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# EVIDENCE

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Cases involving child abuse and neglect present evidentiary issues and procedures unique to this area of the law. This chapter will provide an overview of statutory provisions related to child welfare cases.

## A. Applicability of Rules of Evidence

Unless otherwise provided, the Texas Rules of Evidence apply as in other civil cases. [Tex. Fam. Code § 104.001](#).

## B. Facilitating Child Testimony at Trial

### 1. Prerecorded Statement of Child

If a child 12 years of age or younger is alleged in a suit under [Tex. Fam. Code Title 5](#) to have been abused, the recording of an oral statement of the child recorded prior to the proceeding is admissible into evidence if:

- No attorney for a party was present when the statement was made;
- The recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
- The statement was not made in response to questioning calculated to lead the child to make a particular statement;
- Each voice on the recording is identified;
- The person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and
- Each party is afforded the opportunity to view the recording before it is offered into evidence. [Tex. Fam. Code § 104.002](#).

### 2. Prerecorded Videotaped Testimony of the Child

On the motion of a party to the proceeding, the court may order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court, the finder of fact, and the parties to the proceeding. [Tex. Fam. Code § 104.003\(a\)](#).

Only an attorney for each party, an attorney ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child, and persons necessary to operate the equipment may be present in the room with the child during the child's testimony. [Tex. Fam. Code § 104.003\(b\)](#).

Only the attorneys for the parties may question the child. [Tex. Fam. Code § 104.003\(c\)](#).

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The persons operating the equipment shall be placed in a manner that prevents the child from seeing or hearing them. [Tex. Fam. Code § 104.003\(d\)](#).

The court shall ensure that:

- The recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and not altered;
- Each voice on the recording is identified; and
- Each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom. [Tex. Fam. Code § 104.003\(e\)](#).

### **3. Remote Televised Broadcast of Testimony of Child**

If in a suit a child 12 years of age or younger is alleged to have been abused, the court may, on the motion of a party to the proceeding, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the parties. [Tex. Fam. Code § 104.004\(a\)](#).

The procedures that apply to prerecorded videotaped testimony of a child pursuant to [Tex. Fam. Code § 104.003](#) apply to the remote broadcast testimony of a child. [Tex. Fam. Code § 104.004\(b\)](#).

### **4. Substitution for In-Court Testimony of Child**

If the testimony of a child is taken as provided by [Tex. Fam. Code Chapter 104](#), the child may not be compelled to testify in court during the proceeding. [Tex. Fam. Code § 104.005\(a\)](#).

The court may allow the testimony of a child of any age to be taken in any manner provided by [Tex. Fam. Code Chapter 104](#) if the child, because of a medical condition, is incapable of testifying in open court. [Tex. Fam. Code § 104.005\(b\)](#).

### **5. Hearsay Statement of Child Abuse Victim Can Be Allowable**

In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible as evidence if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and:

- The child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or
- The court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child. [Tex. Fam. Code § 104.006](#).

### **6. Case Law**

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**a. Admissibility of videotaped statement of a child**

“To determine whether it is necessary to use [a] videotape in lieu of [a] child’s testimony in order to protect [their] welfare, the trial court should hear evidence regarding the specific child witness, the child’s welfare at the time of trial, and the circumstances making it necessary to use the statement rather than the child’s testimony in court or by alternative means such as closed-circuit television.” *In re S.P.*, [168 S.W.3d 197, 208](#) (Tex.App.–Dallas 2005, no pet.).

“Regardless of admissibility of [a] videotaped statement under [Tex. Fam. Code § 104.002](#), that section does not authorize the trial court to admit [child’s] videotaped statement in lieu of [their] testimony at trial without requiring the Texas Department of Family and Protective Services to make the child available to testify.” *In re S.P.*, [168 S.W.3d 197, 209-210](#), (Tex.App.–Dallas 2005, no pet.).

