CHAPTER 17

EVIDENCE

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17.1. INTRODUCTION

This chapter is a brief synopsis of the rules of evidence most relevant to the child welfare context. This chapter is not intended to address evidence and procedure in criminal law cases. This brief primer is meant to assist in initial civil Child Protection case assessment and preparation but is not an exhaustive treatment of evidence rules. The rules are set forth in a way intended to be useful to both caseworkers from the Michigan Department of Human Services and to attorneys and judges handling child welfare cases. Hopefully the presentation is neither too technical for the former nor too summary for the latter.

The quality of evidence required in child protection and termination of parental rights proceedings is not always as rigorous as required by the Michigan Rules of Evidence (MRE). Only at a formal trial for neglect under MCL 712A.2(b) do the formal rules of evidence fully apply. Nonetheless, the credibility of presentation in court is generally enhanced by complying with the formal rules to the greatest extent possible at all stages.

The most important evidentiary rules in child protection are presented here.

17.2. RELEVANCY AND PERSONAL KNOWLEDGE

> "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.[1]

The rule is broad and encourages the admission of as much useful information as possible in making judicial determinations. The rule is based on two concepts: to be admissible evidence must be material and relevant. Material means that the offered evidence addresses a fact that is truly at issue, i.e. a "fact that is of consequence to the determination". Relevant means that the offered evidence has a logical relationship between the evidence offered and the facts to be proven.

Relevance is not the same as sufficiency.

> The fact that an item of evidence is not sufficient, or in other words does not necessarily prove what one is trying to prove, does not mean that the evidence is irrelevant. Often items of evidence are closely intertwined;

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1. MRE 401

> each item alone may be relevant, but only when all of the items are considered together are they sufficient.[2]

The Michigan Supreme Court has specifically distinguished relevance from sufficiency.

> In quantitative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt.[3]

With an exception for expert witnesses, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.[4] Generally, upon calling a witness, the party establishes that the witness has personal knowledge of the matter to be testified to by establishing a foundation that the witness had opportunity to personally perceive relevant facts. Experts may testify to their opinion without personal knowledge.[5]

17.3. HEARSAY RULE

> "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.[6]

For example, "The neighbor told me that the children had been left alone for six hours" is hearsay. Evidence that the children had been left alone for six hours should be provided by the neighbor's direct testimony, assuming that he or she has firsthand direct knowledge of the incident.

The rationale behind the hearsay rule is to assure the reliability of the evidence presented in court and to preserve fairness of the proceedings. The direct testimony of a witness can be subjected to cross-examination so that the judge or jury can evaluate the reliability of the witness, especially as to accuracy of perception, memory and communication, sincerity, and credibility. Hearsay statements cannot be subjected to cross-examination and therefore, where the strict rules of evidence are applied, will be excluded by the court unless they fall within one of the accepted exceptions to the hearsay rule.

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2. Wade and Strom, *Michigan Courtroom Evidence*, ICLE 1989, p. 71
3. *People v. Hampton,* 407 Mich. 354, 368 (1979)
4. MRE 602
5. MRE 703 (Note that Rule 703 has been amended with an effective date of 9/1/03. The amendment states that the expert's opinion or inference must be based on information in evidence. The court has discretion to receive expert testimony subject to the condition that the factual basis of the opinion be admitted in evidence thereafter.)
6. MRE 801(c)

Certain *acts* intended primarily as communication, i.e. "assertive conduct" may be hearsay.

> A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.[7]

For example, a neighbor reporting an interaction with a possibly abused child says, "When I asked her who burned her, she pointed to Ms. Jones." The nonverbal conduct of the child, intended as an assertion, is hearsay and may not be admitted unless one of the exceptions to the hearsay rule applies.

