MOCK TRIAL PRESENTATION:
How to Keep from Losing Your Appeal During Your Trial

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ISSUE ONE: JURY SELECTION

The authors would like to thank Judge Les Hatch of the 237th Judicial District Court in Lubbock, who has graciously given us permission to excerpt from his paper, *The Law on Voir Dire*, to be given April 27, 2018 at the TexasBarCLE/TYLA course on "Choosing and Courting a Jury: Stars of the Courtroom" in Houston.
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We know that many jurisdictions conduct few jury trials in Child Protection cases. But since it's becoming more common, and because all Texas litigants have a right to a fair and impartial jury, it's important that child welfare attorneys have the skills to deal with jury selection.

Child protection is also a hot-button issue. In addition to the highly charged emotional atmosphere of these cases of constitutional dimension, jury panels are exposed to media depictions of some of the worst child abuse cases. People can be polarized coming in to the jury selection process and it's the lawyers' job to ferret out those individuals who simply will not be able to set aside their own biases to listen fairly to the evidence and render a verdict.

The definition of bias or prejudice comes from the Texas Supreme Court in *Compton v. Henrie*, 364 S.W.2d 179 (Tex. 1963):

> "Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality.
>
> "Prejudice is more easily defined for it means prejudgment, and consequently embraces bias; the converse is not true."

Tex. Gov't. Code § 62.105. DISQUALIFICATION FOR PARTICULAR JURY. A person is disqualified to serve as a petit juror in a particular case if he:

(1) is a witness in the case;

(2) is interested, directly or indirectly, in the subject matter of the case;

(3) is related by consanguinity or affinity within the third degree, as determined under Chapter 573, to a party in the case;

(4) has a bias or prejudice in favor of or against a party in the case; or

(5) has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact.

Acts 1985, 69th Leg., ch. 480, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 148, Sec. 2.81, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 561, Sec. 23, eff. Aug. 26, 1991; Acts 1995, 74th Leg., ch. 76, Sec. 5.95(28), eff. Sept. 1, 1995.

Challenge for Cause

Attorneys should use their *voir dire* time well by challenging for cause at the end of *voir dire*, for two reasons. First, you are outside the presence of the other jurors. Second, this lets you keep track of how many jurors are being challenged and how many are left.

Be sure to question the potential juror on the record, then repeat the person's statement that leads to the challenge for cause. State that you challenge the juror for cause based on that juror's strongly-held belief, which evidences bias or prejudice, and that the potential juror cannot be rehabilitated.

(a) Denial of a challenge for cause:

To preserve error when a challenge for cause is denied, a party must use a peremptory challenge against the venire member involved, exhaust its remaining challenges, and notify the trial court that a specific objectionable venire member will remain on the jury list. *Cortez v. HCCI-San Antonio, Inc.*,159 S.W.3d 87, 90 (Tex. 2005).

(b) Refusal to deny a challenge for cause:

Judge Hatch advises us as follows:

> "If the court refuses to strike a juror for cause, the challenging party must either (a) advise the court, before exercising any peremptory challenges, that the challenging party will exhaust its peremptory challenges and that after exercising such challenges, specific objectionable jurors will remain on the jury list, *or* (b) must exercise all peremptory challenges and then identify by name the specific jurors on the panel who are objectionable. See *Landers v. State*, 110 S.W.3d 617 (Tex. App.-- Houston [14th Dist.] 2003, pet. ref'd); *Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex.1998); *Goode v. Shoukfeh*, 943 S.W.2d 441, 452 (Tex.1997); *Hallett v. Houston Northwest Medical Center*, 689 S.W.2d 888 (Tex.1985); *Wright v. State*, 28 S.W.3d 526, 534 (Tex.Crim.App.2000), cert. denied, 531 U.S. 1128 (2001); *Gem Homes, Inc. v. Contreras*, 861 S.W.2d 449, 458 (Tex.App.--El Paso 1993, writ denied; *Lopez v. Southern Pacific Transp. Co.*, 847 S.W.2d 330 (Tex.App.--El Paso 1993, no writ).
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> "If the appellant demonstrates he suffered a detriment from the loss of the strike by being forced to accept a juror he would have otherwise struck, reversible error is shown. See *id*; *Ladd v. State*, 3 S.W.3d 547, 558 (Tex. Crim. App.1999), cert. denied, 529 U.S. 1070, 120 S.Ct. 1680 (2000).

