PREPARATION FOR AND DIRECT EXAMINATION OF MOTHER OPPOSING CHOICE OF MANAGING CONSERVATOR

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PREPARING FOR AND THE DIRECT EXAMINATION OF

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I. 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. The primary focus here is how to prepare your client/mother and her testimony in a case where a child over the age of 12 has signed an affidavit choosing her father as the managing conservator. REMEMBER, EACH CUSTODY CASE IS DIFFERENT, AND REQUIRES A DIFFERENT APPROACH.

II. ATTACKING THE CHILD'S AFFIDAVIT OF PREFERENCE

1. THE CHILD'S PREFERENCE AND SECTION 153.008

The Texas Family Code Section 153.008 states " [i]f a child is 12 years of age or older, the child may, by writing filed with the court, choose the managing conservator, subject to the approval of the court." Because such a writing is hearsay, the statement of preference has limitations with regard to admissability.

a. Limits Placed on the Admissability of the Statemetn of Preference

There are several primary limits placed on the admissablity of a statement of preference. The first limit makes a distinction between the use of these statements at a bench trial, as opposed to a jury trial.

i. The distinction is that while the statement is not admissible in a jury trial, it is allowed as evidence in a bench trial. Boriack v. Boriack, 541 S.W. 2d 237 (Tex. Civ. App.-- Corpus Christi 1976, writ dism'd). The court noted that although it is error to admit a child's statement of preference into evidence at a jury trial, it held that this error was harmless in light of other evidence.

ii. Another limit expressly stated in the Family Code is that the child's preference is "subject to the approval of the court." The court in Cole v. Cole, 880 S.W. 2d 477

(Tex. App. – Ft. Worth 1994, no writ), applied this limit and found that custody with the mother was in the child's best interest, and did not follow the written preference of hte child to be with his father. Id.

Based on these interpretations of the affidavit of choice by the child, the client/mother should be advised on the use of the affidavit as evidence in a trial before the judge, as opposed to her right to demand a jury trial pursuant to the Texas Family Code section 105.002. Although the objection to hearsay should always be raised, it will probably only be sustained in a jury trial.

iii. The statement of preference of a child is in and of itself hearsay. It should be objected to, as admissable evidence. The statement does not meet any exceptions to the hearsay rules, discussed in detail below.

Texas Rules of Civil Evidence 703 provides that "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert at or before the hearing." This rule seems to allow an attempt by a lawyer to get the statement in through an expert, as the expert may have relied on the statement to form his opinion. In Chance v. Chance, 911 S.W. 2d 40 (Tex. App. - Beaumont 1995, writ denied) the court stated that even if the item or documetn relied on by the expert to form the opinion if inadmissable, the expert's opinion would remain admissable.

However, Texas Rules of Evidence 801 and other caselaw provides that expert witnesses should not be permitted to testify to hearsay evidence, which includes hearsay information used to form the basis of their opinions. Minnesota Min. & Mfg. Co. v. Nikishika Ltd., 885 S.w. 2d 603 (Tex. App. - Beaumont 1994, no writ).

As you can see, it may be very difficult for the opposing counsel to get the statement of preference into evidence, especially in a jury trial.

2. **THE CHILD'S PREFERENCE AND SECTION 153.009**

The Texas Family Code section 153.009 allows an interview of the child in the judge's chambers "in a nonjury trial."

a. The judge *may* conduct the interview at his own suggestion.

b. The judge *shall* interview the child when managing conservator is contested, on the application of a party, if the child is 12 years old or older. The judge *may* interview a child younger than 12 years old, upon application of a party.

The code allows the judge to maintain his discretion at all times. This includes whether an any attorney or ad litem may be present for the interview. The judge may make a record of the interview if he so chooses, or upon motion of a party the judge *shall* make a record if the child is 12 years old or older.

Again, discuss with your client the options of trial by jury and trial before the judge. If the mother wants the judge to interview the child, a nonjury trial will be her best bet. But she must understand that the affidavit will be considered by the judge in the nonjury situation, as it will be admissable.

