Evidence: Getting it In, Keeping it Out, and Preserving the Record for Appeal

Legal Essentials and Beyond for Representing
Parents and Children in Child Welfare Cases CLE

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Introduction[1]

This presentation will address some of the evidentiary issues that arise in litigation in which the Texas Department of Family and Protective Services (the "Department") is seeking to terminate parental rights. This presentation will also address the admissibility of evidence unique to child welfare matters, including the out-of-court statements by children, the Fifth Amendment privilege, the admissibility of government documents, evidence not produced in discovery, and the evidence that is considered on appellate review. Additionally, we will generally discuss how to preserve error when evidence should have been admitted or should have been excluded.

It is important to note that the admission or exclusion of evidence is within the trial court's sole discretion.[2] The mere fact that a trial court did not abuse its discretion in admitting evidence does not necessarily mean that the trial court would have abused its discretion in excluding the evidence.

I. Candor Toward the Tribunal

A lawyer shall not offer or use evidence that the lawyer knows to be false.[3] Silence by a lawyer when the client lies on cross-examination is not "use" of the testimony, and therefore is not a violation of this rule.[4] However, subsequent use of that false testimony or other evidence by the lawyer in support of the client's case would be a violation.[5] When the lawyer is asked to

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[1] I am grateful for Rebecca Safavi and Brenda Kinsler for their help in editing this paper.
[2] *Fleming v. Wilson*, 610 S.W.3d 18, 21 (Tex. 2020).
[3] Tex. Disc. R. Prof. Conduct 3.03(a)(5).
[4] Professional Ethics Committee Opinion 504 (July 1995).
[5] Tex. Disc. R. Prof. Conduct 3.03 cmt. 13.

place into evidence testimony or other material that the lawyer knows to be false, the attorney must refuse to offer it, regardless of the client's wishes.[6] In that situation, the lawyer would be justified in seeking to withdraw.[7] If the attorney does not withdraw or is not allowed to withdraw, the lawyer should urge the client not to offer false testimony.[8] Importantly, even though the lawyer may not receive a satisfactory assurance that the client or another witness will testify truthfully as to a particular matter, the lawyer may use that person as a witness as to other matters that the lawyer believes will not result in perjured testimony.[9]

II. Out-of-Court Statements by Children

Hearsay, that is, an out-of-court statement offered for the truth of the matter asserted, is generally inadmissible.[10] In the child welfare context, there are a number of exceptions to the prohibition, especially involving the statements of the children the subject of this litigation.

a. Hearsay Statements of Abuse

The Confrontation Clause applies to criminal cases, not civil proceedings like parental-termination proceedings.[11]

In a Suit Affecting the Parent-Child Relationship (SAPCR), the Texas Family Code allows for the admission of a child's statements regarding abuse if certain conditions are met:

> In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is

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[6] Tex. Disc. R. Prof. Conduct 3.03, cmt. 5.
[7] Tex. Disc. R. Prof. Conduct 3.03, cmt. 6.
[8] Id.
[9] Id.
[10] Tex. R. Evid. 801(d), 802.
[11] *In re J.S.*, No. 09-10-00304-CV, 2010 Tex. App. LEXIS 8458, at *6, 2010 WL 4156746, at *3 (Tex. App.—Beaumont Oct. 12, 2010, no pet.); *In re S.A.G.*, 403 S.W.3d 907, 912 (Tex. App.—Texarkana 2013, pet. denied) [SAPCR; not a Department case]; *J.T. v. Tex. Dep't of Family and Protective Servs.*, No. 03-15-00286-CV, 2015 Tex. App. LEXIS 10917, at *12 n.4, 2015 WL 6459607, at *4 n.4 (Tex. App.—Austin Oct. 23, 2015, no pet.) (mem. op.).

admissible as evidence if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and:

(1) the child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or

(2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child.[12]

In a bench trial, a court does not need to make the express findings under 104.006 or consider the admissibility of hearsay statements at any specific time during the proceedings.[13] In a jury trial, an objection to hearsay does not preserve error for failure to hold a hearing outside the presence of the jury.[14]

Tex. Fam. Code § 261.001(1) provides a non-exclusive list of what constitutes "abuse," which can be a guide for admission of hearsay statements under this provision.[15] For example, because witnessing abuse can itself be abusive to a child, statements about abuse the child witnessed but for which they were not the direct victim are still admissible under this provision.[16]

i. Age of the child

As stated *supra*, the statement, to be admitted, must be "made by a child 12 years of age or younger."[17] What matters is the age of the child at the time the statement was made,

[12] Tex. Fam. Code § 104.006.
[13] *In re K.L.*, 91 S.W.3d 1, 17 (Tex. App.—Fort Worth 2002, no pet.).
[14] *In re J.N.*, 05-14-00558-CV, 2014 Tex. App. LEXIS 11101, 2014 WL 4978656 (Tex. App.—Dallas, Oct. 4, 2014, pet. denied).
[15] *In re E.M.*, 494 S.W.3d 209, 217 (Tex. App.—Waco 2015, pet. denied).
[16] *In re Baby Boy J.*, No. 05-22-01136-CV, 2023 WL 2768440, at *4 (Tex. App.—Dallas Apr. 4, 2023, no pet.) (mem. op.).
[17] Tex. Fam. Code § 104.006.

not the age of the child at the time of trial, meaning that a thirteen-year old's statement from the previous year may be admissible under this statute.[18]

ii. Reliability of the Statement

To be admitted, the trial court must find that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability.[19] The phrase "time, content, and circumstances" refers to the time the child's statement was made to the outcry witness, the content of the child's statement, and the circumstances surrounding the making of that statement.[20] The focus of the inquiry must remain the outcry statement, not the abuse itself, and the statement may be reliable even when it contains vague or inconsistent statements about the actual details.[21]

Indicia of reliability includes whether the child understood the difference between truth and lies, whether the statements were voluntary or the result of questioning, whether a child that age would normally know about the matters being described, and whether the statements could be corroborated by other evidence.[22]

Additionally, some appellate courts analogize reliability in the SAPCR context to case law concerning Article 38.072 of the Code of Criminal Procedure—which admits hearsay evidence from minors in certain criminal prosecutions—to determine if the statement is sufficiently

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[18] *In re K.L.*, 91 S.W.3d 1, 15 (Tex. App.—Fort Worth 2002, no pet.).
[19] Tex. Fam. Code § 104.006.
[20] *In re E.M.*, 494 S.W.3d 209, 219 (Tex. App.—Waco 2015, pet. denied).
[21] *Id*.
[22] *In re P.E.W.*, 105 S.W.3d 771, 775-76 (Tex. App.—Amarillo 2003, no pet.).

reliable in criminal cases.[23] Indicia of reliability of a child's statement in the criminal context include:

> (1) whether the child victim testifies at trial and admits making the out-of-court statement;
>
> (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate;
>
> (3) whether other evidence corroborates the statement;
>
> (4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults;
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> (5) whether the child's statement is clear and unambiguous and rises to the needed level of certainty;
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> (6) whether the statement is consistent with other evidence;
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> (7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate;
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> (8) whether the child behaves abnormally after the contact;
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> (9) whether the child has a motive to fabricate the statement;
>
> (10) whether the child expects punishment because of reporting the conduct; and
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> (11) whether the accused had the opportunity to commit the offense.[24]

iii. Availability to testify

The first method of admissibility may occur when the child testifies or is available to testify.[25] One appellate court implied that when the record does not show that the children were unavailable to testify, the trial court in a bench trial may determine that the children were

