might cross into character evidence prohibitions. The judge also advised counsel that he would need to reurge his objection at that point. Later, the expert testified as to the "profile" of a sexual harasser, but no objection was lodged. The Supreme Court concluded that error had been waived.

See also, Fabian v. Fabian, 765 S.W.2d 516 (Tex. App.–Austin 1989, no writ), in which the wife complained that the husband should not be able to use evidence derived as a result of a wire tap placed on her telephone to learn of her extracurricular sexual activities. The court never reached the question of the Texas Wire Tap Statute, however, holding that the complaint was waived because similar testimony was received without objection. Accord, City of Houston v. Riggins, 568 S.W.2d 188 (Tex.Civ.App.–Tyler 1978, writ ref'd n.r.e.); Hundere v. Tracy & Cook, 494 S.W.2d 257 (Tex.Civ.App.–San Antonio 1973, writ ref'd n.r.e.); New Hampshire Fire Insurance Company v. Plainsman Elevators, Inc., 371 S.W.2d 68 (Tex.Civ. App.– Amarillo 1963, writ ref'd n.r.e.). In this instance, any error in admitting the proffered testimony is deemed harmless. Lopez v. Southern Pacific Transportation Company, 847 S.W.2d 330 (Tex.App.–El Paso 1993, no writ); C & H Nationwide, Inc. v. Thompson, 810 S.W.2d
b. Grounds of objection as limitation

On appeal, a party will be confined to the grounds of objection as stated in the trial court. *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997); *Texas Department of Transportation v. Olson*, 980 S.W.2d 890, 898 (Tex.App.–Fort Worth 1998, no pet.). A party cannot enlarge his complaint on appeal. *See Perez v. Baker Packers*, 694 S.W.2d 138 (Tex.App.–Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Cusack v. Cusack*, 491 S.W.2d 714 (Tex.Civ.App.–Corpus Christi 1973, error dism'd). Thus, the grounds which are urged in an objection to the trial court limit appellate review. This rule operates in two directions. When an objection is predicated on one ground during trial, but no point of error is predicated on that ground on appeal, error is waived. By the same token, if a ground of objection is not raised during the trial, but is raised by point of error on appeal, no error has been preserved. Two cases demonstrate the difficulty.

*In re Estate of Plohberger*, 761 S.W.2d 448 (Tex.App. –Corpus Christi 1988, writ denied) involved a dispute as to which of two wills of the deceased was entitled to probate. Her surviving husband sought to probate a will in which her entire estate passed to him. The proponent of the other will offered into evidence medical records which contained statements by the deceased that her husband was a Nazi who had exterminated Jews and who had treated her as a slave. The records were offered as a whole. The husband's objection as to hearsay was overruled. When enlarged copies of the damaging sections of the records were marked as evidence, the husband objected again as to hearsay. This objection was overruled as well. The sections of the records were then read to the jury -- this time the objection was that the statements were inflammatory. The trial court overruled the objection. The court of appeals determined that any error in the admission of the statements was harmless. Its logic places definitive restrictions on the estoppel theory discussed above:

Since the statements appellant objected to being read to the jury had previously been admitted without objection (that the statements were prejudicial and should be excluded under Rule 403), we conclude that if any error existed, it was not reversible error.

The highlighted portion of the quotation is important. Obviously, the husband had previously objected. He had merely objected on a different and insufficient ground. Thus, it is imperative that you make the correct objection the first time the evidence is offered. If the first objection is predicated on the wrong basis or is a general objection, error will be waived inasmuch as the same or similar evidence will have been previously admitted without proper objection.

*In Lade v. Keller*, 615 S.W.2d 916 (Tex.Civ.App.– Tyler 1981, no writ), the proponent of a holographic will was represented by two attorneys. One of the attorneys called the other as a witness concerning the testator's testamentary capacity and state of mind. On cross examination, the attorney was asked whether he presently represented Lade in a criminal
matter. The first objection lodged was that the answer was a matter of attorney-client privilege. The question was also objected to on the basis that it was immaterial. The privilege issue was not raised on appeal and was deemed waived. The immateriality issue was found to be too general to preserve any error. In the appeal, Lade urged that the testimony should have been excluded because it was highly prejudicial. This ground was waived because it had not been raised in the trial court. THE MORAL OF THIS STORY IS GET IT RIGHT THE FIRST TIME.

c. Cannot rely upon aligned party’s objections

It is not unusual, particularly in family law matters, to have two distinct parties aligned by a common purpose. Paternal grandparents and the father may seek substantially similar relief against the mother. It is important to note that a party complaining of the improper admission of evidence must have objected to that evidence at trial. Thus, if the grandparents had objected to evidence at trial but the father did not, and only the father appealed, he would be precluded from reliance upon the grandparents’ objection.

A party must either make its own objection to the evidence or state an exception to the ruling of the court regarding the objection if it wishes to preserve any error for appeal. *Wolfe v. East Texas Seed Co.*, 583 S.W.2d 481 (Tex.Civ.App.– Houston [1st Dist.] 1979, error dism’d).

d. Withdrawal of objection

It is also important to note that when an objection to the admissibility of testimony is withdrawn, even following an adverse ruling by the court, the objection is not preserved for review. The same is true if the exhibit is withdrawn by the party offering it. *Paramount Petroleum v. Taylor Rental Center*, 712 S.W. 2d 534 (Tex.App.– Houston [14th Dist.] 1986, writ ref’d n.r.e.). Counsel should never withdraw an exhibit or an objection if an appeal is even remotely likely.

e. Running Objections

Less delineated are running objections, where a trial court allows one objection to apply to an area of testimony generally. Since Rule 611(a) of the Rules of Evidence permits the court to exercise reasonable control over the mode and order of interrogation of witnesses and presenting evidence so as to avoid the needless consumption of time, the granting of running objections is within the trial court's discretion.

The appellate courts are inconsistent in their view of running objections, so they should be exercised with caution. Generally, any variance between the testimony given to which a formal objection is made and testimony which may be slightly different or dissimilar may render the running objection a waiver. Further, the later admission of testimony successfully excluded earlier in a trial is considered a waiver of error. *Celotex Corp. v. Tate*, 797 S.W.2d 197, 201 (Tex.App.– Corpus Christi 1990, no writ). In *City of Houston v. Riggins*, 568 S.W.2d 188 (Tex.Civ.App.–Tyler 1978, writ ref’d n.r.e.), the appellate court concluded that the trial court had not erred in admitting testimony where the party offering the testimony thereafter introduced the same type of testimony from other witnesses without objection and full cross examination was conducted. See also, *Kelso v. Wheeler*, 310 S.W.2d 148 (Tex.Civ.App.–Houston 1958, no writ); *F. W. Woolworth Co. v.*
Ellison, 232 S.W.2d 859 (Tex.Civ.App.–Eastland 1950, no writ). Some courts hold, however, that a party who makes a proper objection to testimony that is overruled is entitled to assume the judge will make the same ruling as to other offers of similar evidence, and is not required to make further objections. See Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236, 242-43 (Tex.App.–Corpus Christi 1994, writ denied); Bunnett/Smallwood & Co. v. Helton Oil Company, 577 S.W. 2d 291 (Tex. Civ.App.–Amarillo 1978, no writ); Crispi v. Emmott, 337 S.W.2d 314 (Tex.Civ.App.–Houston 1960, no writ). This is akin to the idea of the running objection. Still others limit running objections to testimony elicited from the same witness. City of Fort Worth v. Holland, 748 S.W.2d 112, 113 (Tex.App.–Fort Worth 1988, writ denied). The Dallas Court of Appeals has loosened that rule in bench trials, and allows running objections to all evidence sought to be excluded, even when elicited from other witnesses. Commerce, Crowdus & Canton, Ltd. v. DKS Construction, Inc., 776 S.W.2d 615, 620 (Tex.App.–Dallas 1989, no writ).

Since running objections appear fraught with peril, they should be avoided if you believe continuing objections will not turn judge and jury against you. If a running objection is the only choice, then certain steps should be followed:

- request a running objection on specific grounds, otherwise the courts may waive error on subsequent admission of testimony. See City of Houston v. Riggins, 568 S.W.2d 188, 190 (Tex.App.–Tyler 1978, writ ref'd n.r.e.)(holding error was waived when counsel did not object to testimony from other witnesses);
- obtain a ruling on the request for a running objection. See City of Fort Worth v. Holland, 748 S.W.2d 112, 113 (Tex.App.–Fort Worth 1988, writ denied) (referring negatively to counsel's failure to gain a ruling on his request for a running objection);
- make a new request for a running objection if similar testimony is sought from another witness; and
- remember to make proper objections to other objectionable testimony elicited while you have a running objection, otherwise face the specter of waiver on untimely or non-specific objection grounds.

f. Partially Admissible Evidence

Specific objections are critical when evidence is admissible in part. A general objection to evidence admissible in part, which does not point out specifically the objectionable portions, is properly overruled. Celotex Corp. v. Tate, 797 S.W.2d 197, 205 (Tex.App.– Corpus Christi 1990, no writ) citing Brown & Root, Inc. v. Haddad, 142 Tex. 624, 180 S.W.2d 339, 341 (1941). This rule is most often applicable to documentary evidence. Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc., 779 S.W.2d 474, 477 (Tex.App.–El Paso 1989, writ denied).