> "A party cannot wait until the trial is finished, then seek to reverse an unfavorable verdict by complaining of an error which the trial court could have corrected had it been timely informed of the error. *Hallett*, 689 S.W.2d at 890.
>
> "After the challenge for cause has been made during voir dire, the record must show the party made an objection to the exhaustion of peremptory strikes **before the party gives its peremptory strikes to the clerk** [emphasis added]. *Beavers v. Northrop Worldwide Aircraft Services, Inc.*, 821 S.W.2d 669 (Tex. App.–Amarillo 1991, writ den'd). If the party does not make the objection before it turns in its peremptory strikes, it waives the error. *Operation Rescue v. Planned Parenthood, Inc.*, 937 S.W.2d 60 (Tex. App.–Houston [14th Dist.] 1996), modified on other grounds, 975 S.W.2d 546 (Tex. 1998)."

ISSUE TWO: JUDICIAL NOTICE

Department attorneys (and sometimes attorney ad litems) often ask the Court to "take judicial notice of the court's file." Usually the Department does this to ensure that it has met all prerequisites for achieving its goal of termination. But what does judicial notice really achieve?

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Tex. R. Evid. 201.

A court may take judicial notice of the *existence* of pleadings and other documents that have been filed in the case, and the fact that such documents were filed on a certain date. But that does not include the veracity of statements within those documents. After all, this is litigation. Assertions by one side must be subject to cross-examination by the other. In our dialogue for this CLE, the Department's lawyer argued that the statements set out in the removal affidavit and statements made in the service plan were facts from "sources whose accuracy cannot reasonably be questioned." We did this purposely to illustrate the concept that Department's counsel may attempt to get these contested statements into the record without the parent's attorney having the opportunity to cross-examine those statements.

Parents' attorneys must be hyper-vigilant to the following possible requests for judicial notice by either the Department's counsel or the attorney ad litem, or even intervenors' counsel (and all of these examples have come from actual appellate cases):

a) the court's file;
b) the removal affidavit;
c) the contents of the removal affidavit that substantiate the D and E grounds;
d) the fact that Mother had two other children removed from her care;
e) the service plan [*which* service plan?];
f) Mother's testimony from other hearings in this case;
g) Mother's testimony from other hearings in another case.

If no individual testifies regarding the circumstances surrounding the removal of the children, and the Court has not taken judicial notice of the removal affidavit, it's possible that the court will have no evidence regarding the reason for the Department's involvement. And, lacking evidence of endangerment, several termination grounds fail.

The Third Court of Appeals stated in *B.L.M. v. J.H.M., III*, No. 03-14-00050-CV, 2014 WL 3562559, at *11 (Tex.App.-Austin, July 17, 2014, pet. denied) (mem. op.) that "A court may take judicial notice of the existence of pleadings and other documents that have been filed in a case, but the court cannot take judicial notice of the truth of allegations in those documents unless they have been admitted into evidence. *Guyton v. Monteau*, 332 S.W.3d 687, 693, 692-93 (Tex. App.—Houston [14th Dist.] 2011, no pet.)."

Attaching the affidavit to the Petition does not work, either, because "Pleadings are not evidence. Further, 'instruments attached to pleadings are not evidence unless they are introduced as such.' *Ceramic Tile Int'l, Inc. v. Balusek*, 137 S.W.3d 722, 724 (Tex.App.-San Antonio 2004, no pet.)." *In re E.W.*, 494 S.W.3d 287, 298 (2015) (Tex.App.-Texarkana 2015, no pet.).

