



# Trial Brief

April 10, 2012

Re: Hearsay of Children to Counselors & Psychologists

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In a child custody case, a child's counselor or psychologist will usually be allowed to repeat what the child has told the counselor.

## Rules Bent in Child Custody Cases

The court's duty to protect the children's interests should not be limited by technical rules. *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967).

## Some Statements Are Not Hearsay

Statements made by children to a counselor or psychologist may be repeated in court if they are offered for some reason other than proving the truth of the matter asserted. Such statements are not hearsay under Texas Rule of Evidence (TRE) 801(d). For example, a six year old child tells the counselor, "when I am 12 I get to decide who I live with." If the counselor is asked to repeat that statement in court, it is not hearsay because the statement is not being offered to prove what the child gets to do when she is 12. Rather, the child's statement is offered to show that someone has been telling the child what happens when she turns 12.

## An Expert May Be Allowed to Disclose Hearsay That Opinions Are Based On

TRE 705(a) states, "The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data." The trial court has discretion whether to allow an expert to relate hearsay that forms the basis for the expert's opinion. As one court of appeals said:

*Appellants are correct that some of Dr. Leonard's testimony concerning the review of the ten-slide group by persons in his lab was based on hearsay. "The testimony of an expert may be admissible while at the same time the facts or data underlying that testimony may be inadmissible.... [T]he use of the permissive word 'may' [in TRE 705] does not indicate an absolute right of the expert to disclose all of the facts and underlying data under all circumstances." While such supporting evidence is not automatically admissible because it is supporting data to an expert's opinion, neither is it automatically excludable simply because it is hearsay. The decision whether to admit or exclude evidence is one within the trial court's sound discretion.*

*Kramer v. Lewisville Memorial Hosp.*, 831 S.W.2d 46, 49 (Tex. App.—Fort Worth 1992), *aff'd* 858 S.W.2d 397 (Tex. 1993)(citations omitted)(emphasis added).

### **Hearsay Exception: Then Existing State of Mind**

TRE 803(3) provides an exception to the hearsay rule commonly encountered with therapists: “A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain or bodily health) but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant’s will.”

### **Hearsay Exception: Statement Made for Purposes of “Medical Diagnosis” (Applies to Therapists)**

TRE 803(4) excludes from the hearsay rule, “Statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Counselors and therapists have been included in those providing “medical diagnosis or treatment.” *Munoz v. State*, 288 S.W.3d 55, 58-60 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2009, no pet.)(child’s statements about sexual abuse to a therapist); *Taylor v. State*, 268 S.W.3d 571, 590 (Tex. Crim. App. 2008)(child’s statements about sexual abuse to a licensed professional counselor); *Gohring v. State*, 967 S.W.2d 459, 461 (Tex. App.—Beaumont 1998, no pet.)(child’s statements to a drama therapist working under the supervision of a licensed psychologist); *Puderbaugh v. State*, 31 S.W.3d 683, 685 (Tex. App.—Beaumont 2000, pet. ref’d)( child’s statements to a social worker seen for therapy); *Syndex Corp. v. Dean*, 820 S.W.2d 869, 973-4 (Tex. App.—Austin 1991, writ denied)(social worker/psychotherapist was allowed to repeat statements made by an adult victim of sexual harassment made during therapy); *Horner v. State*, 129 S.W.3d 210, 219 (Tex App.—Corpus Christi 2004, pet. ref’d)(child’s statement to medical social worker); *Burns v. State*, 122 S.W.3d 434, 438-9 (Tex. App.—Houston [1<sup>st</sup> Dist] 2003, pet. ref’d)(child’s statement to psychologist). *“We reject the notion ... that before a witness can relate the out-of-court statement made for purposes of medical diagnosis or treatment under Rule 803(4), the witness must be shown to have medical " qualifications" that " conform to the rule." It is clear that the drafters of the [identical] federal rule did not think so, for they expressly designated that in order for the exception to apply " the statement need not have been made to a physician." Taylor v. State*, 268 S.W.3d 571, 587 (Tex. Crim. App. 2008).

### **Hearsay Statement of Child Abuse Victim**

Texas Family Code Sec. 104.006. HEARSAY STATEMENT OF CHILD ABUSE VICTIM. In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible as evidence if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and:

- (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.