1. Complaint as to admission

A general objection to a unit of evidence as a whole which fails to specify the portion objected to is properly overruled if any portion of the evidence is admissible. Speier v. Webster College, 616 S.W.2d 617 (Tex. 1981); Brown & Root, Inc. v. Haddad, 142 Tex. 624, 180 S.W.2d 339 (1944); Wolfe v. Wolfe, 918 S.W.2d 533 (Tex.App.–El Paso
1996, writ denied). It is incumbent upon the objecting party to make a specific objection to the inadmissible portion and then request a limiting instruction. Ramirez v. Wood, 577 S.W.2d 279 (Tex.Civ.App.–Corpus Christi 1978, no writ). If a specific objection is made, the trial court can strike the objectionable portion. In the absence of a specific objection, error is waived. Zamora v. Romero, 581 S.W.2d 742 (Tex.Civ.App.–Corpus Christi 1979, writ ref'd n.r.e.).

2. Complaint as to exclusion

Where evidence is tendered, only a portion of which is admissible, and an appropriate and specific objection is sustained, it is the burden of the party offering it to separate the admissible from inadmissible testimony. In Hurtado v. Texas Employers Insurance Association, 574 S.W.2d 536 (Tex. 1978), TEIA sought to introduce 280 pages of medical records. Over objection, the trial court admitted the records in their totality. The court of appeals concluded the problem was one of determining which party had the burden of separating the inadmissible portions of the exhibit from the admissible portions. It decided that the trial court had the discretion to determine which party should specifically point out the objectionable portions. In his dissent, the chief justice declared that a specific objection had been made as to the inadmissible nature of the records and that the admission was error. The Supreme Court agreed with the dissent. If that burden is not met by the tendering party, the trial court does not err in excluding it in its entirety, and a point of error challenging the exclusion will not be preserved. Perry v. Teras Municipal Power Agency, 667 S.W. 2d 259 (Tex.App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.).

**g. Motions to Strike and Motions for Mistrial**

Witnesses often motor on while counsel objects to questions and testimony. The jury hears the answer, and the testimony appears in the appellate record. Also, evidence sometimes becomes properly objectionable later in a trial. It is insufficient in these instances to merely object; a motion to strike is required in order to prevent the jury from considering the testimony, and to prevent the appellate court from considering it on a sufficiency review. Hur v. City of Mesquite, 893 S.W.2d 227, 231 (Tex.App.–Amarillo 1995, no writ); Prudential Ins. Co. v. Uribe, 595 S.W.2d 554, 564 (Tex.Civ.App.–San Antonio 1979, writ ref'd n.r.e.); City of Denton v. Mathes, 528 S.W.2d 625, 634 (Tex.Civ.App.–Fort Worth 1975, writ ref'd n.r.e.).

1. **No resurrection of error after waiver**

   Basically speaking, since untimely objections are frowned upon, a motion to strike will be of little assistance in preserving error where an objection could have been made at the time the evidence was offered but none was forthcoming. Neither the motion to strike nor the motion for mistrial will prevent waiver of an objection when the grounds for the mistrial or the motion to strike do not clearly indicate the objectionable portion of the testimony. Top Value Enterprises v. Carlson Marketing, 703 S.W.2d 806 (Tex. App.–El Paso 1986, writ ref'd n.r.e.).

2. **When required**

   When an objection is made and sustained as to testimony which has been heard by the jury, the testimony is before the jury unless they are instructed to disregard it. Chavis v. Director, State Worker's
Compensation Div., 924 S.W.2d 439 (Tex.App.–Beaumont 1996, no writ). If an objection to an answer is made but there is no ruling and no motion to strike is urged, there is no error. Prudential Insurance Company of America v. Uribe, 595 S.W.2d 554 (Tex.Civ.App.–San Antonio 1979, writ ref'd n.r.e.). Where objection is made to expert testimony after the testimony is admitted, any error in admitting the testimony over the objection is waived if no motion to strike is made. City of Denton v. Mathes, 528 S.W.2d 625 (Tex.Civ.App.–Fort Worth 1975, writ ref'd n.r.e.).

Thus, a motion to strike may become necessary in the following instances, as noted by both Jordan, TEXAS TRIAL HANDBOOK 2D, §§243 (Exclusion of Evidence) and Pope and Hampton, Presenting and Excluding Evidence, 9 TEX.TECH L. REV. 403 (1978):

- to exclude an answer of a witness made before an objection could be made;
- to exclude volunteer statements of the witness;
- to exclude non-responsive answers;
- to exclude prior testimony admitted conditionally upon counsel’s promise to connect up the testimony or to lay a foundation;
- to exclude testimony which later turns out to be improper, such as hearsay, or in violation of the best evidence rule; and
- to exclude testimony of a witness, who by reason of sickness, death, or refusal, fails to submit to cross examination.

H. Motion to Amend Pleadings

If your opponent objects to the admission of evidence or submission of the case to the court for decision on the grounds that you failed to plead a claim or defense, then you must make a motion seeking leave to file a trial amendment to your pleadings. See Tex.R.Civ.P. 66 and 67. This step is a necessary prerequisite to having the court of appeals review whether the trial court erred in granting or denying the motion for leave to amend pleadings. Chapin & Chapin, Inc. v. Texas Sand & Gravel Co., 844 S.W.2d 664, 664-65 (Tex.1992); Hardin v. Hardin, 597 S.W.2d 347, 349-50 (Tex.1980).

Rule 66 provides:

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault, or omission in a pleading, either of form or substance, is called to the attention of the court, then the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant postponement to enable the objecting party to meet such evidence.


Rule 67 provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to
the Court or jury, but failure to so amend
shall not affect the result of the trial of
these issues; provided that written
pleadings, before the time of submission,
shall be necessary to the submission of
[jury] questions as is provided by Rules
277 and 279.


As shown by the text of Rule 66 and 67,
the Texas Rules of Civil Procedure are
extremely liberal in allowing amendments
for the cure of defects, faults, or omissions
in a pleading, either of form or substance,
provided that there is no prejudice to the
opposing party. See Id.; see also, In re
Laughlin, 153 Tex. 183, 265 S.W.2d 805
(1954). Moreover, even if prejudice is
demonstrated, the trial court may be able to
cure the prejudice by granting a continuance
for additional discovery and preparation to
respond to the new claim or defense. See
Yowell v. Piper Aircraft Corp., 703 S.W.2d
630 (Tex.1986); Thompson v. Caldwell, 22
S.W.2d 720 (Tex.Civ.App.—Eastland
1929), aff’d, 36 S.W.2d 999 (Tex.Comm’n
App.1931); Deutsch v. Hoover, Bax &
Slovacek, L.L.P., 97 S.W.3d 179, 185- 86
(Tex.App.—Houston [14th Dist.] 2002, no
pet.).

To obtain a trial amendment, you must
make a motion for leave to amend your
pleadings. The motion may be oral. See
Pennington v. Gurkoff, 899 S.W.2d 767, 771
(Tex.App.—Fort Worth 1995, writ denied).
However, the amended pleading must be in
writing, signed by the attorney, and tendered
to the court for filing. See Tex.R.Civ.P.
45(d), 63; City of Fort Worth v. Zimlich, 29
S.W.3d 62, 73 (Tex.2000)(holding that as a
general rule trial amendment must be in
writing but also holding that error was
waived when opposing party failed to object
to oral pleading amendment before the case
was submitted to the jury).

Trial amendments are available to cure
procedural or formal defect in your
pleadings. See Chapin & Chapin, Inc. v.
Texas Sand & Gravel Co., 844 S.W.2d 664,
664-65 (Tex.1992)(trial amendment sought
to cure lack of verified denial); Smith
Detective Agency & Nightwatch Serv. v.
Stanley Smith Sec., Inc., 938 S.W.2d 743,
748-49 (Tex.App.—Dallas 1996, writ
denied)(trial amendment sought to cure lack
of verified denial). It is often held to be an
abuse of discretion for a trial court to refuse
a trial amendment that is aimed at curing a
procedural or formal defect in a pleading.
Ramsey v. Cook, 231 S.W.2d 734
(Tex.Civ.App.—Fort Worth 1950); Reiser v.
Jennings, 143 S.W.2d 99 (Tex.Civ.App.—
Amarillo 1940, writ dism’d). Further, the
courts have held that it is mandatory to
allow a trial amendment when necessary to
conform the pleadings to the evidence
admitted at trial. See Stephenson v. LeBoeuf,
16 S.W.3d 829, 839 (Tex.App.—Houston
[14th Dist.] 2000, pet. denied).

Trial amendments are also available to
cure substantive defects in your pleadings,
such as failure to plead a claim or defense,
but only if one of two conditions are met:

1. The trial amendment does not
surprise or prejudice your opponent
or, if it does surprise or prejudice
your opponent, then the resulting
surprise prejudice can be cured by a
continuance or other remedy
fashioned by the trial court. See
Tex.R.Civ.P. 63, 66; Francis v.
Coastal Oil & Gas Corp., 130
S.W.3d 76, 91-92 (Tex.App.—
Houston [1st Dist.] 2003, no pet.);
Deutsch v. Hoover, Bax & Slovacek,
L.L.P., 97 S.W.3d 179, 185-86
2. The trial amendment is authorized because the claim or defense was tried by express or implied consent. See Tex.R.Civ.P. 67, Ingram v. Deere, 288 S.W.3d 886, 893 (Tex.2009); Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 495 (Tex.1991); Hirsch v. Hirsch, 770 S.W.2d 924, 926 (Tex.App.— El Paso 1989, no writ).

