

# **CUSTODY LITIGATION: DISCOVERY, EXPERTS, EVIDENCE, TRIAL PROBLEMS, ETC.**

## **1. INTRODUCTION**

Custody battles involve the most emotionally, financially, and physically taxing areas of family law litigation. The key to prevailing in a custody case is thorough preparation from the very inception of the case. From the moment the client is interviewed, the practitioner should begin to develop possible themes and theories of the case. The unique nature of each custody case requires the practitioner to develop a different strategy and approach for every client. Additionally, the dynamic character of custody litigation demands a strategy and approach that is adaptable to facts that are constantly changing and developing throughout the representation.

While it was impossible to cover every topic, this article addresses the major areas of custody litigation, from the client interview to the actual trial. Because of the dynamic nature of custody litigation, each suggestion in this article is intended to be modified or expanded depending on the particular facts of your case.

A particularly hot trend in custody litigation is the issue of domicile relocation. In this situation, the interests of the parent with primary possession who wishes to move away with the child are pitted against the other parent who wishes to maximize possession of and access to a child. An attorney needs to be aware of a possible relocation issue within a custody case from the initial client interview throughout the litigation process. See attached addendum, Webb, Ackels, Burton, and Norman Relocation: Should I Stay or Can I Go?, AFLC Aug. 21 - 24, 2000, San Antonio, Texas

## **2. DISCOVERY**

### **a. Client Interview**

Custody litigation is perhaps the most emotional and most expensive type of litigation. You should advise a client seeking custody of all the potential costs associated with a custody suit. The lawyer should also ascertain important information from the client. Some of the key topics which should be covered in every client interview are discussed below.

#### **i. HISTORY OF THE CASE**

A client questionnaire is probably the easiest method to obtain the basic information regarding the parties. If possible, the client should fill out the client questionnaire prior to the interview. A completed client questionnaire will enable the lawyer to pinpoint key issues in a quick and efficient manner.

Once the interview begins, a client is more than willing to tell you all the reasons he or she would make the better parent, and is also happy to point out the other parent's bad points. Clients may, however, try to hide the bad facts of their case out of fear of having the lawyer reject them or from general embarrassment. You must warn a client of the ill effects of surprise evidence and stress the importance of honesty. A good question to ask your client is "what is the worst thing that your spouse might say about you?"

Your client needs to understand that to win the case, you need to know what evidence their spouse has against them and what positions they are going to take. Once the client understands that disclosure of "bad facts" is essential to their case, the client is usually willing to provide the information you need.

#### **ii. CLIENT'S MOTIVATION**

The reasons why your client wants custody is really the theory of your case. Your client's motivation for seeking custody will also help you to determine how serious he or she is about going to trial and whether or not any possibility of settlement exists.

You should also ask your client why he or she believes that his or her spouse is seeking custody. If at the end of the client interview you are able to understand why the parties are each willing to endure the time and expense of a custody fight, you will probably also have a good understanding of the strengths and weaknesses of your case.

iii. EXPECTATIONS

You need to know what your client expects from you and then explain how feasible it is to achieve those expectations. Be open and honest with a client so that he or she understands the risks involved in custody litigation. The client needs to understand your limitations and not hold an unrealistic picture in his or her mind of the potential outcome.

Explain to your client the expenses involved in litigation. The client needs to know up front that custody litigation is extremely expensive and be willing to make the financial sacrifice. At this point you should explain the possible necessity of investigators, mental health professionals, ad litem and depositions. If the client cannot afford your services, you should be honest and offer alternatives. It is a bad idea to take the case on an expectation of getting paid by the other side.

Outline for your client the steps of the litigation process. Even though you will likely have to explain it again, you should review service of process, temporary hearings, discovery, masters, ad litem, investigators, the trial and post trial. The client should also understand that friends, relatives, neighbors, teachers, mental health care providers and confidants may all be subject to depositions and investigations by the other side.

iv. WITNESSES

The client questionnaire which you give to your client should ask for the names, addresses, and telephone numbers of people who will be good witnesses. You may interview these witnesses by mail, telephone or in person. Depending on your time constraints, you may want to have your client give each of his or her potential witnesses a questionnaire to fill out and return directly to your office. From these responses you can determine what witnesses you may want to use at the hearing and then call them with any additional questions you might have.

If you intend to initially contact the witnesses by telephone, have your client talk to them ahead of time so that they will be expecting your call. Witnesses are generally more willing to provide the information you need when the questions are expected.

Frequently, a potential witness who knows all the parties concerned will want to stay out of the litigation and not testify. Make sure that the persons calling the witnesses are courteous and understanding. A personal interview at the reluctant witness' home will sometimes persuade him or her to come forward. If the witness is still unwilling, you and your client need to discuss how important this witness is to your case and whether or not you really want to issue a subpoena.

After interviewing witnesses by mail and/or telephone, you should interview them in person whenever possible. Someone may sound like your star witness over the telephone, but may be very offensive in person.

You will want to prepare your witnesses for the hearing in terms of what information they have that is important to your case and also potential areas of cross-examination. The witnesses should also understand that discussing his or her testimony with you prior to trial is acceptable and they should not be afraid to admit it on the witness stand. If the witness is not so warned, they may answer the common question: "You talked to Mrs. Jones lawyer before testifying today, didn't you?" with a "No". Additional questioning will later reveal that he or she did talk to you and the witness' credibility will be tarnished.

b. Discovery

i. 1ST STEP: REQUEST FOR DISCLOSURE, INTERROGATORIES & PRODUCTION REQUESTS

You should send Request for Disclosures pursuant to the 1999 Texas Rules of Civil Procedure (hereafter "TRCP"). Specifically, TRCP 194 and its subparts provide all of the information you may need to know for sending out the Requests, and for responding to them. A good time to send out the Requests is after the Temporary Hearing and/or the Temporary Orders are in place. Interrogatories and a Request for Production should be sent out to the other side as soon as possible thereafter. Note, however that the TRCP do not require the above mentioned forms of discovery to be sent out in any particular order. In fact, TRCP 192.1 lists the various forms of Discovery and TRCP 192.2 states that the forms of discovery "may be combined in the same document and may be taken in any order or sequence." You should be familiar with all of the rules, but pay close attention to TRCP 192.3, which covers the scope of discovery.

Because opposing counsel will frequently send the identical discovery requests back to you, you may want your client to look over the Interrogatories and Request for Production to see if anything is included that they would not want to answer. For example, if your client has a girlfriend or boyfriend and does not suspect that their spouse has one then you are probably better off omitting that question. Some basic requests that you will always want to ask are:

1. Any photographs, tape or electronic recordings, and/or video recordings portraying the likeness of Respondent, Petitioner or the children.
2. Any correspondence or other written memoranda between you and your spouse for the last year.
3. Any calendars, diaries or other written logs of (Petitioner or Respondent) made in connection with this action.

Once you obtain the answers to your Interrogatories and Request for Production, you should interview all witnesses to determine what knowledge they have regarding your case. This will help you determine which witnesses to depose.

ii. DEPOSITIONS: Depositions are governed by TRCP 195, 199, 200, 201, 202, and 203.

(1) Who to Depose

(a) Opposing Party

Always depose the opposing party thoroughly so that you will know his or her demeanor, personal knowledge and contentions. No substitute exists for personal knowledge of the party's mode of responding to questions. If the party is extremely hostile, non-committal or uncooperative during the deposition and changes his or her demeanor in trial, the video deposition can be played for the jury to reveal Mom's or Dad's "true colors" before their lawyer prepared them for trial testimony.

(b) Adverse Witnesses

If unfavorable witnesses exist in the opposition's case who have

incriminating evidence against your client and whose presence and evidence is known to the opposition they must be deposed. Obtaining such evidence prior to trial will allow you to effectively plan a strategy to either exclude the evidence altogether or overcome its damaging effect.

In some instances, a possibility exists that adverse testimony will not be available at the time of trial. In such cases, you should consider not taking the deposition of the unfriendly witness. This decision, however, should be weighed against the risk of not learning the witness' full testimony and against the possibility of the opposing side deposing the witness or calling them at trial.

(c) Private Investigators

You must depose any private investigators hired by the opposing party. If you discover that the investigator found no detrimental information, you can use the lack of evidence to your advantage. You may also emphasize the excessive expenditures the opposing party is willing to make to chase rabbit trails in hopes of damaging your case.

(d) Experts and Professionals

Depose all opposing mental health professionals and subpoena their original test instruments, notes, drawings, pictures and work papers, etc.

In a medical context it is often extremely helpful to depose the nurses and other assistants who have been exposed to the particular witness. Many times nurses have more knowledge of personal information than the doctor.

(e) Friendly Witnesses

In many instances, a cautious trial counsel will want to preserve the testimony of a friendly witness by taking a deposition. The preservation of testimony guards against the possibility of witness unavailability at trial or the possibility that the witness will not remember the true facts at trial. Taking a deposition of a friendly witness will, however, alert opposing counsel to facts or issues on which you base your strategy.

Crucial witnesses will generally be deposed by your adversary; however, if your adversary does not avail himself of the deposition, the question arises as to whether you should conduct the deposition. In such a situation, the drawbacks of educating the opponent must be weighed against the potential harm to your case if the witness is unavailable at trial. In cases where the friendly witness is of advanced age, is ill, or is of a transient nature, the deposition should be taken.

As for content of the testimony, there is little hope of improving it in the case of a friendly witness except by making it more complete than in the deposition. If a variance occurs, the deposition is available for impeachment. Variance toward a more favorable story might well result in harm because of the unfavorable reflection on the witness' testimony. In short, a disadvantage does exist in calling a witness in person when you have a favorable deposition. The disadvantage of calling the witness in person, however, will usually be far outweighed by the advantage of the impact of live testimony.

As a basic rule, you do not want to depose witnesses unless they are hostile to your case because you are only educating the opposition. The only exception is when the witness is going to be unavailable for trial.

(2) When to Depose

After the initial written discovery responses are received, depositions of significant witnesses should be noticed. Although the old rules of procedure did not limit when an attorney could take depositions, the new TRCP may be applied differently. TRCP 199.2(a) states that “[a]n oral deposition may be taken outside the discovery period only by agreement of the parties or leave of court.” It appears that the Discovery Control Plan or Level the case is plead under may have an affect on when the “discovery period” begins. Only time will tell. Additionally, depending on the case

Discovery Control Plan or Level, depositions are limited in time per the new rules. (TRCP 190 and 199). Further, the objections during the deposition are limited to three specific objections. (TRCP 199.5 (e)). Thus it appears that if a party seeks to take a deposition prior to "the appearance day of any defendant" he or she must obtain leave of court. Leave of court may be granted with or without notice to the opposing party. The opposing party should be deposed promptly and thoroughly before the party has an opportunity to become over-educated. The deposition is particularly effective as an early discovery device. The deposition of adverse parties and witnesses can be taken early in the proceeding with minimum notice. The advantage of this tactic is to catch the witness cold and capture unrehearsed testimony. Early in the proceedings the witness may not have been tainted by litigation tactics and theories; therefore, he or she may not equivocate on important matters.

### (3) Where to Depose

It has been believed for years that in any adversarial conference or negotiation, the person on home turf has some advantage. The deposition taken in the adversary's conference room may not be as successful as the one taken in your own conference room. If you have a choice, you will probably prefer the deposition in your own office. However, this is not a hard and fast rule and the final decision on the location of the deposition depends upon the personalities involved and the geographic locations of the witnesses and documents. Also, TRCP 199.2 (b) (2) addresses the time and place of depositions.

When deposing experts, the location of the deposition will depend on the circumstances of the case. If you take the deposition in the expert's office, you will be able to observe his or her surroundings, which might enlighten you as to characteristics of the expert which may affect his or her opinions. You may also wish to note particular treatises and codes on the bookshelves upon which the expert probably relies. You can then research these authorities and prepare cross-examination and arguments to effectively discredit that expert's testimony. If you feel that a court-appointed expert will be a particularly friendly witness, make him or her as comfortable as possible; take the deposition wherever they so desire.

The courthouse is the worst place to take a deposition. Only do so if you have an uncooperative or non-responsive witness and you need a judge to make periodic rulings.

Avoid hospital depositions if at all possible. Lawyers are traditionally uncomfortable in the hospital setting. If you must take a deposition of a hospital patient, it may be interpreted in one of two ways: (i) the horrible lawyers will not leave anyone in peace, or (ii) this person's opinion is important because the lawyer went to great lengths to obtain it. Make sure your demeanor and questions achieve the right impression.

If you are going to depose an adverse witness and he or she is in a prison, mental institution or drug rehabilitation center, take full advantage of the situation. Videotape the deposition and be sure to capture the institutional atmosphere as much as possible.

If it is absolutely necessary to take a deposition in a hotel, make sure it is done in a conference room to maintain a professional atmosphere. Regardless of where the deposition is taken, always dress appropriately; stay in a position of power.

### (4) To Video or Not to Video

Videotaped depositions are extremely effective. The powerful effect of the videotape on jurors and attorneys alike can be traced to the popularity of television. Fred Misko, Videotape for Litigation, 26 S. Tex. L.J. 485 (1985). In our current television age, most people are conditioned to watch and believe what they observe.

Generally, the impact of testimony of a witness appearing in person is greater than that of one whose testimony is read. Whether this general rule is applicable in a particular instance will depend in part on the personality of the witness. People are often influenced as much by how a person says

something as by what he says. It is impossible for the deposition record to accurately reflect how the witness spoke. If the manner of the witness is singularly impressive, the party loses by using the deposition instead of live testimony. If his manner is singularly unimpressive or likely to make a poor impression, the party may gain by using his deposition testimony rather than a personal appearance.

Videotaped depositions are very useful to highlight certain circumstances. For instance, in a custody case, if the father has an unusually young girlfriend that you are deposing, a videotape will make clear to a jury just how young she really is.

(a) Capture the Moment

Videotaping the adverse party and witnesses makes it possible to take complete control of the trial and present the adverse party's witnesses in a less favorable light. For example, instead of waiting for the well coached and rehearsed presentation of the adverse party's version of the facts, the earlier videotaped deposition revealing a less prepared witness can be presented first. In addition, the demeanor of the witness (e.g. expressions of shock, anger, frustration, hostility and fear) can be captured and replayed to the jury to counter a deponent's cool, self-confident trial demeanor.

A video is useful when asking the witness trick questions. For example, "[h]ow many affairs have you had?" instead of "[h]ave you had any affairs?" This type of trick question will catch a witness by surprise, and the expression of shock will be captured on video.

You may not want to take a deposition of a "Robert Redford" adverse witness, as the jury will be inclined to favor him or her. Carefully weigh the advantages and disadvantages of a video deposition before making the decision.

Videotaping usually cuts down on abusive techniques of counsel during depositions (e.g. coaching the witness, unnecessary interruptions of questions, and abusive questions or objections). If the opposing counsel is particularly a rude or obnoxious attorney, keep an extra video camera aimed at the attorney at all times. A jury will not be impressed with an impolite or irritating lawyer and will tend to sympathize and favor your position.

(b) Lighting

Lighting is a very useful tool in creating a particular atmosphere in a videotaped deposition. Use a very harsh, white light to make an adverse witness look ugly, unappealing, swarthy, pale or sickly. A light from behind will make a witness look fatter and more unattractive. Additionally, with a production quality camera it is even possible to make an adverse witness look slightly green or orange, and quite unappealing to a jury.

(5) Preparation

(a) The Client

Preparing a client for deposition is often one of the most neglected areas in the practice of law. The failure to properly prepare the witness for deposition can prove devastating to the client's case. Make sure the client has read all of the pleadings, including pending motions and his or her discovery responses. Next, thoroughly review the law and explain to the client the evidence necessary to prove a claim or defense. The following are some suggested instructions for every witness prior to deposition:

- \* Always tell the truth.
- \* Every word uttered at deposition can and will be used against him at trial.
- \* Be short, concise and answer only the question asked.
- \* Do not volunteer information.
- \* If you instruct him or her not to answer a question during the deposition, he or she should not.

\* Do not try to vindicate yourself on every point; this is not the trial.

Remember that any documents used by the client to refresh memory are discoverable by the opposing party if reviewed during the deposition testimony. Additionally, documents reviewed to refresh memory before the deposition may, at the discretion of the court, be discoverable. City of Dennison v. Grisham, 716 S.W.2d 121, 123-24 (Tex.App.--Dallas 1986, no writ).

Advise your client of possible situations that may arise. It is very difficult for one spouse to hear the other tell a one-sided version of every incident without feeling some strong emotion.

Always show your client or witness a video of a deposition before their own in order to prepare them for what to expect. In addition, give them articles to review regarding deposition procedures and rules. Videotape the prospective deponent and let them view it to work on their attitude and appearance.

#### (b) The Psychologist

When deposing a psychologist in a custody situation, the family-law practitioner will need a working knowledge of psychological tests.

Do not forget that psychology and psychiatry are not the exact science that the professionals would have everyone believe. Once you have received all the records which you requested from the expert, you may find it beneficial to have another psychologist or psychiatrist evaluate these same test results. Opinions based on the same test results often vary widely. Some of the psychological instruments administered by mental health professionals are objective, but there are different descriptive words which may be applied in the expert's explanation. A second expert who has reviewed and evaluated the records may explain away the problem area easily and may actually discredit the first witness who may be hedging his testimony. Projective or subjective psychological instruments are subject to any number of different interpretations. No standardized scoring exists to these projective instruments and entirely different meanings or perceptions are possible.

The license of a psychologist must be on file with the Board of Psychological Examiners in Austin, Texas. If complaints or reports exist which have been filed against the psychologist, records are available. If you are uncertain about a particular expert, check into his qualifications and record.

#### (6) Atmosphere

Some attorneys try to make an adverse witness as uncomfortable as possible. Many attorneys use techniques that are intended to bring out an adverse witness' true colors. One technique which I do not recommend is to make the witness and his or her attorney wait a while in your reception area before the deposition. This will possibly create tension and anger which will be apparent on video, and make the witness look defensive and unbelievable to a jury. Additionally, you may wish to make the deposition room particularly hot or cold in order to make an adverse witness so uncomfortable that he or she cannot concentrate on the answers that they are giving. You may elicit testimony that the witness had been instructed not to reveal.

Maintain eye contact, but do not stare a witness down, as this will make the jury disfavor your position.

#### (7) Deposing an Expert or Professional

When deposing the mental health professional, be sure to obtain the following:

- \* any written notes taken by the professional;
- \* any tape recording or video containing the voices or likeness of the parties of the children made by the professional;
- \* the originals of any test administered by the professional including test questions, responses and scoring of the test.

When deposing an expert witness you are looking for two things: information and the effect he or she will have on a jury. The witness may have a tremendous amount of information, but you may

know little about them because the opposing side has been strategically withholding information. For example, you may have a generic affidavit saying that the expert has observed the children with the parent you represent, and the expert believes that due to emotional abuse, the children belong with the other parent. The expert clearly holds potentially damaging information that is unavailable to you. Therefore, questions must be asked with care.

During questioning of court appointed experts, watch for religious or political overtones in his or her answers. In a custody case this is very important, as the expert may tend to favor one parent due to similarities in religious or political beliefs.

(8) Use Visual Aids

(a) Video Tapes

Video tapes can be used within a deposition in many creative ways.

An effective use of a video player during questioning is in a situation where you are trying to establish that your client (the husband) has a good relationship with his kids. The following is an example:

- (i) Prepare a string of photographs of your client playing and spending time with the kids that can be shown on the video player.
- (ii) Before showing any pictures, or referring to them in any way, ask the wife if your client ever, for example, plays baseball with the kids.
- (iii) If she answers something like, "No, he never does anything with the kids," then fade into a picture of the husband playing baseball with the kids.
- (iv) A jury viewing a video will then most likely discredit the wife's testimony completely.

(b) Publications

When preparing to depose adverse experts it is important to go to a public library and research the expert's published books, articles and theses. An effective use of this information is to enlarge quotes from the expert that are beneficial to your position onto a large poster. On the back of the poster, note where each quote is located in the expert's work. Additionally, intersperse statements that the expert did not say at all that you would really like him to agree with. Ask the expert to read certain statements that he did make out loud, without revealing that they are quotes from his own work. Then ask whether he or she agrees with the statement. If the answer is no, point out where he or she has been of this opinion previously. After being embarrassed, the expert will then most likely agree even to statements that he or she did not make and that are extremely beneficial to your case.

c. Importance of Social Studies and Psychological Evaluations

i. PURPOSE

(1) Determination of the Best Interest of the Child

So many times, court ordered social studies and/or psychological evaluations are viewed, solely, as what makes or breaks a custody case. Regardless of its effect on one's client, one should never lose sight of the justification for court ordered evaluations: an objective mechanism to help determine the best interest of the child in accordance with TEX.FAM.CODE § 153.008. "The best



interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child." Id.