A statement is not hearsay, however, when not intended to show the truth of the matter asserted but only to show that the statement was made. The most common of these exclusions from the hearsay rule are statements showing (1) a relevant state of mind ("I don't care what happens to those children."); (2) prior inconsistent statements used to impeach credibility used consistent with MRE 613 ("Ms Smith testified that the Jones children were always well-supervised and never left alone, but when I first visited the neighborhood about April 10, she told me that the Jones children were often left alone, begged food from neighbors, and ran wild in the neighborhood."); and (3) commands or questions ("I heard Ms. Jones say to sixteen-year old Sally Smith, "You look after the children while I am gone. Call me at my mother's if you need to.")

There are 24 exceptions to the hearsay rule listed in the Michigan Rules of Evidence even where the declarant (the person who made the statement) is available. Hearsay exceptions are based on the notion that certain statements are inherently trustworthy so that the ability of an opponent to cross-examine the person making the statement is not essential to ensure either reliability or fairness. These well-established hearsay exceptions must be distinguished from the rules of evidence unique to child protection proceedings. During several stages of the Juvenile Court process, the rules of evidence are relaxed to allow the court to receive evidence that does not meet the civil standards for admission so long as the court finds the evidence is reliable and trustworthy. Unlike the rules unique to Child Protection court action, however, the hearsay exceptions discussed below are set forth in the Michigan Rules of Evidence (MRE) and can be relied upon at trial or at any legal proceeding.

Several hearsay exceptions are particularly relevant to child protection cases and are discussed immediately below.

17.4. EXCLUSIONS FROM THE HEARSAY RULE/IMPORTANT DISTINCTION

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7. MRE 801(a)

17.4.1. *Admission by a Party Opponent - Not Hearsay*

Before discussing the hearsay exceptions, one important distinction needs to be clear. Admissions by a party are not considered hearsay.[8] Statements by parents or custodians are among the most common pieces of evidence in Child Protection cases. Words or acts of a party may be offered against that party. For example, the statement, "Mrs. Jones, the mother and respondent, told me that she struck her children with a large wooden spoon and did it often" is not hearsay and is proper testimony.

17.5. EXCEPTIONS TO THE HEARSAY RULE (Most Relevant to Civil Child Protection Proceedings.)

17.5.1. *Present Sense Impression*

> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.[9]

Underlying Rule 803(1) is the assumption that statements of perception *substantially contemporaneous* with an event are highly trustworthy because: (1) the statement being simultaneous with the event there is no memory problem; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who had equal opportunity to observe and check misstatements.[10] Statements of a caller to child protective services reporting an incident as it is happening may qualify as present sense impression. "I am calling from the upstairs telephone. My dad is downstairs right now and is hitting my brother really hard. I can hear my brother crying out."

There is a considerable overlap between present sense impression [MRE 803(1)] and excited utterance [MRE 803(2)]. More time may overlap between the perception and the statement under 803(2) and there is no requirement that the declarant be under stress or excitement under 803(1).

8. MRE 801(d). MCR 3.903(A)(18)(b)
9. MRE 803(1)
10. *Hewitt v. Grand Trunk Western Railroad Co*, 123 Mich.App. 309, 317 (1983)

17.5.2. *Excited Utterance*

> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.[11]

MRE 803(2) assumes that excited utterances are reliable because they are spontaneous, there is little time to fabricate, and there is no memory problem. The time lapse between the event and the statement may be longer than for present sense impression but the time of the statement bears on whether the declarant was still under the stress of excitement and whether he or she had an opportunity to fabricate. Hearsay statements of a seven-year-old sexual abuse victim made the next day were admissible as an excited utterance where there was a plausible explanation for the delay. The child had limited mental ability and she had been threatened not to tell anyone about the assault.[12] In a rape-murder prosecution, the court allowed the mother and babysitter to testify as to statements made by a three-year old witness to the murder which were made one week after the event. The delay could be explained because the child had stayed with her grandparents that week. The rape and murder were startling events and the child's statements were spontaneous.[13] Where statements regarding sexual abuse were made by a child one month after the event and after a doctor's examination and repeated questioning, the Michigan Supreme Court found a lack of spontaneity and that the statement could have been triggered by the stress of the medical exam and not the event.[14] There must be independent evidence, either direct or circumstantial, of the underlying startling event to which the statements relate.[15]