Even if the court relied on its own recollections of the initial adversary hearing, judicial notice of that initial hearing is, likewise, inappropriate because such recollection "can reasonably be questioned. The trial judge's own memory of what the witness may have said at the prior proceeding is insufficient to substitute for an accurate and properly authenticated record of that testimony. A fact is not capable of accurate and ready confirmation simply because a trial judge remembers that a witness testified to it in trial." *Davis v. State*, 293 S.W.3d 794, 797 (Tex.App.-Waco 2009, no pet.).

The Third Court of Appeals explained this in *B.L.M., supra*:

> "In order for testimony from a prior hearing or trial to be considered in a subsequent proceeding, the transcript of that testimony must be properly authenticated and entered into evidence." *Id*.; see also *In re M.C.G.*, 329 S.W.3d 674, 675 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (supp. op. on reh'g); *In re C.L.*, 304 S.W.3d 512, 514-16 (Tex. App.—Waco 2009, no pet.). *B.L.M*., supra, at *12.

The *Davis* court went on to explicitly state that "A trial judge may not even judicially notice testimony that was given at a temporary hearing in a family law case at a subsequent hearing in the same cause without admitting the prior testimony into evidence. Further, while a court may judicially notice the existence of an affidavit in its file, it may not take judicial notice of the truth of the factual contents contained therein." *Davis*, *supra* at 797.

Texas Rule of Evidence 201(e) requires the court to notify the parties and give them an opportunity to challenge its decision to take judicial notice of anything. Due process guaranteed by the Texas Constitution Article I, § 19 and the U.S. Const. Amend. 5 & 14 mandates that the parent, whose constitutionally-protected parent-child relationship is in danger of being severed forever, know and understand the evidence brought against her. Since judicial notice is one way to bring in evidence for the trier of fact to consider, the parent has a right to know if the court is actually taking judicial notice of something (and to challenge that notice).

Thus, the trial court must inform a parent when it takes judicial notice of evidence that constitutes an essential element of a cause of action for termination of that parent's relationship with her child.

ISSUE THREE: ADMISSION OF SERVICE PLAN

Texas Family Code §161.001(b)(1)(O) provides that a court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has:

> Failed to comply with the provisions of a court order that specifically establish the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child.

For termination under (O) grounds, therefore, the Department must prove that:

(a) the child was removed for abuse or neglect; *and*
(b) the Department has had temporary managing conservatorship of the child for at least nine months; *and*
(c) the parent has failed to comply with a court order that specifically states how the parent may regain custody of the child.

It's normally not too difficult for the Department to prove the first two elements. It merely needs to introduce the testimony of the investigator or caseworker regarding the reasons for the removal, and the fact of the first court order granting TMC to the Department. As illustrated in our judicial notice section, therefore, the parent's attorney must keep an eye on how the removal facts come into evidence. However the court must also have in evidence a court order that reflects the elements of the service plan – the document that the Department is required to prepare and share with the parent that states the steps necessary to return the child to the child's home. Tex. Fam. Code § 263.102.

The cases on (O) grounds are all over the map. Sometimes the Department introduces the status or permanency orders that had been entered in the case. Sometimes those order contain the elements of the service plan. Sometimes they don't. Sometimes they incorporate the service plan requirements by reference. Sometimes they are incomplete. This is where judicial notice requests come in, and both sides must be aware what has become part of the record.

A hierarchy exists among cases on this issue, and what evidence is sufficient to meet this requirement.

(a) A court order is entered into evidence

(b) No court order is entered at trial, but a service plan is entered

(c) No court order or service plan entered, but the court takes judicial notice on the record

(d) No court order or service plan and no judicial notice

(e) No court order or service plan and no judicial notice, but judicial notice is implied

Where there is no court order that specifically establishes the actions necessary for a parent to obtain the return of the child, the evidence is legally insufficient to support a termination finding under subsection (O). *In re: B.L.R.P.*, 269 S.W.3d 707, 709-11 (Tex. App. – Amarillo 2008, no pet.).