Determining the "best interest of the child" is quite a task when considering that each child requires different intensities of affection, protection, and guidance. Likewise, the ability of each parent to provide affection, protection, and guidance varies. The expert can provide valuable assistance to the judge or jury by evaluating the child's current needs for affection, protection, and guidance, and the ability of each parent to satisfy the child's needs. Shuman, "Legal Issues Including Children," Psychiatric and Psychological Evidence, 310 (1986).

(2) Judges Use it as a Tool

The importance of court ordered social studies and psychological evaluations is clear when reviewing the results of a 1989 survey entitled "Child Custody Decisions: A Survey of Judges". One hundred fifty-six California Judges were asked to rank the importance of various evidentiary factors in custody cases on a scale of 1 to 9 with "9" being "extremely important" and "1" being "not at all important". The results showed Custody Investigation Reports ranked at "6.87"; Court-Appointed Psychologist at "6.49"; and Psychologist Retained by One Attorney at "4.5". Reidy, Silver and Carlson, Child Custody Decisions: A Survey of Judges, 23 Fam. L.Q. 79 (Spring 1989) (Published by the American Bar Association Family Law Section).

Although California judges are arguably "far left", their views cannot be so drastically different as to render their rank of studies and evaluations worthless. Furthermore, common sense tells us that a lay juror will certainly place great emphasis on an arguably "objective and experienced" expert opinion.

One practice tip that may work in this circumstance is to file a Motion to Exclude the Expert and the Expert's Report, pursuant to the Texas Rules of Evidence (hereafter "TRE") 104, 401 - 403, and 702 - 705. Additionally, caselaw supports such expert exclusion, and a court may hold a preliminary hearing on the admissibility of evidence per TRE 104 (c). Under E. I. du Pont de Nemours & Co. v. Robinson, 923 S.W. 2d 549, 556 (Tex. 1995), the trial court must act as a "gatekeeper" to determine the qualifications of an expert and whether the expert's opinion is admissible.

(3) Serve Your Client

A social study or psychological evaluation that has an unfavorable outcome towards your client is a fearful and, often, desperate time for a mother or father.

In a perfect world, every expert would be objective and their conclusions always correct as to who should be awarded conservatorship. Unfortunately this is not a perfect world and, very often, social studies or psychological evaluations are based on untrue or inadequate information, misunderstandings, or just flat-out bias.

ii. BURDEN OF PROOF

TEX.FAM.CODE § 105.005 establishes the burden of proof in a suit affecting a parent child relationship: "...the court's findings shall be based on preponderance of the evidence under rules generally applicable to civil cases."

Notwithstanding an unfavorable social study or psychological evaluation, a good advocate should and can meet his or her burden of proof in custody case.

d. Discovery in Preparation of Cross-Examination

One cannot conduct a meaningful cross examination without having full command of all the facts which make up the issues in your case and at least a general understanding of any psychological tests, if any, used. More than anything else, thorough discovery and preparation will determine how successful your cross examination will be in trial. Michael H. Flynn, Ph.D., Psychiatric and Psychological Examinations and Testimony: The Mental Health Professional in the Courtroom, State Bar of

Texas Advanced Family Law Course (1991), Chapter AA at 18. Unless you are armed with prior inconsistent statements, inconsistent facts or other information at odds with the expert's opinion, you will not be effective in cross examination. Id. In other words, "The biggest gun in town will not shoot anybody without a bullet". Id.

e. Other Evidentiary arguments: TRE 510(d)(6)

Remember that TRE 510, "Confidentiality of Mental Health Information" is not an appropriate privilege to claim in suits affecting the parent-child relationship because of the exception to privileges found in TRE 510(d)(6).

i. THE SOCIAL STUDY

Texas Family Code Section 107.55 (b) requires that any social study conducted be furnished to you "before the earlier of (1)the seventh day after the date the social study is complete; or (2) the fifth day before the date of commencement of the trial."

If the study has not been furnished to you, demand that it is. You should review it, decide how to use it, what you want from it, what you want out of it, and file your Motion In Limine. Remember to have your excised version already prepared, so that you hopefully can obtain a favorable ruling on the portions that contain damaging hearsay.

Further, this may be a good time to submit a Motion to Exclude Expert and Expert's Opinion, as discussed above.

ii. THE EXPERT: WHAT YOU SHOULD DISCOVER

The starting point for cross examination is discovery. Through a deposition with a comprehensive subpoena duces tecum, you should discover the following information:

(1) Regarding Qualifications

- \* The expert's vita
- \* What professional organizations the expert belongs to and what he or she did to be admitted, i.e. just pay a fee.
- \* Has the expert testified before? If so, in what case and who were the attorneys and the judge?
- \* Has the expert ever failed a certification or licensing exam?
- \* What were the expert's grades in child psychology or family dynamics classes in college or post graduate classes? Did the expert ever take classes in child psychology?
- \* Has the expert ever been fired from a job within the expert's field?
- \* Has the expert ever failed to qualify as an expert in court?
- \* Has the expert ever been published? If so, where?
- \* Has the expert ever been professionally disciplined or had a grievance filed against him?
- \* Has the expert ever been denied malpractice insurance?
- \* What were the expert's grades in undergraduate and graduate school?
- \* What is the expert's experience in interpreting MMPI, Rorschach, TAT and other tests professionally?
- \* Has the expert ever been sued by a patient?

(2) Regarding the Basis of the Expert's Opinion

- \* When, where and how long the expert spent with your client, other persons seeking custody, the children and anybody else the expert saw or

- \* talked to in the evaluation process, including opposing counsel
- \* What factual allegations or circumstances the parties or others alleged during the evaluation process
- \* Which factual allegations the expert deemed important
- \* Any tests administered to the parties or children, including the questionnaire or test sheet and the actual answers, any notes or score sheets, and any test instruction manuals
- \* Any books or materials relied on by the expert in scoring the tests given
- \* The psychologists hand-written notes and video or tape recordings of any interviews with the parties, children or others.
- \* The names, addresses and phone numbers of any other expert consulted in the evaluation process
- \* Regarding any test that was administered:
  - Who actually gave the test?
  - Where was it given?
  - How long did the test take?
  - When was the test given- date and time?
  - Who supervised the taking of the test?
- \* Was any insurance claim filed for the treating or evaluation process? If so, what diagnosis, if any, appears on the insurance claim form?
- \* Who or what scored any tests given? Some psychological tests are scored by computer. Psychiatrists often are not trained to score psychological tests and have someone else do this for them.
- \* The ultimate opinion of the expert and when the expert arrived at the opinion.
- \* Each and every basis for the opinion
- \* Any psychological theories or "schools of thought" relied on in forming the opinion

(3) Regarding Bias

- \* How was the case referred to the expert?
- \* What is the expert's hourly fee or other fee arrangement?
- \* Is there a separate fee for court work and why?
- \* When, where and how has the expert been paid, i.e. in cash?
- \* What is the relationship between the expert and opposing counsel?
- \* What is the relationship between the opposing party and the expert?
- \* How many times has the expert been retained by mothers/fathers to testify?
- \* Is the expert professionally or personally biased, i.e. believes all young children should remain with their mothers?
- \* Has the expert been through a custody/divorce case personally?

e. Discovery Trap

You should always formally ask for the discovery of experts in order to invoke the duty to supplement a response to discovery by naming, not less than 30 days before trial, any expert who has not previously been disclosed. The substance of the expert's testimony must also be disclosed, including any changes in the substance of a previously disclosed expert's testimony, if the new or different opinion would render the original discovery response untrue or incomplete. If there was no initial "formal" discovery request, there would be no duty to supplement.

f. Non-Response or Failure to Supplement

If information is requested regarding an expert, but is not properly responded to or supplemented in response to a discovery request requesting such information, then the expert may be prohibited from testifying or, at the least, from giving undisclosed opinions which were not disclosed in the discovery response (or when the discovery response did not list the underlying facts and data upon which the opinions were based in response to a proper request). Additionally, TRCP 215 provides for sanctions which may be imposed for abuse of the discovery process which may include striking pleadings, ordering attorney fees, or even contempt.

**3. EXPERTS**

a. Introduction

The best defense is a good offense. In other words, one must effectively use direct examination, especially in jury trials, to convince the jury or judge to believe your expert in their conclusions and recommendations. Effective direct examination takes two prepared persons: the attorney and the expert.

b. Whether to use the Appointed Expert or Hire Your Own

Just because there is a custody case does not mean a psychologist needs to be hired. "If you have to hire and pay a witness to prove that your client loves the children and the children love him/her, you are pretty desperate." McCurley, Webb, Karlson, Munsinger, Direct and Cross Examination of Psychologist Re: Custody and Validation of Child Abuse Allegations, Texas Academy of Family Law Specialists, (1992) at 3. However, where the opposition is seriously alleging your client is a sex abuser, a psychologist or psychiatrist may be necessary to rebut these allegations. Id.

Determining when to use an expert in matrimonial litigation, the expert chosen, and the role the expert will play, is an important process of presenting the case. Knowing when to hire an expert and how to use the expert is vital in the effective presentation of the case.

In deciding whether or not to use a "hired" expert, you need to ask yourself the following questions: (1) Do I really need the expert testimony? (2) Can the expert conduct the evaluation necessary to render his or her opinion in a manner that will seem fair to the jury?

You may be given an opportunity to participate in the selection of a "court-appointed" psychologist or psychiatrist. If you are allowed to participate, use the same care in selecting such an expert as you would if you were hiring an expert solely for your client.

c. What to Look for in an Expert

i. HAVE A SPECIFIC PURPOSE

If you are going to hire an expert for your side of the case, have clear in your mind the specific purpose you want to use the expert for and how that purpose fits into the overall theory of your case. (Of course, this assumes you have started formulating your theory of the case.) For instance, you may need to prove that your client is not a sex abuser; your client is mentally stable; and/or the opinions, methods, or training of the opposition's expert are subject to attack.

ii. AVOID USING THE SAME EXPERT REPEATEDLY

Avoid using the same expert all the time. True or not, it may look like a fixed deal, especially to a jury, if Dr. X always testifies in your custody cases.

iii. CREDIBILITY

If the trial is to the court, check out the expert's reputation at the courthouse. Talk to the bailiffs, attorneys, and other court personnel to find out if the expert has a reputation and whether the

reputation is good or bad. Find out if the expert has testified before. If so, who were the attorneys. Call both attorneys and find out what they think of the expert. Take special care to find out whether the expert has a reputation as a "mom's" or "dad's" expert and if the expert has worked in the past for your opponent.

iv. THE EXPERT'S WORK ETHIC

The following issues concerning the expert's work ethic should be considered before hiring any expert:

- \* Is the expert enthusiastic about being involved and does he eagerly invite information about his role?
- \* Is the expert inquiring as to what information he will be given? Does he research significant issues?
- \* Is the expert cooperative and willing to accompany you when gathering information and records, or is he demanding to have all the data submitted to his office?
- \* Is the expert willing to give his home or weekend phone number?
- \* Will the expert be willing to take time to assist and offer suggestions from the moment of his involvement in the case?
- \* Will the expert be willing to educate you - the attorney - on the problems when facing experts from the opposing side?
- \* Will the expert assist in question formation for the opposing expert at trial? Will he be available to sit the trial?
- \* Will the expert demand to see the other side's exhibits to highlight those flaws where possible?
- \* Will he request that he be allowed to attend important depositions (or willing to attend), so that vital information can be pinpointed or false information be exposed to insure victory for the client?

v. JURY FRIENDLY

The two main qualities needed for a persuasive expert opinion are competence and the ability to communicate. Having the ability to use plain English to explain complicated psychological theories or tests is crucial. Find out how the expert approaches the evaluation process. Do the expert's methods, testing procedures and thoroughness appear to be sound? Can you persuade a jury or a judge that the methods of your expert are sound?

vi. SUBJECTIVE FACTORS

Sometimes the subjective factors may be equally important. Such factors include appearance, age, and people skills. Curtis M. Loveless, Some Practical Considerations Concerning the Presentation of Psychiatric and Psychological Examinations, State Bar of Texas Advanced Family Law Course (1991), Chapter AA at 1.

vii. SURVIVAL OF CROSS EXAMINATION

Determine whether the expert's opinion will survive the opposing side's cross-examination. If your expert won't hold up because his analysis methods are flawed, or if he is not mentally up to it, then you should reconsider using him.

viii. DO NOT BUY THE OPINION

Upon the "hiring," it may be advisable, if possible, to pay for the expert's evaluation process "up front", before the evaluation is done. This may take some of the sting out of cross-examination regarding bias. You can show you paid for the expert's expertise and time not the opinion. In considering a particular expert, try to determine whether or not that expert can be accused of any

particular bias. Michael H. Flynn, Ph.D., Psychiatric and Psychological Examinations and Testimony: The Mental Health Professional in the Courtroom, State Bar of Texas Advanced Family Law Course (1991), Chapter AA at 2.

d. Effective Direct Examination of Your Expert

Although an expert may lead his or her field, have an impeccable background, and is well acquainted with the courtroom, it can all crumble without proper preparation of the expert to your particular case.

i. PRETRIAL PREPARATION OF THE EXPERT WITNESS

Always spend time with an expert before trial no matter how experienced or how good they are. The following are basic - general areas that should be covered with the expert:

\* Make sure the expert knows where they are supposed to be and when they are supposed to be there. Immediately, before commencement of the trial, try to schedule a specific day or time when your expert will be testifying. This will avoid disruption of the expert's business and is a basic professional courtesy.

\* Prepare your expert to deal with well-recognized publications or learned treatises in the following manner, "I accept that book as authoritative in the field with certain reservations", thereby permitting disagreement when necessary.

\* Make sure the expert understands there is more to the trial than what goes on in the courtroom. Warn them about inappropriate conduct or statements in the courthouse parking lot, halls, and bathrooms.

\* Make sure the witness will be appropriately attired. Some psychologists and psychiatrists just do not dress like the rest of us. The expert should convey the impression of assurance and knowledge in his area of expertise.

\* Make sure the expert knows who and where all the players will be in the courtroom.

\* Review any documents, tests, pictures, videos, or other like evidence with the expert before trial. If you are going to enlarge any documents or use a document out of its normal sequence or context, warn the expert so they will not be thrown off.

\* Explain the general mechanics of direct and cross-examination to your witness. Make sure the witness knows cross-examination will likely be one leading question after another. Don't hesitate to explain the adversarial system to your expert! "Trained as they are to think in terms of open discourse, apparent tolerance, and mutual respect, experts are often taken aback by the conflict of the courtroom. Explain to them the importance of responsive and brief answers. Caution him that the other attorney will attack anything that can be challenged. Teach your expert to expect attack and even to be wounded, that his opinions will not be ignored because the other side scores some points in cross-examination." Id. at 18.

\* Make sure your witness is familiar with such legal terms as managing conservator, possessory conservator and joint managing conservators. Also make sure the witness has an understanding of the term "best interest".

\* If the case is a modification case, make sure the expert understands the requirements of TEX.FAM.CODE ANN. § 156.001 et seq.

\* In a jury case, it is often very useful to provide the expert with a copy of the special issues and instructions so that the expert can more clearly understand what they are being asked to persuade the jury to do.

\* Make sure the witness understands the restraints of any motion in limine order and the effects of invoking "the rule".

\* Make sure the witness understands there is nothing wrong with you discussing his or her testimony before trial.

\* Determine whether or not you need a subpoena for the witness to appear and whether or not the subpoena needs to include documents, test data or notes.

\* Before your expert takes the stand, the expert should be fully aware of what the answers to any question you ask will be, whether on direct or redirect, over such matters as qualifications and professional standards. Obtain a vita from your expert and go over the vita with the witness. Determine which associations, organizations and affiliations require that certain standards or expertise be met before membership is allowed and emphasize these in direct. Get an extra copy of the expert's vita to use as an exhibit.

\* Give the expert a small lesson in evidence. Before your expert takes the stand, he or she should be generally acquainted with TRE 702 and 703. Regarding Rule 702, the expert should be aware that his or her "specialized knowledge" must "assist the trier of fact to understand the evidence or to determine a fact in issue". Have your expert prepared to explain how and why his or her expertise will assist the trier of fact. Regarding Rule 703, the expert should be made aware of the "reasonably relied on" predicate for considering "inadmissible" evidence in forming their opinion. If your expert "reasonably relies" on lie detector tests, hearsay, or other like evidence, rule 703 can provide a window for the admissibility of otherwise objectionable evidence. The expert should also be made familiar with TRE 705. It is important because, if the expert is aware of explosive facts or information that your opponent has not discovered, you may be able to set a trap for your unprepared opponent.

\* Leave the witness stand with a confident expression after testifying.

\* Remember that testifying for a length of time can be tiring. Keep the temper in check. Fatigue can be recognized by certain symptoms: crossness, nervousness, anger, careless answers, and the willingness to say anything or answer any questions in order to leave the witness stand. Some attorneys will try to "wear down" the expert. Do not let this happen to your expert.

## ii. HOW TO PRESENT OPINION TO JUDGE OR JURY

The expert's testimony can best assist the judge or jury in determining the best interests of the child if it addresses three major areas - the reciprocal attachment between parent and child, the child's needs and the adult's parenting capacities, and relevant family dynamics. Shuman, "Legal Issues Involving Children," in Psychiatric and Psychological Evidence, 309 (1986).

The reciprocal attachment between parent and child involves an assessment of the strength and quality of the ties between each parent and the child, and the child and each parent. Id. Included in this category are such things as trust, love, and realistic relationship expectations. Id.

Children require affection, protection, and guidance; however, the nature and intensity of each of these requirements varies from child to child and from year to year. Similarly, the ability of each parent to provide affection, protection, and guidance varies. The expert can provide valuable assistance to the judge or jury by evaluating the child's current needs for affection, protection, and guidance, and the ability of each parent to satisfy the child's needs. Id. at 310.

The expert may also provide useful information to the court by providing insight into family dynamics. This might include, for example, reasons the parent is seeking custody unrelated to a desire to further the welfare of the child or the effect of other relationships on the custody determination. Id.

## iii. PREPARE YOUR EXPERT FOR CROSS EXAMINATION

### (1) Access to Files

An expert may wish to make all of his or her files accessible to the attorney to insure that his or her statements in court are consistent with the information in the file. Id.

### (2) Double Check Expert's Credentials

One should always go over the credentials, schooling, and background of an

expert to insure the absence of embarrassing questions being asked during the course of live testimony.

(3) Stage a Mock Trial

A mock trial is one of the best ways to prepare the expert (and you) for cross-examination. Putting the expert in a near-actual courtroom situation may be beneficial for the expert. It will also help prepare the attorney in examining the whole case from both perspectives. If the attorney and expert clearly understand both positions, the attorney will be in a better position to defend the position attacked.

iv. PROTECT YOUR EXPERT IN THE COURTROOM

One of the main problems is the court's demand for responsiveness in cross examination. Flynn, supra, at 18. Too often, expert witnesses are cut off when they have so much more to offer. Id. One way to protect your expert is to redirect your expert on any perceived misunderstandings. Id.

The best protection, however, is to tell the expert from the start what to expect from the crossing attorney. While in the courtroom, always be supportive. If you have prepared him adequately, he will expect to lose some points, but if he is not prepared it will be confusing to him. If you convey by your looks and actions that you are attentive and not distressed, he will remain calmer himself. If he does not think you are watching, he may become defensive or argumentative, even waver on his opinions. Id.

e. A Plan For Effective Cross Examination

i. GENERAL

(1) Learn From Your Expert

The more your expert knows about the courtroom and the law, the better he will be as a witness. The more YOU know about psychology, psychological tests, and mental health professionals' thinking, the more equipped you will be for cross examination. Flynn, supra, at 18. The psychologist is more apt to find ways to challenge not only the psychological tests result, per se, but the findings and recommendations that have been offered as a result of those results. Id. at 14. If a psychologist has used a test in a careless or unprofessional manner, it is certain that he or she has done other, more obvious and more provable things in the same fashion. Id. No one will be better able to provide the basis for exposing a sloppy professional than another professional with the same credentials. Id.