A trial amendment asserting a new claim or defense is prejudicial on its face if it: (1) asserts a new substantive matter that reshapes the nature of the trial itself; (2) is of such a nature that the opposing party could not have anticipated it in light of the development of the case; and (3) detrimentally affects the opposing party’s presentation of the case. Stephenson, 16 S.W.3d at 839. The party opposing the trial amendment must object and prove why the amendment is prejudicial. Hardin v. Hardin, 597 S.W.2d 347, 349-50 (Tex.1980); Diesel Fuel Injection Serv. v. Gabourel, 893 S.W.2d 610, 611 (Tex.App.—Corpus Christi 1994, no writ). If the opposing party fails to demonstrate that the new matter causes surprise or prejudice, or is prejudicial on its face, then the court has no discretion to deny the amendment. Francis, 130 S.W.3d at 91. Further, if it is shown that evidence was admitted in support of each element of the new claim or defense, without objection from the opposing party, then the issue was tried by consent and the court has no discretion to refuse the amendment. See Tex.R.Civ.P. 67, Ingram, 288 S.W.3d at 893; Roark, 813 S.W.2d at 495; Hirsch, 770 S.W.2d at 926.

V. Conclusion

Well, congratulations are in order. You’ve made it to the end of this paper! And, if your case is over, you’ve also made your client’s position a lot more tenable on appeal. Again, you probably didn’t do anything that will make or break your client’s case at trial (facts are facts are facts), but you hopefully were able to use some of the skills outlined in this paper to at least make the appellate attorney that you hand the case off to (remember how I told you to do that?) happy that they have SOMETHING to work with when they review the record, even if it isn’t much.

I know that I have made it sound like I don’t think our clients in CPS termination trials have a snowball’s chance in hell of keeping their parental rights – however, I don’t want you to think that my cynicism keeps me from being an effective advocate for my clients. I know that with effective trial advocacy, including a heavy reliance on the error preservation skills that I have written about here, it actually is possible to fight for and win a favorable ruling at the trial court level. Sometimes, making your offers of proof or keeping out evidence will be enough to make a finder of fact realize that the State hasn’t met it’s very high burden to terminate parental rights.

But if you find yourself in the camp with the majority of attorneys that represent parents who are in a final trial where the Department is seeking to terminate their parental rights who didn’t win their parent-client’s case at trial (myself included), you will know that you gave it your best, and that your client at least won’t have a ineffective assistance of counsel claim on appeal (there’s that cynicism again).
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Before We Begin, Don’t Forget about these:

Pretrial Issues:
1. File an Answer and Counterpetition
2. Request that your client be appointed TPC
3. Pay attention to Discovery
4. Pretrial motions, if appropriate

Post-trial Issues:
1. Talk to a CAFA appellate attorney BEFORE trial
Preserving Error in CPS Termination Trials

Preserving Error – What is it, why should I do it?
• It boils down to this: Keeping out inadmissible evidence, making sure admissible evidence is in the record even if not admitted by trial court
• Four words: Ineffective Assistance of Counsel
• Perquisite for an appeal
• Constitutionally-protected rights at stake
• Appellate Counsel will thank you

Preserving Error in CPS Termination Trials

Keeping Evidence Out
• Requisites for a Proper Objection:
  1. Objection must be timely
  2. Objection must be specific
  3. Objection must be ruled upon
• What does specific mean?
  1. Identify Rule of Evidence that is violated
  2. No “general objections”
  3. “Irrelevant” or “Immaterial” – not specific enough

Reference objections should incorporate the text contained in TRE 401 and identify the material fact issue to which the evidence is purportedly directed but irrelevant
  4. Know your predicates, know when they aren’t followed

Preserving Error in CPS Termination Trials

Getting Evidence In
• Documents/Tangible Evidence
  1. M.I.O. A. – Mark, Introduce, Offer/Object, Admit
  2. If you don’t follow these steps, your evidence may never appear in the record
  3. If there is an objection, make sure you get a ruling admitting or denying the evidence
• Witnesses
  1. Fact or Opinion (Expert) Witness?
  2. Don’t be discouraged, ask it again in a different way
  3. If there is an objection, make sure you get a ruling admitting or denying the question/testimony
Preserving Error in CPS Termination Trials

Offer of Proof

- Informal (Documents/Tangible Things)
  1. Be concise, but be thorough
  2. Identify the Rule of Evidence
  3. Summarize what the evidence is, why it is admissible, what it offered to prove
  4. RE-OFFER, GET ANOTHER RULING

- Formal
  1. Usually for witnesses
  2. Ask your questions, get the testimony you need
  3. OC can cross examine, but usually that works in your favor
  4. RE-OFFER, GET ANOTHER RULING

Format for Informal Offer of Proof

1. Offer evidence, Objection by Opposing Counsel, Objection
   Sustained – Evidence not admitted
2. “Your honor, at this time I would like to make an offer of proof of this document and the testimony that would go along with it. I would also ask that the document be filed with the reporter’s record.”
3. [make offer – make sure that the court reporter records it]
4. Get a ruling on offer of proof.

Example of Informal Offers of Proof

1. “The document that Mr. Doe seeks to admit is a chart that he created summarizing his attendance at parenting classes, his visitation schedule and his work schedule. The chart includes dates that his work schedule and visits overlapped with the parenting classes, and would help to demonstrate to the Court that it was not for a lack of effort that Mr. Doe was only able to complete 8 of 12 parenting classes, but that he prioritized his court-ordered service of maintaining stable employment and court-ordered visitation with his child during the pendency of this case.”
2. “The document that Mr. Doe seeks to admit is several emails that he sent to the caseworker that were not returned in a timely fashion, showing that he offered family members for possible placement of his children over 10 months before the Department began to investigate these relatives, and it would show that the Department did not make best efforts, as required by statute and the Department’s own policies, to attempt to place the child with a family member instead of terminating Mr. Doe’s parental rights.”
Preserving Error in CPS Termination Trials

Format for Formal Offer of Proof

1. Attempt to elicit testimony, Objection by Opposing Counsel, Objection Sustained – Evidence not admitted
2. "Your honor, at this time I would like to make an offer of proof of this witnesses' testimony for the reporter's record."
3. [make offer – make sure that the court reporter records it]
4. Get a ruling on offer of proof.

Offers of Proof – Why?

An offer of proof is an informal bill of exception, and its purpose is two-fold: (1) to give the trial court a second chance to look at the evidence before finally ruling on its admissibility, and (2) to complete the record on appeal so that it is clear to the appellate court exactly what was excluded at trial.

Remember - Get a Final Ruling!

Always keep in mind that an offer of proof is just that – an offer. Therefore, at the conclusion of the recitation or presentation of the evidence, the proponent of the evidence should re-urge its admission. As with any other offer of evidence, a ruling must be secured in order to preserve error. In other words, after giving the court a second chance to consider the evidence, the attorney should secure a final ruling on admissibility.

Don't Blow it – Waiver of Error

1. Similar evidence offered without objection
2. Grounds of Objection as Limitation on Appeal
3. Can't rely on aligned party's objection
4. Withdrawal of Objections – DON'T
5. Running Objections – Be Careful
6. Partially admissible evidence
7. Motion to Strike Motion for Mistrial – When?
8. Motion to Amend Pleadings – When?
Preserving Error in CPS Termination Trials

Questions?

Thank you to:

• My wife, Suzanna, for letting me put this presentation/paper together and attend this CLE a few days after our son was born.
• Chief Justice Anne Crawford McClure (El Paso Court of Appeals) and Chris Nickelson for allowing me to reproduce large parts of their "Preserving Error Before, During, and After Trial" paper from the 2014 Family Law 101 CLE.
• CAFA Board, for asking me to present here today.
Case Law Update

Presented By:
Brenda L. Kinsler
Rebecca L. Safavi

Advanced CAFA CLE
October 22, 2015

PRE-TRIAL ISSUES

Jurisdiction—Lack of Pleadings to Support Termination
Department's petition alleged termination grounds against Mother.

- The petition listed Father as deceased and did not allege any termination grounds against him, or seek termination of his parental rights.
- Father was not deceased.

BUT....

Father was not deceased...he was in jail.

- Father participated in a hearing and attended the trial by telephone due to his incarceration, however the Department’s petition was never changed.
- At the jury trial, without objection, the Department’s counsel indicated that it was seeking termination of both Mother’s and Father’s parental rights.
- The trial court entered a partial verdict as to (N) and (O), and the jury found that termination was in the children’s best interest.
On appeal, Father argued that the Department’s pleadings were fatally defective because they failed to request termination of his parental rights.

Father conceded he failed to object to the pleadings—but—the court found that the issue could be raised for the first time on appeal as it was fundamental error.

The court explained that jurisdictional defects represent fundamental error and can be raised for the first time on appeal. It reasoned that a judgment must be supported by the pleadings, and a trial court exceeds its jurisdiction if it renders a judgment in the absence of pleadings.

Because a court’s jurisdiction is invoked by the pleadings, without proper pleadings, the trial court is without jurisdiction, either as to the parties or the subject matter.

The court, in rejecting the Department’s argument that the issue of termination was tried by consent, wrote “we conclude the trial by consent doctrine does not apply here, where there is no pleading whatsoever seeking to terminate [Father’s] parental rights.”