"A termination finding under subsection (O) cannot be upheld where there is no court order that specifically establishes the actions necessary for the parent to obtain return of the child." *In re K.F.*, 402 S.W.3d 497, 504 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

The Court made clear the requirement for a court order in *In re D.W.,* Nos. 01-13-00880-CV; 01-13-00883-CV; 01-13-00884-CV (Tex. App.-Houston [1st Dist.] April 11, 2014, no pet.). Proof of such an order is an essential element of subsection (O) that the State must prove by clear and convincing evidence.

In re Q.W.J., No. 07-10-00075-CV (Tex. App.-Amarillo, Aug. 18, 2011, no pet.) and *In re B.L.R.P.*, 269 S.W.3d 707, 711 (Tex. App.--Amarillo 2008, no pet.) both declined to "elevate the status of a family service plan to that of a court order."

In *In re C.L.*, 304 S.W.3d 512, 514 (Tex. App. – Waco 2009, no pet.), the State failed to offer or enter any order to do services. In *C.L.* "the Department did not ask the trial court to take judicial notice of any prior orders in its file or of any other matters. The court did not announce in open court that it was taking judicial notice, nor did it recite in the termination decree that it had done so. Thus, we hold that the court did not take judicial notice." *Id.* at 516.

There is a split of opinion between the 10th and the 14th Courts of Appeal on the issue of judicial notice of a service plan for (O) grounds.

In *In re K.F.,* 402 S.W.3d 497 (Tex. App.-Houston [14th Dist.] 2013, pet. denied) the Court of Appeals "presumed that the trial court took judicial notice . . . without any request being made and without any announcement that it has done so." *In re D.W.,* Nos. 01-13-00880-CV, 01-13-00883-CV, 01-13-00884-CV (Tex. App.-Houston [1st Dist.] April 11, 2014, no pet.). The *K.F.* Court of Appeals concluded that Tex. R. Evid. 201(e) pertains to adjudicative facts rather than the mere existence of a document in the court's record. It noted that the "trial court here was not required to ascertain adjudicative facts" rather it "merely took judicial notice of the existence of the order." *In re K.F.*, 402 S.W.3d 497 (Tex. App. – Houston [14th Dist.] 2013 pet. denied).

The Court in *In re C.L., supra,* specifically addressed the fundamental fairness issues in judicial notice, and found not only that Tex. R. Evid. 201(e) is applicable to subsection (O) orders, but that due process, and the constitutional dimensions of termination litigation, mandates the parties be advised when the trial court takes judicial notice. It found a United States Supreme Court case applicable:

> "There is nothing in the record to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial.'"
>
> *Garner v. Louisiana*, 368 U.S. at 173, 173 S. Ct. at 256-57 (1961), *supra* at p. 516.

A trial court may take judicial notice of its own records in matters that are generally known, easily proven, and not reasonably disputed. *Trimble v. Texas Dep't. of Protective & Regulatory Servs.*, 981 S.W.2d 211, 215 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *see also* Tex. R.

Evid. 201. "A court may take judicial notice, whether requested or not." Tex. R. Evid. 201(c). But when the court takes judicial notice, it must notify the parties and give them an opportunity to challenge that decision. *See* Tex. R. Evid. 201(e). *In re R.W.*, No. 01-11-00023-CV, (Tex. App.-Houston [1st Dist.], June 16, 2011, no pet.) (mem. op.).

The Department must not take lightly proving the endangerment grounds – one of the elements necessary for termination under (O). In *In re C.B.,* 376 S.W.3d 244 (Tex. App.-Amarillo 2012) (no pet.) the Court reversed termination because "[a]t trial the Department presented its proof relevant to the removal of C.B. largely through the testimony of a conservatorship worker. She was not the investigator who signed the affidavit appended to the Department's petition, but was assigned C.B.'s case during April 2010." *Id.* at 247. The footnote to this section states, "At times, the worker qualified her testimony with phrases such as, "I believe"; "I have not read ; "I wasn't the investigator on it, so I'm not for certain"; and "to my knowledge."" *Id.* at 247 n.7.