Cultivate a relationship with a psychologist or two so you can learn more about the tests given and reports made of the opposing party's expert. You can use that information or that expert when you need to dispute another expert's opinion or when you need an informal expert opinion for a client. Id. at 19. Use this information to prepare your plan for cross-examination.

(2) Prepare Yourself!

In dealing with psychiatric and psychological examinations and testimony, the attorney must understand and be familiar with the appropriate terminology. One of the best references is the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

The lawyer seeking testimony from mental health professionals has no need to become an expert in psychometrics (the science of test construction) nor in the administration, scoring, or interpretation of psychological tests. On the other hand, some familiarity with the terms and the procedures, as well as the tests, themselves, can be very useful when preparing a case in which expert psychological testimony is involved. There are many publications available that examine and discuss psychological tests, psychological testing, and the interpretation, limits, and applicability of such tests. The following is not an attempt to provide an exhaustive list nor a discussion of all the possible sources of information



concerning psychological assessment. Rather, it is a brief list of some publications that will be of particular value to the lawyer who wants to be informed.

- \* Alberts, F., Jr., Blau, T., Davenport, S., & Hartley, K.(Eds.) (1988) Cue Book. Psychological Seminars, Inc.
- \* American Psychiatric Association. (1987). Diagnostic and statistical manual of mental disorders (3rd ed., revised). Washington, DC: Author.
- \* Ewing, C.P. (Ed). (1985) Psychology, psychiatry, and the law: A clinical and forensic handbook. Sarasota, FL: Professional Resource Exchange, Inc.
- \* McCurley, M.J. & Katz, E.M., "Psychological Testing: An Update," Marriage Dissolution Course (1989).
- \* McCurley, M.J., "Dealing With Experts and Psychological Tests," Marriage Dissolution Course (1991), Chapter P.
- \* McCurley, Webb, Karlson, Munsinger, "Direct and Cross Examination of Psychologist Re: Custody and Validation of Child Abuse Allegations," Texas Academy of Family Law Specialists (1992)

### (3) General Attack Plan

The general plan of attack for the cross-examination of a psychologist, psychiatrist, or social worker in a custody case should be aimed at one or more of the following issues:

- \* Lack of qualifications to render opinion
- \* Biased opinion - "hired" or "treating" expert
- \* Wrong or insufficient factual basis which gave rise to opinion
- \* Wrong or unreliable evaluation methods which gave rise to opinion; and/or
- \* Right information and basis for opinion but wrong opinion based on the right information
- \* Specific impeachments, previous contradictory or inconsistent statements, writings, or general credibility.

### (4) General Cross-Examination Tips

The main tool for successful cross examination is to have a theory, i.e. the witness is biased, the witness assumed the wrong fact, the witness does not know important facts, etc. The main ingredient for a successful cross-examination must be for a point to be made. If you do not have a point - you should not cross examine. Once you have a theory, back it up with facts. You should have these facts from your discovery process and information from your client.

The following are common theories for cross-examination of psychologists, psychiatrists, or social workers in custody cases:

- \* The witness does not know what he is doing because of lack of training or education.
- \* The witness has rendered an opinion without knowing important facts or information.
- \* The witness has based his opinion on disputed or untrue factual information.

The main theme to examine and expose in the area of both psychological testing and in clinical interviews with the parties is that, in custody cases, everybody has the incentive to lie and exaggerate. Further, because of the pressure and turmoil involved in contested custody litigation, everyone's perceptions, inferences and impressions of their own and other's actions will be altered. With exaggerated, altered or untrue representations of reality, the psychologist's job is extremely difficult, if not impossible.

- \* The methods used in arriving at the opinion are unprofessional, unreliable or invalid.
- \* The witness' testimony is for sale and has been bought and paid for.

### (5) Guidelines in Cross

- \* Ask short, clear and leading questions. Establish your theory of why the expert should not be believed one question and one fact at a time.

- \* Once you have established your facts and your theory, save it for summation. Do not beat a point to death.
- \* If a witness is particularly pompous and seems to have an explanation for everything, you may want to let this kind of witness talk, if what they are saying sounds ridiculous.
- \* Do not ask questions without knowing what the answer will be, unless you know there is no good way for the witness to answer the question.
- \* In your cross - pick out three or four major points you wish to expose. Expose these points convincingly and move on. Do not get mired down in details which may have little or only subtle importance. In short, go for the jugular and leave the fingers and toes alone.
- \* If the witness has not hurt you, do not cross.
- \* If the witness has good things to say about your client or your expert, have the witness testify about these matters before you establish or begin your destructive cross-examination.
- \* Timing. Use timing and proper pauses to control the pace of the cross examination and to emphasize when significant points have been made.
- \* Use demonstrative tools to help the jury or judge follow your cross. Use blow ups, calendars, or time lines where needed.
- \* Know where you are going with your cross and when you will make your point. Do not let the witness steal your thunder.

ii. AREAS TO ATTACK ON CROSS-EXAMINATION

A thorough cross-examination will include questions aimed at the expert, the expert's evaluation process, any tests given by the expert, and the expert's conclusions.

(1) The Expert's Credentials

(a) Social Workers

Generally speaking, there are only a handful of mental health professionals likely to appear regularly in the courtroom: psychiatrists, psychologists, social workers, and Licensed Professional Counselors. Obviously, the credentials, along with proper cross examination questions, vary as to each expert.

The qualifications of a witness may be attacked upon voir dire or cross-examination. Texas Emp. Ins. Ass'n v. Garza, 557 S.W.2d 843 (Tex.Civ.App.--Corpus Christi 1977, writ ref'd n.r.e.)(Cross examination may inquire into an expert's qualifications). The Social Worker is one such "expert" you may encounter. Her qualifications are governed by statute. For example, Family Code Section 107.051(b) states:

The social study may be made by a state agency, including the Texas Department of Human Services or any person appointed by the court. Section 107.052 further states: The court may appoint an investigator to conduct the social study required by this section who has the qualifications established by the rules of the Department of Protective & Regulatory Services providing minimum qualifications for persons who may conduct social studies. If the Department of Protective & Regulatory Services, or another governmental agency, is appointed, the person who conducts the investigation and makes the report must also have those qualifications. A study made under this section must comply with the rules of the Texas Department of Human Services establishing minimum standards, guidelines, and procedures for social studies. TEX.FAM.CODE ANN. §107.052(a)(b) (Vernon 1996) (emphasis added).

The Family Code leaves the setting of "minimum qualifications" to the Department of Protective & Regulatory Services. Pursuant to Family Code Section 107.052, the Department of Protective &

Regulatory Services proposed, and the Texas Legislature adopted, its General Licensing Procedures. The relevant sections regarding qualifications are as follows:

Section 85.6051. Minimum Qualifications

(a) A person qualified to conduct a court-ordered social study in a suit affecting the parent-child relationship must:

(1) be licensed or certified in an appropriate professional field or, if the profession is not regulated under state statutes requiring licensure/certification, be a member of an appropriate professional organization, and

(2) have completed, as a minimum, one of the following conditions:

(A) have a master's degree from an accredited college or university and: (I) two years of professionally supervised full-time experience that includes evaluating physical, intellectual, social, and psychological functioning and needs and the potential of the social and physical environment (present and/or prospective) to meet these needs; or (ii) at least 10 court-ordered social studies under the supervision of a person meeting one of the minimum qualifications. Direct supervision must be provided within the context of employment in a social service organization or agency or direct employment by a person meeting the minimum qualifications.

(B) a bachelor's degree from an accredited college or university and: (I) five years of professionally supervised full-time experience that includes evaluating physical, intellectual, social, and psychological functioning and needs and the potential of the social and physical environment (present and/or prospective) to meet these needs; or (ii) at least 20 court-ordered social studies under the supervision of a person meeting one of the minimum qualifications. Direct supervision must be provided within the context of employment in a social serviced organization or agency or direct employment by a person meeting the minimum qualifications.

(3) Licensing/certifying entities and professional organizations in appropriate fields not regulated under state statutes requiring licensing/certification must file notice of intent and ability to comply with these regulations.

(b) A person with a bachelor's degree from an accredited college or university may conduct court-ordered social studies if he is directly supervised by a person meeting one of the minimum qualifications. Direct supervision must be provided within the context of employment in a social service organization or agency or direct employment by a person meeting the minimum qualifications. These studies must be signed by both the person making the study and the person providing the required supervision.

(c) If by August 31, 1988, a person, has completed at least 20 court-ordered social studies in suits affecting the parent-child relationship within the period September 1, 1983 and August 31, 1988, he is not required to meet these minimum qualifications. He must register his qualifications and willingness to conduct social studies with the appropriate court(s). The

court(s) is responsible for investigating any complaints in regard to the conduct of social studies and determining the person's continuing eligibility to provide these services to the court.

(d) Persons qualifying under these regulations offering to provide these services must complete a registration form provided by the department. They must file this form with the appropriate court(s).

(e) Persons wanting to file a complaint about the conduct of a court-ordered social study must contact the appropriate court to determine the appropriate complaint investigating entity." TEX.GOV.CODE ANN. § 85.6051 (Vernon's Supp. 1993)

Be aware of the fact that many jurisdictions in Texas have local rules controlling the minimum qualifications for a person to perform social studies.

(b) Mental Health Experts

Each expert and each field of expertise will require research and, probably, consultation with an expert in the same or similar field to develop a fully effective cross examination. The following information of credentials, qualifications, and experience is just a starting point.

An expert must be qualified by study or experience in a science, art, or trade. Beyond the legal standards required by Texas courts to qualify as an expert, there are professional standards of education and experience which a forensic psychologist must meet to qualify as an expert in child custody evaluations. The minimal professional qualifications needed to be considered an expert in the area of child custody are: (1) an advanced degree in mental health; (2) two or more years of supervised experience; (3) specialization in child psychology or family relationships; and, (4) experience with the American legal system. Also keep in mind the standards set out in E. I. du Pont de Nemours & Co. v. Robinson, 923 S.W. 2d 549, 556 (Tex. 1995), which include elements to take the expert on voir dire to establish that he or she does not have the expertise to draw the conclusions made in the report, or testimony which is being submitted.

The Interdisciplinary Committee on Child Custody (1986) recommends that custody evaluators be knowledgeable in the following areas: child development; functional and dysfunctional family dynamics; child psychopathology; adult psychopathology; effective parenting techniques and behaviors; the effects of divorce and remarriage on families; applicable methods of psychological assessments; applicable Texas Statutes and common laws; typical custody and visitation arrangements; ethical standards in child custody evaluations.

(c) Cross-Examination Questions

The following questions are suggested as a means to effectively cross examine an expert.

- \* What training and experience does the expert have in evaluating children, and what ages of children is he or she qualified by training and experience to evaluate?
- \* What training and experience does the expert have in family law related matters? Does the expert understand the requirements of the statutes in custody matters?
- \* If alcohol or other drug abuse is the question, what experience and training does the expert have in the area?
- \* If any central individual has been in a psychiatric hospital or psychiatric ward, does the witness have specific training and experience relevant to drawing conclusions about that hospitalization?
- \* If any central individual is retarded, does the expert have any specific training or experience in evaluating people who are retarded?
- \* How many times has the witness testified in custody matters, how many times in other family court or juvenile court matters? How many times in other forensic matters?

- \* One might remember the usual questions about testifying for one of the other attorneys before, how many times the expert has been appointed by this particular court or other courts as the ad litem, or other such matters that would designate bias.
- \* Does the expert have the training and experience to evaluate the presence and magnitude of any psychological disorders that any party is alleged to have or have had? (In general, this will require the expert to be a clinical psychologist or psychiatrist, as other types of mental health professional rarely have significant training or experience in the diagnosis and treatment of serious disorders.)
- \* Question the witness about certification as a diplomate in any specialty and about his membership and various organizations where one has had to do more than pay dues.
- \* Has the expert published articles in a professional journal, given speeches to professional organizations or authored or co-authored any professional books?  
Ackerman, Psychological Experts, at 19-20.

(2) Impeachment of the Expert

If opinion testimony is not excluded, it still may be impeached by way of cross-examination or other evidence.

(a) Credibility of the Expert

The credibility of a witness may be attacked by any party, including the party calling him. TRE 607; Lloyd Electric Co., Inc. v. Millett, 767 S.W.2d 476 (Tex.App.--San Antonio 1979, no writ). Credibility can be either objective or subjective or both. Objectively, the cross-examiner can attack his findings, his academic record, etc. Subjectively, it should be the goal of the attorney to make the "good doctor" not likable to the jury. You can try to make him look "nerdy" or maybe attempt to make him appear cold and callous.

(b) The "Hired Gun"

Cross examination may inquire into any matters tending to show bias, Grocers Supply Co. v. Stuckey, 152 S.W.2d 911 (Tex.Civ.App.--Galveston 1941, writ ref'd), including how often the witness has testified for a particular attorney, Horton v. Houston & T.C. Ry. Co., 103 S.W. 467 (Tex.Civ.App.--1907, writ ref'd n.r.e.), the payment received for prior testimony, and related questions, Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980); Russell v. Young, 452 S.W.2d 434 (Tex. 1970), and any relevant financial relationship with the party for whom testifying. See Highway Ins. Underwriters v. Dempsey, 232 S.W.2d 117 (Tex.Civ.App.--Amarillo 1950, writ ref'd n.r.e.).

The following is a suggestion from Podell, Geary, and Holmes, Jr., Evidentiary Objections in Texas Divorce Actions as a way to bring out the "hired gun":

Q: Mr. Psychologist, are you being paid a fee to testify on behalf of Mr. Parent today?

A: Yes

Q: As a matter of fact, Mr. Psychologist, you are a close friend Mr. Lawyer and/or Mr. Parent and Mr. Lawyer or his clients have paid you over \$10 million over the last 5 years for examining parties for litigation purposes in custody cases.

Isn't that true Mr. Psychologist?

A: Yes. (Don't expect this answer)

(c) Interest in the outcome of Litigation

Cross examination may include questioning the witness on his or her interest in the outcome of the litigation. Highways Ins. Underwriters v. Dempsey, 232 S.W.2d 117

(Tex.Civ.App.--Amarillo 1950, writ ref'd n.r.e.). Information such as contingency fee arrangements or any other financial interest should be explored. Also, maybe the expert has become romantically involved with the client. These are issues that can only be learned through vigorous discovery and a good private investigator.

(d) Prior Inconsistent Statements

Texas Rule of Civil Evidence 801(e)(1)(A), impeaching on prior inconsistent statements, is an extremely useful cross examination device. See e.g., Reyes v. Wyeth Laboratories, 498 F.2d 1624 (5th Cir. 1974), cert. denied, 419 U.S. 1096 (1974); Ex parte Shepperd, 513 S.W.2d 813 (Tex. 1974); City of Garland v. Stevener, 462 S.W.2d 67 (Tex.Civ.App.--Waco 1970, writ ref'd n.r.e.). This is what most jurors think "lawyering" is all about -- catching a witness in a lie. This is a "Perry Mason" tactic, and if you have it, you should use it because it is very effective.

(e) Character Evidence

Opinion and reputation evidence of character can be used to impeach a witness. TRE 608.

(f) Learned Treatises

Cross examination may likewise be based on learned treatises. Wendell v. Central Power and Light Co., 677 S.W.2d 610 (Tex.App.--Corpus Christi 1984, writ ref'd n.r.e.). Excerpts so read, however, are admitted solely to discredit the expert's opinion. Bowles v. Bourdon, 219 S.W.2d 779 (1949).

Note that statements contained in learned treatises are a specific exception to the hearsay rule. TRE 803(18)

(g) Conviction of a Crime

This will rarely be used in the everyday cross-examination of an expert witness in a custody case, but you never know! Conviction of a crime, under certain circumstances may be used to impeach an expert under Texas Rule of Civil Evidence 609. TEX.R.CIV.EVID 609; see also Landry v. Travelers Ins. Co., 458 S.W.2d 649 (Tex. 1970).

(h) Unofficial Impeachment Tools

Other methods of impeachment include the following:

\* Specific instances of conduct of witness (except conviction of crimes provided by TRE 609). TRE 608.

\* Evidence of beliefs or opinions of a witness on matters of religion, to show witness' credibility is impaired. TRE 610.

\* Questions too remote or irrelevant or which go beyond proper bounds to embarrass or harass an expert. TRE 611(a).

(i) Use a Careful Approach

In handling a court-appointed expert witness who has found against your client, a very careful approach is absolutely essential. Loveless, "Some Practical Considerations Concerning the Presentation of Psychiatric and Psychological Examinations," supra, at 2. A professional approach that avoids acrimony or confrontation will frequently elicit some favorable responses toward your client. Id. "If you are going to attempt to embarrass or impeach the expert, you had better

make it stick. Frequently if you do intend to challenge such an expert, you can delay your challenge until the final part of your cross-examination and get favorable responses before you have alienated the witness". Id.

(3) The Evaluation Process of the Expert

One will want to compare, through cross examination, the actual steps the evaluator took in reaching his or her conclusion and the steps that should have been taken in the process. Have the expert walk you through the test results, consultations and other information that the expert relied on in reaching his or her opinions in the evaluation.

The process differs between social workers and mental health experts.

(a) Social Workers

In 1986, The Association of Family and Conciliation Courts produced guidelines for court connected child custody evaluations. The following is a summary of areas that should be addressed in cross examination.

- \* Review of written materials: Was it sufficient?
- \* Interviews with each parent:
  - Difference in parenting styles and or personalities;
  - Behavior towards children;
  - Punishment habits.
- \* Interview with child(ren):
  - Who did the child feel closest to? go to for comfort? share secrets with?
  - Level and nature of interaction between parent and child;
  - Child's interaction and relationship with significant others in that particular parent's home, for example, stepparents, other adults, children;
  - How the child handles stress and change - divorce - awareness of strife between the parents;
  - Child's likes and dislikes;
  - The degree to which parents involved the child in the custody disputes.
- \* Visits to the parents' home:
  - Inadequacy of physical environment;
  - Compare and contrast the child's behavior in each parent's home.
- \* Interviews with significant others
- \* Interviews with relevant collateral sources
- \* Contact with parent's designated witnesses:
  - The frequency of contact between the witness and the child and the witness and parent for whom they are in support;
  - The most recent contact with each parent and child;
  - The relationship of each witness to each parent;
  - Differentiation of what the witnesses have been told vs. what they actually observed or experienced.

See Honorable Frank Sullivan, Social Studies In Custody Cases -- Taming The Evidentiary Monster, State Bar of Texas Advanced Family Law Course (1988) B.

(b) Mental Health Experts

Texas has not adopted set rules or minimum requirements to guide mental health experts in their evaluation procedures. However, a 1980 survey of 190 psychologists, psychiatrists and masters degree level mental health practitioners in which approaches to evaluating a custody dispute scenario showed: "[a]ll of the evaluators interviewed the mother and the father individually, taking approximately two hours for each individual. Almost all interviewed each child

individually, taking one and one-half hours for each interview. Seventy-five percent of the evaluators administered psychological tests to the parents and the children, taking approximately two and one-half hours each. Approximately seventy percent of [the examiners] observed the interaction between each parent and child for slightly less than an hour. Only half of the individuals observed the mother and father together or had conversations with significant others (friends and relatives). Thirty percent made school visits or home visits; of those who did, the average duration was over one hour. In addition, the average report writing took 2.8 hours, the average consultation with attorneys took 1.4 hours, and the court testimony took 2.3 hours for a total of 18.8 hours on the average." Ackerman, Psychological Experts, at 54.