“In the absence of a pleading seeking affirmative relief, the trial court is without jurisdiction to render judgment.”

Jurisdiction—Service by Publication
Two issues presented:

1. Service by publication was improper in this case; and
2. If service was proper, the trial court lacked personal jurisdiction over Father because the trial court signed the termination order prior to the expiration of time in which he had to answer.

Original Petition filed March 2, 2014
Father was appointed an attorney but had not been served

January 28, 2015-Department files motion for substituted service, granted on same day.

January 29, 2015-“Citation by Publication By Courthouse Door” signed by Dist. Clerk on January 29, 2015.

February 3, 2015-Citation posted on the courthouse door at 9:30 a.m. for “seven days”.

February 23, 2015-Termination trial-TPR order signed
Held that
Issue (1): “We conclude it was not possible or practicable to give appellant more adequate warning; therefore, service on appellant by publication was proper.”
Issue (2): Under the Family Code, “answer date is computed from [ ] the expiration date of the posting period.” See TEX. FAM. CODE § 102.010(e).
Appellant’s answer was due on March 9, 2015, the Monday following twenty days from February 10, 2015. Therefore, the court concluded that “the trial court lacked personal jurisdiction over appellant because the time period in which appellant had to file his answer had not yet expired.”

Adversary Hearing—Local Rules Do Not Negate Requirement of Evidence


- The parents sought mandamus relief arguing that the trial court abused its discretion by granting the Department temporary managing conservatorship of the child without conducting a full adversary hearing as required by TFC § 262.201
The order setting case for adversary hearing warned the parents that to proceed with the setting they must first: ”(1) announce ready in accordance with the Local Rules and attached procedures; [and] (2) timely appear for the Monday Family Law Docket at 8:30 a.m. in accordance with the Local Rules and attached procedures.”

The order also stated that if the parents “fail[ed] to comply with the specific procedures for announcing and appearing for the hearing” the trial court could enter appropriate orders, including granting temporary managing conservatorship to the Department.

Counsel for the parents failed to announce as required and failed to appear for the hearing. Trial court signed temporary orders finding that “[the parents’ attorney] failed to announce as required by the instructions and [parents’ attorney] failed to appear at the Family Law Docket”, granting temporary managing conservatorship to the Department, and contained requisite findings under TFC § 262.201(b).

The appellate court noted that despite the finding of evidence to support TFC § 262.201(b), “the Department did not dispute that no evidentiary hearing was conducted and that it presented no evidence or testimony to the trial court in support of the temporary orders” and “[a]s such, there was no evidence on which the trial court could have based its findings.”
The appellate court found that the trial court “signed the temporary orders, at least in part, based on its finding that [the parents’ attorney] failed to comply with the requirements of the court’s local rules” and that “[a] court’s local rules . . . cannot trump the mandatory requirements of a statute.” The court held that “[a]bsent a record of an evidentiary hearing, we cannot determine that the trial court had a basis on which to make the findings required under § 262.201(b).”

Appointment of Counsel—Critical Stage of Proceeding

*In re V.L.B.*, 445 S.W.3d 802 (Tex. App.—Houston [1st Dist.] 2014, no pet.)

- Eight days after Mother filed affidavit of indigence, the trial court began a termination trial
- Trial court appointed Mother an attorney after three witnesses testified. The court then recessed the case to give Mother’s attorney “an opportunity to get up to speed on [her] case.”
When trial continued:
- Department did not present any additional witnesses.
- Mother’s appointed counsel asked the trial court for additional time for Mother to complete her service plan and presented testimony relevant to this request.
- The trial court denied the request and terminated Mother’s parental rights.

On appeal, Mother complained that the trial court erred in proceeding with trial before considering her affidavit, in violation of “her statutory right to appointment of counsel and her constitutional due process rights.”

The appellate court noted that TFC § 107.013(a) (1) provides that in a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of an indigent parent who responds in opposition to the termination.

The court cited precedent that “A parent’s filing of an affidavit of indigency ‘trigger[s] the process for mandatory appointment of an attorney ad litem.’”

In addressing the timing of the appointment of Mother’s counsel, the appellate court presented the question of whether “delaying that appointment until after the commencement of the termination trial” constitutes reversible error.
The appellate court reasoned that “[c]onsidering the mandatory nature of the appointment of counsel upon a finding of indigency, and the appointed attorney’s specific obligations in connection with representing an indigent parent, a trial court should address a parent’s affidavit of indigence as soon as possible—before the next critical stage of the proceedings, whether it be a hearing, a mediation, a pretrial conference, or, in particular, a trial on the merits, and allow a reasonable time for appointment of counsel to make necessary preparations.”

“When an indigent parent seeks representation before a critical stage of the proceedings, and the trial court nonetheless proceeds with that stage, the delay may render the ultimate appointment a toothless exercise and irreparably impair the parent’s ability to defend the case or regain custody of the child.”

see also In re K.M.L., 443 S.W.3d 101 (Tex. 2014) (Justice Lehrmann questioned “whether the trial court erred in failing to appoint counsel to represent [Father] or admonish him of his right to counsel” when Father did not receive notices of hearings, did not attend any hearings, but showed up at final hearings as a result of a Department-issued subpoena. Justice Lehrmann concurred that Father’s case be remanded for a new trial “[b]ecause [Father] was given no meaningful opportunity to invoke, much less to intelligently waive, his right to appointed representation in these critically important proceedings.”).
The trial court granted Mother court-appointed counsel but denied one for Father.

Father and Mother filed an affidavit of indigency more than six months before the underlying jury trial began. There was nothing in the clerk’s record to indicate that the Department or the court clerk filed a written contest of the indigency finding.

A jury trial was held—the parental rights of both parents were terminated.

The appellate court applied TRCP 145(d), holding that a parent is indigent in a parental termination case as a matter of law when an affidavit of indigence is filed with the court unless either the Department or the court clerk files a written document contesting indigency. Accordingly, the case was remanded back to the trial court to appoint Father an attorney and for a new trial.
Compare In re G.S., No. 14-14-00477-CV (Tex. App.—Houston [14th Dist.] Sept. 23, 2014, no pet.) (mem. op.) (Department’s oral contest to parent’s indigency status was sufficient to remove court-appointed counsel for parent making $70k/year).

Appointment of Counsel—Delayed Appointment

> He was appointed an attorney on May 1, 2014.
> Father claimed that the months he spent without an attorney “robbed him of 10 months of possible work towards services and dialogue with the Department about what services were recommended.”
Court noted that 107.013 was the version in effect during the time period in question which had no timetable for appointment of counsel.

Based on the cases holding that the request for a lawyer triggers the trial court’s duty to appoint one, the trial court erred in not appointing counsel for nearly ten months.

However, error harmless because appellant’s lawyer had nine months to prepare for trial and filed continuances and numerous documents, moreover, Father did not argue that his trial counsel was ineffective. He was in prison, was not expected to complete the service plan, and he was not terminated on (O).

Notice of Final Hearing
More than two months after suit was filed, the Department served Father by publication without appointing an attorney ad litem.

Over the next six months, Father received no notice of the proceedings, nor did he have any involvement with the child.

Father filed pro se pleadings and provided contact information.

Father was not provided notice of any hearings, including trial.

The Department served Father with a subpoena to attend the trial.

At trial:

The court told Father that he possibly could have been entitled to appointed counsel, but that it was “a little late for that now.”

Following a four-day jury trial, Father’s parental rights were terminated.
The court of appeals held that Father waived his complaint about notice of trial and right to counsel by making a general appearance.

The Supreme Court granted Father’s petition for review. Father’s petition asked the court to consider whether he waived his right to notice of the termination hearing by appearing at trial after being subpoenaed.

Record did not show that Father was served with actual notice of the trial setting.

Father appeared at trial under subpoena, and claimed he received no notice of the trial by mail.

“Failure to give a parent notice of pending proceedings ‘violates the most rudimentary demands of due process of law.’ . . . Given the constitutional implications of parental rights termination cases . . . we must conclude that [Father] did not receive notice of trial.”

The Department argued that Father waived notice by appearing at trial and not moving for a continuance. The Court acknowledged that the due process right to notice prior to judgment is subject to waiver, but stated, “such waiver must be voluntary, knowing, and intelligently waived.”

The Court further explained that the “due process requirement of notice must be provided “at a meaningful time and in a meaningful manner.”
The Court concluded, “[b]ased on the record before us, we cannot conclude that [Father] waived his due process right to notice of trial by sitting, under subpoena, through trial without any help from counsel and failing to formally move for continuance.”

TFC § 263.401—What Constitutes Commencement?

In re D.S., 455 S.W. 3d 750 (Tex. App.—Amarillo 2015, no pet.)

The issue on appeal was “whether, under the facts of this case, the trial court commenced the trial on the merits” when it continued the case pending the final hearing.
On the date of the final trial, two-and-a-half weeks before the new dismissal date, the Department was granted a continuance.

The trial was reset and was scheduled to be held two days before the new dismissal deadline.

On the day of trial, the Department advised the trial court that it anticipated it needed “[a]t least half a day” for the trial.

The trial court then “continue[d the case] pending the final hearing.”

The case was continued for one month.

About two weeks before the case was called for final hearing, Father “filed a motion to dismiss for failure to try this matter within the statutory time period.”