17.5.3. *Then Existing Mental Emotional or Physical Condition*

> (3) Then existing mental, emotional, or physical condition. 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, and bodily health), but not including a statement of memory or belief to prove the fact remembered or

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11. MRE 803(2)
12. *People v. Garland,* 152 Mich.App. 301 (1986)
13. *People v. Lovett,* 85 Mich.App. 534 (1978); Note that this case was vacated in 412 Mich. 904, and then reaffirmed on remand in *Lovett v. Foltz,* 884 F.2d 579 (1989). On remand the excited utterance admission was not addressed. A more recent case which deals with a child witness' excited utterance is *People v. Cobb*, 108 Mich. App. 573 (1981)
14. *People v. Straight,* 430 Mich. 418 (1988); *See also People v. Lee,* 177 Mich.App. 382 (1989) where a 17 day lapse was too long a delay to qualify as an excited utterance where the victim had time to fabricate and other opportunities to report to her mother
15. *People v. Burton,* 433 Mich. 268 (1989)

> believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.[16]

Statements such as "I am angry" or "I have a headache" or "I am depressed" are admissible for the truth of the statements as are statements of plan or intent such as, "I plan to go right home" or "I am going to leave the children with Fred for the week-end."

17.5.4. *Statements for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment*

> (4) Statements for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with 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 necessary to such diagnosis and treatment.[17]

This is perhaps the most commonly used exception to the hearsay rule in child abuse cases. The paradigm case is of the young child suspected of being abused and neglected who is examined by a physician. Any statements the child makes to the physician regarding injuries or their cause may be testified to by the doctor as a hearsay exception. For example, the physician asks, "What happened here?" and the youngster replies, "Mom hit me with belt."

Two cases from the United States Court of Appeals for the Eighth Circuit are credited with broadening this hearsay exception. In *United States v. Iron Shell,* the court held that the testimony of a physician who examined a nine-year old victim of sexual assault could be admitted even though it contained a repetition of the child's description of the "general cause of her injury" i.e. a sexual assault.[18] In admitting this testimony, the *Iron Shell* panel defined a two-pronged test for admission of hearsay evidence pursuant to the Federal Rules of Evidence 803(4). First, the declarant's motives in making the statement must be consistent with the purposes of the rule, i.e. the promotion of treatment. Second, the content of the statement must have been of the type reasonably relied upon by a physician in diagnosis or treatment.[19] In *Iron Shell t*he admitted hearsay involved only the occurrence and nature of the attack without identifying

16. MRE 803(3)

17. MRE 803(4)

18. *United States v. Iron Shell*, 633 F.2d 77 (CA 8, 1980) (adopted by 6th Circuit in *Dever v. Mack*, 40 Fed. Appx. 980, 986 (2002) and *Haggins v. Warden Ft. Pillow*, 715 F.2d 1050 (1983)

19. *Id.* at 84

the assailant. In *United States v. Renville*, however, an eleven-year-old complainant was examined by a physician who later testified that she had told him that she had been subjected to repeated acts of sexual abuse by the defendant.[20] The court affirmed the admission of the doctor's testimony holding that cases of child sexual abuse fell outside the rule that the identity of the individual allegedly responsible for a declarant's injuries may not be revealed pursuant to FRE 803(4) since the knowledge that the assailant is a member of the same household is pertinent to the treatment required. The court noted that child abuse involves more than physical injury and that proper psychological treatment requires knowledge of which member of the household was the abuser. The physician must take protective actions such as removing the child from the home upon learning that intrafamily child sexual abuse is occurring and that therefore the identity of the perpetrator is a fact relied on by the doctor.