**b. Age of child when statement is made**

[Tex. Fam. Code § 104.006](#), which applies to statements made by a child 12 years of age or younger, conditions the age of the child on when the statements were made, not on when the trial court later determines the admissibility of the child’s statements at trial. *In re K.L.*, [91 S.W.3d 1, 15](#) (Tex.App.—Fort Worth 2002).

**c. Child testimony by alternative means is a case-by-case determination**

An exception “to the right of face-to-face confrontation exists when the State shows that a special procedure is necessary to protect child witnesses from the trauma of testifying in court...The determination of whether such alternative forms of testimony are necessary should be made on a case-by-case basis. In making such a determination, courts should consider whether: (1) use of a video is necessary to protect the welfare of the child; (2) the trauma to the child comes from exposure to the abuser, rather than from the courtroom generally; and (3) the emotional distress to the child would be more than minimal.” *In re R.V.*, [977 S.W.2d 777, 781](#) (Tex.App.—Fort Worth 1998, no pet.).

**d. Nonverbal communication during a child interview**

“[...] questions directed to a child must be open-ended and not suggestive of a response.” Additionally, an interviewer’s nonverbal communication may not contribute to the making of a particular statement. *James v. Texas DHS*, [836 S.W.2d 236, 239-241](#), (Tex.App.—Texarkana 1992, no writ.).

**e. Confrontation Clause**

“[A] statement cannot fall within the Confrontation Clause unless the primary purpose [of the statement] was testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. [Additionally,] statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. *Ohio v. Clark*, [576 U.S. 237, 238, 248-249](#) (2015).

**f. Statement of Abuse**

“The determination that a child had suffered significant emotional difficulty due to her parents’ continuous fighting, drug use, lack of food and care, and spanking or slapping of the child was sufficient for the trial court as the factfinder to have determined that the incidents together rose to the

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level of abuse.” *In re E.M.*, 494 S.W.3d 209, 218 (Tex.App.—Waco 2015, pet. denied) (allowing therapist testimony about statements child made to her).

A child’s testimony about parent’s drug use, how the child was placed in charge of a younger sibling, how the family found their food in dumpsters, how the family drove around at night to try to find a place to sleep, and how the children were spanked with belts, fell within the definition of abuse under [Tex. Fam. Code § 261.001\(1\)](#) for the purposes of [Tex. Fam. Code § 104.006](#). *In re M.R.*, 243 S.W.3d 807, 812 (Tex. App.—Fort Worth 2007, no pet.).

#### **g. Reliability of Statement**

“The analysis provided in case law relating to [Tex. Crim. Proc. Code Art. 38.072](#) is an appropriate guide for courts to follow in determining reliability [of a statement] pursuant to [Tex. Fam. Code § 104.006](#)...In making its determination of reliability pursuant to [Tex. Fam. Code § 104.006](#), just like in [Tex. Crim. Proc. Code Art. 38.072](#),[...] the focus of the inquiry must remain upon the outcry statement, not the abuse itself. A child’s outcry statement may be held reliable pursuant to [Tex. Crim. Proc. Code Art. 38.072](#) even when it contains vague or inconsistent statements about the actual details of the sexual abuse...[T]he same [is] true as it relates to [Tex. Fam. Code § 104.006](#).” *In re E.M.*, 494 S.W.3d 209, 218 (Tex.App.—Waco 2015, pet. denied).

A child's statements introduced in a caseworker's report were not reliable because the report did not describe the circumstances of the interview, including who was present. Additionally, there was no evidence of whether the child was asked leading questions or allowed to tell what happened to her, and there was no evidence that the child understood the difference between truth and lies. *In re E.A.K.*, 192 S.W.3d 133, 146-147 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[Tex. Fam. Code § 104.006](#) “is the civil analogue of [Tex. Crim. Proc. Code Art. 38.072](#) ..., [and courts can use] the same type of analysis [when applying [Tex. Fam. Code § 104.006](#)]...The reliability referred to in [Tex. Crim. Proc. Code Art. 38.072](#) is the reliability of the child’s declaration, not the witness relaying the child’s declaration.” *In re M.R.*, 243 S.W.3d. 807, 813-814, (Tex.App.—Fort Worth 2007, no pet.).