More specifically, cross examination should point out the differences between the actual steps taken by the mental health expert and the "ideal" steps in an "ideal" evaluation which would include:

- \* A complete psychosocial history of each family member.
- \* A home observation of parent-child interactions (with both parents interacting separately with the child). See Casebook on Ethics (1991), American Psychologists Association stating that psychologists may not offer an opinion as to which of two parents would be the best custodian without examining both parents. Ethical Rulings (1989), Texas State Board of Examiners of Psychologists.
- \* Collect the Parenting Stress Index (Abidin, 1983) from the parents and ask for reports from the child's school.
- \* Clinical interviews with the parents and child and significant extended family members (such as older siblings, grandparents, etc).
- \* Personality tests of both parents and the child.
- \* The Bricklin Perception of Relationships Test (PORT) (Given to the child to nonverbally evaluate parent-child bonding and the child's custody preference).
- \* Custody Quotients (CQ) on both parents involved in the litigation (Gordon and Peek, 1989).
- \* If sex abuse is alleged, a Sex Abuse Legitimacy Scale (Gardner, 1987).
- \* Review of letters, police files, and court papers, etc.
- \* Review of divorce decrees, visitation agreements, etc.

#### (c) Collateral Contacts

Whether you are dealing with a social worker or a mental health expert, collateral contacts play a key factor in the evaluation process. Likewise, collateral contacts should play a large role in the cross examination.

Collateral contacts are the consultations and conversations that an expert has with others who have personal knowledge of the clients being examined. These contacts may include neighbors, relatives, past or present employers, supervisors, or co-workers, past or present counselors and psychotherapists, the other individuals involved in the case -- including the attorneys, social workers, or others doing evaluations. The purpose of collateral contacts is to invite the insights and perceptions of others who know the client in contexts different from the evaluator's office. Flynn, supra, at 15. Information given to mental health experts and/or social workers can be, and probably is, weak in three areas. One should point out each applicable area and allow it to become part of the theory: The adverse expert's opinion was based on biased and unreliable sources; therefore, the expert's conclusion is wrong.

#### \* Bias of Collateral Contact

To what extent is the contact likely to be biased regarding the client being examined? Friends, relatives, and coworkers are nearly always partial and can be relied upon to provide mostly biased information. Even negative information must be weighed carefully for bias, because the motives that drive interpersonal and family relationships are often extremely complex. Few of us are impartial, objective observers of those with whom we interact and work, and little of what we perceive about



friends and relatives is unbiased. Id.

Other professionals -- counselors, psychotherapists, pastors, and even the attorneys involved -- are capable of greater objectivity, but must also be measured for the potential of biased involvement. Current or former psychotherapists will be likely to advocate for their patients -- and against their patient's spouse. Psychotherapists do not always have objective perceptions of their patients' family members, nor necessarily of their patients. They do, however, possess information and a perspective that is not available from other sources. Id.

\* Unreliable Collateral Contacts

Another dimension critical to determining the importance and meaning of collateral information concerns how long the source has known the client. Changes occur in people over time. A skilled clinician is able to extrapolate future behavioral probability on the basis of past behaviors. Sources who have known a client for several years, who knew the client before the litigation began, and who have observed important changes in the client's behavior contribute a wealth of useful information. That is true of the non-objective sources, such as friends and family, as well as more objective sources such as former work supervisors and counselors.

\* Second-hand Reports From Collateral Contacts

The third important dimension to collateral contact is whether the information is a second-hand report of events, or a first-hand observation by the examiner. Where did the information come from? Of particular importance in this context are, for example, home visits, personal contact with minor children who are the subject of a custody suit, and written reports that were completed outside the context of the litigation. Whether the information was gathered before or after the litigation makes a significant difference because it avoids much of the bias introduced by the demands and implications of the court. A discharge report from a state hospital, for example, is written for an entirely different purpose than social study done on the basis of a court order. If there are reports available from other mental health professionals, the examiner should have them, and should read them. Id. at 16.

(4) Tests Given By the Expert

Generally, psychological testing is a standardized method of checking a portion of an individual's behavior and comparing it to that of a group with known characteristics. The tests are categorized depending on what factors the particular test is designed to measure. Intelligence tests, personality tests, achievement tests and neuropsychological tests have all been developed in an effort to create objective and standardized instruments.

There are very few tests that are designed for use specifically in courts of law. The results of psychological tests answer specific, clinical questions that are of interest to the clinician doing a psychological assessment. The answers to such questions assist the clinician in making decisions, but they are not the decision; the test result is not the finding. Flynn, supra, at 13.

It is imperative that each family law practitioner have a working understanding of each test that may be given. Generally, tests relate to diagnosis, treatment, and prognosis (the clinical/personality tests) and questions regarding specifics of a client's functioning (for example, intelligence and aptitude). Main tests include Minnesota Multiphasic Personality Inventory-II, the Rorschach Inkblot Technique, the Bricklin Perceptual Scales, The Phallic Plethysmography, and the Custody Quotient.

The first place to start with any psychological test that has been used by an adverse psychologist is one's own consulting or testifying psychologist. Information that one should be familiar with is as follows:

\* How the test works

- \* What the test was designed to measure
- \* Whether or not the test is reliable and valid
- \* Whether or not the test can be or was appropriately used in making custody determination. Id.  
A second place for information is the library and published articles.  
In custody cases when your clients have been psychologically tested, you should always question validity, reliability and fairness. Does it violate your client's constitutional rights?

(a) Categories of Psychological Tests

Psychologists place test instruments into two broad categories: empirical tests (sometimes called objective tests) and projective tests. The critical difference between the two involves the range of possible responses that the client may offer, and by extension, the clinician's freedom in scoring and interpreting the client's responses. In both cases, the client is presented with a standardized task. For most of the empirical tests the client is typically presented a set of specific, usually written, questions. The possible range of choices is limited -- most often either true or false, or an option among three or four preferences. The tasks on the projective tests are less structured insofar as the range of possible responses that the client may supply. The rationale for the projective test is that given a vague, undefined stimulus, the subject projects thoughts, feelings, attitudes, etc., onto the stimulus -- i.e. the Rorschach Technique ("ink blot test"). Flynn, supra, at 12-13.

For years, psychologists have argued the relative merits of empirical versus projective instruments with adamant proponents and opponents of each. Finally, however, both have become accepted and standard tools of the professional psychologist or other qualified administrator. In the hands of a skilled clinician, both are useful information gathering tools. The experienced expert witness has learned that empirical tests provide a better appearance for court-related assessments. In fact, even the best-researched of empirical instruments were not designed to be tolerant of hostile cross examination. They were designed for the purpose of sampling behavior with the goal of providing standardized comparisons of samples of individual and reference group behaviors. Id.

(b) What the Attorney Should Establish

\* Tests Were Not Designed For Custody Cases

None of the most widely used psychological tests, such as the MMPI-2, the Rorschach Ink Blot Test and the Thematic Apperception Test (TAT) were designed to measure parenting skills, abilities or qualities. Nor were these tests designed to be given to individuals with every incentive to lie or exaggerate. The MMPI-2, Rorschach and TAT all were designed and developed as clinical aids to be used in the diagnosis and treatment of mental diseases or ailments. These tests were designed to be given to persons potentially in need of psychiatric or psychological treatment, not persons seeking custody of their children through the courts.

However, be aware that publishers and suppliers of psychological tests are aware of their tests' weaknesses, and they present a good case for their own tests' reliability, validity, and applicability to a variety of situations. Flynn, supra, at 13. Flynn warns that efforts to discredit an expert by discrediting the test are misguided and miss the point of psychological testing (though such efforts sometimes succeed for peripheral reasons). To discount an expert's finding and recommendations, however, because a given test was not designed to provide such a finding or to determine such a recommendation is to miss the point that no test provides findings or recommendations. Tests and the testing process only provide information -- a standardized sample of the client's behavior for rigorous comparison to other clients' behaviors. It is the clinician's responsibility to make appropriate and accurate use of the information obtained from testing. Findings and recommendations are the result of a clinician's comprehensive information-gathering and information-organizing process and are based in the clinician's overall skill and acumen. The attorney's ability to discredit a clinician's use of a given test on cross

examination is more a measure of the clinician's experience in the courtroom than of his or her professional skill. Id. at 14.

\* Custody Situations Were Not Designed For Tests

Establish that people seeking treatment are more likely to be truthful in their responses to the tests than people seeking custody. If exaggerated or untruthful responses are given in the tests, the test will not be valid.

\* Exaggerated and Untruthful Responses

Establish that people's emotional peaks and valleys are more exaggerated during the heat of a custody case and that because the test measured an exaggerated peak or valley it may not be accurate. Id.

\* Test scoring

There are numerous methods and tools used by mental health experts to "grade" psychological tests. Very often, these methods and tools provide a key point for cross examination. One method, in particular, leaves itself open for damaging questions: computer scoring. Although computer scoring is used in limited areas, namely Minnesota Multiphasic Personality Inventory-2 tests (MMPI-2), it serves as the perfect example for the effective cross examination of testing methods.

The MMPI-2 is normally scored by a computer resulting in a print-out that, in narrative form, describes the person tested. Often these computer print-out statements in no way resemble your client. From these facts alone, the following cross examination ideas are available if the MMPI-2 has been computer graded. Id.

- \* Establish that the expert does not know how to score the MMPI-2 and uses a computer service to do this.
- \* Establish that the MMPI-2 test responses were mailed to a computer grading service.
- \* Establish that the expert was not personally present when the test was "scored" by the computer.
- \* Establish that the expert has no way of knowing whether the computer graded your client's test responses or someone else's. This may provide a basis for excluding the experts reliance on the MMPI-2 scores.
- \* Establish that the psychologist does not know whose theories and interpretations were programmed into the computer scoring system. This being the case, how can the expert agree or disagree with the computer's MMPI-2 interpretation.
- \* Obtain various positive descriptions of your client, i.e. she's hard working, held a job for 15 years, etc. Contrast these with opposite descriptions of your client in the computer scoring narrative, i.e. the test scores indicate this person could have trouble holding a job.

(c) Reliability and Validity of the Test

In appraising a particular psychological test there are two considerations that must always be kept in mind: reliability and validity of the particular test. Although validity and reliability seem to run along the same line, they are very different and deserve individual attention. Proving up (or disproving) one in no way proves or disproves the other.

Though validity and reliability should be addressed, the attorney's point should be made and then

immediately left because lengthy cross examination on either subject contributes little. Flynn, supra, at 14.

Generally, the concept of reliability is such a statistically arcane concept that effective demonstration of its absence in the courtroom is more likely to be distracting than convincing. The publishers of tests provide impressive reliability data with all the tests that they sell. For an attorney to attempt to prove that an alpha coefficient is less meaningful in a given case than a corrected split half reliability, even if the criticism is relevant, will most likely leave a jury quite bored. Id.

\* Reliability

Reliability is synonymous with consistency. To the advocate it has two uses: a "pro" for tests and/or witness reliability or a "con" for a particular test and/or witness reliability. There are several methods to test such reliability: A test-retest reliability; parallel forms procedure; "split-half" reliability; interscorer or interrator reliability. However, there is not complete agreement among psychologists as to what reliability standard should be set in order to be confident of a certain test. See McCurley & McCurley, Psychological Testing, Marriage Dissolution Course (1987), Chapter N at 2.

\* Test-retest reliability:

Reliability of a test is usually determined in terms of a co-efficient correlation between test scores on a first test and then on a second. Id.

\* Split-half reliability:

Here, the scores on arbitrarily selected halves of a test are statistically compared with one another, and a correlation coefficient is obtained. Although popular, this reliability testing method is limited in that it can only be used when there is relative equality of items through the instrument. Id. at 112-113.

\* Parallel-forms procedure:

Another popular reliability is the parallel-forms procedure. In the parallel-forms procedure, parallel or equivalent forms of a test are administered to the same group of individuals. The correlation between the two sets of scores is then computed and one test-giver attempts to correlate the scores for reliability. Ackerman, Psychological Experts, at 216.

\* Validity

In Larry P. v. Riles, 343 F. Supp. 306 (N.D.Cal. 1972), the court held that "tests used for classification purposes [i.e. good parent/ bad parent] must be shown to have clear validity." As an advocate, one must question whether the tests covered in this article or any psychological test given to one's client has any validity in assessing parenting skills. Additionally the United States Supreme Court challenged the constitutionality of psychological testing where such testing had been given in order to secure employment, stating, "good intent does not redeem testing mechanisms that are unrelated to measuring job capability." Griggs v. Duke Power Co., 401 U.S. 424 (1971). By analogy, in order for psychological testing to meet constitutional muster in custody cases, the test must demonstrate a manifest relationship to parenting skills. See id.

Validation of a test, for scientific purposes, requires that the test measure what it actually purports to measure. For example, does a particular intelligence test truly measure intelligence? Id. While validity is a more relevant consideration before the court than reliability, its usefulness to the attorney to discredit an expert by discrediting the test remains limited because "there is a lack of any methodologically sound empirical evidence allowing psychological predictions as to the effect of various types of custodial placements on children, or whether joint custody, in general, is better option than single parent custody" Weithorn & Grisso, Psychological Evaluations in Divorce Custody: Prob-

lems, Principles, and Procedures, Psychology and Child Custody Determinations 161 (1987). While statements about past and present may be "to a reasonable degree of certainty," statements about the future must be stated as opinions only. Ackerman, Psychological Experts, at 37.

Various approaches are used to measure validity:

\* Predictive validity

This is, perhaps, the most common and most useful validation test. It questions the "predictions" of the expert by pinpointing whether or not information about A can lead an expert to state with probability that "B" will occur. J. Zisken, Coping with Psychiatric and Psychological Testimony, Vol. I, (1981) at 78. The examiner should point out that no psychologist has the ability to predict with certainty which parent would be the better custodial parent in all circumstances.

\* Concurrent validity

This is similar to predictive validity except the test scores are compared to present information instead of being predictive in nature. Comparing what score one makes on an intelligence test with what grades the test taker is making in school is an example of concurrent validity. Id. at 80.

\* "Content" or "face" validity

This validity measure is based on what we call in law, *res ipsa loquitur*, "the thing speaks for itself." If the tests involved problems in multiplication, it would then seem to follow that the test measures one's ability to multiply. Id. at 81.

\* Construct validity

This is an all encompassing concept which assimilates one or more of the other types of validation tests. "It refers to the extent to which the test may be said to measure a theoretical concept, for example, intelligence or mechanical comprehension or anxiety. It entails a broader more enduring and more abstract kind of behavioral description". Id.

(5) The Conclusion Itself Should Be Attacked

In essence, all cross examination is aimed at attacking the adverse expert's conclusion; however, one should never lose sight of that fact. Take special efforts to have well rounded and "to the point" arguments aimed at *the* conclusion. In other words, do not get wrapped up in a "validity of test" argument to prove only that the test was not valid. Instead, use a "validity test" argument to prove that the test was not valid AND that is why the expert's conclusions are wrong.

#### 4. EVIDENCE

a. Building Evidence for Your Case

i. PHOTOGRAPHS AND VIDEOS

Your client should bring to your office all of the family photographs, videos, and other family memorabilia in their possession. Review all this "evidence" with an eye towards trial.

Consider blowing up some family photos or turn them into a slide show. Every custody case should include some photographs because the judge or jury wants to see the children whose lives they will be affecting. You will likely score points with the judge or jury if you are the side providing the happy photos or videos they so desperately want to see.

You may consider editing the home videos into a "greatest hit" collection. Your client should continue to make home videos during the pendency of this suit. You may consider a professional day-in-the-life video; however, they are usually attacked as being staged and self serving. A home video is

less expensive and usually more charming.

ii. WIRE TAPPING

You may advise your client to tape telephone conversations with their spouse during the pendency of this suit. Taped conversations may be helpful if your client's spouse is expected to lie or completely change his or her testimony when on the witness stand. Make sure you thoroughly explain to your client what types of taping are legal and what types are illegal. The statutes which prohibit wire tapping can be found at 18 U.S.C. § 2511, and Texas Penal Code § 1602.

Generally wiretapping is not illegal if the person taping the conversation is also a party to the conversation being taped or one of the parties to the communication gave prior consent to the interception. 18 U.S.C. § 1511(c). Any tape illegally obtained cannot be used as evidence in court. 18 U.S.C. § 1515.

A person who illegally wire taps another's conversations may be liable for statutory damages, actual damages, punitive damages and reasonable attorney's fees and costs. TEX. CIV. PRAC. & REM. CODE ANN. § 123.001-123.004 (Vernon 1992).

iii. PRIVATE INVESTIGATORS

You may consider hiring a private investigator if you believe that your client's spouse is engaged in activities which are difficult to discover by other methods. Private investigators are very expensive, but can often uncover information that cannot be otherwise obtained. When choosing a private investigator, be sure to check references. Like any other business, there are good investigators and bad investigators. Bad investigators can cause serious problems in your case if he or she engages in any illegal activities. Before hiring an investigator, make sure that they understand the scope and bounds of the assignment and is willing to follow your instructions.

The communications between the investigators and the client or the attorney are not discoverable pursuant to the attorney-client privileges and the work product exemptions. TRE 503; TRCP 683 and 687; Bearden v. Boone, 693 S.W.2d 25 (Tex. App.--Amarillo 1985, no writ). To assert the privilege, the investigator must have been hired by the lawyer:

A representative of the lawyer is:

- (1) one employed by the lawyer to assist the lawyer in the rendition of professional legal services....

TRE 503(a)(4) (emphasis added). The privilege belongs to the client and any claim of privilege must be by or on behalf of the client. Once created, the privilege continues for as long as the client want to assert it, even after the case is over or the attorney-client relationship is terminated. Maryland American Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455, 458 (Tex. 1982). The work product exemption is broader than the attorney-client privilege, but ceases at the conclusion of the litigation. Bearden, 693 S.W.2d at 28.

iv. DIARIES

You may advise your client to keep a diary or calendar during the pendency of the suit to record pertinent information. For example, your client should keep track of who shows up for visitation and who attends the children's extracurricular events.

The obvious danger of keeping a diary is that the other side may obtain it inadvertently. Any diary should be addressed to the attorney with the following statement on the front:

This document is intended to be a communication between CLIENT and ATTORNEY.  
The attorney-client privilege is asserted as to all statements, notes, opinions and writings contained in this document.

You should warn your client about the possible ramifications of letting the diary fall into the wrong hands. The diary should be delivered to the attorney on a weekly or monthly basis to reduce the possibility of misplacing it.

If your client is keeping his or her diary on a computer, you should warn them of how easily computer information can be copied. Under no circumstances should the privileged information be kept on the computer hard drive. All information should be stored on a disk and kept in a very safe place. The disks, like a diary, should be turned over to the attorney periodically to prevent them from falling into the wrong hands.

b. Effective Use of the Motion in Limine

If you are trying your case to a jury, you should consider what information you would like to exclude from the jury through a Motion in Limine. Carefully analyze any "bad facts" relating to your client or your witnesses in conjunction with the Texas Rules of Civil Evidence and file a Motion in Limine. For example, the court may exclude your client's bad conduct prior to the birth of the children as too remote.

Remember that a Motion in Limine only requires that the opposing counsel approach the bench prior to mentioning the information to the jury. If the Court denies your Motion in Limine, be sure to object at the time the evidence is introduced to preserve error for appeal. TEX. R. APP. P. 52(b). Do not be disappointed if the court denies nearly all of your Motion in Limine because most courts tend to follow the rule that everything is relevant in a custody case.

c. Social Studies & Psychological Evaluations

i. STATUTORY BASIS FOR A SOCIAL STUDY

The Court's power to order a social study is contained in Family Code Section 107.051.

ii. GETTING SOCIAL STUDIES AND PSYCHOLOGICAL EVALUATIONS INTO EVIDENCE

(1) Court-Ordered Social Studies Are Automatically in the Record

Texas Family Code Section 107.054 and 107.055 provide that the agency or person making the social study shall file its findings and conclusions with the Court on a date set by the court. The report shall be made a part of the record of the suit; however, the disclosure of its contents to the jury is subject to the rules of evidence. In a contested case, the agency or person making the social study shall furnish copies of the study to the attorneys for the parties before the earlier of: (1) the seventh day after the social study is completed; or (2) the fifth day before the date of commencement of the trial. (emphasis added).

Such reports contain facts as well as the worker's opinions and inferences. It has been held that a written social study is automatically a part of the record, in a non-jury trial, whether or not tendered into evidence. Green v. Remling, 608 S.W.2d 905 (Tex. 1980) (adoption case); Wimpey v. Wimpey, 662 S.W.2d 680 (Tex.App.--Dallas 1983, no writ). Another court, however, held that the study must be properly admitted into evidence to be a part of the record. McPherson v. McPherson, 626 S.W.2d 349 (Tex.App.--Fort Worth 1981, no writ).