Declarant's statements need not be made to a physician to invoke this exception. It is applicable even where the statements are made to a hospital attendant, ambulance driver, or member of the family.[21] Statements made by a three-year-old girl to a child sexual abuse expert were admissible because the statements were made by the child to the expert as part of her diagnosis and treatment.[22]

Hearsay statements identifying the perpetrator are not admissible unless the statements are shown to be necessary to the care and treatment of the declarant. The Michigan Court of Appeals has allowed statements identifying the perpetrator under MRE 803(4) where statements where made to a physician, a nurse or a psychiatric social worker.[23] The Michigan Supreme Court, however, in *People v. LaLone*, applying the *Iron Shell* and *Renville* analysis, refused to extend the 803(4) exception to a psychologist where the perpetrator of sexual abuse was identified by the child's statements.[24] In *LaLone* the complainant had already made accusations against the defendant, was aware that a case against defendant was being prepared and was seen by the psychologist following the accusation --perhaps because of a probate court order and perhaps not for treatment. The court found that even though the precise nature of the meeting between the complainant and the psychologist could not be determined, "it did not have the same measure of reliability as would even

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20. *United States v. Renville*, 779 F.2d 430 (CA 8, 1985) (Note that the Renville analysis has not been explicitly adopted by the 6th Circuit. No Court of Appeals opinion cites this case and it has received negative treatment in various circuits.)
21. McCormick, Evidence, (3rd Ed), s293, p 840
22. *People v. James* 182 Mich.App. 295 (1990)
23. *People v. Wilkins*, 134 Mich.App. 39 (1984); *In re Rinesmith*, 144 Mich.App. 475 (1985); *People v. Zysk*, 149 Mich.App. 452 (1986); *In re Freiburger*, 153 Mich.App. 251 (1986)
24. *People v. LaLone*, 432 Mich. 103 (1989)

a normal psychological therapy session ... .” Further, the identification of the assailant was not reasonably necessary to the treatment of the declarant.[25] In *People v. Storms*, relying on *LaLone*, the Court of Appeals held that testimony of a treating physician that the child identified her father as sexually abusing her was inadmissible as not reasonably necessary to her treatment.[26] In *Meeboer*, however, the Court of Appeals distinguished *LaLone* in that the statements were made to a physician and not to a psychologist, by holding that the identity of the perpetrator was essential to medical treatment for possible contraction of sexually transmitted diseases, because statements to physicians are inherently reliable and because the statements were corroborated by the declarant's testimony at trial.[27]

In summary, within the limits of reliability set by *LaLone*, statements made to one providing diagnosis or treatment, when those statements are reasonably necessary to medical diagnosis and treatment are admissible under 803(4). The exception is not limited to statements made to medical doctors; psychiatric counseling is "medical treatment" within the meaning of the rule and statements reasonably necessary for treatment and diagnosis of emotional and behavioral problems resulting from child abuse may be included.[28]

17.5.5. *Business records*

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, or events, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in the paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.[29]

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25. *Id.* at 115
26. *Storms v. Storms*, 183 Mich.App. 132 (1990)
27. *People v. Meeboer* (On Remand), 181 Mich.App. 365 (1989)
28. *See Freiburger*, and *Zysk op cit*, and *People v. Skinner*, 153 Mich.App. 815 (1986) (statements made to a child psychologist); and *Galli v. Reutter*, 148 Mich.App. 313 (1985) (statements made to a physical therapist)
29. MRE 803(6)

Statutory rules of evidence, not in conflict with the Michigan Rules of Evidence, remain effective.[30] A Michigan statute also provides for admission of business records and adds, "The lack of an entry regarding any act, transaction, occurrence or event in any writing or record so proved may be received as evidence that no such act, transaction, occurrence or event did, in fact, take place."[31]

Photocopies of Department of Human Services (DHS) case records or relevant excerpts of those case records are commonly used in child protection legal proceedings. The DHS records, if kept consistent with department policy, qualify as a business record in that the record is made at or near the time of each event, by a person with knowledge, and the record is kept in the ordinary course of the department's business. The circumstances of the keeping of the records must be presented by testimony of a custodian of the records, usually the assigned caseworker. When the source, method or circumstances of the making of the record indicate a lack of trustworthiness, the record will not be received into evidence.