The Court concluded that, "[w]hile the affidavit may have been sufficient to support the trial court's order under § 261.201(b)(1) [the adversary hearing], it does not provide sufficient evidence to show by the clear and convincing standard that C.B. was removed from the mother under Chapter 262 for abuse or neglect." *C.B., supra* at 252.

ISSUE FOUR: DRUG TEST RESULTS

The trial court is the gatekeeper when it comes to the admissibility of expert testimony. Drug testing and drug test results – including the collection of the specimen, the chain of evidence and the tests themselves – all rely on expert evidence.

For an expert's opinion to be admissible under Rule 702 of the Texas Rules of Evidence, the expert must be qualified on the specific issue before the court, and the expert's opinion must be relevant and based on a reliable foundation. Texas Rule of Evidence 702; *Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713, 719-20 (Tex. 1998).

The three cases below clearly illustrate what the court should require to admit drug tests results in a suit involving termination of parental rights. However there are a plethora of cases in which, despite the Department failing to lay the foundation illustrated in these cases, the courts of appeals found it to be harmless error. In other words, there were plenty of other reasons to terminate the parents' rights.

A. *In re K.C.P.*, 142 S.W.3d 574 (Tex.App.-Texarkana 2004, no pet.)

In this case, a mother's rights to her children were terminated based on her drug use and repeated abandonment of the children. Mother objected to the termination on several grounds, including that the drug test results were improperly admitted under a business records affidavit.

At trial, the parents' attorneys objected that the business records affidavit did not overcome the need to establish a chain of custody, the hearsay of the testing itself, and "foundation." The appellate court found this rather broad, but held that it nevertheless preserved the issue for appeal.

The court said that, "The critical question is whether the statements (the drug test results) showed sufficient indicia of trustworthiness or reliability to bring them within an exception to the hearsay rule." *K.C.P.* at p. 579.

The court went on:

> "The rights involved in a termination of parental rights case are "more [important] than any property right." *In re J.F.C.,* 96 S.W.3d 256, 273 (Tex.2002). Due process requires that the issue be established by clear and convincing evidence, instead of the normal civil standard. Tex. Fam. Code Ann. § 101.007 (Vernon 2002). When judging the sufficiency of the evidence, courts must apply a more stringent standard than in other civil cases. *In re C.H.,* 89 S.W.3d 17, 25 (Tex.2002). In light of these distinguishing features of termination of parental rights cases to other civil cases, we deem it inappropriate to apply the more relaxed standard in determining the admissibility of these records [emphasis added]." *K.C.P.* at p. 580.

Criminal cases require more, as evidenced by cases such as *Philpot v. State,* 897 S.W.2d 848, 852 (Tex.App.-Dallas 1995, pet. ref'd), and *Strickland v. State,* 784 S.W.2d 549, 553 (Tex.App.-Texarkana 1990, pet. ref'd).

The state presented no evidence regarding:

- the qualifications of the persons who tested the specimens
- the types of tests administered
- the type of equipment used
- whether such tests were standard for the particular substance being evaluated

The court said: "We believe that admitting drug tests in a termination of parental rights case with no information [as to the four issues above] indicates a lack of trustworthiness of the test and admission of such evidence is an abuse of discretion." *K.C.P.* at p. 580.

The court went on to examine whether the improper introduction of the drug test evidence caused harm to the mother and, ultimately, concluded that it did not (given all the other evidence of mother's drug abuse).

B. *In the Interest of S.E.W. and S.A.W., Children*, 168 S.W.3d 875 (Tex.App.-Dallas 2005, no pet.)

In this case, the court found that the Department had failed to present essentially the same evidence as in the *K.C.P.* case, previously, but that the omission did in fact result in harm to the appellant, and it reversed the termination.

The State used a very well qualified drug testing expert to introduce and explain to the jury the entire spectrum of drug testing, although the expert did not conduct the tests himself or know which specific labs performed the tests. The court of appeals found this to be an abuse of discretion.