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[23] *In re M.R.*, 243 S.W.3d 807, 813 (Tex. App.—Fort Worth 2007, no pet.); *Regost v. Regost*, 03-21-00328-CV, 2022 WL 4349323, at *8-*9 (Tex. App.—Austin Sept. 20, 2022, no pet.) (mem. op.).
[24] *Norris v. State*, 788 S.W.2d 65, 71 (Tex. App.—Dallas 1990, pet. ref'd).
[25] Tex. Fam. Code § 104.006(1).

available to testify.[26] This position may not be universally accepted, especially in the context of a jury trial.[27]

iv. Admitting hearsay to protect the child's welfare

The other possible method of admissibility—to protect the child's welfare—is a little trickier.[28] In *S.P.*, the trial court had to consider the admission of videotaped statements by the alleged child victim.[29] The Department indicated that it knew where the child was, but did not offer to make her available to testify.[30] The Department admitted that it had no evidence that the use of the videotape was necessary to protect the child's welfare, arguing instead that it would obviously be detrimental for an eight-year-old to face her abuser in open court.[31] After having reviewed the video in chambers, the trial court found, based on common sense, the judge's knowledge of his own seven-year-old daughter, and the videotape itself, that the use of the statement was necessary to protect her welfare.[32] The court of appeals reversed, writing, "Common sense does not dictate that knowledge of one young child equates to knowledge of the welfare of another young child."[33]

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[26] *See In re R.H.W. III*, 542 S.W.3d 724, 740 (Tex. App.—Houston [14th Dist.] Jan. 9, 2018, no pet.) (mem. op.) ("The record does not show that the children were unavailable to testify.").
[27] *In re S.P.*, 168 S.W.3d 197, 207 (Tex. App—Dallas 2005, no pet.) ("The Department indicated that the whereabouts of [the child] were known, but did not offer to make her available to testify.").
[28] *Id.*
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*. at 208.
[33] *Id*. at 208.

It is worth noting that, although there have been psychological studies on this issue for nearly forty years, no agreement has been made about whether the overall effect of a child testifying is positive or negative.[34]

b. Children's Advocacy Center Videos

A Children's Advocacy Center (CAC) is designed to minimize revictimization of minor children by, among other things, establishing a working protocol for forensic interviews.[35] The Family Code establishes ownership of the recording of those interviews based on the status of the criminal and civil litigation.[36]

These recordings are often admissible under certain circumstances:

> If a child 12 years of age or younger is alleged in a suit under this title to have been abused, the recording of an oral statement of the child recorded prior to the proceeding is admissible into evidence if:
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> (1) no attorney for a party was present when the statement was made;
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> (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
>
> (3) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;
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> (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
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> (5) each voice on the recording is identified;

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[34] Donald Duquette, ed., Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases, 3rd ed. (2016), § 32.4 (John E.B. Myers was the author of the chapter on courtroom advocacy); *see also* Committee on Psychosocial Aspects of Child & Family Health, American Academy of Pediatrics, "The Child in Court: A Subject Review," 104 Pediatrics, 1145, 1146 (1999).

[35] Tex. Fam. Code §§ 264.403(b)(1), 264.4031(a)(4)(D).

[36] Tex. Fam. Code § 264.408(d).

(6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party; and

(7) each party is afforded an opportunity to view the recording before it is offered into evidence.[37]

This provision does not include a requirement of reliability, so a complaint about the child's credibility goes to the weight, not admissibility of the physical evidence.[38] Considering that the legal definition of "proceeding" can be "[t]he ordinary process of a lawsuit or criminal prosecution, from the first filing to the final decision," [39] it is unknown whether a CAC interview taken after the Department filed its petition would be admissible under this provision.

It is important to note that if any testimony is taken as provided by Chapter 104 of the Texas Family Code, the child cannot be compelled to testify.[40] It is unclear at this point whether a child could be compelled to testify if their out-of-court statement was admitted because they were available to testify pursuant to Tex. Fam. Code § 104.006(1), or whether a child would be "available" if their testimony ultimately could not be compelled.

c. State of Mind Exception

Generally, a declarant's state of mind (like motive, intent, or plan) or a statement about the declarant's emotional condition is an exception to the hearsay rule regardless of whether the declarant is available as a witness.[41]

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[37] Tex. Fam. Code § 104.002.
[38] *In re S.H.*, No. 10-02-00086-CV, 2004 Tex. App. LEXIS 1450, at *7-*8, 2004 WL 254011, at *3 (Tex. App.—Waco Feb. 11, 2004, no pet.) (mem. op.).
[39] Nolo's Plan-English Law Dictionary, *available at* https://www.law.cornell.edu/wex/proceeding#:~:text=1)%20The%20ordinary%20process%20of,part%20of%20a%20larger%20action (last viewed Nov. 18, 2020).
[40] Tex. Fam. Code § 104.005(a).
[41] Tex. R. Evid. 803(3).

In this context, a statement that a child is excited about adoption, or even just has an opinion about adoption, falls within this exception.[42]

d. Hearsay Statements for Medical Purposes

Another exception to hearsay is a statement made for purposes of medical diagnosis or treatment and describing medical history.[43] Statements by a victim of child abuse as to causation and source of injuries are admissible under this exception.[44] Because the nature and extent of the psychological harm may depend on the identity of the abuser, their identity may be reasonably pertinent to medical diagnosis and treatment and therefore admissible.[45]

III. Government Documents Generally

a. General Rules

There are two exceptions to hearsay that are normally relevant to parental termination matters when attempting to admit documents, to wit:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available:
>
> …
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> (6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:
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> > (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

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[42] *M.D. v. Tex. Dep't of Family and Protective Servs.*, No. 03-18-00544-CV, 2018 WL 5629132, at *3 n.3 (Tex. App.—Austin Oct. 31, 2018, no pet.) (mem. op.); *see also Melton v. Dallas County Child Welfare Unit of Tex. Dep't of Human Res.*, 602 S.W.2d 113, 121 (Tex. App.—Dallas 1980, no writ) (noting that caseworker's testimony regarding "children's statements concerning their desire for adoption" fall within the state of mind exception).
[43] Tex. R. Evid. 803(4).
[44] *In re L.S.*, 748 S.W.2d 571, 576 (Tex. App.—Amarillo 1988, no writ).
[45] *In re C.K.L.*, No. 13-02-00328-CV, 2002 WL 34231207, at *1 (Tex. App.—Corpus Christi, Dec. 12, 2002, no pet.) (mem. op.).