On the day of trial, the trial court orally overruled Father’s motion to dismiss and commenced the trial.
The appellate court noted that on the first date the trial was called, “the parties never answered that they were ready or not ready for trial.”

In reviewing the trial court’s actions, the court determined that “No substantive action was taken regarding the case. No preliminary matters or motions were heard.”

The court concluded that TFC 263.401 “requires more than a putative call of the case and an immediate recess in order to comply with the statute. It is suggested that, at a minimum, the parties should be called upon to make their respective announcements and the trial court should ascertain whether there are any preliminary matters to be taken up.”
Five months following the children’s removal, the children were placed in a monitored return with their father upon a finding of good cause by the trial court. One month later, the children were removed following an altercation between the parents. A trial was subsequently held and parental rights were terminated.

On appeal, Father contended that “the trial court, by stating that there was good cause to return the children to his care in July 2013, made a ‘judicial admission’ that the return was in the children’s best interest, and that [the court of appeals’s] ‘best interest analysis should be limited to the facts that occurred from the date that the monitor[ed] return started to the date of the re-removal or the date of trial.’”
The Court disagreed, reasoning, in part, that:

“The family code specifically allows a trial court to issue a temporary order for a monitored return, provided the court determines it is in the child’s best interest for the court to retain jurisdiction over the case.”

“To hold that the majority of a parent’s actions during the pendency of a termination proceeding could not be considered if a trial court enters a monitored return order would discourage the Department and the courts from attempting family reunifications in close cases such as this one.”

Authentication of Exhibit
R.Z. v. TDFPS, No. 03-14-00412-CV (Tex. App.—Austin October 29, 2014, no pet.) (mem. op.)

Mother argued that the trial court erred in overruling her objection to the admission of one of the Department’s exhibits.

The challenged exhibit was a printout of pages from a website called “Naughty Reviews”.

The pages contained pictures of mother that identified her as “Natalia”, a “Female Escort in Austin Texas”.

The contact information included a phone number with an area code from Pennsylvania, an email address, and costs of services.

Mother contended that the exhibit was not properly authenticated pursuant to TRE 901(a), which states: “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”
Mother argued that some information on the website, such as her height, was not accurate.

Mother testified that she was not aware of the website before trial, she had nothing to do with it, she had never used the phone number that was listed, and someone must have created the profile on the website to humiliate her.

Mother did not dispute that the pages were posted on the website, the photographs on the website were of her, or the email address on the website was her email.

A Department caseworker testified that the phone number on the website matched the contact number that the Department had been provided for Mother for several months, and that mother admitted to using the name “Natalia” on a Facebook account that she created.

The appellate court determined that “given this evidence, the trial court could have concluded that there was sufficient evidence to support a finding that the pages from the website were what the Department purported them to be and, therefore, the trial court did not abuse its discretion by overruling [Mother’s] objection to the evidence based on lack of authentication.”
Rule of Optional Completeness

The rule of optional completeness provides:

When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. TEX. R. EVID. 107.
Trial counsel for appellants sought to introduce the following statements from the first page of the investigative report:

The children appear to be in “good shape”. They were observed “bouncing around” and “happy.” There are no concerns about abuse. There is no known effect on children at this time, but situation my change quickly.

“Physical abuse comes in many forms, and we cannot fault a trial court for refusing to conclude that forcing children to live in squalor or otherwise unhealthy conditions falls outside its scope.”

“The trial court could have reasonably deduced that the first page of the report was rather misleading and an incomplete description of the circumstances to which the children were being subjected.”
“Thus, some portions of the additional twenty-six pages were admissible to explain whether the children showed signs of physical abuse or some other adverse consequences when the Department first encountered them in 2013. This is true even though those portions of the report may have contained hearsay.”

Department was entitled to introduce portion relevant to refute the claims that appellant was trying to make but not entire report “without first redacting its irrelevant aspects”.

However, admission of entire report harmless error- “The appellate record here is comprised of multiple volumes of testimony. In perusing those volumes, we found evidence substantially similar to that appearing in the investigative report.”

TRIAL ISSUES
In re S.F., No. 11-15-00055-CV (Tex. App.—Eastland Sept. 10, 2015, no pet. h)(mem.op.)

Facts: Two children, termination as to (O). One child had been in TMC of Department nine months the other had not. Trial court terminated as to the one that had been in TMC of Dept. for required period but denied termination as to the other child.
After requisite time elapsed for second child, the Department filed a supplemental petition to terminate, pleading 161.004.

The entire trial centered on whether there was any material and substantial change; the trial court took “the matter under advisement”.

Without another hearing, the trial court issued its termination order.

Proceeding took thirty minutes and the reporter’s record is fifteen pages.

No evidence was presented regarding any actions of the parents or the best interest of the child, nor was the trial court asked to take judicial notice of the evidence presented at the prior trial.

The appellate court stated that “There is no question that the parents should have been permitted to present evidence on their behalf in response to the State’s efforts to terminate their parental rights.”

Held: “the trial court erred when it rendered judgment without conducting a trial on the merits after it took the Section 161.004 matter under advisement.”
In re J.D., 436 S.W.3d 105 (Tex. App.—Houston [14th Dist.] 2014, no pet.)

- Mother challenged sufficiency of evidence supporting termination of her rights under (D) and (E).
- The child sustained multiple serious injuries while in Mother’s care; Mother was the child’s sole caregiver.
- Mother gave “inconsistent” descriptions of the events surrounding the child’s injuries.

- Mother only identified child’s five-year-old sibling as having possibly caused the child’s injuries.
- Mother denied “ever hearing the [c]hild cry or scream” as a result of her injury, despite the medical testimony that any child would have screamed after such an injury.
Expert testimony showed that the child’s injuries were “intentionally inflicted” and “consistent with physical abuse having occurred on more than one occasion.”

The expert testimony also established that a five-year-old could not have caused the injuries.

The trial court could have credited the expert medical testimony that a five-year-old was not capable of causing the child’s injuries and that the injuries resulted from abuse.

The trial court was also not required to believe Mother’s testimony that she was unaware of the injury until shown the x-ray at the hospital.

The court of appeals concluded that: “In light of the evidence in this case that the child sustained an arm fracture and a leg fracture at different times while in Mother’s care, the injuries were not accidental, but instead were abusive injuries caused by extreme force, and the child would have screamed in pain so that her caregiver should have been aware of the arm fracture” the evidence was sufficient to support trial court’s (D) and (E) findings.
“It was within the trial court’s province to judge [Mother]’s demeanor, to disbelieve her testimony that she did not know how the [child] was injured, and to infer that she knew of the [child]’s injuries and how they occurred, supporting its findings under subsections D and E.”

Unexplained Injuries

- *In re H.A.G.*, No. 04-14-00396-CV (Tex. App.—San Antonio Nov. 21, 2014, no pet.) (mem. op.) ((D) and (E) findings upheld)
- *In re J.D.B.*, 435 S.W.3d 452 (Tex. App.—Dallas 2014, no pet.) (Finding under (D) upheld, despite parents’ lack of explanation for child’s injuries and denial of knowledge of how injuries occurred).

Factually Insufficient Evidence
In re E.W., No. 06-15-00018-CV (Tex. App.—Texarkana June 26, 2015, no pet.)

- Mother challenged sufficiency of evidence supporting termination of her rights under (D), (E), (O), and the trial court’s best interest finding.
- Rule 11 Agreement was “revoked” or “recanted” by Mother.

- The Reporter’s Record was very short.
- Trial court took “Judicial knowledge” of the case, however, “[p]leadings are not evidence.”

- The appellate court found that there was no evidence as to (D) and (E)—we did not argue there was.
- The court held that the evidence was factually insufficient to support (O) or the best interest finding.
Remanded because “it is apparent here that the parties and the trial court were confused as to what evidence had been submitted for the trial court’s consideration.”

**BEST INTEREST**

Insufficient Evidence to Support Best Interest Finding

> Referral for neglectful supervision by Mother and Father of one of their children after police approached their vehicle and discovered approximately eight grams of heroin in the vehicle.

> Mother did not appear at the termination hearing, and the only witness who testified was the Department supervisor.

> Supervisor testified to:
  > no recent contact with Mother
  > her belief—based on a Facebook post—that Mother was “in a relationship with an individual who smokes marijuana and has guns.”
  > “a couple” of missed visits with the children
  > Mother’s completions of parts of her service plan
  > Mother’s missed drug test
  > Criminal history of robbery without detail

> The supervisor also testified that Mother had not maintained significant contact with the Department and had done “nothing” to demonstrate she could provide the children with a safe and stable home.

> Supervisor also believed that Mother’s behavior during the September 2013 incident endangered the child’s well-being, but was not asked whether her behavior endangered the other three children.
The appellate court found that the evidence was insufficient to support the trial court’s best interest finding, noting there was:

- “no evidence adduced regarding any physical or mental vulnerabilities of any of the four children”
- “[n]o evidence of the magnitude, frequency, and circumstances of the harm, if any, to any of the four children,”
- “no evidence in the record that any of the children have been the victim of repeated harm” or whether “any of the children have expressed any fear of living in or returning to their home.”

The court also reasoned:

- “[o]ther than [the supervisor’s] testimony, no other witness testified and no evidence was admitted”;
- “the record contained no evidence about or even a mention of the other three children except their names and birthdates”; and
- that “[the supervisor’s] agreement that it was in the children’s best interest to terminate [Mother’s] parental rights and it was in their interest to ‘move on’ was conclusory.”