Texas Rule of Evidence 702 requires, for an expert's opinion to be admissible, that the expert be

- Qualified on the specific issue before the court and
- The expert's opinion must be relevant and
- The expert's opinion must be based on a reliable foundation

The classic cases cited for this are: *Exxon Pipeline Co. v. Zwahr,* 88 S.W.3d 623, 628 (Tex. 2002); *Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713, 719-20 (Tex. 1998); *Merrell Dow Pharms., Inc. v. Havner,* 953 S.W.2d 706, 714 (Tex.1997); *E.I. DuPont de Nemours & Co. v. Robinson,* 923 S.W.2d 549, 556-58 (Tex.1995).

The Department's expert did collect one sample of hair from the mother, sent the sample to a licensed lab in Nevada, and read the report returned from that lab. He did not collect the sample from earlier in the case, but did testify as to the results of that test, too. The reports indicated the methodology used by the lab, but not the specific instrument or machine used. In this case the expert testified that he had no knowledge of:

a) how the actual tests were performed *on these samples*
b) the protocols used for the instruments
c) whether those protocols were followed with these samples
d) whether or not a standard was run before or after the tests on these samples

Mother objected that the expert was not qualified because he had no knowledge of:

a) which machines were used to conduct the tests
b) the methodology used in the drug testing
c) the last time the machine was cleaned
d) whether the protocol for the machine was followed

The court said:

> "The Department did not offer evidence explaining the scientific theory and reliability of the immunoassay and GCMS/ GCMSMS tests for determining whether a person had used cocaine. Nor did the Department request the trial court take judicial notice of the reliability of these scientific tests. *See* Tex. R. Evid. 201; *Hernandez v. State,* 116 S.W.3d 26, 29 (Tex.Crim.App.2003) (concluding that scientific validity and reliability of scientific theory and methodology may be established by judicial notice). Thus, the trial court was not presented with the information necessary for it to perform its gatekeeping function. *See Hernandez,* 116 S.W.3d at 30 (concluding trial court abused its discretion in admitting drug test results of an ADx analyzer "without *any* showing of its scientific reliability or *any* reliance upon other scientific materials or judicial opinions which had found 'an ADx analyzer' a reliable methodology for determining whether a person does or does not have marijuana in his body."). *S.E.W.* at p. 884.

The court was willing to concede that the lab itself was likely very reliable, and that the Department's witness had considerable expertise in collecting samples, sending them to the lab and interpreting results. However it stated that the State's complete failure to apply that expertise to *these particular drug test results* resulted in a record that lacked the necessary predicate for an admissible test. It said that the witness's "expertise in collecting hair samples for testing could not bootstrap the reliability of the actual testing procedures done by the remote laboratory." *S.E.W.* at p. 884.

Ultimately, by allowing in these test results – together with the disputed facts of the case – the trial court's decision was reversed and remanded.

C. *In re S.S.,* No. 12-12-00119-CV, 2012 Tex. Ap. LEXIS 9946 (Tex. App. – Tyler, November 30, 2012, n.pet.h.) (mem. op.)

This case relies upon the reasoning in *In re K.C.P., supra,* with respect to drug test results and expert testimony. At issue in this appeal (interestingly, filed by the mother *and* the children) were three sets of drug tests.

The attorney ad litem, joined by the parents, objected that:

- the Department had failed to designate an expert who could authenticate the drug test results, per Texas Rule of Evidence 702
- the Department intended to introduce drug test results via a business record exception to the hearsay rule
- such affidavits lacked sufficient indicia of trustworthiness or reliability to bring them within an exception to the hearsay rule
- the Department intended to rely upon those business records to obtain termination pursuant to (D) and (E) grounds

The court then allowed the introduction of two business record affidavits regarding the tests.

The Tyler Court of Appeal again acknowledged the different standards between civil and criminal cases, and the higher standard of proof required in a termination case.