(B) the record was kept in the course of a regularly conducted business activity;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and

(E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

"Business" as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

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(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness.[46]

b. Police Records

In the *Corrales* matter, the parents objected to the admission of police reports which they contended contained inadmissible hearsay.[47] The court of appeals held that the reports were admissible as public records under Tex. R. Evid. 803(8).[48] This included the statements of

[46] Tex. R. Evid. 803.
[47] *Corrales v. Tex. Dep't of Family & Protective Servs.*, 155 S.W.3d 478, 484 (Tex. App.—El Paso 2004, no pet.).
[48] *Id*. at 486.

witnesses which would not otherwise qualify as public records because the parents failed to meet their burden to demonstrate that those statements lacked trustworthiness.[49] A different court of appeals has held that the parent has a duty to specifically point out the portions of the record to which he is objecting, which implies the possibility that the hearsay within that police record might have been objectionable.[50]

c. Department Records Generally

The Texarkana Court of Appeals has held that the Department's contact log narrative meets the public records exception to the hearsay rule.[51] The First District Court of Appeals has held that this applies to the Department's entire file, if properly authenticated.[52]

Parties must authenticate documents they are attempting to admit when they themselves produced those documents in discovery.[53] In one instance, the Department failed to lay a proper predicate under the business records exception for the admission of handwritten statements relating to sexual assault allegations.[54]

For the Department, authenticating one's own records requires simply establishing that the document is admissible under a rule or statute.[55] There's no particular reason why an opposing party can't use a Department witness to do the same. If a sponsoring witness is

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[49] *Id*. at 486-87.
[50] *L.M. v .Tex. Dep't of Family & Protective Servs.*, No. 01-11-00137-CV, 2012 Tex. App. LEXIS 5683, at *16, 2012 WL 2923132, at *5 (Tex. App.—Houston [14th Dist.] Jul. 12, 2012, pet. denied) (mem. op.).
[51] *In re B.G.M.*, No. 06-10-00022-CV, 2011 Tex. App. LEXIS 6040, at *32, 2011 WL 3332165, at *11 (Tex. App.—Texarkana Aug. 4, 2011, pet. denied) (mem. op.).
[52] *Rogers v. Tex. Dep't of Family & Protective Servs.*, 175 S.W.3d 370, 376 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd w.o.j.).
[53] *Banowsky v. State Farm Mut. Auto. Ins.*, 876 S.W.2d 509, 513 (Tex. App.—Amarillo 1994, no writ).
[54] *In re E.A.K.*, 192 S.W.3d 13, 142-43 (Houston [14th Dist.] 2006, pet denied).
[55] *See* Tex. R. Evid. 902(10)(B) (form of business records affidavit).

unavailable, parties opposing the Department have a method for authenticating Department documents:

> A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection.[56]

"The clear purpose of this rule is to alleviate the burden on a party receiving documents through discovery from proving the authenticity of those documents when they are used against the party who produced them."[57] The party that produced the document can only make a good-faith objection.[58]

d. Removal Affidavit

A few appellate courts have taken the position that the removal affidavit is inadmissible.[59] Other courts have pointed out that the parent's counsel failed to preserve hearsay objections by failing to point out the specific objectionable provisions of the affidavit.[60]

A respectable argument can be made that the affidavit is admissible for a limited purpose.[61] The Texas Supreme Court has stated, "This affidavit, even if not evidence for all

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[56] *See* Tex. R. Civ. P. 193.7.
[57] *Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 451 (Tex. App.—Dallas 2002, no pet.).
[58] Id.
[59] *See In re M.W.*, No. 13-19-00593-CV, 2020 Tex. App. LEXIS 3159, at *2 n.3, 2020 WL 1887769, at *1 n.3 (Tex. App.—Corpus Christi Apr. 16, 2020, no pet.) (mem. op.) (describing the removal affidavit as "hearsay admitted over an appropriate objection"); *In re T.T.*, 39 S.W.3d 355, 361 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("unless an issue arises upon retrial over whether TDPRS properly took temporary custody of the children, the emergency removal affidavit should not be admitted then against [mother]").
[60] See *In re M.T.R.*, 579 S.W.3d 548, 569 (Tex. App.—Houston [14th Dist.] 2019, pet. denied); *In re C.J.P.*, No. 04-04-00770-CV, 2005 Tex. App. LEXIS 10788, at *21, 2005 WL 2508058, at * 7 (Tex. App.—San Antonio Oct. 12, 2005, no pet.) (mem. op.).
[61] *In re A.J.E.M.-B.*, No. 14-14-00424-CV, 2014 Tex. App. LEXIS 12129, at *15-*21, 2014 WL 5795484, at *8-*9 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.) (mem. op.).

purposes, shows what the trial court relied on in determining whether removal was justified."[62] The Fourteenth Court of Appeals interpreted this to mean that the Texas Supreme Court has approved the consideration of the removal affidavit to evaluate sufficiency of the O ground for termination.[63]

Utilizing the same rationale, the Austin Court of Appeals, without any citation, held that when: (1) a parent objects to the admissibility of the removal affidavit; and (2) a parent fails to request a jury instruction that the affidavit only be considered for the limited purpose of proving that the children were removed for abuse and neglect under chapter 161, the parent has failed to preserve a hearsay objection for appellate review.[64] Later, the Austin Court of Appeals cited the prior case for the express proposition that removal affidavits are admissible to prove that the children were removed for abuse or neglect.[65]

e. Drug tests

One court of appeals--in dicta--indicated that personal observations of drug test results are not hearsay.[66] In this instance, the better objection would be an objection on the basis of a violation of the best evidence rule.[67] That said, drug test results tend to be admitted as an exception to the general prohibition against hearsay.[68]

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[62] *In re E.C.R.*, 402 S.W.3d 239, 248 (Tex. 2013).
[63] *A.J.E.M.-B.*, 2014 Tex. App. LEXIS 12129, at *19.
[64] *F.C. v. Tex. Dep't of Family & Protective Servs.*, No. 03-19-00625-CV, 2020 Tex. App. LEXIS 119, at *18-*20 (Tex. App.—Austin Jan. 9, 2020, no pet.) (mem. op.).
[65] *R.P. v. Tex. Dep't of Family & Protective Servs.*, No. 03-21-00326-CV, 2021 WL 4755952, at *5 (Tex. App.—Austin Oct. 13, 2021, no pet.) (mem. op.).
[66] *In re A.G.*, No. 13-17-00318-CV, 2017 WL 4546984, at *6 (Tex. App.—Corpus Christi Oct. 12, 2017, no pet.) (mem. op.)
[67] Tex. R. Evid. 1002.
[68] *In re E.B.*, No. 11-19-00001-CV, 2019 Tex. App. LEXIS 7518, at *9, 2019 WL 3955974, at *3 (Tex. App.—Eastland Aug. 22, 2019, no pet.) (mem. op.); *F.C. v. Tex. Dep't of Family & Protective Servs.*, No. 03-19-00625-CV, 2020 Tex. App. LEXIS 119, at *18-*20 (Tex. App.—Austin Jan. 9, 2020, no pet.) (mem. op.).