Mother signs MSA and affidavit of voluntary relinquishment; attempts to revoke at final hearing. Trial court terminated her parental rights pursuant to (K).

Appellate court affirms trial court’s determination that the affidavit was not procured through fraud, duress or coercion

Reversed and remanded because evidence was factually insufficient to support best interest
Execution of a valid affidavit of relinquishment is relevant to the best interest inquiry, but is not dispositive.

In re Lee does not foreclose trial court from conducting a best interest determination in termination cases.

The Department was still required to prove that termination was in the child’s best interest, even though Mother was bound by her valid affidavit of relinquishment.

Evidence was legally sufficient.
- Factors one, two, five, six, and seven weighed against termination.
- Factors three, four, eight, and nine weighed for termination.

Evidence factually insufficient.
- Conflict and dysfunction between Mother and child.
- Child loved her Mother.
- Contacted her after running away.
- Mother told Department about child’s contact following run away.
- Mother’s execution of affidavit was based on incorrect information.
INDIAN CHILD WELFARE ACT (ICWA)

In re K.S., 448 S.W.3d 521 (Tex. App.—Tyler 2014, pet. denied)

- Actual Notice Sufficient
- ICWA Does Not Preempt TFC Findings
- Burden Remains Clear and Convincing for TFC Findings

Mother and child were traveling through Texas when a report of neglectful supervision was received, which led to the removal of the child from Mother’s custody.

At an initial setting in the case, a representative from the Cherokee Nation appeared and advised the trial court that it was intervening in the case on the child’s behalf.
On appeal, Mother first argued that the proceedings should be invalidated because the notice afforded to Cherokee Nation did not strictly comply with 25 U.S.C.A. § 1912(a), which states: “the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.”

The appellate court noted that there was no showing that the Department strictly complied with Section 1912(a)’s requirements; however, it also found that Cherokee Nation became involved “very early” in the case, had a representative attend court hearings, provided transportation to Mother to Texas for visits and services, and conducted home visits to Mother’s apartment in Oklahoma City.

The appellate court found that the interested tribe had actual notice of the proceedings and agreed that “[w]hen actual notice of an action has been given, [irregularity] in the content of the notice or the manner in which it was given does not render the notice inadequate.”

Also, there was no evidence that the failure to strictly comply with Section 1912(a)’s notice requirements negatively affected Cherokee Nation’s interest in the child and in retaining the child in its society.
Mother also argued that the ICWA preempts the Texas Family Code termination ground and best interest findings, alleging that it is impossible to simultaneously comply with the Family Code and ICWA.

The court disagreed and addressed whether the Family Code serves as an obstacle to the accomplishment and execution of the objectives Congress sought to accomplish with ICWA.

The court noted that “[t]he ICWA and the Texas Family Code address similar interests when a child is removed from his or her home because they both seek to protect the best interests of the child and to preserve family stability.”

Further, “the concurrent application” “provides additional protection to parents of Indian children because it requires the party seeking termination to prove state and federal grounds before the parent-child relationship may be terminated.”

The appellate court also concluded that the “family code is not preempted each time an Indian child is involved in a child custody proceeding in Texas, namely a suit involving the termination of the parent-child relationship. . . . Thus, when the ICWA applies, both the ICWA and the Texas Family Code grounds for termination must be satisfied.”
Mother also challenged the sufficiency of the evidence supporting the jury’s findings, which terminated her parental rights under TFC § 161.001(1)(D), (E), and (O) and 25 U.S.C.A. § 1912(d) and (f) of the ICWA. The jury charge imposed a beyond-a-reasonable-doubt burden of proof as to both the Family Code findings and the ICWA grounds.

Section 1912(f): No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in emotional or physical damage to the child.

The court of appeals held that because the Family Code and the ICWA require different burdens of proof to terminate the parent-child relationship, different standards of review apply to each—beyond a reasonable doubt for the ICWA and clear and convincing evidence for TFC § 161.001.
Mother also contended that in an ICWA jury trial, the trial court erred by permitting a broad-form submission to the jury rather than multiple submissions containing the TFC and ICWA grounds.

The appellate court disagreed, ultimately noting that the controlling question under both statutes remained the same: “Should the parent-child relationship between [mother] and the child, [...] be terminated?”

See also, In re G.C., M.C., and H.C., No. 10-15-00128-CV (Tex. App.—Waco August 13, 2015, no pet. h) (mem. op.)

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Introduction and Overview

This paper is based on the paper presented by the author with Judge Karin Bonicoro and Assistant Attorney General, Barry Brooks at the State Bar of Texas 41st Annual Advanced Family Law course, and on the author’s compilation of all Family Code changes made in 2015, available in two documents, one covering the “non-substantive” clean-up bill, Senate Bill 219, effective April 2, 2015. Both documents have been posted on the Texas Lawyers for Children Online Legal Resource Center at www.TexasLawyersforChildren.org.

The 84th Texas Legislature passed bills making more than 1,000 changes to the Family Code alone, a far greater number of changes than were made in any session of the past fifteen years. Changes include amendments, revisions or repeals, and include provisions that were changed by “non-substantive” clean-up legislation such as Senate Bill No. 219, that, among other changes, eliminated the term “mental retardation” in favor of “intellectual disability,” replaced references to the Bureau of Vital Statistics with the “vital statistics unit” of the Department of State Health Services, and moved language from Chapter 261 defining the term “born addicted” to the termination provisions in Chapter 161.

The author has attempted to extract significant changes relevant to the audience at this session.

The text, effective date and legislative history of each bill can be found by bill number at http://www.legis.state.tx.us/Home.aspx. Note that the “enrolled” version will be the version signed by the Governor and enacted into law unless vetoed. This web site also includes prior versions, of each bill beginning with the text “as introduced” through each step in the legislative process along with bill analyses and witness lists, all of which may be helpful in divining legislative intent.

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2015 FAMILY CODE CHANGES

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October 22, 2015

Access to Legislation

• “Non-substantive” changes effective April 2, 2015 and large TFC compilation: Texas Lawyers for Children Online Legal Resource Center at www.TexasLawyersforChildren.org.
• The text, effective date and legislative history of each bill can be found by bill number at http://www.capitol.state.tx.us/Home.aspx
• “Enrolled” version is the final text as passed by both houses.

Appointment Reports

• Court Appointment Reports, S.B. No. 1369.
• Clerk must submit to the Office of Court Administration a report on appointments and payments to AAL, GAL (if not CASA), guardian, mediator or competency evaluator, and post the report at the courthouse and on any internet website of the court.
• OCA shall study the feasibility of statewide uniform attorney ad litem billing system.
Appointment Wheels

• S.B. No. 1876 requires each court to establish and maintain at least 4 lists, including “all attorneys who are qualified to serve (as AAL) and registered with the court.”
• Appointment must be first from list unless specified “good cause” is found.
• Lists must be posted at the courthouse and on the court’s internet web site.

Is S.B. 1876 Constitutional?

• An attorney general opinion has been requested on:
  • 1. whether the statute violates the Texas Constitution’s separation of powers clause;
  • 2. whether it is unconstitutionally vague because it fails to define “qualified” for the various lists.
• RQ-0060-KP (September 21, 2015).

Digitized Signature

• A “digitized signature” means a graphic image of a handwritten signature having the same legal force and effect for all purposes as a handwritten signature. [Sec. 101.0096, Family Code (2013)]
  The topic drew a lot of attention in 2015.
• New Sec. 1.109(b) “may be applied only by, and must remain under the sole control of, the person whose signature is represented.” [A similar provision applies throughout the Family Code].
Digitized Signature (continued)

• A “digitized signature” may not be used on a waiver in a divorce suit, in a suit for removal of disabilities of minority, or in a suit for change of name [Sec. 6.4035(e); Sec. 31.008(b); Sec. 45.0031(b) & 45.107(b)].
• A “digitized signature” may not be used on a waiver in any suit under Title 5 [Sec. 102.0091(b)].

Exemption from Marrying

• Chapter 2, new subchapter G. Freedom of Religion with respect to recognizing or performing certain marriages
• Applies to a “religious organization, an organization supervised or controlled by or in connection with a religious organization, an individual employed by a religious organization while acting in the scope of that employment, or a clergy or minister,” not to public officials.

New TRO options

• Sec. 6.501 now specifies many more orders that may be granted “without notice to the adverse party” for “for the preservation of the property and for the protection of the parties,” conforming to suggested issues addressed in practice forms, but not previously included in the statute, such as using electronic communications to threaten, or alarm the other party. S.B. No. 815.
Title 2 Changes

- Title 2, Child in relation to Family includes provisions relating to disabilities of minority, including emancipation, consent to medical care, judicial bypass for abortion, the “authorization agreement” for relative care under Chapter 34, parental liability for the child’s conduct and civil liability for interference with custody or visitation, and change of name for child or adult.