3. THE CHILD'S PREFERENCE AND IMPROPER INFLUENCE

If the client/mother believes that the father improperly influenced the child in order to convince the child to sign the affidavit in favor of the father as managing conservator, then it will be necessary to put forth evidence to show the adverse influence. In the Interest of Anglin, 542 S.W. 2d 927 (Tex. Civ. App. - Dallas, 1976), the court stated that the child's desires should be considered by the court *unless it is shown that the adverse party has purposely influenced the child's decision.*

Client/Mother will need to prove that father enticed the child to sign the preferecence affidavit by allowing the child to do whatever the child wants to do so as to win her over. This would include things like allowing the child to date at an early age while in his possession, allowing the child to do whatever she wants without adult supervision and other type of unregulated lifestyles which teenagers undoubtedly would desire.

III. THEME OF THE CASE

If the client/mother has a history in the family as being the primary caregiver during all or most of the child's life, there are well known theories that these psychological ties should not be broken. If a child is separated from the primary caregiver for any significant length of time, then the child will experience psychological and physical withdrawals. Among these are stress, proper development and sleeplessness.

With this, you should begin your theme of the case. One possible theme may be that the child needs an adult in her life that has an unconditional commitment to the child, a constant concern for her physical safety and her emotional stability, and consistent parental guidance and discipline. Your client/mother has always done this, and is able to continue to do this for the child.

It is also important to show that the father is unable to do this, through other evidence. If the father works and has never really spent any time with the child, evidence of nannies, daycare or babysitters is highly relevant. This will show how little time the father has to raise the child and to be there for the proper guidance and discipline of the child. Your theme should reflect that any substitute for the primary caregiver will be inadequate for the child. This type of theme will require the hiring of an expert to testify to these psychological needs of the child. Expert testimony will reveal the dangers of separating the child from the primary caregiver.

IV. DISCOVERY

1. Client Interview

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

a. HISTORY OF THE CASE

A client questionnaire is probably the easiest method to obtain the basic information regarding the parties. A completed client questionnaire will enable the lawyer to develop a theory of the case and 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 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. The client must be warned of the ill effects of surprise evidence and stress the importance of honesty. A good question to ask is "what is the worst thing that your spouse might say about you?"

The client needs to understand that to win the case, their lawyer needs 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.

i. CLIENT'S MOTIVATION

The reasons why the client wants custody is really the theory of the case. The 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.

The client should also be asked why she believes that her spouse is seeking custody. If at the end of the client interview it is clear why the parties are each willing to endure the time and expense of a custody fight, you and your lawyer will probably also have a good understanding of the strengths and weaknesses of the case.

ii. EXPECTATIONS

The lawyer needs to know what the client expects from the custody litigation and then he or she can explain how feasible it is to achieve those expectations. The attorney should be open and honest with a client so that he or she understands the risks involved in custody litigation. The client needs to understand the limitations inherent in legal representation and not hold an unrealistic picture in his or her mind of the potential outcome.

The client needs to know up front that custody litigation is extremely expensive and be willing to make the financial sacrifice. At this point the attorney should explain the possible necessity of investigators, mental health professionals, ad litems, social studies and depositions. If the client cannot afford your firm’s services, the lawyer should be honest and offer

alternatives.

Outline for the client the steps of the litigation process. Even though you will likely have to explain it again, you should define for the client and review service of process, temporary hearings, discovery, masters, ad litems, 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.

2. DISCOVERY PROCESS

a. 1ST STEP: INTERROGATORIES & PRODUCTION REQUESTS

Interrogatories and a Request for Production should be sent to the other side as soon as possible. Because opposing counsel will frequently send the identical discovery requests back to you, have the 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 the client has a girlfriend or boyfriend and does not suspect that their spouse has one, then you are probably better off omitting that question. Also ask them if there is anything specific they would like to ask or request for production. Some basic requests that you will always want to ask are:

i. Any photographs, tape or electronic recordings, and/or video recordings portraying the likeness of Respondent, Petitioner or the children.

ii. Any correspondence or other written memoranda between you and your spouse for the last year.

iii. Any calendars, diaries or other written logs of (Petitioner/Respondent) made in connection with this action.

iv. Any and all personal and/or financial records as requested in (1) - (__) above, which are maintained on or have been copied to a computer or computer disk or computer tape format or any other computerized media, providing the information on disk or tape format, and a hard copy of the information contained thereon.