(2) Rule of Confidentiality Does Not Apply

The last privilege listed in the Texas Rules of Civil Evidence is Rule 510, "Confidentiality of Mental Health Information." Communications between a patient and a mental health professional are confidential under this rule. However, the rule of confidentiality does not apply where the disclosure is relevant in a suit affecting the parent-child relationship. TRE 510(d)(6).

(3) Studies and Evaluations Are Generally Inadmissible Hearsay

Texas Family Code Section 107.054 and 107.055 provide that the social study report shall be made a part of the record of the suit; however, the disclosure of its contents to the jury is subject to the rules of evidence.

Although the study "shall be made a part of the record," this does not assure its availability to the jury. It has been held that social study reports "are generally inadmissible hearsay". Rossen v. Rossen, 792 S.W.2d 277, 279 (Tex.App.--Houston [1st Dist.] 1990, no writ).

(4) Battling Hearsay Objections

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TRE 801(d). Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by law. Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay. TRE 802.

A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by him as a substitute for verbal expression. TRE 801(a).

A "declarant" is a person who makes a statement. TRE 801(b).

"Matter asserted" includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief as to the matter. TRE 801(c).

(a) Other Than to Prove Truth of the Matter Asserted

The basic reason for rejecting hearsay is that a statement offered to prove that which it asserts is true may not be trustworthy without the guarantees of cross examination. However, where the "out of court statement" is introduced for any purpose other than to prove the truth of the matter asserted, there is no need to cross-examine the declarant; hence, the statements are not hearsay and should be admitted.

This is of particular importance because "out of court statements not offered to prove the truth of the matter asserted" may include verbal acts or statements offered by children to social workers and/or psychologists that show the effect on the hearer or reader and/or circumstantial evidence of the child's state of mind. See McCormick on Evidence 579-613 (2d ed. 1981).

(b) TRE 703: Bases of Opinion Testimony

One can always attempt to get a study/evaluation in evidence, even if it is full of hearsay statements, with Texas Rule of Civil Evidence 703, which provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or reviewed by the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. TRE 703.

Many cases stand for the rule that testimony is allowed, even though based on inadmissible evidence, if it is of the type reasonably relied upon by experts in the particular field. See e.g., Lipsey v. Texas Dept. of Health, 727 S.W.2d 61, 72 (Tex.App.--Austin 1987, writ ref. n.r.e.)(allowing expert to testify as to his conclusions which were partially based on an inadmissible hearsay contour map, because it was of the type reasonably relied upon by experts in his field); Metro Aviation, Inc. v. Bristow Offshore Helicopters, Inc., 740 S.W.2d 873, 876 (Tex.App.--Beaumont 1987, writ ref. n.r.e.)(allowing an expert to testify as to his thoughts which were based solely on hearsay reports not admitted into evidence about helicopter maintenance under TRCE 703); Moore v. Polish Power, Inc., 720 S.W.2d 183, 191-192 (Tex.App.--Dallas 1986, writ ref. n.r.e.) (allowing expert to testify in strict liability, negligence, and breach of warranty case as to characteristics of formaldehyde under TRE 703);



Sharpe v. Safway Scaffolds Co. of Houston, 687 S.W.2d 386, 392 (Tex.App.--Houston [14th Dist.] 1985, no writ).

One recent case, In Interest of A.V., 849 S.W.2d 393 (Tex.App.--Fort Worth 1993, no writ), involved a penile plethysmography test which appeared to have favorable results for the appellant accused of sexual misconduct in a termination of parental rights suit. The appellant did not object to the test coming into evidence. Later, a social worker, who had reviewed the test, among other things, attempted to testify as to his conclusions about the situation and how the test results affected his conclusion.

At that time, the appellant objected to the reliability of the test. The trial court overruled appellant's objection based on Rule 703, although the Judge expressed his own concerns about the exam. The Court of Appeals affirmed. It held that "Because appellant did not object to the prior introduction into evidence of [the test], we find appellant has waived any complaint regarding subsequent testimony about these test results.... Accordingly, if [social worker] qualifies as an expert witness his interpretation of the test results was admissible...." Id. (emphasis added).

Another important case in this area is Birchfield v. Texarkana Memorial Hospital, 747 S.W.2d 361 (Tex. 1987), There the court stated that an expert should not ordinarily be permitted to recount a hearsay conversation with a third person, even if that conversation forms a part of the basis of his opinion. Id. However, the statement was dictum, and made no reference to Rules 703 or 705. Id. See First Southwest Lloyds Ins. Co. v. McDowell, 769 S.W.2d 954 (Tex.App. 1989) (following Birchfield and specifically addressing the language of Rules 703 and 705). Contra, Pyle v. Southern Pacific Transportation Co., 774 S.W.2d 693 (Tex.App.--Houston [1st Dist.] 1989, writ den.); Decker v. Hatfield, 798 S.W.2d 637 (Tex.App.-Eastland 1990, writ dis'd w.o.j.).

There is a special problem involving hearsay - the extent to which an expert may repeat hearsay statements in his testimony. An expert may base his opinion on data that is not admissible in evidence so long as it is established that his is the type of data reasonably relied upon by his colleagues in forming opinions on the same subject. But can he or she quote that inadmissible data on direct examination? Yes and no! See Hearsay And Exceptions To The Hearsay Rule, The Ultimate Trial Notebook Family Law (1992), Chapter J, at 13. For an excellent discussion of this subject, and the authorities pro and con, see Price, Opinion Evidence-Lay and Expert", State Bar of Texas Advanced Family Law Course, Chapter K (1992).

(c) TRE 803(1): Present Sense Impression

A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." TRE 803(1).

Rarely in a psychological setting or a social study interview will a hearsay exception come in to play; however, one should always keep it in mind.

(d) TRE 803(2): Excited Utterance

An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." TRE 803(2).

This is a commonly used exception to hearsay in dealing with psychological testimony. In Woodard v. State, 696 S.W.2d 622 (Tex.App.--Dallas 1985, no writ), the court held that a social worker could testify as to statements the child made to her in response to questioning. See also Hartford Accident and Indemnity Company v. Hale, 400 S.W.2d 310 (Tex. 1966) ("To be admissible as res gestae, statements must be shown to have been a spontaneous reaction to an excited event").

(e) TRE 803(3): State of Mind Exceptions

One of the more common and useful hearsay exceptions is the state of mind exception, which provides:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. TRE 803(3).

Note that the case law limits permitting statements made by the person whose state of mind is in issue. See Payne v. Edmondson, 712 S.W.2d 793 (Tex.App.--Houston[1st.Dist] 1986, writ ref'd n.r.e.) (witness' reliance on declarant's out-of court statements should have been admitted); see also Knesak v. Witte, 715 S.W.2d 192 (Tex.App.--Houston [1st Dist] 1986, writ ref'd n.r.e.)(Statement by former husband that he had made a will in favor of his nieces and nephews was admissible to show his state of mind); Baxter v. Texas Dept. of Human Resources, 678 S.W.2d 265 (Tex.App.--Austin 1984, no writ)(witness' statement that child had told him that he had been beaten, was afraid he would be beaten again when his parents returned, and that he had seen sexually explicit letters and photographs in his parents' house was admissible to show child's state of mind; Thrailkill v. Montgomery Ward and Co., Inc., 670 S.W.2d 382 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.)(Patient's testimony concerning her conversation with treating physician regarding need for future surgery was not hearsay but, rather, to show patient's state of mind, which was relevant to her claim of mental anguish).

(f) TRE 803(6): Regularly Conducted Activity

Records of regularly conducted business activity are not excluded by the hearsay rule even though the declarant is available as a witness. Specifically, Rule 803(6) states:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. 'Business' as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not." TRE 803(6).

(g) TRE 803(8): Public Records and Reports

Texas Rule of Civil Evidence 803(8) provides:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or (C) factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness. TRE 803(8).

Rule 803(8) can be used, through a "government document theory", to admit social studies into evidence. See Honorable Frank Sullivan, Excluding And Admitting Social Studies, Psychological Evaluations and Mediation Results, State Bar of Texas Advanced Family Law Course (1989), Chapter SS at 7.

Some confusion in this area has been caused by Bagley v. Scott, 582 S.W.2d, 511 (Tex.Civ.-App.--Beaumont 1979, no writ), which properly excluded a social study due to lack of proper predicate. In Bagley, the Court of Appeals implied that a social study could be classified as a "government document" and is, therefore, admissible if two requirement are met: (1) the report was produced by a government or public agency such as the Department of Human Services, Family Court Services, a

County Juvenile Department, etc.; and (2) the source of information is trustworthy. Id. The implication is that the report would have been admissible as such if the proper predicate had been established by meeting the two prongs. Id.

As Judge Sullivan noted, the Court is not very likely to rule that its own appointed caseworker is untrustworthy. Sullivan, Excluding And Admitting Social Studies, Psychological Evaluations and Mediation Results, supra at 7.

It is not reasonable for the right of cross-examination of such witnesses to be denied by admitting statements made to an investigator simply because the investigator is employed by a government agency and files a report of what was said by the witnesses. Id. at 8. If the court should choose to admit all contents of a government produced social study under this theory, the objecting party should move for an instruction limiting the purpose of the admission as proof only that the statements were made to the caseworker and not as proof of the matters asserted within the statements. Id.

(h) TRE 901 & 902: Authentication and Identification

Evidence Rules 901 and 902 provide an exception to the hearsay rule when documents are authenticated and identified. These rules, because of their broad sweep, arguably support the introduction of social studies, even before juries, if the proper predicate is established. Bagley v. Scott, 582 S.W.2d 511 (Tex.Civ.App.--Beaumont 1979, no writ)(implying proper predicate for social studies is government document); see also, City of Corsicana v. Herod, 768 S.W.2d 805, 814 (Tex.App.--Waco 1989, no writ).

Rule 901(b)(1) expressly allows testimony of a witness with knowledge that a document is what it is claimed to be as a means of sufficient authentication of that document. See March v. Victoria Lloyds Ins. Co., 773 S.W.2d 785, 789 (Tex.App.--Fort Worth 1989, writ denied)(the requirements under 803(6) [Records of Regularly Conducted Activity] and 902(10) [Business Records accompanied by affidavit] do not require the sponsoring witness or affiant to testify as to the trustworthiness of the report). The witness or affiant is to set forth the facts upon which an assessment of trustworthiness can be made by the court.

Although broad and helpful, attorneys are required to establish a proper predicate to take advantage of these rules. Id.

(i) TRE 805: Hearsay Within Hearsay

"Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." TRE 805.

If each part of the report conforms with an exception to the hearsay rule, the statements would be admissible. The attorney must demonstrate that the out-of-court statements in the report are admissible. See Ziegler v. Tarrant County Child Welfare Unit, 680 S.W.2d 674, 679-80 (Tex.App.--Forth Worth 1984, writ ref'd n.r.e.). (medical records containing hearsay statements admissible in a child abuse case because the medical records were properly authenticated, predicated and admitted, and the hearsay statements also met the hearsay exception for statements for purposes of medical diagnosis or treatment under Rule 803(4)).

iii. EVIDENTIARY BATTLES DIFFER BETWEEN JURY AND NON-JURY TRIAL FOR SOCIAL STUDIES

The evidentiary battle greatly varies between a jury and a non-jury trial because the Family Code differentiates between the two. According to Family Code Section 11.12(c), the social study shall be made part of the record in a non-jury case. See also Green v. Remling, 608 S.W.2d 905 (Tex. 1980)(in a non-jury trial, a social study may be considered by the trial Court even though it

contains inadmissible statements and is not offered or admitted into evidence). The judge will, therefore, see any and all hearsay statements, irrelevant matters, and otherwise inadmissible sections made in the record. Judges are, however, presumed to ignore any such matters when making a decision in the case. Megallon v. State, 523 S.W.2d 477 (Tex.Civ.App.-- Houston[1st Dist.] 1975, no writ); see also Green, 608 S.W.2d at 905 (while the legislature intended for the Court to have "potentially valuable information, ... consideration of the contents of the report by the jury on the other hand is a different matter").

When considering hearsay in non-jury family law cases, it is important to remember that Judges are human and humans cannot forget about a statement just because "it's an out of court statement offered to prove the truth of the matter asserted" when it comes to a child's best interest. The damaging statement is already "out of the bag," and once the judge hears it, you cannot take it back. This is a good thing to keep in mind when determining whether or not to obtain a jury in custody case.

A good strategy is to take advantage of the rule and get the social study before trial. If it is unfavorable to your client, pay the jury fee, get a jury, and get ready to omit all the unwanted and inadmissible statements.

iv. HOW TO KEEP SOCIAL STUDIES AND PSYCHOLOGICAL EVALUATIONS OUT OF EVIDENCE

As shown above, social study reports are generally inadmissible hearsay. Exclusion of relevant evidence can often times be used to effectively keep out statements in reports of psychologist and social workers. Evidence Rules 402, 403 and 802 should and can all be used together to exclude an unfavorable statement made in a social study.

Regarding objections, if counsel does not move for a Motion in Limine, or if the judge refuses to entertain the pretrial motions, then counsel must object at trial. When asserting an objection, the specific reason or rule for the objection must be stated in a courteous, timely, and specific fashion. Delayed objections will result in a waiver of the objection.

If you find the report or evaluation to be inadmissible due to hearsay or other reasons; counsel should object to the testimony of a social worker on the ground that it indirectly places the inadmissible written report in evidence. However, counsel should recognize that the expert opinion rendered may be admitted as being independent of the report.

As stated earlier, another practice tip that may work in this circumstance is to file a Motion to Exclude the Expert and the Expert's Report, pursuant to the Texas Rules of Evidence (hereafter "TRE") 104, 401 - 403, and 702 - 705. Additionally, caselaw supports such expert exclusion, and a court may hold a preliminary hearing on the admissibility of evidence per TRE 104 (c). Under E. I. du Pont de Nemours & Co. v. Robinson, 923 S.W. 2d 549, 556 (Tex. 1995), the trial court must act as a "gatekeeper" to determine the qualifications of an expert and whether the expert's opinion is admissible.

(1) TRE 802: Hearsay

Whether a psychological evaluation or a social study, the reports are almost always packed with hearsay. Although Green tells us that hearsay does not apply to social studies in trials before the Court, the Rules of Evidence still apply in those cases where juries will decide the facts. See Green, 608 S.W.2d at 905.

Advocates should take special note of the fact that Evidence Rule 802 places an affirmative obligation on counsel to object. The old law that hearsay would not support a judgment has been replaced by Rule 802.

As Judge Frank Sullivan advises:

As a practical matter, the hearsay in a social study tends to be strewn throughout its many pages...It is time consuming, wasteful, and infuriates the jury for the Court to be forced into a "cut and paste job" as it wades through each line of a thirty-page report. In view of the fact that attorneys for both sides are entitled to receive a social study before trial, the proper means to exclude evidence not admissible is by pre-trial Motion in Limine. Most Judges would prefer to be given an estimate of how long such a hearing will last and no Judge will appreciate having a jury panel cool its heels in the hall while such a tedious task is performed. The process of deleting hearsay from a social study will invariably take some time. First, a copy must be used to white-out, black-out, or cut-out the objectionable portions. The remaining portions should then be reassembled in a coherent form and a new, or "clean" copy made...While the Judge may have no choice in the matter if objection is first raised when the study is offered, rest assured that 'what goes around comes around' -- usually about the time that attorney's fees are awarded or a continuance requested in another case. This is called judicial temperament.

Id. at 4-5. The above, of course, also holds true for psychological evaluations.

(2) TRE 401 & 402: Relevancy

Relevancy is another evidentiary requirement which should be utilized when attempting to keep psychological evaluations and social studies out of evidence. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TRE 401. "Evidence which is not relevant is inadmissible." TRE 402.

(3) TRE 403: Unfairly Prejudicial to Client

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TRE 403. Note that just because evidence would anger or outrage a reasonable juror does not, itself, render the evidence inadmissible. The court must balance the probative value of the evidence with the danger of unfair prejudice.

For example, we all know that evidence may be admissible to show inadequate care of the child at the time of the arrest (i.e., who kept the kid while Mommy and Daddy were in jail?) but not for the purpose of showing actual involvement with drugs or that the parents are bad people. But are events that occurred seven years ago, with no recurring problems in the interim, too remote? Are numerous arrests, even if they do not result in conviction, so inflammatory that their probative value would be outweighed?

d. Getting Expert Testimony Into Evidence

The social worker preparing the report may be compelled to testify and may be subject to direct and cross-examination. TEX.FAM.CODE ANN. §107.055. The social worker may qualify as an expert with respect to certain opinions. Yancey v. Koonce, 645 S.W.2d 861 (Tex.App.--El Paso, writ ref'd n.r.e.). A party must have the right to cross-examine the social worker. Kate v. Smith, 556 S.W.2d 630 (Tex.Civ.App.--Texarkana 1977, no writ). However, if a party fails to call the social worker, he has not been deprived of his right to cross-examine the witness. Green, 608 S.W.2d at 905.

i. BURDEN OF PROOF IN QUALIFYING AN EXPERT

The burden of establishing the qualification of the witness to testify by means of opinion testimony is on the offering party. Stanley v. Southern Pac. Co., 466 S.W.2d 548 (Tex. 1971); see also Milkie v. Metni, 658 S.W.2d 678 (Tex.App.--Dallas 1983, no writ)(the trial court has broad discretion in determining if a witness is qualified to give an opinion); Hughett v. Dwyre, 624 S.W.2d 401

(Tex.Civ.App.--Amarillo 1981, writ ref'd n.r.e.).

The qualification of the witness as an expert and the admissibility of their testimony is within the sound discretion of the court. Ford Motor Co. v. Bland, 517 S.W.2d 641 (Tex.Civ.App.--Waco 1975, writ ref'd n.r.e.). Before he or she can testify by way of opinion, the witness must be established as an expert qualified to testify on the particular subject matter for which an opinion is offered. Milkie, 658 S.W.2d at 678 (offering party has burden to establish expert's qualification); Trick v. Trick, 587 S.W.2d 771 (Tex.Civ.App.--El Paso 1979, writ dismiss'd).

ii. WITHIN JUDGE'S DISCRETION

It is up to the judge, in his or her discretion, to determine whether a witness is qualified and would assist the trier of fact to determine a fact in issue. Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977). The "fact in issue" is invariably the parenting ability or mental condition of the parties.

iii. TRE 702: ADMISSIBILITY OF EXPERT OPINION

As with all evidence, there are certain prerequisites to the admissibility of expert opinions. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.  
TRE 702.

The Rule generally sets forth a three-prong foundation for admission of expert opinions:

(1) Subject Matter Authorizes or Requires Expert Opinion

An expert opinion is permitted "if scientific, technical, or other specialized knowledge" will assist the fact finder. TRE 702. The opinion can only legitimately be given by a qualified expert who has scientific, technical or other specialized knowledge which exceeds that of the ordinary person. Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977); Herrera v. FMC Corp., 672 S.W.2d 5 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd) (subject matter must be outside grasp of ordinary layman); McKinney v. Air Venture Corp., 578 S.W.2d 849 (Tex.Civ.App.--Fort Worth 1979, writ ref'd n.r.e.) (flying plane is outside realm of ordinary person); see also Bristol Meyers Co. v. Gonzales, 548 S.W.2d 416, 431 (Tex.Civ.App.-Corpus Christi 1976) rev'd on other grounds, 561 S.W.2d 801 (Tex. 1978) (holding that where the jury is in possession of the same information as the witness and the expert's testimony adds nothing to the information, his testimony is unnecessary and in fact, encumbers the proceedings).

(2) Opinion Will Assist Fact Finder

Expert opinions or inferences must "assist the trier of fact to understand the evidence or to determine a fact in issue." TRE 702; Louder v. De Leon, 754 S.W.2d 148 (Tex. 1988).

(3) Expert Qualified to Opine on Subject Matter

The particular expert must be qualified to give an opinion on the specific subject matter inquired into, which has two prerequisites: (1) special expertise; and, (2) sufficient bases for opinion. Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977); Trailways, Inc. v. Clark, 794 S.W.2d 479 (Tex.App.--Corpus Christi 1990, writ denied) (experts may testify if it is shown that they are trained in the science of which they testify); Thompson v. Mayes, 707 S.W.2d 951 (Tex.App.--Eastland 1986, writ ref'd n.r.e.); see also Warren v. Harnett, 561 S.W.2d 860, 863 (Tex.Civ.App.--Dallas 1977, writ ref'd n.r.e) (improper for a handwriting expert to testify that, based upon his analysis of a testatrix's handwriting, the testatrix was mentally incapacitated due to alcoholism).