With regard to drug tests within business records affidavits, it is important to note that one element of their admissibility is that the opponent must fail to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.[69]

A mere business records affidavit is insufficient to admit records of drug tests in a parental termination case due to the lack of trustworthiness.[70] This does not mean that experts must always testify in person regarding drug tests.[71] The issue is whether there is sufficient indicia of trustworthiness to justify the admission of the tests through an affidavit.[72] There is no requirement in termination cases that the sponsoring witness be capable of testifying about the reliability of the test when the documents themselves establish that reliability.[73]

In *K.C.P.*, the affidavit tendered by the Department contained all of the requirements of Tex. R. Evid. 902(10)(b).[74] However, it was an error to admit this affidavit because there was no evidence presented regarding the qualifications of the persons who tested the specimens, the types of tests administered, or whether such tests were standard for detecting the particular substance.[75]

In *F.C.*, the Austin Court of Appeals held that there was sufficient indicia of trustworthiness:

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[69] Tex. R. Evid. 803(6)(E).
[70] *In re K.C.P.*, 142 S.W.3d 574, 580 (Tex. App.—Texarkana 2004, no pet.).
[71] *In re E.B.*, No. 11-19-00001-CV, 2019 Tex. App. LEXIS 7518, at *9 (Tex. App.—Eastland Aug. 22, 2019, no pet.) (mem. op.) ("We do not read *K.C.P.* to require live testimony regarding these matters."); see also *In re C.M.-L.G.*, No. 14-16-00921-CV, 2017 WL 1719133, at *10 (Tex. App.—Houston [14th Dist.] May 2, 2017, pet. denied) ("Mother cites no authority, and we know of none, requiring expert testimony about drug test results in parental termination cases.")
[72] *F.C.*, 2020 Tex. App. LEXIS 119, at *16.
[73] *In re J.S.*, 675 S.W.3d 120 (Tex. App.—Dallas 2023, pet. dism'd).
[74] *K.C.P.*, No 142 S.W.3d at 578.
[75] *Id*. at 580.

> The accompanying business-records affidavit avers that the drug test 'utilize[ed] strict chain of custody procedures' and 'was performed utilizing GC/MS (gas chromatography/mass spectrometry) instruments by a certified scientist and reviewed by a licensed medical review officer.' It further avers that a record of the test result was kept in the regular course of business of the Texas Alcohol and Drug Testing Service and that it is in the regular course of business of that entity for an employee or representative with knowledge of the act, event, condition, opinion, or diagnosis to record the information at or reasonably near the time it occurred. The drug test itself was signed by the medical review officer, an MD, verifying that the test was positive. The test result identifies the collection site, date, type of panel test used, and name of the lab that performed the test. Attached also to the business-records affidavit within [the exhibit] was (a) the laboratory report indicating the quantitative results, identifying the lab as 'DHHS Certified,' and (b) the 'Hair and/or Urine Custody and Control Form' that accompanies the sample Father provided as it was transported from the testing facility to the laboratory.[76]

Eastland likewise held that there was no evidence to indicate a lack of trustworthiness when the affidavits of drug tests showed that there was a "strict chain of custody procedures", the testing was performed by a scientist certified for GC/MS instruments and reviewed by a licensed medical review officer.[77]

It is worth noting that *K.C.P.* from 2004 (which held that it was an abuse of discretion to admit the drug test results), *E.B.* from 2019 (admission was not an abuse of discretion), and *F.C.* from 2020 (admission not an abuse of discretion) all concerned the admissibility of the business records from Texas Alcohol and Drug Testing Service.[78] One might presume from these cases that their procedures for creating business records affidavits have improved over time.

Even when the sponsoring witness testified that the drug results were labeled as "presumptive positive" because the hospital's employees believe that the lab's testing

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[76] F.C., 2020 Tex. App. LEXIS 119, at *17-*18.
[77] *E.B.*, 2019 Tex. App. LEXIS 7518, at *9.
[78] *K.C.P.*, No 142 S.W.3d at 578; *E.B.*, 2019 Tex. App. LEXIS 7518, at *9-*10; F.C., 2020 Tex. App. LEXIS 119, at *17-*18.

standards are "not good enough for court testimony," the trial court did not abuse its discretion in admitting the test results because the doctor testified that the test is a standard procedure at the hospital.[79]

IV. Fifth Amendment Privilege

A person cannot be compelled to incriminate themselves under the U.S. Constitution.[80] This gives a witness the right against compelled self-incrimination when reasonably fearing prosecution.[81] This right does not permit a blanket assertion or allow a party or witness in a civil proceeding from wholly refusing to take the witness stand.[82] In *Verbois*, the parents sought mandamus relief, claiming their constitutional rights were violated after the Department removed their child and the trial court ordered them to submit to a psychological evaluation and to submit to counseling if recommended.[83] The appellate court denied relief in part because the parents had not been asked any direct questions at that point that could incriminate them.[84]

When there is a specific question and a witness asserts his Fifth Amendment right, "he is not the exclusive judge of his right to exercise the privilege."[85] The trial court makes a limited inquiry to determine under the circumstances that the answer is likely to be hazardous to the witness.[86]

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[79] *In re A.T.*, No. 02-04-00355-CV, 2006 WL 563565, at n.7 (Tex. App.—Fort Worth, Mar. 9, 2006, pet. denied) (mem. op.).
[80] U.S Const. amend. 5; Tex. Const. art. 1 § 10.
[81] *U.S. v. Balsys*, 524 U.S. 666, 674 (1998).
[82] *In re Verbois*, 10 S.W.3d 825, 828 (Waco 2000, orig. proceeding).
[83] *Id*. at 827.
[84] Id. at 830.
[85] *Ex parte Butler*, 522 S.W.2d 196, 198 (Texas 1975).
[86] *Id*.

When the witness is a party, a factfinder may draw whatever adverse inference is reasonable under the circumstances.[87] This is meant to prevent converting "the Fifth Amendment privilege from shield to sword against the other party who needs that information."[88] This inference can be used to support the termination of parental rights.[89]

The rule is different when the witness asserting their Fifth Amendment privilege is not a party.[90] In that instance, "neither the court nor counsel may comment on a privilege claim," "the factfinder may not draw an inference from the claim", and "[t]o the extent practicable, the court must conduct a jury trial so that the making of a privilege claim is not suggested to the jury by any means."[91] In one instance, Mother accused Grandmother of conspiring with her husband to sexually assault Daughter.[92] Grandmother denied all allegations in her deposition.[93] Grandmother's spouse, on the other hand, pled the Fifth to many questions, including whether he and Grandmother had a meeting of the minds regarding a plan to cover up his sexual abuse of Daughter.[94] The court of appeals held that the spouse's assertion of his Fifth Amendment rights did not defeat Grandmother's no-evidence motion for summary judgment against the claims.[95]

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[87] *In re C.J.K.*, 134 S.W.3d 343, 352-53 (Tex. App.—Amarillo 2003, pet. denied).
[88] *P.C. v. E.C.*, 594 S.W.3d 459, 462 (Tex., App.—Fort Worth 2019, no pet.).
[89] *See, e.g., In re C.R.*, 263 S.W.3d 368, 370 (Tex. App.—Dallas 2008, no pet.); *In re S.A.P.*, 459 S.W.3d 134 (Tex. App.—El Paso 2015, no pet.); *In re A.B.*, 372 S.W.3d 273 (Tex. App.—Fort Worth 2012, no pet.).
[90] Tex. R. Evid. 513.
[91] Tex. R. Evid. 513(a), (b).
[92] *P.C.*, 594 S.W.3d at 460.
[93] *Id*. at 646.
[94] *Id*. at 645.
[95] Id. at 465-66.