Additionally, the Texas Rule of Civil Procedure 167(a) authorizes a physical or psychiatric examination of a child whose physical or mental condition is an issue. If the child is receiving psychotherapy, the therapist's notes may be valuable. Access to interviewer's notes and audio/visual tapes could disclose prior on word inconsistent statements, possibly coaching, defects in capacity or maturity, or other valuable information.

Other documents that will be helpful are education records. These will help to detect disciplinary problems at school, the child's dishonesty, emotional problems and family conflicts which may be causing behavior problems at school. The education records may also indicate

that the child requires special programming for psychological problems which may be particularly important in determining conservatorship.

Once you obtain the answers to your Interrogatories and Request for Production, you should interview all witnesses disclosed by the other side to determine what knowledge they have regarding the case. This will help to determine which witnesses to depose. But be prepared when you call them - as witnesses for the other side, the may not agree to talk to you, much less give you useful information.

3. DEPOSITIONS

a. Who to Depose

i. Opposing Party

It's standard operating procedure to always depose the opposing party thoroughly so that your side will know his 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 demeanor in trial, the video deposition can be played for the jury to reveal Dad's "true colors" before their lawyer prepared them for trial testimony.

ii. Adverse Witnesses: The Child

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. This is particularaly a must when your client's child has chosen the other parent to be the managing conservator. Obtaining such evidence prior to trial will allow the lawyer to effectively plan a strategy to either exclude the evidence altogether or overcome its damaging effect to the greatest extent possible.

The Texas Rules of Civil Procedure permit a child's deposition to be taken. This provides the attorney with not only the opportunity to elict the child's story, but also the opportunity to establish a rapport with the child, in case the child would testify before a judge or jury.

The attorney deposing the child should achieve a rapport with the child, so that the child will agree to certain facts that are very important to client/mother's case and theme. For example, it would not be difficult for the child to agree that "Dad works a lot, and did not have time for me" after a series of questions about everyday life.

Further, the cross-examiner of the child should elicit information from the child about the number of interviews the child has had, and what occurred each time. When you learn that improper suggestion has occurred in order to obtain the affidavit of preference, it becomes yet another attack to the opposition without, attacking the child. When counsel can establish taht an adult improperly implanted the idea in a child's mind, the judge or jury is unlikely to be sympathetic with the adult, while still being able to believe the child.

Some suggested questions in this area follow:

- Who interviewed the child?
- Who was present in the room during the interview?
- What type of questions did they ask?
- Were the questions leading or suggestive?
- Were any promises made? By whom?
- Did the child read the affidavit?
- Did the child know the consequences of her actions?

b. When to Depose

After the initial written discovery responses are received, depositions of significant witnesses should be noticed. Oral depositions may be taken at any time "[a]fter commencement of the action" without leave of court. Tex.R.Civ.P. 200(1). Caveat. If a party seeks to take a deposition prior to "the appearance day of any defendant" he or she must obtain leave of court. Id. Leave of court may be granted with or without notice to the opposing party. Id. 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 witnesees and more specifically, the child, can be taken early in the proceeding with minimum notice. The advantage of this tactic is to catch the child's 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. But remember, if you depose early, so might the opposition. The lawyer should evaluate his/her client to determine if an "early" deposition would help or harm the case.

It is also important for the lawyer to realize that once you decide to depose the child, ***when*** you depose a child is very important. If a long gap in time between the event and a deposition will weaken the child's memory, then you may want to depose the child as soon as possible in order to harness the improper suggestions of father and/or his attorney. Otherwise the child may forget the circumstances under which she signed the affidavit of preference.

c. 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 there is a choice, the lawyer will probably prefer the deposition in his/her 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.

Perhaps a location that is not intimidating for the child would aid in a more comfortable deposition of the child, such as the child's school or home. However, this may not be practical.

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

d. 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 written 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.

i. 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.

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.

ii. Preparation

(a) The Client

Preparing a client for deposition and for testifying in court is often one of the most neglected areas in the practice of law. The failure to properly prepare the witness 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, the lawyer should 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 her deposition and her testimony in court:

* **Always tell the truth.**
* Every word uttered at deposition can and will be used against her at trial.
* Be short, concise and focus on the question, 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.
* Try not to let anger, frustration or impatience show in your answers.