In a San Antonio case, a social worker was not qualified as an expert to testify on the particular

subject matter in question in a custody case. In re B.S.L., 579 S.W.2d 527 (Tex.Civ.App.--San Antonio 1979, writ ref'd n.r.e.). In In re B.S.L., the husband successfully brought a modification suit to become managing conservator, thereby replacing his wife. On appeal, the court affirmed the trial court's decision noting that there was no clear abuse of discretion by the trial court when it excluded testimony of a witness who recommended that the original divorce decree appointing wife managing conservator not be disturbed. Although witness was employed by Child's Service Bureau, there was no evidence indicating the length of the employment, the number of investigations the witness had made, or the extent to which witness had gained a measure of expertise in any special area as a result of studying families.

iv. TRE 703: BASES OF OPINION TESTIMONY

Texas Rule of Civil Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or reviewed by the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. TRE 703.

Personal knowledge may be the basis in whole or in part of an expert opinion. A.Cohen & Co. v. Rittiman, 139 S.W.2d 59 (Tex.Civ.App.--San Antonio 1911, writ dismissed). Unlike lay opinions, expert opinions do not require personal knowledge and may be based in whole or in part on other than personal knowledge. This includes otherwise inadmissible evidence, so long as the bases of the opinion are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. Loper v. Andrews, 404 S.W.2d 300 (Tex. 1966)(expert opinion allowed notwithstanding lack of personal knowledge). This is an exception to the personal knowledge requirement of Evidence Rule 602.

Expert opinion can be based solely on hearsay. Sharpe v. Safway Scaffolds Co. of Houston, 687 S.W.2d 386, 392 (Tex.App.--Houston [14th Dist.] 1985, no writ). Expert opinion can be based on facts made known to the expert for the first time at trial. Geochemical Surveys v. Dietz, 340 S.W.2d 114 (Tex.Civ.App.--Austin 1960, writ ref'd n.r.e.).

A controversy exists in Texas regarding the extent to which an expert may recount, on direct examination or cross-examination, the facts and data underlying his opinion. See Price, Opinion Evidence-Lay and Expert", State Bar of Texas Advanced Family Law Course, Chapter K (1992), at 19. Generally, data underlying an opinion may be divided into two tiers: (1) broad categories of general sources of information underlying the opinion; and (2) specific and detailed contents of those sources. Id.

The first tier, "sources," would include observations, conversations, reading documents, etc. There is virtually no dispute that the first tier may be disclosed on direct or cross. Id. at 26.

The second tier, "contents," would include the contents of conversations, the substance of documentary evidence, etc. Since an expert may base his opinion in whole or in part on otherwise inadmissible hearsay, the controversy centers upon the extent to which an expert may recount to the trier of facts otherwise inadmissible hearsay under the guise of disclosing the data underlying his opinion. Id. at 19-20.

There is little dispute that the adverse party may explore the contents of the underlying data on cross-examination. Id. But the conflict focuses upon whether an expert may recount in detail the contents of the data underlying his opinion on direct examination. Proponents for admitting this evidence (contents of underlying data) on direct examination rely upon a liberal interpretation of the evidence rules. They argue that the fact finder is entitled to hear this information and decide which information can be subject to cross-examination, which can be limited or prohibited if its probative value is outweighed by its potential misuse by the fact finder, which can be limited for consideration by instruction, and which can be ignored if it so chooses. Id. at 25.

Opponents argue that it is not required by a reading of the rules, that such a rule merely allows for such an expert to be used as a conduit for otherwise inadmissible hearsay, and that any limiting instructions by the court are, in reality, merely illusory and do not work. Id.

v. TRE 705: DISCLOSURE OF FACTS OR DATA UNDERLYING

"The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data." TRE 705.

This is an excellent direct examination tool. Be prepared, however, to deal with the limitations discussed in Birchfield v. Texarkana Memorial Hospital, 747 S.W.2d 361 (Tex. 1987). In Birchfield, the court stated that Rule 705 "cannot be used as a guise to get in hearsay testimony." But, despite the holding in Birchfield, Rule 705 is still commonly used to bring in hearsay testimony.

vi. TRE 704: OPINION ON ULTIMATE ISSUE

Texas Rule of Civil Evidence 704 provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. TRE 704.

This rule allows expert witnesses to give opinions or inferences on the ultimate questions to be decided by the jury or judge. See Birchfield, 747 S.W.2d at 365 (fairness and efficiency dictate that an expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts).

vii. METHODS OF ELICITING EXPERT OPINION AT TRIAL

(1) Statements

A lay or expert opinion may simply be stated by the witness. Price, Presentation and Exclusion of Opinion Testimony, supra at 17.

(2) Hypothetical Questions

An expert may respond with opinions to hypothetical questions, but this is no longer required, unless the court so requires. Id.; M.W.J. Producing Co. v. Sparkman, 655 S.W.2d 286 (Tex.App.--Corpus Christi 1983, no writ). If hypothetical questions are used, it is not necessary that it include reference to all of the relevant facts in evidence or that it be confined to the exact facts proven with mathematical certainty. Kasey v. Barkley, 527 S.W.2d 256 (Tex.Civ. App.--Corpus Christi 1975, writ ref'd n.r.e.). However, hypothetical questions are limited to facts in evidence or which will be admitted in evidence at a later date. Texas Employers Ins. Ass'n v. Draper, 658 S.W.2d 202 (Tex.App.--Houston [1st Dist.] 1983, no writ); O'Kelly v. Jackson, 516 S.W.2d 748 (Tex.Civ.App.--Corpus Christi 1974, no writ); Polasek v. Quinius, 438 S.W.2d 828 (Tex.Civ.App.--Austin 1969, writ ref'd n.r.e.). Hypothetical questions may, however, assume facts that the evidence fairly tends to prove but that have not yet been clearly established. J. Weingarten, Inc. v. Tripplett, 530 S.W.2d 653 (Tex.Civ.App.--Beaumont 1975, writ ref'd n.r.e.).

e. Excluding Expert Testimony

Challenging the admissibility of expert testimony should start with excluding it altogether. One should challenge prerequisites to opinion testimony, by way of voir dire, to demonstrate that the prerequisites for the expert opinion have not been met. See, supra, Section IV D of this paper regarding



prerequisites.

There are three prerequisites to admitting opinion testimony: (1) Subject Matter Requires Expert Opinion; (2) Opinion Will Assist Fact Finder; (3) Expert Qualified to Opine on Subject Matter. See TRE 702.

The objecting party must object at the time an opinion is elicited, by succinctly stating that the prerequisites for the opinion have not been met, and stating with specificity how the prerequisites have not been met.

The second method of excluding harmful expert testimony is to use the same three objections referenced in IV C (4) (a)-(c), supra, for the exclusion of studies and evaluations: TRE 802 (Hearsay); TRE 401 and 402 (Relevancy); and, TRE 403 (Unfair Prejudice).

Finally, if the expert testimony if the expert's testimony is especially damaging, do not forget to utilize the Motion in Limine. This will help avoid any potential jury prejudice that may result from testimony that is improper, but gets to the jury before a proper objection can be made. In many instances, even the question that seeks to elicit the improper testimony may unfairly prejudice your client.

## 5. TRIAL PROBLEMS

### a. Bad Facts

Almost every custody battle will involve allegations of bad facts. Regardless of who has the bad facts, you should introduce them first. Any bad facts about your client should be introduced to the jury in the best possible light. Do not wait and allow your opposition to tell their version first. If you can "steal their thunder," the theory of their case will be destroyed. Likewise, if you have the opportunity to introduce the bad facts about Mom, do so in the worst possible light.

If your client is the respondent, he should be prepared to testify at all times. The opposition may very well call him first to elicit the bad facts at the very beginning of the case. If your client knew that this may happen, he will be much less shaken by starting the trial with his own cross-examination.

For a complete discussion of bad facts custody tactics, see Mike McCurley, Bad Facts Custody, State Bar of Texas Advanced Family Law Course, Chapter H (1992).

### b. Problems in Representing Dad

#### i. THE UNDERDOG

Fathers are generally thought to be the "underdog" in a custody case because society still perceives that infants and small children should be with their mothers. Even though the Family Code states that the gender of the parent cannot be considered in awarding custody, fathers may still have a tougher time gaining custody of their children. If a father is actively involved in the day to day care of his children, a court or jury will be apt to award dad custody. In the past decade, a number of studies show that fathers are winning custody more and more often:

- \* A Minneapolis study of 196 custody cases revealed that fathers were successful 45% of the time.
- \* A North Carolina study showed fathers prevailed in almost 50% of the custody cases studies.
- \* In Alameda County, California, a study of 13 contested custody cases showed fathers won 38% of the cases.

Polikoff, Why are Mother's Losing: a Brief Analysis of Criteria Used in Child Custody Determinations, Women's Rights Law Reporter, Vol. 7, No. 3, 263-67 (Spring 1982).

The statistics stated above may be helpful in counseling a father who is unsure whether or not he should seek custody. The perception of fathers as underdogs can be countered by a very well prepared

case. The following tactics may help in preparing Dad for a custody trial.

ii. PRIMARY CARETAKER

The biggest problems that fathers have in seeking custody is that they often have not spent very much time with their children prior to the divorce proceedings. One should first take a long hard look at who has been the primary caretaker of the children. If Dad has not been the primary caretaker, several different approaches may counter the mother's role as primary caretaker.

First, determine who is the primary caretaker by looking beyond the obvious. The parents' roles may then become blurred.

(1) Dual Delegation

In many cases where both parties work, the babysitter, nanny, or day care center may actually be the primary caretaker. Under these circumstances, focus on each parent's time with the children.

Compare the father's work hours with that of the mother's. Then look at the parties' leisure time. A chart or graph depicting a typical work week may illustrate that your client dedicates more of his leisure time to the children.

(2) Medical Care

Determine which party takes the children to the doctor or dentist. When a child is sick at school, which parent is most likely to pick the child up from school? Which parent knows when the child's next doctor's appointment is scheduled?

(3) Education

Determine which parent places the most emphasis on the child's education. Do both parents attend PTA meetings, visit with the child's teachers, help with homework and extracurricular activities? The parent who takes the more active role in a child's education may be given more credit as a caretaker than a parent who is home with the child but not actively participating in these activities.

(4) Special Activities

First, what activities do the children take part in and which parent encourages the children to become involved in that activity? Determine which parent picks up and takes the children to practices and performances. What special roles does your client play as perhaps a softball coach or an Indian Princess guide?

iii. THE WEEKEND DAD

If all of Dad's time with the children is fun time, Mom may attack Dad as being unable to cope with the responsibilities of a full time father. Under these circumstances, Dad needs to learn how to deal with all of the responsibilities of parenthood quickly.

Mom will then accuse Dad of becoming a "90-Day Wonder Dad". The reality of the situation may, however, be that Mom and Dad agreed that Mom would shoulder most of the parenting responsibilities because Mom had more time than Dad. One should also point out that Dad may not have been the one chauffeuring the children to and from their activities; however, Dad was the one who worked the extra hours so that they could afford for the children to participate in those activities.

iv. PRIMARY CARETAKER, PROBLEM MAKER

If the mother is the primary caretaker and the children are doing poorly in school or have discipline problems that are separate from mental and emotional problems, one may clearly argue that

Mom is doing a poor job as the primary caretaker. If during the pendency of the suit, the father is able to assume more primary caretaker responsibilities and the children's problems improve, so will Dad's odds of winning custody. It is important to note that if Dad is going to argue that Mom is a poor primary caretaker, he needs to show he can do a better job.

v. WHEN DAD IS "TOO BUSY" TO BE PRIMARY CARETAKER

If Dad has not been the primary caretaker and his schedule cannot permit him to become the primary caretaker, he must offer a reasonable alternative to the court or jury. Dad may possibly have relatives, friends or neighbors who can help with the children; otherwise, he will need to hire someone.

Regardless of the alternative Dad chooses, he must be able to present it as a viable option in court. If Dad intends to hire someone, he should try to hire that person in advance of trial to allow them to spend time with the children. An outsider as a primary caretaker is much more appealing if the children have already met them and they can appear in court. A live person in court is far more convincing than Dad merely testifying in court about all of his "plans" for the children if he get custody.

If, however, Dad does not have enough time with the children under the temporary orders to set up the situation, he should certainly investigate, interview, and research so that he can formulate his plans. The court or jury will have to choose his "plans" over Mom; therefore, the plans need to be detailed and well thought-out.

vi. PUT MOM TO WORK

Often when Mom has been the primary caretaker; she has not had to work many hours. Often divorce will force Mom to work more hours. She will then lose the advantage of having been the primary care taker during the marriage. Be sure to point this out in Court as this may put Mom and Dad on more equal footing.

vii. FATHERS AND DAUGHTERS

Generally, society tends to think that little girls should be with their mothers. If a father is seeking custody of a little girl, he may have additional problems in convincing a court in jury that he will be able to cope with all the changes in a little girl's life. For example, Dad will need to explain in court how he will cope with puberty, dating, sex, shopping, and makeup. You may want to advise your client to seek advice from a child psychologist or do some independent reading to prepare himself on dealing with these issues.

viii. STRATEGIES

(1) Devotion

Any father seeking custody should become involved in every aspect of parenting. He needs to spend as much time as possible with the children and create a situation where they rely upon him. The court or jury must be convinced that Dad is really devoted to the children.

If Dad simply cannot sacrifice his career to assume a major role in the children's lives, he then needs to initiate his outsider primary caretaker program. Whether he is going to hire a full time nanny or get his sister to act as a babysitter, he needs to get his planned support system into place.

(2) Paying the Freight

A father who is seeking custody should be prepared to pay if necessary, not only your fees but also the mother's fees, ad litem fees, psychologist fees, court costs and even private investigator fees. Depending on the circumstances, your client may not actually be required to pay anyone fees other than yours; however, he should be warned of the potential financial consequences of launching a custody fight. If part of Dad's argument is that he is better equipped financially to provide

for the children, he simply cannot take a position to the contrary.

(3) Filing First

If at all possible, file first so that you have the opportunity to open and close at trial. Because Dad is in somewhat of an underdog position, you will want to get your message to the jury first and last. In a jury trial, the ability to go first will also help to purge the jury of promom jurors before the other side has the opportunity to neutralize the gender issue.

If Mom files first, you should attempt to convince the other side to let you go first. You may offer to flip coins or argue that because your client opposes joint custody, he has more to prove and should get to open and close.

(4) Temporary Hearing

Dad should have a plan ready to implement in the event that he is awarded custody. Whomever Dad intends to be the primary caretaker of the children needs to appear in court to help convince the judge to award Dad custody.

In the event that the issue of temporary conservatorship is settled or Dad loses the temporary hearing, try to have Dad named as a temporary joint managing conservator in the temporary orders or do not give either parent a legal title. If you are able to keep the language neutral, Dad will not appear as an underdog at the final trial.

(5) Child Support

Dad should offer to pay as many direct expenses for the children as possible such as day care, school, clothes, doctor bills, etc. This will prevent the mother from receiving a lump sum of money each month to spend. This may also help to nudge the mother into the work place if she is not already there.

If Dad is hesitant about paying support, you should remind him that part of the theory of his case is that he can provide more for the children than Mom and he needs to live up to this role. A jury will not want to award a Dad custody who is not willing to pay for his children's expenses.

(6) Tactics at Final Trial

(a) Witnesses

If you are petitioner, Dad should be called as the first witness in your case-in-chief. Only if Dad is a poor witness or overly nervous should you call other witnesses before him. Under these circumstances, much of the evidence can be developed through other witnesses and Dad will have the opportunity to view the overall demeanor of the courtroom and become more comfortable.

Dad's entire support group should be prepared to testify so that the jury can meet these people. Expert witnesses who can testify to Dad's superior parenting skills should also be included.

If you decide to call the mother during your case-in-chief, be sure that you have a very short air-tight cross-examination. Stick to lines of questioning where you have sworn testimony.

(b) The 90-Day "Wonder Dad"

If prior to separation, Dad was not actively involved in the children's lives and has subsequently become a "wonder dad", this fact is likely to be brought out by the opposition. You should analyze with your client the reasons for Dad's inactive role prior to separation and be prepared to explain this at trial. Some of the common reasons that dads are inactive include:

- \* Financial pressure;
- \* Mom and Dad agreed that Dad would work and Mom would raise the children;

and

\* Dad thought that Mom would be better suited to raise the children.

You must be able to effectively present to the court the reasons why Dad's role has changed. Your opposition is likely to accuse Dad of seeking custody only to get revenge against Mom. Your client's motivation in seeking custody is the theory of your case and needs to be fully developed at trial to counter the 90-day wonder Dad attack.

c. Problems in Representing Mom

Most mothers begin custody litigation as the party favored to win, this is however subject to change particularly if Dad is working hard on his custody case. Encourage Mom to develop a support group of family, friends and/or counselors to ensure that the pressures of the case do not break down her emotional and mental stamina.

Like fathers, mothers often face common difficulties in custody fights. Some of the problems arise from the traditional roles of women, while new problems can arise with so many mothers now in the work force with hours just as demanding as Dad's.

i. NEVER WORKED A DAY

If Mom has never worked a day in her life, obviously you will first have to determine whether or not she will be able to maintain this lifestyle. If the financial facts indicate that she will not have to work, outline a financial plan for the children as part of your trial preparation. You will need to demonstrate to the jury why Mom will not have to work and how she will spend her time with the children. This is a wonderful set of facts, but not all that common.

More often when Mom has not worked a day in her life, divorce forces her into the work place. Under these circumstances, Mom needs to find a job that allows her to work at home as much as possible or work hours that conform with the children's school schedules. In reality, not many jobs like this exist; however, Mom will need to demonstrate at trial that she will be able to spend as much if not more time with the children than Dad.

ii. COUNTRY CLUB MOM

If Mom is accustomed to having a full time staff of maids, nannies and babysitters to care for the children while she goes to the country club or the mall, Dad will tell the court or jury that Mom does not care very much about the children. One should first point out to the Court or jury that Dad also enjoys the benefits of the full time staff. Secondly, let the jury know that Mom is not a bad person just because she does not have to "scrub toilets". No one should blame her for being able to afford a staff who will take care of housework for her. If Mom has time to spend with the children during the pendency of the case, she ought to take advantage of it. Wherever Mom spends her time, she ought to take the children with her. If she is at the country club, the children should be taking swimming, tennis or golf lessons to enrich their lives.

iii. THE MALL MONSTER

Frequently, mothers are attacked for their excessive spending habits. Under these circumstances, first go back through the mother's expenditures and determine how many of the expenses were for the benefit of the children, mom, father and others. If the numbers are favorable, a chart or graph showing that a majority of the expenses were for the benefit of the children will defuse the attack. If the facts are not favorable, then Mom needs to readjust her spending habits so that the children benefit.

iv. DAD IS "MR. MOM"

Now that many women work full time in important positions requiring a lot of hours,

more and more Dads are becoming "Mr. Mom". Society is tolerant of a Dad who has to work long hours, but thinks a mother must not love her children very much if she is willing to live the life of an executive.

First, one must show that a double standard exists. No one questions that a Dad is supposed to work hard and provide for his family; the same should apply to Mom. One way to bridge the gap is to show fruits of Mom's labor. Perhaps the children couldn't go to private school if it were not for Mom's career. Whatever the facts are, you must be able to show that the children benefit from Mom's career. It also would not hurt if Dad is receiving benefits from Mom's career that will no longer be available after the divorce. Dad may not be able to afford the Mr. Mom lifestyle post-divorce.

v. COFFEE, TEA OR ME

If Mom's career requires her to travel overnight, people tend to assume that Mom must be spending the night with other men when she is out of town. This is completely illogical, but must be addressed. First, the jury needs to know that Mom's job requires travel and that Mom does not choose to go out of town. No one would question business trips as part of Dad's job; therefore, the jury must see that Mom should not be treated any differently. Mom should also be able to explain to the jury what a typical business trip entails. The jury needs to know that Mom spends her time in meetings and seminars and is quite tired at the end of her day. Mom should always call home when she is away to dispel preconceived notions that she is out partying.

vi. PAYING THE FREIGHT

If Mom consults with you prior to filing the divorce and indicates that she does not have any money, you should inquire about joint accounts. If joint accounts exist, you may have no alternative but to advise Mom to "raid" the joint accounts in the following manner:

1. Immediately deposit the exact amount withdrawn from the joint account into an account in her name only;
2. The new account should be at a bank that has no relationship with her husband;
3. No excessive expenditures should be made; and
4. She should leave enough money in the joint account to cover outstanding checks.