V. Fewer Privileged Communications in Child Abuse Cases

In a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in the case of communications between an attorney and client.[96] This means that in the child abuse context, there is no privilege for spousal[97] or clergy-communicant communications.[98]

VI. Evidence Not Produced in Discovery

a. The General Rule

The purpose of discovery is to allow the parties to obtain the fullest knowledge of the issues and facts before trial.[99] The rules of discovery prevent "trials by ambush."[100] The Texas Rules of Civil Procedure address the admission of evidence not produced in discovery:

> **Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
>
> (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
> (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.[101]

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[96] Tex. Fam. Code § 261.202.
[97] *In re L.E.S.*, 471 S.W.3d 915, 928 (Tex. App.—Texarkana 2015, no pet.).
[98] *In re W.B.W.*, No. 11-11-00269-CV, 2012 WL 2856067, at *15 (Tex. App.—Eastland, Jul. 12, 2012, pet. denied) (mem. op.).
[99] *West v. Solito*, 563 S.W.2d 240, 243 (Tex. 1978).
[100] *Gutierrez v. Dallas Indep. Sch. Dist.*, 729 S.W.2d 691, 693 (Tex. 1987).
[101] Tex. R. Civ. P. 193.6(a).

The party seeking to introduce the evidence has the burden to show good cause or lack of unfair surprise or prejudice.[102] If that party fails to meet its burden, the trial court may grant a continuance.[103]

The Texarkana Court of Appeals takes this rule very seriously in parental termination cases:

> Given the constitutional mandate that termination of parental rights be carried out only where there is clear and convincing evidence justifying that result, as well as the requirement that termination proceedings and termination statutes be strictly construed in favor of the parent, it follows that—in parental-rights termination cases—Rule 193.6(a)'s exceptions should also be *strictly construed* in favor of the parents and against the Department.[104]

(emphasis added).

The following are example cases in which appellate courts held that the trial court did not abuse its discretion in admitting evidence or allowing the testimony of witnesses even though there was an omission in the Department's discovery:

- A mother who signed an affidavit of relinquishment could still testify against the father—even though she had not been designated as a witness—because her rights had not yet been terminated, meaning she was still a named party.[105]
- A certified copy of a conviction was admissible even though it was not produced in discovery because that conviction was one of the grounds for which the Department was seeking termination, and the attorney declined the opportunity for a postponement of the trial.[106]
- A three-page assessment from North Carolina about an allegation of neglectful supervision did not create unfair surprise or prejudice when the mother testified about

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[102] Tex. R. Civ. P. 193.6(b).
[103] Tex. R. Civ. P. 193.6(c).
[104] *In re D.W.G.K.*, 558 S.W.3d 671, 680-81 (Tex. App.—Texarkana 2018, pet. denied)
[105] *In re J.L.J.*, 352 S.W.3d 536 (Tex. App.—El Paso 2011, no pet.).
[106] *In re T.B.*, No. 11-11-00034-CV, 2011 Tex. App. LEXIS 7222, at *4, 2011 WL 3915508, at *1-*2 (Tex. App.—Eastland Aug. 31, 2011, no pet.) (mem. op.).

her history in North Carolina, which included neglectful supervision, and counsel had almost a week to review the document before trial resumed.[107]

- It was not an abuse of discretion to admit the testimony of the parents' therapist when the Department identified her as the witness even though they had not produced her CV or her report until the day of trial because, as the party's therapist, there was no undue surprise.[108]

- Parents were not unfairly surprised or prejudiced when child abuse pediatrician's testimony remained consistent between his testimony at the adversary hearing and his testimony at trial.[109]

b. The *Spurk* Exception to Admission only with No Unfair Suprise

There is some case law in which the rule for allowing the admission of undisclosed evidence or witnesses deviates from the general rule outlined in Rule 193.6 of the current Texas Rules of Civil Procedure.

This discrepancy, to some extent, is due to the historical development of the case law in this area. Under the rule of civil procedure that was available from 1987 until 1998, evidence that had not been disclosed in discovery was not admissible "unless the trial court finds that good cause sufficient to require admission exists."[110] The Fourteenth Court of Appeals, examining a case that was subject to this rule—but whose opinion was issued after the rule was otherwise invalid—stated in an opinion in a SAPCR, "We believe that the best interest of a child can only be attained when a court's decision is well-informed as the circumstances allow."[111] In that case the Fourteenth Court held that the trial court abused its discretion in excluding

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[107] *In re D.C.*, No. 06-18-00114-CV, 2019 Tex. App. LEXIS 4865, at *37-*38, 2019 WL 2455622, at*12 (Tex. App.—Texarkana Jun. 13, 2019, no pet.) (mem. op.).
[108] *In re E.A.G.*, 373 S.W.3d 129, 145 (Tex. App.—San Antonio 2012, pet. denied).
[109] *In re M.H.*, 319 S.W.3d 137, 147 (Tex. App.—Waco 2010, no pet.).
[110] Tex. R. Civ. P. 215(5) (1987, amended 1998).
[111] *In re P.M.B.*, 2 S.W.3d 618, 624 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

evidence that had not been produced in discovery without first attempting a lesser sanction that would have allowed the evidence to be admitted.[112]

The Austin Court of Appeals then addressed a similar issue in an opinion that did not have precedential value.[113] The jury trial occurred in November 1999, meaning that the current Tex. R. Civ. P. 196.3 would have been in effect.[114] In *R.H.*, the mother decided after the beginning of trial to call her grandparents to the stand.[115] The mother appealed the trial court's exclusion of the grandparents testimony on the basis that either there was good cause for not disclosing the witnesses earlier or the Department was not unfairly surprised.[116] The Austin Court ultimately adopted the general reasoning outlined in a prior Fourteenth Court of Appeals's opinion of a SAPCR case, determining that because of the best-interest-of-a-child standard, "[i]t is in the court's primary interest to have as much evidence before it as possible."[117] Austin's decision to exclude the grandparents' testimony was held to be an abuse of the trial court's discretion, albeit a harmless one.[118]

The Austin Court later reaffirmed its rule that it is in the best interest of a child for a trial court, as factfinder, to have as much evidence before it as possible.[119] In *Spurck*, a case which does have precedential value, the court of appeals characterized the establishment of unfair surprise as "a close call."[120] Nevertheless, it held that that the trial court did not abuse its

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[112] *Id*. at 625.
[113] *R.H. v. Tex. Dep't of Family & Regulatory Servs.*, No. 03-00-00018-CV, 2001 Tex. App. LEXIS 3019, at *22-*23, 2001 WL 491119, at*8 (Tex. App.—Austin May 10, 2001, pet. denied) (mem. op., not designated for publication).
[114] *Id*., at *3.
[115] *R.H*, 2001 Tex. App. LEXIS 3019, at *21.
[116] *Id*.
[117] *R.H*, 2001 Tex. App. LEXIS 3019, at *23(*citing In re P.M.B.*, 2 S.W.3d 618, 624 (Tex. App.—Houston [14th Dist.] 1999, no pet.)).
[118] *R.H*, 2001 Tex. App. LEXIS 3019, at *22-*23.
[119] *Spurck v. Tex. Dep't of Family & Protective Servs.*, 396 S.W.3d 205 (Tex. App.—Austin 2013, no pet.).
[120] *Spurck*, 396 S.W.3d at 215.