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 the 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 the 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.

iii. Atmosphere

Advise your client that some attorneys try to make an adverse witness as uncomfortable as possible. Some attorneys use techniques that are intended to bring out an adverse witness' true colors. One technique is to make the witness and his or her attorney wait a while in your reception area before the deposition. If this happens to you and your client, it might create tension and anger which will be apparent on video, and make your client look defensive and unbelievable to a jury. Additionally, the opposition might make the deposition room particularly hot or cold in order to make your client or witness so uncomfortable that he or she cannot concentrate on the answers that they are giving. Testimony may be elicited 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.

4. Importance of Social Studies and Psychological Evaluations

a. PURPOSE

i. 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).

b. 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.

c. Serve The client

A affidavit of choice signed by the child, which selects the opposing parent as the managing conservator is emotionally devastating to any parent. Likewise, a social study or psychological evaluation that has an unfavorable outcome towards the 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 it does happen that some social studies or psychological evaluations are based on untrue or inadequate information, misunderstandings, or just flat-out bias.

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5. THE SOCIAL STUDY

Texas Family Code Section 107.055(b) requires that any social study conducted be furnished to you prior to trial:

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. TEX.FAM.CODE ANN. § 107.054 - 107.055 (Vernon 1996).

If the study has not been furnished to you, a demand for a copy should be made to the other side. Review it, discuss with your client how she wishes to use it, what is favorable to your case and what is unfavorable, and use that information to draft the Motion In Limine. Remember to have an excised version already prepared, so that the attorney hopefully can obtain a favorable ruling on the portions that contain damaging hearsay

V. PRETRIAL PREPARATION OF THE MOTHER WITNESS

The lawyer should always spend time with an client before trial no matter how good you may think they are. The following are basic - general areas that should be covered with the client:

* Make sure the client knows where they are supposed to be and when they are supposed to be there. This will avoid disruption.
* Warn them about inappropriate conduct or statements in the courthouse parking lot, halls, and bathrooms.
* Make sure the witness will be appropriately dressed.
* 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. Explain to them the importance of responsive and brief answers.
* 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".
* Make sure the witness understands there is nothing wrong with discussing her testimony with the lawyer before trial.
* Everyone should remember that testifying for a length of time can be tiring. Advise the witness to 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. Remind your client of this tactic.

1. 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. (Don't forget, however, that your witness should be prepared for this from the opposition.) This can also be used against the child witness, as you would have deposition testimony to impeach with.

2. Character Evidence

Opinion and reputation evidence of character can be used to impeach a witness. TEX.R.CIV.EVID. 608.

3. 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).

4. Unofficial Impeachment Tools

Other methods of impeachment include the following:

* Specific instances of conduct of witness (except conviction of crimes provided by TEX.R.CIV.EVID. 609). TEX.R.CIV.EVID. 608.

* Evidence of beliefs or opinions of a witness on matters of religion, to show witness' credibility is impaired. TEX.R.CIV.EVID. 610.

* Questions too remote or irrelevant or which go beyond proper bounds to embarrass or harass an expert. TEX.R.CIV.EVID. 611(a).

VI. EVIDENCE

1. Building Evidence for Your Case

a. PHOTOGRAPHS AND VIDEOS

The 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.

Discuss with your client 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. The 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. Always keep in mind, however, you can have too much of a good thing. Don't drag out the trial by showing hours of happy videos and/or pictures. Consider showing the videos to someone who has no connection with the case whatsoever, and see how long their attention span lasts for this type of evidence.

b. WIRE TAPPING

The lawyer may advise the client to tape telephone conversations with their spouse during the pendency of this suit. Taped conversations may be helpful if the client's spouse is expected to lie or completely change his or her testimony when on the witness stand. Caveat: Make sure the lawyer thoroughly explains to the 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). Criminal charges could also be brought against your client.

The client should be advised, however, to save all answering machine tapes that contain messages left by their spouse, which may be used as evidence.

c. DIARIES

Advise the client to keep a diary or calendar during the pendency of the suit to record pertinent information. For example, the 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.**

The client should be warned 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 the client is keeping her diary on a computer, 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. The disk(s) should also be labeled with the bold-face statement above.

2. Effective Use of the Motion in Limine

If the case is being tried to a jury, the lawyer should consider what information he/she would like to exclude from the jury through a Motion in Limine. Discuss with your attorney any "bad facts" relating to the 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 the 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, the lawyer presenting same should 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 side's Motion in Limine because most courts tend to follow the rule that everything is relevant in a custody case. It may be wise to include in your Motion in Limine the child's statement of preference. Include with it the deposition testimony of the child which stated the improper coaching and enticement by the father and his lawyer so as to obtain the child's signature on the affidavit. Also assert that the document itself is hearsay.