Medical records are also commonly admitted in child protection cases under this rule. The Michigan rule departs from the federal rule in not permitting medical diagnoses in the exception. A medical record may be admitted to show the observations of hospital staff and physicians, but the actual diagnosis cannot be admitted under this rule. It is often difficult to distinguish medical observations from diagnosis as, for instance, when a physician's report says that the child suffered multiple fractures in various stages of healing.

Police reports also feature in child protection reports and are admissible under this rule and under 803(8) as public records and reports if the observations contained in the police report are those of the reporting officer himself and not hearsay statements of some other witness (unless of course those statements fall within another hearsay exception). In a case for termination of parental rights, admission of police reports, which contained hearsay within hearsay, was error, albeit harmless.[32] MRE 803(8) specifically excludes motor vehicle accident reports and, in criminal cases, police reports. Child protection cases in Juvenile Court, being civil proceedings, may admit police reports under 803(6) as business records and under 803(8) as public records and reports. The Michigan Supreme Court has held, "The police report is a writing. It can

30. MRE 101
31. MCL 600.2146
32. *In re Freiburger*, 153 Mich.App. 251 (1986)

be admitted into evidence as an exhibit if the proponent can show it meets the requirements of the business records exception.[33]

Be aware of a double hearsay problem when using business records. The mere fact that the statement gets into a case record, medical record or police report does not cleanse it of hearsay problems. For instance, can the court admit at trial the following entry written by a caseworker that has since left the agency?

> I entered the home and it was very cold and drafty. A neighbor was there who said that the gas had been turned off for over one week and that she was concerned about the children being in there in January. Mr. Smith, the parent, was also there and said the gas was off but would be turned on at 4:00 PM."

A business record exception allows the direct observations of the caseworker ("it was very cold and drafty") into evidence even though it is hearsay. The statements of the neighbor as recorded by the caseworker are themselves hearsay (double hearsay) and not admissible unless they fall within some other exception to the hearsay rule which they do not. The statements of the father, while also double hearsay, are party statements meeting another exception and therefore admissible.

17.5.6. *Public Records and Reports*

> (8) Public records and reports. Records, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCLA 257.624; MSA 9.2324.[34]

A party may wish to admit the DHS Services Manual as evidence and this hearsay exception provides one means of doing so. Reports of actual or suspected child abuse and neglect, DHS-3200, are required of certain individuals under the Child Protection Law and as long as they contain only first-hand knowledge of the maker of the report, are admissible under this rule. Admission of police reports under this rule is discussed immediately above, under business records.

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33. *Moncrief v. City of Detroit*, 398 Mich. 181 (1976). The court also went on to say that "because of the 'nature' of police business and the circumstances under which such reports are usually made, the possibility of police reports so qualifying is unlikely.

34. MRE 803(8)

17.5.7. *Deposition of an Expert*

> (18) Deposition testimony of an expert. Testimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding if the court finds that the deponent is an expert witness and if the deponent is not a party to the proceeding.[35]

Expert testimony is often relied upon in child protection cases and it is important to facilitate the involvement of qualified experts to the extent possible. Using depositions in lieu of live testimony is one means of obtaining the expert testimony without imposing burdens of travel and waiting time on the witness. Current law also permits the deposition to be taken by videotape should that be desirable.[36]

17.5.8. *Judgment of Previous Conviction*

> (22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgment against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility[37]

Child protection cases arise from the same circumstances as criminal prosecutions. Previous judgements may assist proceedings in the juvenile court. Evidence of previous convictions of crime and sentences is relevant for disposition both for reunification and termination.

17.5.9. *Residual Hearsay Rule*

> (24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by

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35. MRE 803(18)
36. MCR 2.315
37. MRE 803(22)

admission of the statement into evidence. However, a statement may not admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.[38]

This rule, also called the residual hearsay rule, is designed to cover those instances where the hearsay is trustworthy but does not come within the specific exceptions listed in MRE 803(1) through (23). To make use of this exception, the statement must possess circumstantial indices of trustworthiness, which are equivalent to those supporting the specific hearsay exceptions. The statement has to be relevant to the issue before the court. This provision requires the proponent of the statement make a good faith effort to seek better evidence than the proffered hearsay. It should be kept in mind, however, that the court retains the discretion to exclude the statement pursuant to MRE 403 to prevent undue prejudice, confusion of the issues or delays.