discretion in allowing a law enforcement officer to testify regardless of whether the Department failed to timely identify him as a witness because his testimony was probative of mother's suitability as a parent.[121]

Other courts of appeals have reacted to *Spurck* in different ways. The Fort Worth Court determined that *Spurck* only applied to cases involving termination of parental rights, and did not apply to purely conservatorship matters.[122] Whereas the Texarkana Court, as mentioned *supra*, declined to follow *Spurck* in parental termination cases. Curiously, the justice in Texarkana who rejected the reasoning of *Spurck* in Department litigation later accepted that same reasoning for SAPCRs generally.[123]

VII. Preserving Error on Appeal

In order to present a complaint for appellate review, the record on appeal must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requires of the Texas Rules of … Evidence or the Texas rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

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[121] *Spurck*, 396 S.W.3d at 215.
[122] *Santana v. Santana*, No. 02-15-00140-CV, 2016 Tex. App. LEXIS 628, at *6 n.5, 2016 WL 278781, at *2 n.5 (Tex. App.—Fort Worth Jan. 21, 2016, no pet.) (mem. op.).
[123] *In re Marriage of Keys*, No. 06-19-00018-CV, 2019 Tex. App. LEXIS 8814, at *14-*17, 2019 WL 4865671, at *5-*6 (Tex. App.—Texarkana Oct. 3, 2019, no pet.) (mem. op.).

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.[124]

A timely objection is made at the earliest possible opportunity. *Guillory v. Boykins*, 442 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Error may be waived if the objection is made later.[125] The "shotgun" approach to objections, that is, making a "prolonged soliloquy" of various objections, might not preserve anything for appeal.[126]

An objection at trial which is not the same objection urged on appeal preserves nothing for review.[127] A party who fails to preserve error forfeits their complaint.[128] An objection to the admission of evidence from one parent does not preserve the issue on appeal for the other parent.[129]

Requiring parties in civil litigation to raise complaints at trial conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds.[130] This is just as true in parental termination cases as it is in any other case involving constitutional rights.[131] In defending this position, the Texas Supreme Court stated the following:

> [A]dhering to our preservation rules isn't a mere technical nicety; the interests at stake are too important to relax rules that serve a critical purpose. As we recently said, 'appellate review of potentially reversible error never presented to a trial court would undermine the Legislature's dual intent to ensure finality in these cases and expedite their resolution.'[132]

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[124] Tex. R. App. P. 33.1(a).
[125] *See, e.g., Gaytan v. State*, 331 S.W.3d 218, 229 (Tex. App.—Austin 201, pet. denied).
[126] *See Berry v. State*, 813 S.W.2d 636, 638 (Tex. App.—Houston [14th Dist. 1991, pet ref'd) (approximately thirty distinct grounds for objection failed to preserve any error for appellate review).
[127] *In re M.M.W.*, 536 S.W.3d 611, 613 (Tex. App.—Texarkana Dec. 1, 2017, no pet.).
[128] *In re M.R.J.M.*, 280 S.W.3d 494, 500 (Tex. App.—Fort Worth 2009, no pet.).
[129] *In re G.M.G.-U.*, No. 06-16-00075-CV, 2017 Tex. App. LEXIS 2256, at *38 n.9, 2017 WL 1018607, at *14 n.9 (Tex. App.—Texarkana Mar. 16, 2017, pet. denied) (mem. op.)
[130] *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999).
[131] *In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005).
[132] *In re L.M.I.,* 119 S.W.3d 707, 708 (Tex. 2003) (quoting *B.L.D.*, 113 S.W.3d 340, 353 (Tex. 2003)).

Fundamental error, namely error affecting a substantial right that does not have to be preserved at trial, is available in criminal cases;[133] however, within the civil context generally it is mostly "a discredited doctrine."[134] The Texas Supreme Court has expressly declined to extend the Fundamental Error Doctrine from the criminal arena to child welfare litigation in particular.[135]

a. Preserving claim evidence was erroneously admitted

Parties should object each and every time a piece of evidence is introduced, or the admission of that evidence will be deemed harmless.[136]

Normally, a ruling on a motion in limine does not preserve error at all.[137] A ruling on a pretrial motion to exclude evidence, on the other hand, does.[138] Under that scenario, the party does not need to renew the objection in front of the jury.[139] An appellate court may hold that trial court's response to a document entitled a "motion in limine" is in fact a pretrial order on a motion to exclude evidence.[140] In *D.W.G.K.*, while the document was entitled a motion in limine, it specifically asked the trial court for an order preventing the Department and the attorney ad litem from calling any witness who had not been properly disclosed in discovery.[141] The court of appeals held that this was substantively a motion to exclude, and therefore did preserve the issue for appeal.[142]

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[133] Tex. R. Evid. 103(e).
[134] *Cox v. Johnson*, 638 S.W.3d 867, 868 (Tex. 1982) (per curiam).
[135] *B.L.D.*, 113 S.W.3d at 351.
[136] *Richardson v. Green*, 677 S.W.2d 497 (Tex. 1984).
[137] *In re R.V.*, 977 S.W.2d 777, 780 (Tex. App.—Fort Worth 1998, no pet.).
[138] *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 557 (Tex. App.—Houston [1st Dist.] 1996], *aff'd* 972 S.W.2d 35 (Tex. 1998).
[139] Tex. R. Evid. 103(b).
[140] *See*, *e.g.*, *In re D.W.G.K.*, 558 S.W.3d 671, 682-83 (Tex. App.—Texarkana 2018, pet. denied).
[141] *Id*. at 682.
[142] *Id*.

Running objections are an exception to the rule of objecting in every instance.[143] The Texas Court of Criminal Appeals has stated, "A running objection, in some instances, will actually promote the orderly progression of a trial."[144] Running objections must be specific and unambiguous.[145] If the running objection is broad, the party risks the appellate court construing the objection itself, and doing so in a way that is disadvantageous to the appellant.[146] In *A.D.K.*, the Department asked the caseworker about the children telling her that Father directed them to fight.[147] Father's timely objection was overruled.[148] The caseworker answered in the affirmative, then testified that the children told her about fights between Father and Mother.[149] The trial court, in response, *sua sponte* granted Father a running objection.[150] On appeal, Father argued that the trial court erred in allowing the caseworker and the CASA volunteer to testify about where the children wanted to live.[151] Due to the context of the objection and the timing of the running objection, the court of appeals construed the running objection to concern violence between the parents and violence between the children, meaning that Father failed to preserve his error on appeal on the children's desires.[152]

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[143] *In re A.P.*, 42 S.W.3d 248, 260 (Tex. App.—Waco 2001), *overruled on other grounds by In re J.F.C.*, 96 S.W.2d 256 (Tex. 2002).
[144] *Lopez v. State*, 253 S.W.3d 680, 684 (Tex. Crim. App. 2008).
[145] *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203 (Tex. App.—Texarkana 2000, pet. denied).
[146] *In re A.D.K.*, No. 06-19-00019-CV, 2019 Tex. App. LEXIS 5295, 2019 WL 2607599 (Tex. App.—Texarkana Jun. 26, 2019, pet. denied).
[147] *Id*., 2019 Tex. App. LEXIS 5295, at *17.
[148] *Id*., 2019 Tex. App. LEXIS 5295, at *17-*18.
[149] *Id*., 2019 Tex. App. LEXIS 5295, at *18.
[150] *Id*.
[151] *Id*., 2019 Tex. App. LEXIS 5295, at *17.
[152] *Id*. at *20-*21.