#### **h. Admissibility of videotaped statement of a child**

“[Tex. Fam. Code § 104.006](#) does not require the trial court to make a finding that the witness’ statement in lieu of the child’s testimony is necessary to protect the child’s welfare if the child does not testify...Only if a child is *unavailable* to testify is the trial court required to make a finding that admission of the witness’ statement in lieu of the child’s testimony is necessary to protect the child’s welfare.” *In re K.L.*, 91 S.W.3d 1, 16 (Tex.App.—Fort Worth 2002).

### **C. Video Testimony of Certain Professionals**

In a proceeding brought by DFPS 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:

- On the agreement of the department’s counsel and the respondent’s counsel; or
- If good cause exists, on the court’s own motion. [Tex. Fam. Code § 104.007\(b\)](#).

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In ordering testimony to be taken as provided by [Tex. Fam. Code § 104.007\(b\)](#), the court shall ensure that the videoconference testimony allows:

- The parties and attorneys involved in the proceeding to be able to see and hear the professional as the professional testifies; and
- The professional is able to see and hear the parties and attorneys examining the professional while the professional is testifying. [Tex. Fam. Code § 104.007\(c\)](#).

Professional means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers. [Tex. Fam. Code § 104.007\(a\)](#); [Tex. Fam. Code § 261.101\(b\)](#).

If the court permits the testimony of a professional by videoconference as provided by [Tex. Fam. Code § 104.007](#) to be admitted during the proceeding, the professional may not be compelled to be physically present in the court during the same proceeding to provide the same testimony unless ordered by the court. [Tex. Fam. Code § 104.007\(d\)](#).

## **D. Testimony from Forensic Assessment Center Network (FACN)**

Allegations of abuse and neglect in medically complex cases are typically generated by an intake report received from hospital personnel or medical providers, such as a child's pediatrician.

DFPS utilizes the Forensic Assessment Center Network (FACN) in complex medical cases. The FACN was established by DFPS in 2006 to make specialized pediatricians available for consultation to DFPS and HHSC's Child Care Licensing in cases of suspected child abuse and neglect. The FACN is managed by the University of Texas Health Science Center (UTHealth)- Houston McGovern Medical School, in coordination with UT Health Science Center at San Antonio, UT Medical Branch at Galveston, UT Southwestern Medical Center at Dallas, Dell Children's Medical Center at Austin, and Texas Tech University Health Sciences Center at Lubbock.

The FACN requires consultations with physicians who are board certified in a relevant field or specialty, including radiologists, geneticists, orthopedists, and endocrinologists. Physicians must also have experience in diagnosing treating certain specific conditions such as rickets, Ehlers-Danlos Syndrome, and other medical conditions that mimic child maltreatment or increase the risk of misdiagnosis of child maltreatment. [Tex. Fam. Code § 261.3017\(b\)](#). More information about referrals to the FACN is available in [CPS Policy Handbook §2232](#) and the [DFPS Forensic Assessment Center Network \(FACN\) Resource Guide](#).<sup>18</sup>

A health care provider who makes a report of suspected abuse or neglect of a child may not provide forensic assessment services in connection with an investigation arising from the report. This applies regardless of whether the health practitioner is a member of the FACN. [Tex. Fam. Code § 261.30175\(b\)](#).

An exigent removal of a child may not be based solely on the opinion of a medical professional under contract with DFPS who did not conduct a physical examination of the child. However, if the physician

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who conducted the physical examination and the FACN physician both agree that abuse or neglect occurred, both opinions may be used for an emergency removal. [CPS Policy Handbook § 2232.5](#).<sup>19</sup>

## **E. Allegations of Abuse and Neglect and Attorney-Client Privilege**

### **1. General Duty to Report**

A person having reasonable cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report. [Tex. Fam. Code §261.101\(a\)](#).