You should file the Petition for Divorce immediately to enjoin the father from doing the same thing and also to obtain the right to open and close at trial.

vii. PRE-FILING STRATEGY

If no court orders are in effect and Mom is the primary caretaker, she may attempt to make the status quo more favorable. If Dad's work schedule is fairly rigid and Mom does not have to work, she may try to schedule the children's activities during Dad's working hours. If, however, temporary orders do exist, this should not be done.

viii. TEMPORARY HEARING

If Dad has had only a minor role with the children in the past, and is now seeking equal time, be sure to point out his track record to the court. Under these circumstances you will not want to agree to "equal time" as this is a significant departure from the status quo.

If Dad has a track record of spending little time with the children, Mom should not agree to the label of temporary joint managing conservator. This could easily lead to Dad's being named a

permanent joint managing conservator, even if he is really just a "weekend Dad".

ix. TRIAL TACTICS

As previously discussed, many people believe that young children should be placed with their mother because mothers are perceived to be more loving toward their children. If the facts are favorable, you should develop this theme throughout your case:

- \* Mom has always been the primary caretaker;
- \* When the kids get sick, Mom takes care of them;
- \* When the children get scared, Mom takes care of them;
- \* When the kids go to school, Mom takes them;
- \* When the kids get in trouble, they call Mom;
- \* When it comes to kids or career, Mom chooses the kids.

As previously mentioned the theory of sacrifice for the benefit of the children often wins custody cases. Showing the jury evidence of dedication and sacrifice through testimony, photographs, videos and any other documentary evidence will help to win the case.

(1) Defense Against the "90-Day Wonder Dad"

If Dad never spent much time with the children prior to separation and has become the "90-day wonder Dad," this must be shown at trial. A chart or graph comparing Dad's time with the children before and after the separation is an effective device to illustrate the point. Although Dad's recent efforts are noble, the jury should be shown that Mom has been "Mom" for years and years.

(2) Love

In every custody case, a client should tell the jury eye-to-eye how much she loves their children. Juries want to award custody to a parent who loves and cares for the child. A lot of times, little things make the difference between being a Mom and a Dad. Sometimes a Mom knows their children's secret dreams or fears and Dad does not. These seemingly trivial facts can often sway the emotions of a jury to award Mom custody.

**6. ETC.**

a. Voir Dire

Voir dire is probably the single most important phase of a jury trial. This process enables you to eliminate members from the panel who are not sympathetic to your client. You should strongly consider retaining the services of a professional who is experienced in preparing profiles for prospective jurors. You need to carefully analyze your case and know what your "bad facts" are so that you can eliminate unfavorable jurors. Some topics which often invoke strong emotions are adultery, abortion, substance abuse, religion and homosexuality. Any jurors with strong feelings contrary to your client's actions should be stricken from the panel.

A juror may be stricken for cause which means that you have a statutory ground for that potential juror's disqualification. The number of strikes for cause are unlimited. Jurors who cannot be stricken for cause, may still be eliminated by exercising a peremptory strike. The number of peremptory strikes are, however, limited to six in a district court and three in a county court. TRCP 233.

For a more complete discussion of voir dire strategy in a custody trial, see Mike McCurley, Bad Facts Custody, State Bar of Texas Advanced Family Law Course, Chapter H (1992), at 11-13.

b. Ad Litem

Ad litem are appointed and/or used for a number of purposes. Some courts utilize ad litem to balance the unequal skill level of the attorney's representation of the parties. Others appoint an ad litem

to assist in the possible resolution of a hotly contested custody suit. Ideally, the primary reason for appointing an ad litem should always be to protect the rights of the minor participants.

i. AUTHORITY TO APPOINT

Texas Family Code Section 11.10 provides the basis for courts to appoint both guardian and attorney ad litem. TEX.FAM.CODE.ANN § 107.001. In private custody litigation, the appointment of an ad litem is left to the sound discretion of the trial court. Id. cmt.

ii. ROLE AND PURPOSE

(1) Guardian Ad Litem

The guardian ad litem is the personal representative of the minor(s). He/she is appointed to protect the interests of the minor in any lawsuit where the minor is a party. A guardian ad litem is not an attorney for the child, but an officer of the court appointed by the court to assist it in properly protecting the child's interests. Dawson v. Garcia, 666 S.W.2d 245, 256 (Tex.App.--Dallas 1984, no writ). The guardian ad litem must make decisions for the child-client after competently investigating the circumstances of the case. He/she has the authority to hire an attorney to represent the child in court.

(2) Attorney Ad Litem

An attorney ad litem is appointed to give the child an independent legal voice and advocate during the proceedings. Like the guardian ad litem, the attorney ad litem must also always consider the child's best interests. The attorney ad litem must, however, do so as the child's legal representative. This includes the duty to actively present the child's case during the proceedings. In complying with this duty, the attorney ad litem has the authority, where appropriate, to call and examine witnesses, submit evidence, make opening and closing statements, make preemptory strikes, and argue to the jury. Priest v. Priest, 536 S.W.2d 954, 955 (Tex.Civ.App.--Waco 1976, no writ).

(3) THE HYBRID

There is no bar to appointing one person to fulfill both ad litem roles so long as the ad litem is a licensed attorney. From a practical standpoint, a hybrid appointment is the most convenient.

iii. STRATEGIC USE OF THE AD LITEM

Bear in mind that an ad litem can often do things in your lawsuit more easily or more appropriately than you can. If you have any input into who the ad litem will be, the selection of the ad litem can sometimes be quite significant. Consider whether you want somebody who will be aggressive and a self-starter, as opposed to someone more laid-back. Regardless of the type of ad litem you end up with, remember that individual not only has the Court's ear, but can be a substantial resource or detriment to your case, depending on how you present your client and yourself.

**7. CONCLUSION**

While other issues of family law litigation, such as characterization of assets or tax problems, necessitate a substantial amount of preciseness in developing the facts, the preparation and litigation of a custody case centers on the personal emotions of all the parties involved. The complex psychology of the custody case defies definition. Thus, the key to prevailing in a custody case is to engage in thorough preparation from the very inception of the case. In such a meaningful area of law, the greatest disservice you could do for the client would be to take short cuts or fail to explore every possible theory and theme to advance your position.





## **ADDENDUM**

**RELOCATION:  
SHOULD I STAY, OR  
CAN I GO?**

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## **Relocation**

### **I. INTRODUCTION**

Relocation cases present some of the most perplexing problems that trial courts are called upon to decide, pitting the interests of the parent with primary possession who wishes to move away with the child against the other parent who wishes to maximize possession of and access to a child. These cases are just too complex to be easily handled by presumptions. Presumptions tend to erect artificial barriers to the trial court's consideration of all relevant factors. To hold that a move should always be denied is to overlook any benefits that may accrue to the child physically and emotionally, including remaining with the parent with primary possession. To hold that a move should always be granted overlooks any benefits that may accrue to the child physically and emotionally by remaining in familiar surroundings and remaining close to the other parent.

### **IVIII. STATE APPROACHES TOWARD RELOCATION LITIGATION**

#### **A. Review of State Law Regarding Relocation**

It appears that the respective fifty states fall into one of three categories in their statutory and case law approaches toward relocation litigation. These categories are (1) permissive approach toward relocation; (2) restrictive approach toward relocation; and (3) the middle ground.

##### **1. PERMISSIVE APPROACH TOWARD RELOCATION**

A number of jurisdictions with specific statutes have adopted the far less restrictive attitude that absent exceptional circumstances, relocation should be allowed. New Jersey, Massachusetts, Michigan, and Minnesota, all have statutes requiring permission from the non-custodial parent or court for a relocation, yet all four have announced the rule that relocation will be favored unless the non-custodial parent can prove the move is not in the child's best interest. See D'Onfrio v. D'Onfrio, 365 A.2d 716 (N.J. 1981), Hale v. Hale, 429 N.E.2d 340 (Mass. 1981), Henry v. Henry, 326 S.W.2d 493, 497 (Tenn. 1982), Auge v. Auge, 334 N.W.2d 910, 912 (Wis. 1983).

##### **2. RESTRICTIVE APPROACH TOWARD RELOCATION**

The restrictive approach toward relocation, as recognized by Wisconsin, Florida and New York, generally holds that relocation of the custodial parent and the child is prohibited unless the custodial parent can demonstrate compelling, exceptional circumstances of pressing concern for the welfare of the custodial parent and the child. But see Handschu, Changing a Child's Residence: New Moves by the Courts New York Law Journal, Feb 26, 1991, Vol 205, page 1.

Several states have codified their restrictive attitude toward relocation of the custodial parent after the divorce, but the existence of a specific statute can be very deceptive. For example, Wisconsin has such a statute, WIS. STAT. ANN. §767.245(6), whereas Florida and New York do not. Nevertheless, New York holds to the view that the child and custodial parent should stay put unless the custodial parent can show exceptional circumstances which would justify interference with the joint right of the child and non-custodial parent to be together for substantial periods. See Weiss v. Weiss, 79 A.D.2d 1110, 436 N.Y.S.2d 862 (1981). Wisconsin and Florida are similarly strict. Interestingly enough, New York seems to focus more on the rights of the non-custodial parent, Wisconsin on the best interest of the child, and Florida on the child's right of access to both parents, all to arrive at the same result.

##### **3. THE MIDDLE GROUND**

The middle ground toward relocation as recognized by Illinois, South Dakota and Michigan generally holds relocation should be allowed in the event the primary custodian has a legitimate reason for the relocation and the move is consistent with the best interest of the child. See Bertin, Relocation, No Common Ground, 11 FAM. LAW. ADVOC. 3, at 8.

## **B. Texas Approach to Relocation Litigation**

Given these three general approaches to relocation, the question arises: Where does Texas fit within this scheme?

### **1. TEXAS CASE LAW**

Precisely where Texas fits in this spectrum, nobody knows for sure yet. The scant case law on the subject indicates that Texas would fit in the middle ground and bases the test upon certain statutory requirements and the "best interest of the child". See Bingham v. Bingham 811 S.W.2d 678 (Tex. App.--Fort Worth 1991, no writ). Bingham discusses a joint custody decree, silent as to county of residence for the child, and conferring on each parent the joint right to determine domicile. The mother had a "primary possession," and she and her new husband moved from Dallas to Conroe, Texas. Mother filed a suit to modify the domicile of the child. Dad argued that to do so would require satisfaction of the standards of §156.202 of the TEX. FAM. CODE, i.e. change of circumstances, or unworkability plus positive improvement and best interests. The court rejected that argument stating:

"Clearly, where there is no evidence of the necessity for a change in the mother's status as primary possessory parent, it would not be a positive improvement for the child to have his domicile changed from that of his mother." Bingham at 681.

The court acknowledges the difficulty relocation visits on the non-custodial parent, and shares his anguish but notes that it is powerless to effect any remedy that would in any way benefit the child.

Apparently then, at least one Texas court is serious about focusing on the needs of the child without regard to the legitimate and often conflicting needs of the adults involved. But, does this case hold that the person resisting the move must make a case for modification of primary possession, joint to sole managing conservatorship or possessory conservatorship to sole managing conservatorship, as the situation demands, in order to defeat a move? Hold is a bit strong, but assuming the reason for the move is legitimate, it certainly seems to suggest that result.

### **2. TEXAS FAMILY CODE PROVISIONS**

In the near absence of Texas case law, it is important to examine the Texas statutory scheme and more specifically the various rights, duties, powers and privileges of conservators to determine and/or choose the residence of a child.

#### **a. Sole Managing Conservatorship**

Section 153.132 of the TEX. FAM. CODE contains the rights, privileges, duties and powers of a conservator and, in relevant part, reads as follows:

Unless limited by court order, a parent appointed sole managing conservator of a child has the rights and duties including "(1) the right to establish the primary residence of the child" and the "(3) right to represent the child in legal action and to make other decisions

of substantial legal significance concerning the child.” (emphasis added).

b. Joint Managing Conservatorship

Section 153.134 of the TEX. FAM. CODE contains provisions regarding appointment of joint managing conservators.

(1) Agreement.

Section 153.133(a)(1) of the TEX. FAM. CODE contains provisions that if a written agreement of the parents is filed with the court, the court shall appoint the parents as joint managing conservators of the child in its decree only if the agreement designates the conservator who has the exclusive legal right to establish the primary residence of the child; and (A) establishes, until modified by further order, the geographic area within which the conservator shall maintain the child’s primary residence; or (B) specifies that the conservator may determine the child’s primary residence without regard to geographic location.

(2) Court Order.

Section 153.134(a) of the TEX. FAM. CODE also contains language that if a written agreement of the parents is not filed with the court, the court may appoint the parents as joint managing conservators and in its order the court shall (b)(1) designate the conservator who has the exclusive right to determine the primary residence of the child and (A) establish, until modified by further order, a geographic area consisting of the county in which the child is to reside and any contiguous county thereto within which the conservator shall maintain the child’s primary residence; or (B) specify that the conservator may determine the child’s primary residence without regard to geographic location.

**III. CONSTITUTIONAL ISSUES**

As an attorney, there are at least four possible constitutional issues one should be prepared to weigh in relocation cases:

- A. The right to travel.
- B. The right to rear one’s own child as one sees fit.
- C. The right of meaningful access to one’s child.
- D. The right of a child to meaningful access to one’s parents.

Interestingly enough, the Texas Supreme Court deftly sidestepped the precise issue in Ex Parte Rhodes, 163 Tex. 31, 352 S.W.2d 249 (Tex. 1961), wherein it held that a divorce decree restricting a child’s residence to Karnes County was not void in a proceeding seeking release of his mother on a writ of habeas corpus after incarceration for contempt in violating the order. The Court was careful to point out...



“[4] While we have held that the restrictive residence provision of the custody decree was not void, it is one of an extreme nature. It may drastically affect the freedom of decision of the custodian of the child as to what is best for the child. And, as is pointed out by the counsel for Betty Rhodes, if request for removal to another county is denied, it may materially restrict the right of a citizen (who would not move without her child) to change the place of his or her residence. If permission to move were denied, she would be in a better position to assert that she was deprived of her liberty without due process. We express no opinion on that matter. In any event, the appellate court will look with care to see whether there has been an abuse of discretion on the part of a court which denies permission to remove the residence of the child to that of the new residence of the person having been adjudged the proper person to be the custodian of the child. By citing White v. Lobstein, 246 S.W.2D 953 (TEX. CIV. APP. – Eastland, 1952), we are not to be understood as approving the decision that there was no abuse of discretion in refusing to grant consent for the removal of the child to the residence of the custodian. That case did not reach this court.”

#### **IV. HOW TO DETERMINE THE POSSIBILITY OF A RELOCATION ISSUE**

As an attorney in representation of a client, one must be aware of a possible relocation issue. In other words, utilize the opportunities during representation of your client to insure that you address the relocation issue in the decree of divorce. Consequently, your representation of your client would also include placing appropriate language in a decree regarding residency and/or domicile in order to protect the interest of your client.

While this, of course, sounds good in the theoretical sense, in the practical sense it is often difficult. At the time of the divorce or the dissolution of the marriage, the possibility of what may occur after the divorce seems remote and rarely, if ever, is it actively addressed by the client. The use of a short checklist is advised to determine the possibility of relocation after the divorce. This checklist would contain the following:

1. Ascertaining job stability for either party;
2. Ascertaining the possibility of job advancement for either party;
3. Location of home office for each party's employment;
4. Pattern of advancement in either party's present job situation;
5. Likelihood of job change, educational opportunities, educational goals;
6. economic conditions;
7. location of immediate family;
8. location of extended family;
9. reason/purpose for residing in the present geographic location;
10. does either parent or party have a relocation history;
11. existence of a "significant other" who may have a relocation issue identified above.

After utilizing this checklist, an attorney would have some idea of the possibility of relocation given the facts and circumstances of the party pre-divorce.

#### **V. PROS, CONS, AND OTHER PSYCHOLOGICAL EFFECTS OF RELOCATION ON CHILDREN**

Both positive and the negative aspects of the relocation of a child have been studied in great detail. Social scientists look not only at the effects relocation may or may not have on children, but also

the issues relocating and non-relocating adults may encounter are studied in great detail.

### **A. Pros for Relocation**

Judith S. Wallerstein argues “To require divorcing parents to spend their lives in the same geographical vicinity is unrealistic.” See Wallerstein, Amica Curiae Brief of Dr. Judith S. Wallerstein, Ph.D., filed in Cause No. SO46116, In re Marriage of Burgess, Supreme Court of the State of California, Dec. 7, 1995 [hereinafter Burgess Amica Curiae Brief]. Wallerstein notes that “Prohibiting a move by the custodial parent may force that parent to choose between custody of his or her child and opportunities that may benefit the family unit, including the child as well as the parent.” Wallerstein, Burgess Amica Curiae Brief, at 22. The Burgess brief suggests that children are harmed by frustrating a parent’s desire to relocate because that parent’s suffering over lost opportunities may expose the children to diminished parenting and guilt for causing the parent’s disappointment. But, children may also experience the guilt of leaving behind a parent, thereby causing that child great anguish.

When economic improvement accompanies relocation, children may benefit if they get special educational and health care opportunities that were not previously affordable. Although a better economical situation may benefit the child, most experts in the field find that children’s adjustment does not improve with better financial status. See Hetherington, Long-Term Effects of Divorce and Remarriage on the Adjustments of Children, 24 J. AM. ACAD. CHILD PSYCHIAT. 518. When children are asked to discuss the bad things about the divorce, they do not complain about material deprivation, but they do complain about not spending enough time with their parents. See Warshack, The Impact of Divorce in Father-Custody and Mother-Custody Homes: The Child’s Perspective, CHILDREN AND DIVORCE 29.

Relocation may occur because the custodial parent is moving closer to their extended family, or there is a pending nuptial for the custodial parent. Both situations can be beneficial for the child because of an added family support system after the break up of the child’s once stable family unit. Experts agree that stability is important for a child whose family has been torn apart. And stability may occur with the remarriage of the custodial parent into a supportive relationship, or if the custodial parent and child can get emotional and physical support from the custodial parent’s extended family. Of course, this type of relocation will only benefit the child if they are moving into an environment is better than their present environment. Relocation does not always harm the child and can be beneficial to a child’s adjustment and development.

### **B. Cons for Relocation**

Substantial evidence links frequent residential moves to problems in child adjustment. Frequent relocation was associated with lower academic performance, and higher rates of problems with depression, conduct, and peer relationships. See Benson, Mobility in Sixth Grade as Related to Academic Achievement, Adjustment, and Socioeconomic Status, 16 PSYCHO. IN SCHOOLS 444 (1979). A child’s psychological well-being is challenged by the numerous changes accompanying relocation. These include disrupting familiar routines, changing schools and neighborhoods, leaving friends and familiar care providers, and most important, disrupting the ongoing contact with the other parent. Studies provide limited help in relocation questions because they have not established the threshold level of change necessary to undermine the average child’s adjustment. The results suggest that the more relocations, the greater the risk to children’s development. But they do not allow us to say how many moves are too much.

Relocation subjects children to the strain of frequent air travel, often unaccompanied by an adult, plus the loss of social and recreational opportunities. To this list we should add loss of parenting time. She advises that children should not be forced to spend a major part of their growing up years in constant

travel. Such concerns may sound like a good argument against relocation. But Judith Wallerstein draws a different lesson. Rather than discuss the hardship of travel as a reason for parents to give pause before relocating, and for courts to preclude relocation, Wallerstein advocates reducing the frequency of travel by using alternatives: restrict visits to summers and vacation periods, alternate residences annually, alternate residences to coincide with transitions in school level and have the parent travel to the child's location for visits.

### **C. Psychological Effects on Children**

It is generally agreed that the disruptive effects of divorce have a negative emotional impact on children. Although children's long-term adjustment might be enhanced by the dissolution of a conflicted marital relationship, the immediate and short-term consequence is that significant stress is introduced into the lives of these children. Additionally, when the children are separated from one of their parents, as happens in any type of relocation, the stress becomes significantly greater.