The objecting party must obtain a ruling.[153] An unrecorded bench conference, followed up by the trial court stating, "All right. Anything else?" was not an adverse ruling that preserved error.[154]

It is not enough for the evidence to be inadmissible. To obtain reversal of a judgment based on a trial court's error in admitting or excluding evidence, the complaining party must show that (1) the trial court committed an error, and (2) the error was reasonably calculated to cause, and probably did cause, rendition of an improper judgment.[155] If a party permits the same or similar evidence to be introduced without objection, the error in the admission of testimony is generally harmless and waived.[156] In one case, any error in admitting a caseworker's affidavit was found to be waived or harmless because the same information was contained in services plans to which the parents did not object.[157]

There is no reversible error on the admission of drug test results when: (1) the parent admitted to living in a "dope house" with some of the children; (2) the parent admitted to using drugs while pregnant with the youngest child; (3) the parent indicated she had no doubt the children were exposed to and had methamphetamine in their bodies; and (4) the other parent took responsibility for the children's exposure to drugs.[158] This potentially makes things difficult to the party seeking exclusion of the evidence, because an attempt to address the issue at trial may render any appellate error harmless.

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[153] Tex. R. App. P. 33.1(a)(2)(A).
[154] *Darty v. State*, 709 S.W. 652, 654-55 (Tex. Crim. App. 1986).
[155] *In re J.M.*, No. 12-11-00319-CV, 2013 Tex. App. LEXIS 12816, at *5, 2013 WL 5657422, at *2 (Tex. App.—Tyler Oct. 16, 2013, pet. denied) (mem. op.); Tex. R. App. P. 44.1(a)(1).
[156] *In re A.C.*, 394 S.W.3d 633, 645 (Tex. App.—Houston [14th Dist.] 2012, no pet.).
[157] *In re A.J.E.M.-B.*, 2014 Tex. App. LEXIS 12129, at * 18.
[158] *In re A.H.J.*, No. 05-15-00501-CV, 2015 WL 5866256, at *5 (Tex. App.—Dallas Oct. 8, 2015, pet. denied) (mem. op.).

b. Preserving claim evidence was erroneously excluded

In order to preserve a claim that the trial court erred in excluding evidence, the substance of the evidence must be made known.[159] The primary purpose of this is to enable an appellate court to determine whether the exclusion was erroneous and harmful.[160] To preserve an objection to the exclusion of evidence, the complaining party must present the excluded evidence to the trial court by offer of proof or bill of exception.[161]

i. Offer of Proof

Where the court sustains an objection or grants a motion to exclude evidence, the offering party, as soon as practicable but before the court's charge is read to the jury, must be allowed to make, in the absence of the jury, its offer of proof.[162]

The offer of proof may be made by counsel, who should reasonably and specifically summarize the evidence offered and state its relevance unless already apparent.[163] Formal proof is not mandated—only a short, factual recitation of what the evidence would have shown is sufficient—but must be specific enough to allow the reviewing court to determine its admissibility.[164] Upon request, the trial court must direct that an offer of proof be made in a question-and-answer form.[165] However, it is not reversible error to deny this request if the

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[159] Tex. R. Evid. 103(a)(2).
[160] *Ludlow v. Berry*, 959 S.W.2d 265, Tex. App.—Houston [14th Dist.] 1997, no writ).
[161] *Fitzgerald v. Water Rock Outdoors, LLC*, 536 S.W.3d 112, 121 (Tex. App.—Amarillo 2017, pet. denied).
[162] Tex. R. Evid. 103(c)
[163] *PNS Stores, Inc. v. Munguia*, 484 S.W.3d 503 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
[164] *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied.).
[165] Tex. R. Evid. 103(c).

appellant was allowed to make an offer of proof through the attorney or the appellant was not denied the opportunity for a bill of exception.[166]

In *E.J.*, the trial court imposed time limits on the parties.[167] Once Mother reached her limit, she failed to request additional time to cross-examine witnesses and put on her case, maintaining an objection to any time limit whatsoever.[168] Mother also failed to make an offer of proof.[169] On appeal Mother asserted that the trial court abused its discretion by disallowing her offers of proof.[170] The court of appeals held that even if that were true, she failed to preserve this error because she failed to make a formal bill of exception.[171]

ii. Bill of Exception

To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.[172] A bill of exception, as a method of error preservation, is primarily used when the appellant complains on appeal about the trial court's erroneous exclusion of evidence, evidence that, because it was not admitted, would not otherwise be part of the appellate record.[173] It can also be used for appellate review of misconduct of the trial judge,[174] the bailiff,[175] or the jury.[176]

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[166] *Chance v. Chance*, 911 S.W.2d 40, 51 (Tex. App.—Beaumont 1995, writ denied*); E.J. v. Tex. Dep't of Family & Protective Servs.*, No. 03-18-00473-CV, 2018 Tex. App. LEXIS 10458, at *15-*16 (Tex. App.—Austin Dec. 18, 2018, pet. denied) (mem. op.).
[167] *E.J. v. Tex. Dep't of Family & Protective Servs.*, No. 03-18-00473-CV, 2018 WL 6627720, at *4 (Tex. App.—Austin Dec. 18, 2018, pet. denied) (mem. op.).
[168] *Id*., 2018 WL 6627720, at *5.
[169] *Id*., 2018 WL 6627720, at *6.
[170] *Id.*
[171] *Id*.
[172] Tex. R. App. P. 33.2.
[173] *Sturdivant v. State*, 445 S.W.3d 435, 440 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).
[174] *Layne Glass Co. v. Parker*, 340 S.W.2d 363 (Tex. Civ. App.—Fort Worth 1960, no writ).
[175] *Hayes v. Home Indemn. Co.*, 354 S.W.2d 600 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.).
[176] *Green v. Rudsenske*, 320 S.W.2d 228 (Tex. Civ. App.—San Antonio, 1959, no writ).

A bill of exception does not require a particular form of words, but the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint.[177]

The process for creating a bill of exception begins with the complaining party first presenting it to the trial court.[178] If the parties agree on the contents of the bill of exception, the judge must sign it and file it with the court clerk.[179] If the parties don't agree, then at a duly noticed hearing the judge may:

> (A) sign the bill of exception and file it with the trial court clerk if the judge finds that it is correct;
>
> (B) suggest to the complaining party those corrections to the bill that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or
>
> (C) if the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign, and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.[180]

If the complaining party is dissatisfied with the bill of exception filed by the judge under (2)(C), *supra*, the party may file with the trial court clerk the bill that was rejected by the judge.[181] That party must also file the affidavits of at least three people who observed the matter to which the bill of exception is addressed.[182] The affidavits must attest to the correctness of the bill as presented by the party.[183] The matters contained in that bill of

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[177] Tex. R. App. P. 33.2(a).
[178] Tex. R. App. P. 33.2(c)(1).
[179] Tex. R. App. P. 33.2(c)(2).
[180] Tex. R. App. P. 33.2(c)(2).
[181] Tex. R. App. P. 33.2(c)(3).
[182] Tex. R. App. P. 33.2(c)(3).
[183] Tex. R. App. P. 33.2(c)(3).