Removal of Disabilities

- Waivers are allowed, but must be sworn before a notary public who is not an attorney in the suit (unless the person executing the waiver is incarcerated) and cannot be signed using a digital signature. [Sec. 31.008]

Abortion notice and consent: HB3994

- Major changes to Chapter 33, effective January 1, 2016.
  The burden of proof for judicial bypass is changed to “clear and convincing” evidence; the doctor is required to verify whether the woman requesting an abortion is an adult; if she is a minor, the court must appoint both a guardian ad litem and an attorney ad litem, and the attorney cannot serve in both roles; the applicant’s court appearance must be in person and cannot be by video or telephone conference; the court is given 5 days to rule and an order cannot be “deemed granted” if the court fails to act within the time limit; the minor applicant cannot consult the case, and an order denying the application is given res judicata effect; the attorney must investigate the minor’s application history and must “attest to the truth” of minor’s claims regarding venue and prior applications in a sworn statement; a court of appeals also given 5 days to act if there is an appeal; if the minor reports or there is “reason to believe” that physical or sexual abuse occurred, the doctor and the trial judge have a duty to report the allegation to law enforcement; a civil penalty of up to $10,000 may be imposed for violation of this chapter, and the Attorney General is given enforcement responsibility.
New Chapter 47 (2 bills)

• S.B. No. 813 authorizes use of a digital signature under Title 2.
• S.B. No. 822 provides that:
  – (1) the definitions in Chapter 101 apply to terms used in this title, except if a term is specifically defined in differently in Title 2, the meaning provided by this title prevails; and
  – (2) Chapter 107 applies to the appointment of an attorney ad litem, guardian ad litem, or amicus attorney under Title 2.

Title 3 (Juvenile Justice Code)

• Truancy no longer an offense—Truancy Court Created, H.B. No. 2398.
• S.B. 206 repealed Sec. 264.305 (court order for services), so disobeying such an order cannot be a juvenile code offense.
• Truancy court procedures are in new Chapter 65. Apply only to children 12 to 18 years of age to encourage school attendance.

Juvenile Justice

• H.B. No. 642, creates an alcohol awareness program or drug education program for certain minors convicted of or adjudicated to have engaged in, or placed on deferred disposition or community supervision for, certain drug or alcohol related offenses. Amendments to Chapters 53 and 54, Family Code; conforming changes to Transportation Code and Code of Criminal Procedure.
Juvenile Justice: SB1630

• “Special Commitment” provisions (new).
• A child who is found to have engaged in delinquent conduct that constitutes a felony offense may be committed to the Texas Juvenile Justice Department for an indefinite period if the court makes a special commitment finding that the child has behavioral health or other special needs that cannot be met with the resources available in the community. Sec. 54.04013.

Title 4 Protective Orders

• S.B. No. 817, applies “dating violence” to victims targeted because of marriage to or dating with the perpetrator’s former spouse, etc. Also adds Chapter 261 abuse of a child to definition of “family violence.”

New Presumption, but how broad?

H.B. No. 1782

• Sec. 81.0015. PRESUMPTION. For purposes of this subtitle, there is a presumption that family violence has occurred and is likely to occur in the future if:
  (1) the respondent has been convicted of or placed on deferred adjudication community supervision for any of the following offenses against the child for whom the petition is filed:
    (A) an offense under Title 1, Penal Code, for which the court has made an affirmative finding that the offense involved family violence under Article 42.013, Code of Criminal Procedure; or
    (B) an offense under Title 6, Penal Code;
  (2) the respondent's parental rights with respect to the child have been terminated; and
  (3) the respondent is seeking or attempting to seek contact with the child.

Note that the statute requires proof of conviction of a listed offense, and that the respondent's parental rights have been terminated and that the respondent is trying to contact the child.
Term extended if perpetrator in jail

• H.B. No. 388 amends Sec. 85.025(c) relating to the duration of protective orders.
• If a person who is the subject of a protective order is confined or imprisoned on the date the protective order would expire under Subsection (a) or (a-1), or if the protective order would expire not later than the first anniversary of the date the person is released from confinement or imprisonment, the period for which the order is effective is extended, and the order expires on:
  [1] the first anniversary of the date the person is released from confinement or imprisonment, if the person was sentenced to confinement or imprisonment for more than five years or
  [2] the second anniversary of the date the person is released from confinement or imprisonment, if the person was sentenced to confinement or imprisonment for five years or less.

Title 5—New Definitions

• S.B. No. 206 (DFPS reauthorization bill)
  Sec. 101.0133. FOSTER CARE. “Foster care” means the placement of a child who is in the conservatorship of the Department of Family and Protective Services and in care outside the child’s home in an agency foster group home, agency foster home, foster group home, foster home, or another facility licensed or certified under Chapter 42, Human Resources Code, in which care is provided for 24 hours a day.
• Sec. 101.0134. FOSTER CHILD. “Foster child” means a child who is in the managing conservatorship of the Department of Family and Protective Services.

More definitions

• S.B. No. 550 effective September 1, 2018 added new definitions and provisions for the Child Support Division to establish and enforce dental support.
• S.B. No. 821 effective September 1, 2015 clarified the definition of “school” so it reads as follows:
  Sec. 101.028. SCHOOL. “School” means an elementary [a primary] or secondary school in which a child is enrolled or, if the child is not enrolled in an elementary [a primary] or secondary school, the public school district in which the child primarily resides. For purposes of this section, a reference to elementary school includes prekindergarten.
Sibling access

- H.B. No. 1781 amended Section 102.0045, Family Code, by adding Subsection (a-1) to read as follows:
- (a-1) The sibling of a child who is separated from the sibling as the result of an action by the Department of Family and Protective Services may file an original suit as provided by Section 153.551 requesting access to the child, regardless of the age of the sibling. A court shall expedite a suit filed under this subsection.

Video testimony in CPS cases: SB206.

- Section 104.007(b), Family Code, is amended to read as follows:
- (b) In a proceeding brought by the Department of Family and Protective Services concerning a child who is alleged in a suit to have been abused or neglected, the court may order that the testimony of a professional be taken outside the courtroom by videoconference:
  - (1) on the agreement of the department’s counsel and respondent’s counsel; or
  - (2) if good cause exists, on the court’s own motion.

Child Custody and Adoption Experts:

H.B. No. 1449

- This bill creates a new system of rules and licensing requirements for professionals that perform child custody and adoption evaluations in private cases. Texas has very few professionals that would be qualified under this law, especially in rural areas.
- Sec. 107.102. APPLICABILITY. (a) For purposes of this subchapter, a child custody evaluation does not include services provided in accordance with the Interstate Compact on the Placement of Children adopted under Subchapter B, Chapter 162, or an evaluation conducted in accordance with Section 262.114 by an employee of or contractor with the department.
Court appointment of AAL for parent in CPS suit: SB1931

- Section 107.013, Family Code, is amended by adding Subsection (a1) and amending Subsections (b) and (d) to read as follows:

  - (a1) In a suit described by Subsection (a), if a parent is not represented by an attorney at the parent's first appearance in court, the court shall inform the parent of:
    - the right to be represented by an attorney; and
    - if the parent is indigent and appears in opposition to the suit, the right to an attorney ad litem appointed by the court.

  - (b) If both parents of the child are entitled to the appointment of an attorney ad litem under this section and the court finds that the interests of the parents are not in conflict and that there is no history or pattern of past or present family violence by one parent directed against the other parent, the court may appoint an attorney ad litem to represent the interests of both parents.

  - (d) The court shall require a parent who claims indigence under Subsection (a) to file an affidavit of indigence in accordance with Rule 145(b) of the Texas Rules of Civil Procedure before the court may conduct a hearing to determine the parent's indigence under this section. The court may consider additional evidence at that hearing, including evidence relating to the parent's income, source of income, assets, property ownership, benefits paid in accordance with a federal, state, or local public assistance program, outstanding obligations, and necessary expenses and the number and ages of the parent's dependents. If the court determines the parent is indigent, the court shall appoint an attorney ad litem to represent the parent.

Temporary Appointment of AAL (New Sec. 107.0141): SB1931

- The court may appoint an attorney ad litem to represent the interests of a parent beginning at the time the court issues a temporary restraining order or attachment of the parent's child under Chapter 262 and ending on the court's determination of whether the parent is indigent before commencement of the full adversary hearing.

Duties of Attorney before Adversary Hearing under new Sec. 107.0141

- (b) An attorney ad litem appointed for a parent under this section:
  - (1) has the powers and duties of an attorney ad litem appointed under Section 107.0131; and
  - (2) if applicable, shall:
    - (A) conduct an investigation regarding the petitioner's due diligence in locating and serving citation on the parent; and
    - (B) interview any party or other person who may have information relating to the identity or location of the parent.
  - (c) If the attorney ad litem identifies and locates the parent, the attorney ad litem shall:
    - (1) inform the parent of the parent's right to be represented by an attorney and of the parent's right to an attorney ad litem appointed by the court, if the parent is indigent and appears in opposition to the suit;
    - (2) if the parent claims indigence and requests an attorney ad litem beyond the period of the temporary appointment under this section, assist the parent in making a claim of indigence for the appointment of an attorney ad litem; and
    - (3) assist the parent in preparing for the full adversary hearing under Subchapter C, Chapter 262.
Attorney and Court Action under new Sec. 107.0141

• (d) if the court determines the parent is indigent, the court may appoint the attorney ad litem to continue to represent the parent under Section 107.013(a)(1).

• (e) if the court finds the attorney ad litem is unable to identify or locate the parent, the attorney ad litem shall submit to the court a written summary of the attorney ad litem’s efforts to identify or locate the parent with a statement that the attorney ad litem was unable to identify or locate the parent. On receipt of the summary required by this subsection, the court shall discharge the attorney ad litem from the appointment.