17.6. HEARSAY EXCEPTIONS - DECLARANT UNAVAILABLE

17.6.1. *Unavailability as Witness*

Certain statements are admissible as hearsay only if the declarant is unavailable as a witness. MRE 804(a) defines "unavailability" to include situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
(3) has a lack of memory of the subject matter of his statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for

38. MRE 803(24)

> the purpose of preventing the witness from attending or testifying.[39]

Four types of hearsay fall within MRE 804 exceptions: (1) former testimony, (2) statement under belief of impending death, (3) statement against interest, and (4) statement of personal or family history. Any of these may have applicability in a Child Protection Proceeding, but because of their more likely use, only the last two will be discussed further.

17.6.2. *Statement Against Interest*

> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable person in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[40]

This rule applies only to nonparty statements; party admissions are allowed under MRE 801(d)(2). For example, the boyfriend says, "Sure both Becky (the children's mother) and me used the broom on the kids. She hit the girls, I hit the boys." If he is later unavailable as defined above, his hearsay statement may be admitted as evidence against the mother.

17.6.3. *Statement of Personal or Family History*

> (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.[41]

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39. MRE 804(a)

40. MRE 804(3)

41. MRE 804(4)

Family relationships, paternity and other items of family history are often relevant in Child Protection Proceedings. This hearsay exception may provide another way to introduce evidence of family relationship and history. For instance, in a case where the court is searching for a relative placement, the following statement from a family member, now unavailable, may be admissible under this rule. "The Smith and the Jackson families have been good friends over many years, but there is no blood connection, we just lived near one another and were good friends."

Family records and reputation testimony of personal family history are admissible under MRE 803(13) and (19) regardless of the declarant's unavailability.

At the dispositional and review hearings the court may admit evidence that does not conform to the rules of evidence to the extent of its probative value. A court is likely to afford greater probative weight to evidence that conforms to the well-accepted rules of evidence.

17.7. AUTHENTICATION

17.7.1. *Written Documents and Tangible Evidence*

Whenever a written document or other form of tangible evidence such as a belt, sheet, etc. is introduced in court, a witness must ordinarily "sponsor" it by identifying it and showing that the matter in question is what the proponent claims.[42] Certain documents are self-authenticating so that separate evidence of authenticity is not required. MRE 902 lists 10 such self-authenticating documents. Those most relevant to child protection proceedings are (4) certified copies of public records, (5) official publications, (6) newspapers and periodicals, (8) acknowledged documents (i.e. documents certified before a notary public.).[43]

17.7.2. *Photographs*

Photographs may be invaluable evidence in child protection cases. The only foundation required in court is from a person who either took the photo or observed the taking of the photo that the photograph is a fair and accurate representation of the person, place or subject, which it portrays.[44]

17.8. LAY OPINION TESTIMONY

42. MRE 901(a)
43. MRE 902
44. *See*, for instance, *People v. Curry*, 175 Mich.App. 33 (1988)

A lay witness can ordinarily testify only to those facts, which he or she knows from his own direct personal experience. Firsthand knowledge is required and conclusions are not permitted. Lay opinion, the opinion of a non-expert witness, is accepted only if the opinion is rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.[45] For example, with a proper foundation, lay witnesses traditionally have been permitted to express their opinions on matters such as size, weight, speed, temperature, cautious or risky conduct, cause and effect, value, handwriting (where the witness is familiar with an individual's handwriting) bodily appearance or condition, and mental condition or sanity of a familiar person.

17.9. EXPERT WITNESSES

Expert witnesses, on the other hand, may testify to their opinion in their field of expertise. If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if[46]:

(1) the testimony is based on sufficient facts or data,
(2) the testimony is the product of reliable principles and methods, and
(3) the witness has applied the principles and methods reliably to the facts of the case.