### **2. Mandatory Reporters**

If a professional with reasonable cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under [Tex. Penal Code § 21.11](#), and the professional has reasonable cause to believe that the child has been abused as defined by [Tex. Fam. Code § 261.001](#), the professional shall make a report not later than the 48th hour after the hour the professional first has reasonable cause to believe that the child has been or may be abused or neglected or is a victim of an offense under [Tex. Penal Code § 21.11](#). [Tex. Fam. Code § 261.101\(b\)](#).

The requirement to report child abuse and neglect under [Tex. Fam. Code § 261.101](#) applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental health professional, an employee or member of a board that licenses or certifies a professional, and an employee of a clinic or health care facility that provides reproductive services. [Tex. Fam. Code § 261.101\(c\)](#).

### **3. Privileged Communication**

In a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of a privileged communication except in the case of communications between an attorney and client. [Tex. Fam. Code § 261.202](#).

## **F. Testimony of Children's Ad Litem**

### **1. Attorney ad Litem**

An attorney ad litem or an attorney serving in the dual role of attorney and guardian ad litem for a child may not:

- Be compelled to produce attorney work product developed during the appointment as an attorney;
- Be required to disclose the source of any information;
- Submit a report into evidence; or
- Testify in court except as authorized by [Tex. Disciplinary Rules Prof'l Conduct R. 3.08](#). [Tex. Fam. Code § 107.007\(a\)](#).

[Tex. Fam. Code § 107.007\(a\)](#) does not apply to the duty of an attorney to report child abuse or neglect under [Tex. Fam. Code § 261.101](#). [Tex. Fam. Code § 107.007\(b\)](#).

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## 2. Guardian ad Litem

Unless the guardian ad litem is an attorney who has been appointed in the dual role and subject to the Texas Rules of Evidence, the court shall ensure in a hearing or in a trial on the merits that a guardian ad litem has an opportunity to testify regarding, and is permitted to submit a report regarding, the guardian ad litem's recommendations relating to:

- The best interests of the child; and
- The bases for the guardian ad litem's recommendations. [Tex. Fam. Code § 107.002\(e\)](#).

In a nonjury trial, a party may call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian's report without the guardian ad litem being listed as a witness by a party. If the guardian ad litem is not called as a witness, the court shall permit the guardian ad litem to testify in the narrative. [Tex. Fam. Code § 107.002\(f\)](#).

In a contested case, the guardian ad litem shall provide copies of the guardian ad litem's report, if any, to the attorneys for the parties as directed by the court, but not later than the earlier of:

- The date required by the scheduling order; or
- The 10th day before the date of the commencement of the trial. [Tex. Fam. Code § 107.002\(g\)](#).

Disclosure to the jury of the contents of a guardian ad litem's report to the court is subject to the Texas Rules of Evidence. [Tex. Fam. Code § 107.002\(h\)](#).

## G. Prohibition of Certain Testimony Not Applicable in DFPS Cases

[Tex. Fam. Code § 104.008](#) requiring an expert to conduct a child custody evaluation prior to testifying about conservatorship or possession of or access to a child does not apply to a suit in which DFPS is a party. [Tex. Fam. Code § 104.008\(c\)](#).

## H. Business Records Exception to Hearsay

[Tex. R. Evid. 902](#) provides that an original or copy of a record is self-authenticating and meets the business records hearsay exception requirements of [Tex. R. Evid. 803\(6\)](#), if the record is filed fourteen days before trial and is accompanied by an affidavit that complies with [Tex. R. Evid. 902\(B\)](#).

### 1. Drug Test Results

Admission of drug test results using a business records affidavit are subject to a hearsay objection. For proper admission of drug test results, the source of the testing, the method used, and/or the circumstances or preparation of the test must indicate trustworthiness. Laying the proper foundation typically requires the testimony of three different people: a chain of custody witness, an expert to establish the reliability and proper techniques and testing protocol, and an expert to testify to the results. See *in re K.C.P.*, [142 S.W.3d 574, 580](#) (Tex. App.—Texarkana 2004, no pet.).