Given that children differ along a developmental continuum in terms of cognitive, social and emotional maturity, their stage of development will effect not only their perception and understanding of the divorce, but also the quantity and quality of coping skills that can be marshaled to deal with the transition to a new family life. The following are typical reactions to stress seen in many children. Remember, these vary as a function of age:

1. Preschool children (3 years to 5 years of age):
  - confusion, insecurity and sadness;
  - regression in the form of whining, clinging and bed-wetting;
  - bewilderment occasioned by loss of routine;
  - a strong sense of betrayal in their security needs.
2. Young school age children (6 years to 8 years of age):
  - intense and pervasive sadness;
  - self-blame and guilt;
  - confusion;
  - inhibition of anger towards the non-custodial parent;
  - anger directed at the custodial parent;
  - fantasies of reconciliation;
  - conflicts in loyalty.
3. Older school age children (9 years to 12 years of age):
  - predominantly angry feelings typically expressed towards the non-custodial parent;
  - passive-aggressive behavior directed toward custodial parent and perhaps other significant adults, such as a teacher or a coach;
  - fighting with peers.
4. Adolescents (13 years to 18 years of age):
  - loyalty conflicts;
  - sexual misconduct;
  - jealous and angry feelings directed toward step-parents or parents' boyfriends or girlfriends.

The most obvious source of emotional distress is the loss of a non-custodial parent and this varies in degrees, depending upon the amount of pre- and post-divorce contact. Obviously, if post-divorce contact is lessened because one or both parents have relocated, then the stress might actually be analogous to that of a child who has lost a parent through death. There are six problematic attitudes which are often found among children of divorce and again, these attitudes are exacerbated because of

relocation.

1. Peer ridicule and avoidance. Many children view parental separation and divorce as a stigma that reflects on them. Children may therefore seek to hide the fact of separation or divorce from their peers, limiting their interaction with potentially supportive friends in fear that their secret will be discovered.
2. Paternal blame. A mature attitude toward divorce is that neither a mother or a father alone is entirely responsible for the events leading to the separation; both parties contributed in some manner to the marital disruption. Typically, children (and their parents as well) often do not hold such a view, but tend to blame one parent exclusively. In instances of paternal blame, the father is typically blamed for the divorce and often is seen as a bad person in general.
3. Maternal blame. This attitude is the same as paternal blame, but with a shift in the attribution of blame to the mother along with a generally negative evaluation of her.
4. Self-blame. Children sometime feel that if they had been better behaved that their parents would still be living together. Many children perceive that their misbehavior led to marital arguments and ultimately to marital separation. While such an attitude is most prominent in younger children, it is sometimes observed in older children.
5. Fear of abandonment. Divorce typically forces children to reconcile themselves to life with one parent and occasional visits with the other. If there has been a relocation of one or both parties, it is not unusual for children to catastrophize such a situation, feeling that they may be on the verge of being orphaned, since now they only have "one parent." Perhaps more prominent is the fear of psychological abandonment. Divorce has taught the child that people fall out of love and go their separate ways. The child's fear is that if parents can stop loving each other, then they can also stop loving their children. The insecurity inherent in such an attitude can be the source of considerable emotional distress.

The causes of poor post divorce adjustment in children appear to be numerous and varied for different families and different children. However, most psychological studies strongly implicate parental conflict, loyalty pressures, quality of parenting, adjustment of the residential parent, and access and closeness of the non-residential parent as issues. It must be remembered that family processes existed prior to the divorce and those play a critical role in the nature of children's post divorce adjustment. In all likelihood, divorce exacerbates whatever pre-existing problems existed. For example, children who have modeled coping styles characterized by impulsivity and aggressiveness, may rely on those particular coping styles to an even greater extent when the divorce burdens the child with additional sources of stress. There is mounting evidence which suggests that good relationships with both parents are associated with positive outcomes for the children. Unfortunately, many newly divorced parents and especially those parents who have relocated, are psychologically burdened themselves and may be emotionally and/or physically unavailable to their children.

Overall, the disadvantages of a move may require a child to move away from a school, friends, church, and family with which they have had long attachments. But the move may be beneficial to a child in that it may provide financial and education advancements, a new familial support system which may occur through a remarriage, or a new stability brought by a move closer to a parent's extended family. The court should weigh the pros and cons of the relocation when deciding if relocation is in the child's best interest and should be allowed.

## **VI. MOTIVES FOR RELOCATION**

In many jurisdictions, the parent's motive for relocating is an essential consideration in a court's decision whether or not to allow relocation. Most jurisdictions note motives that do not justify a move are frivolous or advanced out of anger or a desire for revenge that is calculated to prevent or substantially diminish a child's contact with the other parent. See Wallerstein, Burgess Amica Curiae Brief, at 31. Richard A. Gardner adds to the list:

Lack of appreciation of the bonding between the child(ren) and the non-custodial parent; pathological dependency on family members in the locale to which the relocating parent wishes to move; and personality problems that interfere with the parent's ability to adjust to a particular environment, with the associated fantasy that change of location will somehow result in more gratifying personal relationships.

See Gardner, The Burgess Decision and the Wallerstein Brief, 26 J. AM. ACAD. PSYCHIAT. L. 425, at 428. Motives that justify a move, according to Wallerstein, are those that provide, "occupational, educational, or other opportunities that will enhance the quality of life of the relocating child, as well as the parent." To this we should add motives such as accommodating a new spouse's job transfer, living closer to extended family, or getting away from a violent former spouse.

Divorced parents often move in order to be closer to their own parents. When this results in better quality after-school care for children, or intensification of beneficial ties with extended family, this can have salutary effects on the children. Often the main goal of relocating parents is to get emotional comfort from their own parents in the aftermath of the divorce crisis. For the attorney to successfully litigate a client's desire to relocate, that attorney should establish the client's pure motive, which is a valid and compelling reason for the move.

#### **A. Defending the Right to Relocate**

As an attorney defending a relocating client in their decision to relocate, the starting point is to determine the terms of the decree and what rights your client as a relocation expressly or implicitly has under their divorce decree. In defending your client's right to relocate and change the child's residence and/or domicile, an attorney needs to begin with their client's motivation in relocating. If the motive does not justify a move, or the court believes the motive to be frivolous or vindictive, the court will not allow the relocation.

#### **B. Discovering the Motivation**

After reviewing the decree to determine the express or implicit rights that your client has with regard to relocation, it is important to discover the motivation of your client. Assuming that the opposing party has filed a motion with the court attempting to stop or quash your client's right to relocate, it is axiomatic that the motivations behind the decision to relocate will be scrutinized by the court.

Faced with this situation, an attorney must be intellectually honest in forming his or her impressions regarding the client's motives to relocate. To enable the attorney to form an objective impression of the client's motivations, it is suggested that the following factors be examined:

1. What are the child's feelings about the relocation?
2. Does the relocation represent a better life or does it merely represent doing things the same old way?
3. Can the advantages available in the new location be made equally available in the present location?
4. Is the relocation attributable to a remarriage? If so, what are the characteristics of the new spouse and/or family?
5. Is the relocation attributable to an improvement of family relationships because of the

- existence of extended family?
6. Are the employment or career opportunities better?
  7. How does the cost of living compare between the two areas?
  8. What are the educational opportunities and advantages of the child?
    - a) Special needs;
    - b) Percent attending college;
    - c) Graduation rate versus dropout rate.
  9. What are the environmental factors, such as crime, weather, environment?
  10. What is the primary economic focus of the area in which your client is seeking to relocate?
  11. What is the current relationship between the child and the non-relocating parent?
  12. What disadvantages are there to the relocation?
  13. What are the opportunities for extracurricular activities and/or cultural activities for the child?
  14. Is the client moving in order to separate the child from the non-custodial parent?

Examining the relevant factors in determining your client's motivation in relocating will help you provide a quality service to your client in defending the client's right to relocate. If your client is incapable of providing compelling arguments to you for the relocation, then he or she is likely to meet significant difficulty when faced with the adversarial process in court.

### **C. Trying Relocation Issues**

Relocation litigation does not present anything novel about family law litigation. The attorney defending a client in relocation litigation should remember to use prompt discovery to proceed to the ultimate goal of winning the case.

The necessity of an expert witness is fundamental in relocation litigation. If relocation for a child is contemplated, and the child has a meaningful consistent relationship with the non-custodial parent, relocation may jeopardize this relationship. The custodial parent should contact a qualified psychologist or psychiatrist familiar with this field of practice to evaluate the child. Although a relocation is likely to have a negative impact and this negative impact should not be ignored, it can be mitigated by stressing the positive considerations of the move. The positive motivations for a relocation, such as the remarriage of the custodial parent, or a move closer to extended family should be emphasized.

Another tip for litigating relocation is to formulate an alternative visitation schedule. The client should be encouraged to propose visitation arrangements which would minimize the impact of the move on the child.

In order to maximize a client's chance to prevail, there are five practical pointers, which if utilized, may assist the attorney in accomplishing this objective:

1. Know the facts of the case;
2. Develop a theory regarding the motivation behind the relocation;
3. Know the law regarding relocation;
4. Know your judge and/or the court; and
5. Have a backup or contingency plan and/or theory.

## **VII. WHAT COURTS CONSIDER IN PERMITTING OR DENYING RELOCATION**

### **A. Factors Courts Consider**

In an attempt to create consistent relocation standards for courts and legislatures to apply, the American Academy of Matrimonial Lawyers drafted a model relocation statute. Among other things, the

act suggests a number of factors courts should consider when determining whether the relocation of a custodial parent should be permitted. These factors include:

1. The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the non-relocating person, siblings, and other significant persons in the child's life;
2. The age, developmental stage, needs of the child, and likely impact of relocation on the child's physical, education, and emotional development, taking into consideration any special needs of the child;
3. The feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties;
4. The child's preference, taking into consideration the age and maturity of the child;
5. Whether the person seeking relocation has an established pattern of conduct promoting or thwarting the non-relocating person's relationship with the child;
6. Whether the relocation will enhance the general quality of life for both the custodial party seeking relocation and the child, including but not limited to financial or emotional benefit or educational opportunity;
7. The reasons each person seeks or opposes relocation; and
8. Any other factor affecting the best interest of the child.

See Trusch, A Panoramic View of Relocation; Where Have We Been? Where Are We Going?, 20-FALL FAM. ADVICE. 18, at 23. The model relocation act is recommended to assist legislatures and courts with relocation issues that are becoming controversial topics.

#### **B. Reasons Courts May Allow Relocation**

In the event the parents or parties have been appointed joint managing conservators, or alternatively, if the facts and/or policy of the court seems to dictate that the modification of residence or domicile in fact constitutes a modification of the terms and conditions for possession of or access to a child or prescribes the relative rights, privileges, duties and powers of conservators, the court must find one of the following:

1. the circumstances of the child or a person affected by the order or a portion of the decree to be modified have materially and substantially changed since the date of rendition of the order or decree; or
2. the order or portion of the decree to be modified has become unworkable or inappropriate under existing circumstances; or
3. the notice required by §105.007 of the TEX. FAM. CODE was not given or there was a change in a conservator's residence which took place outside the jurisdiction of the court.

#### **C. The Substantive Test Courts Use**

Upon meeting one of the standards necessary to modify a decree, it would appear the court may also utilize and consider the best interests of the child to decide whether to modify the terms of residence and/or domicile, as contained in §153.002 of the TEX. FAM. CODE:

"The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession and support of and access to the child."

In the absence of specific statutory guidelines in determining if relocation will be allowed, courts may default to this standard which provides very little guidance concerning how to prepare for such litigation or in predicting the outcome. This test can be too vague with problems arising when people have a

problem deciding what exactly is in the best interest of the child.

## **VIII. PRACTICE TIPS**

### **A. What You Will Need to Evaluate a New Relocation Litigation Case**

1. Separation or property settlement agreement to see if there are any geographical restrictions.
2. Underlying agreement, court directive and/or statute requiring notice of intention to move.
3. Court-imposed radius restriction that may appear in the divorce judgment.
4. Prior proceeding that speak to visitation or access issues.
5. Financial terms that may affect visitation.
6. Preliminary orders if presently in effect.

### **B. Involving the Client in Identifying Prospective Witnesses**

1. Ask the client to provide detailed notes about everyone closely involved in the child's life.
2. Set up individual notes for every witness, including phone numbers, employment, and areas of testimony.
3. Types of witnesses:
  - a. family or extended family member.
  - b. significant persons in child's life (teachers, clergy).
  - c. witnesses who will address issues related to the proposed move (example: employment counselors or therapists on parental motivation).

## **IX. CONCLUSION**

Obviously these cases can only be decided on a case by case basis. In every case an argument can be made for or against relocation and the court must balance the competing interests of the parties and children involved. Ideally the court's only fixed policy should be to have a completely open mind, with no preconceived bias in favor of or against relocation. While all of us like to have an idea of what the court will do, I think it is important also for the courts to remember that cases are settled every day in part based upon counsel's perception of what a court will do. In this particular area I think it is important that there be no preconceived tendency so that all of the many and various aspects of the relocation issue will be explored fully by the parties, rather than one or the other remaining smugly intractable because they "know" what the Judge does in relocation cases. Only that way can these decisions be made by the parties after full consideration of all factors, including the best interests of the children.



## APPENDIX A

### Sample Relocation Clauses

Adapted from Sample Relocation Clauses, FAMILY LAW ADVOCATE, Vol 20, No. 2, Fall 1998.

#### A. Detailed Restrictions

1. It is the intention of the parties to live in relatively close proximity to one another in \_\_\_\_\_ County, \_\_\_\_\_(State) so as to facilitate frequent and regular contact between the child and each parent.
2. It is not presently anticipated that either party will wish to relocate the residence he or she maintains with the minor child. However, in the event that wither party proposes such a relocation in the future, prior to the time the child reaches majority, the following procedures and requirements shall apply.
  - a. The relocating paren shall give the other parent written notice, by certified mail, at least four months (120 days) in advance of any proposed relocation. The written notice shall include, at a minimum, the proposed state and city to which relocation is planned; the proposed street and address for the child; and the name and address of the child's proposed school.
  - b. In the event the non-relocating parent objects to the proposed relocation, he or she shall notify the relocating parent of the objection in writing by certified mail within seven days of his or her receipt of the notice of proposed relocation.
  - c. In the event the non-relocating parent has objected to a proposed relocation as set forth above, the relocating parent shall be obligated to bring the matter before the Superior Court for the Judicial District of \_\_\_\_\_ at \_\_\_\_\_ for determination as set forth herein, within 14 days of receipt of the objection if he or she wishes to pursue the issue of relocation of the residence he or she maintains for the minor child, In the event that the parent proposing relocation fails to file an appropriate motion to bring the matter before the court within 14 days, as set forth above, he or she shall be deemed to have abandoned the proposed relocation, and the initial notice requirements shall again apply to any future proposed relocation.
3. The parties agree that in any proceeding before the Superior Court relating to a proposed relocation of the residence of the minor child, the following terms shall govern:
  - a. Before any final determination is made by the court, there shall be a psychological evaluation of the child and of each of the parties;
  - b. The relocation shall not be allowed unless the move is determined by the court to be in the best interests of the minor child;
  - c. The party proposing the relocation shall have the burden of establishing that the move is in the best interests of the child; and
  - d. No interim or temporary relocation shall be allowed prior to a final determination of the relocation issue on the merits by the court.
  - e. In the event that the issue if a proposed relocation of the residence of the minor child is placed before the court for determination, the party proposing the relocation shall pay all incidental costs, fees, and expenses incurred in connection with the psychological evaluation of the child and the parties as set forth above, and shall pay the fees of any attorney appointed to represent the minor child.

#### B. Notice Requirement

Neither party shall change the principal place of residence of the children from the State of \_\_\_\_\_ without 90 days' advance notice and a final hearing and a court order from the Superior Court of the State of \_\_\_\_\_ at (address). AN exception shall be if the parents jointly elect to send the child to a private school. A permanent change of principal residence (except for private school) shall be deemed to be an absence from the State of \_\_\_\_\_ for more than \_\_\_\_\_ weeks without mutual written agreement or an order of the court.

**C. Mileage Limits**

The Wife (Husband) agrees not to establish a residence for the children beyond a distance of \_\_\_\_\_ miles from \_\_\_\_\_ as measured by automobile travel over public roads, without the prior written consent of the Husband (wife). This provision shall not be applicable to any temporary residence that the Husband (Wife) may establish for the children or any one of them and the temporary residence is defined by the parties to mean a residence where the children reside for a period of two weeks or less. If the Wife (Husband) shall desire to remove the children, or any one of them, to a permanent address to be located more than \_\_\_\_\_ miles from his (her) present home at (street address/city/state), to be measured by automobile travel, she (he) shall notify the other in writing of such intention and shall set forth the intended place of the new home for the child or the children, as the case may be. The term "permanent residence" shall be deemed to mean any residence where the children are to reside for a period of more than two weeks unless such residence shall be at a boarding school, college, or university. Upon receipt of such notice, the parties covenant and agree to renegotiate new visitation (parenting) rights. If the parties are unable to come to a mutual agreement within thirty (30) days after the receipt by the Husband (Wife) of the Wife's (Husband's) notice, the Court shall fix new visitation rights and shall determine to what extent, if any, the Wife (Husband) shall be obligated to pay visitation expenses incurred by the Husband (Wife).

**D. Written Notification**

In the event either party changes their residence to a location outside the State of \_\_\_\_\_, he or she shall not similarly change the residence of the children without first providing the other party with 90 days' advance written notice and obtaining the written permission of the other parent or the approval of the Superior Court for the Judicial District of \_\_\_\_\_ at (state) after a full hearing on the matter. It shall be the obligation of the parent seeking to make the change of residence to obtain the approval of the other party or to petition the court for a final determination.

**E. Full Discussion and Consultation**

The parties anticipate that the child will reside primarily with the Wife (Husband). However, they recognize that changes in circumstances and educational opportunities may make it desirable, at some time in the future, for the child to reside with the (Husband) or at an educational institution. Any changes in the child's residence will be made only after the full discussion and consultation among the Wife, the Husband, and the child. (Such changes will be made only with the child's consent). (The final decision will be left to the Wife/ the Husband/ the parties jointly/ the Superior Court for the Judicial District of \_\_\_\_\_.)

**F. Transportation Costs**

It is contemplated that the Wife (Husband) shall be moving with the minor children of the parties to \_\_\_\_\_. With respect to transportation expenses of the children for the purposes of visitation with the Husband (Wife), Wife (Husband) shall be made responsible for the costs of said transportation. The foregoing transportation expenses have been taken into consideration in agreeing to the amount of child

support payments.

**G. No Restrictions**

The Husband (Wife) will raise no objection in the event that the Wife (Husband) chooses to move out of the state of \_\_\_\_\_ and relocate with the child to another state. [Such a provision is most often used when relocation is already being anticipated or at least considered. Keep in mind that such a provision probably would not be effective to preclude a court from later determining that the move was not in the best interest of the child in the event the issue was presented for judicial determination.]

## APPENDIX B

Listed in the National Register of Health Service Providers in Psychology Certified School Psychologist by the Texas Education Agency Registered Professional by the Texas Commission on Law Enforcement Standards and Education

<b>Number of Texas Child Travelers, Under 12, Unaccompanied - 1999</b>					
<b>Month</b>	<b>1st Fri.</b>	<b>2nd Fri.</b>	<b>3rd Fri.</b>	<b>4th Fri.</b>	<b>5th Fri.</b>
<b>January</b>	2,375	444	1,316	963	1,003
<b>February</b>	1,001	782	1,213	350	-
<b>March</b>	1,379	677	1,605	648	-
<b>April</b>	1,501	385	1,226	119	1,283
<b>May</b>	1,216	420	1,489	825	-
<b>June</b>	1,416	457	1,677	772	-
<b>July</b>	1,971	754	1,729	604	1,912
<b>August</b>	1,803	592	1,660	314	-
<b>September</b>	1,752	337	1,424	381	-
<b>October</b>	2,280	155	1,947	245	2,288
<b>November</b>	2,379	589	3,426	2,874	-
<b>December</b>	484	498	94	557	26
<b>Total</b>	19,555	6,090	18,806	8,650	6,511

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