3. Social Studies & Psychological Evaluations

a. STATUTORY BASIS FOR A SOCIAL STUDY

The Court's power to order a social study is contained in Family Code Section 107.051. It would be a good strategic move for you to request a social study, if you are confident the mother will come out the winner. It will show and corroborate the evidence that the child's preference of father as managing conservator is not in her best interest.

However, the social study, like the statement of preference, may not be admissable , especially in a jury trial.

b. GETTING SOCIAL STUDIES INTO EVIDENCE

i. 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).

ii. 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. TEX.R.CIV.EVID. 510(d)(6).

iii. Studies 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).

iv. 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. TEX.R.CIV.EVID. 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. TEX.R.CIV.EVID. 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. TEX.R.CIV.EVID. 801(a).

A "declarant" is a person who makes a statement. TEX.R.CIV.EVID. 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. TEX.R.CIV.EVID. 801(c).

c. 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).

i. TEX.R.CIV.EVID. 703: Bases of Opinion Testimony

A lawyer 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. TEX.R.CIV.EVID. 703.

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).

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.

4. 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. As discussed earlier, the statement of preference will not be admitted in a jury trial, but the judge may admit it in a trial before the bench. According to Family Code Section 107.054, the social study shall be made part of the

record in either 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. In a jury trial, hearsay exceptions to portions of a social study may be sustained by the Judge. In a trial to the Court, 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 for a lawyer 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 the client, pay the jury fee, get a jury, try and omit all the unwanted and inadmissible statements.

5. HOW TO KEEP SOCIAL STUDIES 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.

a. TEX.R.CIV.EVID. 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.

b. TEX.R.CIV.EVID. 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." TEX.R.CIV.EVID. 401. "Evidence which is not relevant is inadmissible." TEX.R.CIV.EVID. 402.

i. TEX.R.CIV.EVID. 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." TEX.R.CIV.EVID. 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, it is commonly known 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?

VII. TRIAL PROBLEMS

1. 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, she should be prepared to testify at all times. The opposition may very well call her first to elicit the bad facts at the very beginning of the case. If your client knew that this may happen, she will be much less shaken by starting the trial with her 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 with 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).

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 promote 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 her 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?

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.

iv. 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.

Regardless of the alternative Dad chooses, he must be able to present it as a viable option in court. 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.

iv. 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. Because of this she will then lose the advantage of having been the primary care taker during the marriage. Be sure Mom has a plan that is thought out, as this may put Mom and Dad on more equal footing.

v. 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.

vi. 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. It is important to make sure Mom understands the importance of this testimony.

(2) Child Support

If Dad is hesitant about paying support, you should remind his attorney 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.

(3) Tactics at Final Trial

(a) Witnesses

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

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

(a) 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 should be brought out. 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. The Dad is 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 routine.

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 and the child’s signing of the statemetn of preference. 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, or as here, Mom has not worked for a very ling time. So 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.

IX. ETC.

1. Ad Litems

Ad litems are appointed and/or used for a number of purposes. The primary reason for appointing an ad litem should always be to protect the rights of the minor participants. Some courts utilize ad litems 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.

a. AUTHORITY TO APPOINT

Texas Family Code Section 107.001, Subchapters A and B provide the basis for courts to appoint both guardian and attorney ad litems. In private custody litigation, the appointment of an ad litem is left to the sound discretion of the trial court.

b. ROLE AND PURPOSE

i. 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.

ii. 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).

iii. 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.

iv. STRATEGIC USE OF THE AD LITEM

Bear in mind that an ad litem can often do things in a lawsuit more easily or more appropriately than your side alone can. If the lawyer has any input into who the ad litem will be, the selection of the ad litem can sometimes be quite significant. The lawyer should consider whether it is preferable to have an ad litem who will be aggressive and a self-starter, as opposed to someone more laid-back. Regardless of the type of ad litem appointed, remember that individual not only has the Court's ear, but can be a substantial resource or detriment to your client’s case.

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 to the client would be to take short cuts or fail to explore every possible theory and theme to advance your client’s position.