The bases of the expert's opinion need not be in evidence unless specifically required by the court.[47]

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

In fact, although not ordinarily good advocacy, the expert need not disclose the facts underlying his or her opinion.[48]

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

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45. MRE 701
46. MRE 702
47. MRE 703
48. MRE 705

17.10. EVIDENCE RULES UNIQUE TO CHILD PROTECTION PROCEEDINGS

17.10.1. *Preliminary Hearing; Hearsay Admissible*

Where custody of the child is not at stake, the quality of evidence relied upon by the court is the same as that required in a preliminary inquiry -- that is "with such information and in such manner as the court deems sufficient."[49] Where custody of the child is sought, however, the court's findings of probable cause may be made on the basis of "hearsay evidence that possesses an adequate indicia of trustworthiness."[50]

17.10.2. *Trial; Hearsay Not Admissible*

a. *Rules of Evidence Apply*

The rules of evidence for civil proceedings apply at the trial stage of a child protection case notwithstanding that the petition may contain a request to terminate parental rights.[51] Furthermore, if circumstances relied upon for termination of parental rights were not established during the original adjudication, evidence relating to new or changed circumstances must be proven by legally admissible evidence.[52]

b. *Treatment of Sibling*

How a parent has treated one child is admissible to show how the parent may treat other children.[53]

c. *Statement of a Child under 10 or Incapacitated Individual Under 18 years of age with a developmental disability*

Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(21) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or, (x), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

(a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence

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49. MCR 3.962
50. MCR 3.965(C)(3)
51. MCR 3.972(C)(1)
52. *In re Gilliam*, 241 Mich.App. 133 (2000)
53. *In re LaFlure*, 48 Mich.App. 377 (1973); *In re Andeson*, 155 Mich.App. 615 (1986); *In re Dittrick*, 80 Mich.App. 219 (1977)

of the act or omission if the court has found, *in a hearing held before trial*, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.[54]

d. *Impartial Questioner*

In Child Protection Proceedings, the court may appoint an impartial questioner to ask questions of a child at a hearing.[55] The Michigan Supreme Court, in *In re Brock*, upheld a process in the trial stage in which a three-year-old child was questioned by a psychologist on videotape, which was later shown to the jury. [56] Based on testimony of a clinical social worker, the court, Judge Michael Anderegg of Marquette County Probate Court, determined that the child would be unable to respond to questions asked by attorneys or the court. The clinical social worker also testified that the child would be unable to testify in the courtroom because of trauma stemming from her lack of understanding of the physical aspects of the courtroom, the various people in the courtroom, the consequences of what she would be saying, and the courtroom vocabulary. The social worker further testified that[57]:

> [I]t would be traumatic for the child to be confronted with the alleged perpetrators, her parents, and that this trauma of a courtroom appearance would impair later treatment. Moreover [she] indicated that she believed that the presence of attorneys during an interview and any cross-examination would also be traumatic and impair further treatment. She opined that questioning by a person skilled in interviewing children would elicit the most complete response.

This procedure was challenged on appeal as a violation of the parents' federal and state due process rights. The parents argued that they were denied their rights to face-to-face confrontation and cross-examination. The Michigan Supreme Court disagreed relying on the purpose of civil Child Protection Proceedings and distinguishing them from criminal proceedings.

> Because the spirit of confrontation and cross-examination could only be achieved by alternative, nontraditional procedures, deviation from traditional practices should be allowed. In this initial phase wherein the court acquires jurisdiction in order to

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54. MCR 3.972(C)(2)(a)

55. MCR 3.923(F) (Former rule 5.923(F) allowed the judge to appoint a psychologist or psychiatrist to question a child witness. MCR 3.923(F) allows anyone to be designated as such questioner.)