• (f) if the attorney ad litem identifies or locates the parent, and the court determines that the parent is not indigent, the court shall discharge the attorney ad litem from the appointment.

More Duties to Provide Information, S.B. No.818 (Sec 153.076, Family Code)

• The court shall order that each conservator of a child has the duty to inform the other conservator of the child if the conservator:

  • (1) establishes a residence with a person who the conservator knows is the subject of a final protective order

  • (2) resides with, or allows unsupervised access to a child by, a person who is the subject of a final protective order

• The information required to be made under Subsection (b) must be made as soon as practicable but not later than:

  • (1) the 30th day after the date the conservator establishes residence with the person who is the subject of the final protective order

  • (2) the 90th day after the date the final protective order was issued, if the notice is required by Subsection (b)(1);

  • (3) the 30th day after the date the final protective order was issued, if the notice is required by Subsection (b)(2).

“Born Addicted” Moved to Termination Chapter: SB219

• Sec. 161.001. INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP. In this section, “born addicted to alcohol or a controlled substance” means a child:

  • (1) who is born to a mother who during the pregnancy used a controlled substance, as defined by Section 481.002, Health and Safety Code, other than a controlled substance legally obtained by prescription, or alcohol; and

  • (2) who, after birth, exhibits observable withdrawal from the alcohol or controlled substance, exhibits observable harmful effects in the child’s appearance or functioning, or exhibits the demonstrable presence of alcohol or a controlled substance in the child’s bodily fluids.

• The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:

  • (1) that the parent has:

  • (A) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescribing, or

  • (B) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescribing, or

  • (2) that termination is in the best interest of the child.
New Defense to RAPR finding: SB1889:
Sec. 261.001(4)

- “Neglect” (B), does not include the refusal by a person responsible for a child’s care, custody, or welfare to permit the child to remain in or return to the child’s home resulting in the placement of the child in the conservatorship of the department if:
  - (i) the child has a severe emotional disturbance;
  - (ii) the person’s refusal is based solely on the person’s inability to obtain mental health services necessary to protect the safety and well-being of the child; and
  - (iii) the person has exhausted all reasonable means available to the person to obtain the mental health services described by Subparagraph (ii).

Recording Interviews: S.B. No. 206:
Sec. 261.302

- (e) An interview with a child in which the allegations of the current investigation are discussed with it and conducted by the department during the investigation stage must be audiotaped or videotaped unless:
  - (1) the recording equipment malfunctions and the malfunction is not the result of a failure to maintain the equipment or bring adequate supplies for the equipment;
  - (2) the child is unwilling to allow the interview to be recorded after the department makes a reasonable effort consistent with the child’s age and development and the circumstances of the case to convince the child to allow the recording; or
  - (3) due to circumstances that could not have been reasonably foreseen or prevented by the department, the department does not have the necessary recording equipment because the department employee conducting the interview does not ordinarily conduct interviews.

Hearing on Right to Counsel in CPS suit: SB1931; Sec. 262.201(a-2)

- If a parent claims indigence and requests the appointment of an attorney before the full adversary hearing, the court shall require the parent to complete and file with the court an affidavit of indigence. The court may consider additional evidence relating to the parent’s income, source of income, assets, property ownership, benefits paid in accordance with a federal, state, or local public assistance program, outstanding obligations, and necessary expenses and the number and ages of the parent’s dependents. If the appointment of an attorney for the parent is requested, the court shall make a determination of indigence before commencement of the full adversary hearing. If the court determines the parent is indigent, the court shall appoint an attorney to represent the parent.
ICWA inquiry required: HB825

• Sec. 262.201:
  • (a) The court shall ask all parties present at the full adversary hearing whether the child or the child’s family has a Native American heritage and identify any Native American tribe with which the child may be associated.
• Sec. 263.202:
  • (f) The court shall ask all parties present at the status hearing whether the child or the child’s family has a Native American heritage and identify any Native American tribe with which the child may be associated.
• Sec. 263.306(a):
  • (a) At each permanency hearing the court shall:
  • (9) ask all parties present whether the child or the child’s family has a Native American heritage and identify any Native American tribe with which the child may be associated.

JMC for disabled child: SB1889:
Sec. 262.352

• (a) Before the department files a suit affecting the parent-child relationship requesting managing conservatorship [a person relinquishes custody] of a child who suffers from a severe emotional disturbance in order to obtain mental health services for the child, the department must, unless [if] it is not in the best interest of the child, discuss with the child’s parent or legal guardian [person relinquishing custody of the child] the option of seeking a court order for joint managing conservatorship of the child with the department.

Home School for Foster Child?
S.B. No. 206

• New Sec. 263.0045. EDUCATION IN HOME SETTING FOR FOSTER CHILDREN. On request of a person providing substitute care for a child who is in the managing conservatorship of the department, the department shall allow the person to provide the child with an education in a home setting unless:
  • (1) the right of the department to allow the education of the child in a home setting has been specifically limited by court order;
  • (2) a court at a hearing conducted under this chapter finds, on good cause shown through evidence presented by the department in accordance with the applicable provisions in the department’s child protective services handbook (CP August 2013), that education in the home setting is not in the best interest of the child; or
  • (3) the department determines that federal law requires another school setting.
No More Placement Review:
S.B. No. 206

• To conform to Federal language, all review hearings, both before and after a final hearing are now called “permanency” hearings.

Dismissal Date requirements: SB206:
Sec. 263.401

(a) If, after commencement of the initial trial on the merits within the time required by Subsection (a) or (b), the court grants a new trial or mistrial, or the case is remanded to the court by an appellate court following an appeal of the court's final order, the court shall retain the case on the court's docket and shall order in the order in which the case:

(1) schedules a new date on which the case will be dismissed if the new trial has not commenced; which date may be a date not later than the 180th day after the date on which:

(A) the motion for a new trial or mistrial is granted; or

(B) the appellate court remanded the case;

(2) makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and

(3) sets the new trial on the merits for a date not later than the date specified under Subdivision (1).

(b) If the court grants an extension under Subsection (b) or (b-1) but does not commence the trial on the merits before the dismissed date (required under Subsection (a) or (b-1), as applicable), the court shall dismiss the suit. The court may not grant an additional extension that extends the suit beyond the required date for dismissal under Subsection (b) or (b-1), as applicable.

Normalcy for Foster Child: SB1407

• This bill amended several sections in Chapters 263 and 264 to require that children in foster care have “age appropriate normalcy activity.”

• Sec. 263.306(c) now requires that in addition to the requirements of Subsection (a), at each permanency hearing the court shall review the department’s efforts to ensure that the child has regular, ongoing opportunities to engage in age-appropriate normalcy activities, including activities not listed in the child’s service plan.
Nonparent Managing Conservator: SB314; Sec. 263.408

• The department is required to inform a prospective non-parent managing conservator of differences between managing conservatorship and adoption, and of the rights and duties involved.

• The court must require evidence that the prospective MC was given the disclosures before rendering an order.

Transition Plan for Foster Youth: SB1117; Sec. 264.121

• (i) The department shall ensure that the transition plan for each youth 16 years of age or older includes provisions to assist the youth in managing the youth’s housing needs after the youth leaves foster care, including provisions that [are set out in detail in the statute see pages 24-25 of the paper].

Comprehensive Assessment: SB125: new Sec. 266.012

• Sec. 266.012. COMPREHENSIVE ASSESSMENTS.
  (a) Not later than the 45th day after the date a child enters the conservatorship of the department, the child shall receive a developmentally appropriate comprehensive assessment. The assessment must include:
  • (1) a screening for trauma; and
  • (2) interviews with individuals who have knowledge of the child’s needs.
  (b) The department shall develop guidelines regarding the contents of an assessment report.
Non-Family Code

• Ombudsman for Children & Youth in Foster Care, SB830.
• This Government Code provision establishes an ombudsman for children and youth in foster care.
• A separate Human Resources Code provision requires that all residential child-care facilities post information about the ombudsman.

Homeless Children Staying Overnight in Churches: HB1558

• A municipality may not prohibit a church from providing overnight shelter for children 17 years of age or younger, but may enforce sanitation and safety ordinances, and may limit the number of children and the length of stay allowed for each child.

DFPS Database on Child Care Facilities: HB1180

• Subchapter B, Chapter 42, Human Resources Code, is amended by adding Section 42.025.
• Sec. 42.025. SEARCHABLE DATABASE. (a) The department shall maintain on the department’s Internet website a searchable database that includes the name, the address, and any identification number, as applicable, of each family home registered or listed under this chapter that previously had a registration or listing involuntarily suspended or revoked under this chapter with a permanent notation indicating the involuntary suspension or revocation and the year in which the suspension or revocation took effect or was final under this chapter.
Criminal Procedure Protective Orders, HB1447; SB630

• Code of Criminal Procedure
Art. 56.021. RIGHTS OF VICTIM OF SEXUAL ASSAULT OR ABUSE, STALKING, OR TRAFFICKING.
• This provision requires that victims be informed of the availability of a protective order (under CCP Art. 7A.01) and that the state's attorney may file the application.

School Liaison for Children in the Conservatorship of the Department, HB3748

• Each institution of higher education shall designate at least one employee of the institution to act as a liaison officer for current and incoming students at the institution who were formerly in the conservatorship of the Department of Family and Protective Services. The liaison officer shall provide to those students information regarding support services and other resources available to the students at the institution and any other relevant information to assist the students.