The results of drug tests that generally track the language of [Tex. R. Evid. 803\(6\)](#) and [Tex. R. Evid. 902\(10\)](#) are an exception to the hearsay rule. *In re E.B.*, [No. 11-19-00001-CV](#), 2019 WL 3955974

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(Tex. App.—Eastland Aug. 22, 2019, no pet.) (mem. op.). Records of drug test results must also show sufficient indicia of trustworthiness or reliability to bring them within the business records exception to the hearsay rule. *In re A.T.*, [No. 02-04-00355-CV](#), 2006 WL 563565 (Tex. App.—Fort Worth Mar. 19, 2006, pet. denied) (mem. op.) *citing In re K.C.P.*, [142 S.W. 3d 574](#) (Tex. App.—Texarkana 2004, no pet.).

## 2. Case Law

The following case law was provided by the Texas Department of Family & Protective Services.

### a. Indicia of trustworthiness or reliability

*In re E.B.*, [No. 11-19-00001-CV](#), 2019 WL 3955974 (Tex. App.—Eastland Aug. 22, 2019, no pet.) (mem. op.)

*In re A.T.*, [No. 02-04-00355-CV](#), 2006 WL 563565 (Tex. App.—Fort Worth Mar. 19, 2006, pet. denied) (mem. op.)

*In re A.T.*, [No. 02-04-00355-CV](#), 2006 WL 563565 (Tex. App.—Fort Worth Mar. 19, 2006, pet. denied) (mem. op.)

### b. Live testimony not required for drug test records admitted under the business-records exception

*In re C.M.-L.G.*, [No. 14-16-00921-CV](#), 2017 WL 1719133 (Tex. App.—Houston [14th Dist.] May 2, 2017, pet. denied) (mem. op.)

*In re L.G.R.*, 498 S.W.3d 195 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)

*In re M.R.D.W.*, [No. 14-17-00506-CV](#), 2017 WL 6045575 (Tex. App.—Houston [14th Dist.] Dec. 7, 2017, no pet.) (mem. op.)

*In re C.W.*, [No. 02-14-00274-CV](#), 2014 WL 7139645, (Tex. App.—Fort Worth, December 12, 2014, no pet.) (mem. op.)

*In re Z.N.M.*, [No. 14-17-00650-CV](#), 2018 WL 358480 (Tex. App.—Houston [14th Dist.] Jan. 11, 2018, no pet.) (mem. op.)

### c. Admission of drug test results through other testimony

*In re D.J.H.*, [No. 04-11-00815-CV](#), 2012 WL 1654953, at \*3 (Tex. App.—San Antonio May 9, 2012, no pet.) (mem. op.); see also *In re A.D.H.—G.*, [No. 12-16-00001-CV](#), 2016 WL 3182610 (Tex. App.—Tyler June 8, 2016, no pet.) (mem. op.)

*In K.C.P.*, [142 S.W.3d 574](#) (Tex. App.—Texarkana—2004, no pet.)

*In re A.G.*, [No. 13-17-00318-CV](#), 2017 WL 4546984 (Tex. App.—Corpus Christi Oct. 12, 2017, no pet.) (mem. op.)

### d. Inferences drawn from behavior and testimony



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*In re C.R.*, [263 S.W.3d 368, 374](#) (Tex. App.—Dallas 2008, no pet.); *In re C.A.B.*, [289 S.W.3d 874, 885](#) (Tex. App.—Houston [14th Dist.] 2009, no pet.).

*In re M.L.C.*, [No. 04-17-00459-CV](#), 2017 WL 6597828, at \*4 (Tex. App.—San Antonio Dec. 27, 2017, pet. denied) (mem. op.)

*In re K.P.*, [498 S.W.3d 157, 172 n.4](#) (Tex. App.—Houston [1st Dist.] May 26, 2016, pet. denied)

*In re D.M.*, [58 S.W.3d 801](#) (Tex. App.—Fort Worth 2001, no pet.).