56. *In re Brock*, 442 Mich. 101 (1993)

57. *Id* at 106

> attempt to alleviate the problems in the home so that the children and the parents can be reunited, we find no abuse of discretion where the probate judge makes particularized findings of necessity requiring testimony of the child victim outside the presence of her parents and their counsel.[58]

e. *Child Witness Protections*

The court may allow the use of closed-circuit television, speaker telephone or other similar electronic equipment to facilitate hearings or to protect the parties.[59] The court may also allow the use of videotaped statements and depositions, anatomical dolls and support persons.[60] The Juvenile Code now provides for use of anatomically correct dolls, use of support persons, use of videotaped statements of a witness, and shielding a witness from viewing respondent.[61]

17.10.3. *Disposition; Hearsay Admissible*

The evidence standards are regarding admissibility relaxed at the dispositional hearing. The Michigan Rules of Evidence do not apply at the initial dispositional hearing and all relevant and material evidence, including oral and written reports, may be received and may be relied on to the extent of its probative value.[62]

17.10.4. *Review Hearing; Hearsay Admissible*

Dispositional review hearings are to be conducted in accordance with the procedures and rules of evidence applicable to the initial dispositional hearing. The report of the Agency must be accessible to the parties and offered into evidence.[63]

17.10.5. *Continuous Proceeding*

58. *Id* at 115
59. MCR 3.923(E)
60. *Id*.
61. MCL 712A.17b(3)
62. MCR 3.973(E)(1)
63. MCR 3.973(E)(4)

Evidence admitted at one hearing may be considered evidence at all subsequent hearings.[64] A court is required to take judicial notice of its own file.[65]

17.10.6. *Termination of Parental Rights*

The quality of evidence necessary to support the fact-finding step in termination of parental rights varies depending on whether the court has already relied upon the underlying facts to support assumption of temporary jurisdiction. If the termination petition is based on the offense or conditions which caused the court to initially assume jurisdiction, "all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value, even though such evidence may not be admissible at trial."[66]

If, however, the termination is sought on the basis of circumstances new or different from the offense that lead the court to take jurisdiction initially, the new or different circumstances must be established with "legally admissible evidence," meaning evidence which complies with the Michigan Rules of Evidence. Likewise, if termination of parental rights is sought at the initial dispositional hearing, the court, after finding jurisdiction by preponderance of the evidence that the child falls within MCL 712A.2(b), must then make findings based on "clear and convincing legally admissible evidence."[67]

Once the court establishes a factual basis to permanently terminate parental rights, it must determine whether an order of termination is in the best interests of the child. That determination may be based upon all relevant and material evidence as provided in MCR 3.973(E)(2).
Due process, which requires that parental rights not be terminated unless unfitness is proven by clear and convincing evidence, does not prohibit reliance upon hearsay, which meets the tests of fairness, reliability and trustworthiness.[68] Neither the requirements of due process nor of clear and convincing evidence prevent admission of hearsay evidence.[69] The requirements of due process are not coextensive with the traditional exceptions to the rules against admission of hearsay.[70] Due process does

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64. *In re La Flure*, 48 Mich.App. 377 (1970); *In re Slis*,144 Mich.App. 678 (1985); *In re Adrianson*, 105 Mich.App. 300 (1981) – Overruled on other grounds by *In re Gazella*, 264 Mich.App. 668 (2005); *In re Sharpe* 68 Mich.App. 619 (1976)
65. MRE 201
66. MCR 3.973(E)(2)
67. MCR 3.977(E)(3)
68. *Santoskey v. Kramer*, 455 U.S. 745 (1981); *In re LaFlure*, 48 Mich.App. 377 (1970)
69. *In re Hinson*, 135 Mich.App. 472 (1984); *In re Ovalle*, 140 Mich.App. 79 (1985); *In re Kantola*, 139 Mich.App. 23 (1984)
70. *California v. Green*, 399 U.S. 149, 155-57, (1970)

not prevent admission of hearsay evidence meeting tests of fairness, reliability, and trustworthiness.[71]

71. *United States v. Medico*, 557 F.2d 309, 314 (CA 2 1977)