exception may be controverted and maintained by additional affidavits filed by any party within ten days after the filing of that bill.[184] The truth of the bill of exception will be determined by the appellate court.[185] A formal bill of exception not approved by the trial court or opposing counsel, and is not a bystanders bill, is inadequate to preserve a complaint on appeal.[186]

If a formal bill of exception conflicts with the reporter's record, the bill controls.[187]

The deadline to file a formal bill of exception is no later than thirty days after the filing of the party's notice of appeal.[188]

VIII. Information that Might be Treated as Evidence on Appeal

Often, when conducting a sufficiency-of-the-evidence evaluation, appellate courts consider only the evidence introduced at trial.[189] Testimony from a prior hearing can be used at trial only if the testimony is admitted into evidence.[190] An appellate court cannot consider documents presented on appeal that were not produced in the trial court and formally included in the appellate record.[191]

Judicial notice can be an exception. "A trial court may take judicial notice of its own records in matters that are generally known, easily proven, and not reasonably disputed."[192] It

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[184] Tex. R. App. P. 33.2(c)(3).
[185] Tex. R. App. P. 33.2(c)(3).
[186] *Cont'l Coffee Prods. Co. v. Cazarez*, 903 S.W.2d 70, 80 (Tex. App.–Houston [14th Dist.] 1995), *aff'd in part and rev'd in part on other grounds*, 937 S.W.2d 444 (Tex.1996).
[187] Tex. R. App. P. 33.2(d).
[188] Tex. R. App. P. 33.2(e)(1).
[189] *See In re J.T.K.,* No. 12-13-00339-CV, 2014 WL 1093086, at *8 n. 5 (Tex. App.—Tyler Mar. 19, 2014, no pet.) (refusing to consider evidence offered at pre-trial hearing in determining whether evidence was sufficient to support trial court's finding in a termination-of-parental-rights case)
[190] *In re M.C.G.*, 329 S.W.3d 674, 675 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (citing *In re C.L.*, 304 S.W.3d 512, 514-16 (Tex. App.—Waco 2009, no pet.)).
[191] *In re L.S.*, No. 09-17-00065-CV, 2017 WL 3081120, at *4 at n.3 (Tex. App.—Beaumont July 20, 2017, no pet.) (mem. op.).
[192] *In re J.E.H.*, 384 S.W.3d 864, 870 (Tex. App.—San Antonio 2012, no pet.).

may take judicial notice of the record without any request being made and without any announcement that it has done so.[193] For the purposes of establishing a court order requiring the service plan under the (O) ground, it is presumed that the trial court took judicial notice of its file.[194] A trial court could properly take judicial notice that it signed an order adopting the family service plan and what the plan listed as the necessary requirements the parent was required to complete before the child would be returned.[195]

When necessary, the appellate court can also take judicial notice of its files.[196]

Technically, a "court may not take judicial notice of the *truth* of allegations in its records."[197] However, a trial court "is presumed to 'judicially know[] what has previously taken place in the case' tried before it, and the parties 'are not required to prove facts that a trial court judicially knows.'"[198]

As referenced *supra*, the Texas Supreme Court has used the allegations of a removal affidavit to support the finding of removal for abuse and neglect under the (O) termination ground.[199] Based on the appellate court's recounting of the facts, it does not appear as though the removal affidavit was formally admitted into evidence.[200] The Amarillo Court of Appeals was not impressed:

> We recognize the Supreme Court in *In re E.C.R.*, 402 S.W.3d at 240-41, referenced allegations of physical abuse recited in the affidavit in support of a

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[193] *In re A.W.B.*, No. 14-11-00926-CV, 2012 WL 1048640, at *3 (Tex. App.—Houston [14th Dist.] Mar. 27, 2012, no pet.) (mem. op.)
[194] *In re K.F.*, 402 S.W.3d 497, 504 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).
[195] I*n re J.E.H.*, 384 S.W.3d 864, 870 (Tex. App.—San Antonio 2012, no pet.).
[196] *P.R.M. v. Tex. Dep't of Family and Protective Servs.*, No. 03-16-00065-CV, 2016 Tex. App. LEXIS 9468, at *6, 2016 WL 4506301, at *3 (Tex. App.—Austin Aug. 26, 2016, no pet.) (mem. op.).
[197] *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 508 (Tex. App.—Austin 1994, no writ) (emphasis in original).
[198] *In re J.J.C.*, 302 S.W.3d 436, 446 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (*quoting Vahlsing, Inc. v. Mo. Pac. R.R. Co.*, 563 S.W.2d 669, 674 (Tex. Civ. App.—Corpus Christi 1978, no writ)).
[199] *In re E.C.R.*, 402 S.W.3d 239, 248 (Tex. 2013).
[200] *In re E.C.R.*, 309 S.W.3d 22 (Tex. App.—Houston [1st Dist.] 2023), overruled.

> petition seeking conservatorship of the child and termination of parental rights. This Court is not inclined to disregard the Texas Rules of Evidence in termination cases which are strictly scrutinized and require a heightened standard of review.[201]

In one case, the Eastland Court of Appeals considered a report in the file in which the CASA volunteer expressed concerns that the child had been physically and sexually abused while in her parents' care.[202] The Austin Court of Appeals rejected an attempt by the Department to use reports, service plans, affidavits, and other documents filed during the pendency of the case to support the trial court's refusal to appoint the Mother a managing conservator of the child.[203] However, in another case, Austin was quite comfortable utilizing filed documents that were not admitted at trial in a parental termination case.[204]

This is a very murky area of law. Outside of a trial court taking judicial notice of its file, as discussed *supra*, there are no clear answers when it comes to how an appellate court will react to all portions of the clerk's record that were not formally introduced at trial. A prudential approach would be to presume that the appellate court will not consider documentation that supports one's position and to presume the opposite when the documentation undermines it.

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[201] *In re B.P.*, No. 07-14-00037-CV, 2014 Tex. App. LEXIS 8127, at *18 n.8, 2014 WL 3732898, at *6 n.8 (Tex. App.—Amarillo Jul. 25, 2014) (mem. op.).
[202] *In re A.N.R.*, No. 11-14-00192-CV, 2015 Tex. App. LEXIS 339, 2015 WL 252280, at *2 (Tex. App.—Eastland Jan. 15, 2015, no pet.) (mem. op.).
[203] *D.M. v. Tex. Dep't of Family & Protective Servs.*, No. 03-19-00918-CV, 2020 Tex. App. LEXIS 4289, at *7, 2020 WL 3053679, at*3 (Tex. App.—Austin Jun. 9, 2020, no pet.) (mem. op.).
[204] *C.C.F. v. Tex. Dep't of Family & Protective Servs.*, No. 03-20-00152-CV, 2020 Tex. App. LEXIS 6637, 2020 WL 4929782 (Tex. App.—Austin Aug. 19, 2020, pet. denied) (mem. op) (referencing affidavit filed with petition at 2020 Tex. App. LEXIS 6637, at *1, and six Department reports at 2020 Tex. App. LEXIS 6637, at *3, *4, *5, and *6).