It pointed to *Philpot v. State,* 897 S.W.2d 848, 852 (Tex. App.—Dallas 1995, pet. ref'd), which held that drug test results were inadmissible even though the sponsoring witness provided all the predicate testimony for business records. It cited the opinion in *Strickland v. State,* 784 S.W.2d 549, 553 (Tex. App.—Texarkana 1990, pet. ref d) (holding that test results were admissible as business records when witness could testify that tests were standard tests for particular substance, made by person who had personal knowledge of test and test results, and results were recorded in records kept in the usual course of business of laboratory).

The court said, "Absent evidence of the qualifications of the person who tested the specimens, the equipment used, the method of administering the test, and whether the test was a standard one for the particular substance, there is insufficient indicia of trustworthiness or reliability to bring the test results in the instant case within the business records exception to the hearsay rule. *See id.; Philpot,* 897 S.W.2d at 852; *see also* Tex. R. Evid. 803(6). Thus, the trial court abused its discretion in admitting Exhibits 8 and 9." *In re S.S.*, *supra.*

The court went on to conduct an analysis of whether the trial court's error in admitting the evidence "was reasonably calculated to cause, and probably did cause, rendition of an improper judgment" pursuant to Texas Rule of Appellate Procedure 44.1(a)(1). Ultimately, the court of appeal upheld the termination because, it ruled, admission of the first set of drug test results was harmless error and the trial court had grounds under subsection (O) of Tex. Fam. Code § 161.002(1) to terminate the mother (failure to complete a court-ordered service plan).

D. Offer of Proof

"The primary purpose of an offer of proof is to enable an appellate court to determine whether the exclusion of evidence was erroneous and harmful." *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009).

The right to make an offer of proof is absolute, and trial court does not have discretion to deny a request to perfect a bill of exception. *Kipp v. State,* 876 S.W.2d 330, 333 (Tex.Crim.App.1994).

The offer must be made before the charge is read to the jury, *Hernandez v. State* 127 S.W.3d 206, 226 (Tex.App.-Houston [1st Dist.] pet. for discr. rev. ref'd.); and must state the relevance of the evidence being offered. *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009).

In our demonstration, the Department's attorney requested the court's permission to make an offer of proof because the Department felt the Judge's ruling – to exclude the drug test results – was improper. Because the Court of Appeals may only consider the trial court's record on

appeal, the trial attorney should be sure to get that excluded evidence into the reporter's record. Our Department attorney did this through an offer of proof.

The Judge in our demonstration asked whether the offering attorney needs to get a second ruling from the trial court once he completed his offer of proof. The answer is that the party does *not* have to get a second ruling. The Court has already ruled that it should be excluded.

In *Jones v. State* Justice Harvey Brown in his dissenting opinion complained about procedural defects concerning appellant's offer of proof. Specifically, in the dissenting opinion the Justice argued that appellant's offer of proof failed to segregate admissible evidence from inadmissible evidence, and that appellant failed to obtain a ruling on the admissibility of evidence.

Justice Brown cited *Sohail v. State* for the proposition that when a party proffers evidence containing both admissible and inadmissible evidence but does not segregate the evidence to offer only the admissible statements, the trial court may properly exclude all the statements. *See* 264 S.W.3d 251, 261 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). The Court's majority noted that *Sohail* did not involve an offer of proof. Rather, in *Sohail*, the defendant sought to introduce into evidence during his case-in-chief, a letter, an affidavit to dismiss a protective order, and a tape recording of the complainant's conversation with an unidentified individual, all of which included both admissible and inadmissible evidence. *Id.* The defendant did not attempt to redact the inadmissible statements from these exhibits. *Id.* at 260. As a result, this Court held that the trial court properly excluded the exhibits because they contained inadmissible evidence. *Id.* at 261.

In *Jones*, however, involved an offer of proof, which, necessarily, is made after the trial court has already ruled that evidence is inadmissible and has excluded that evidence. *See* TEX. R. EVID. 103(a)(2); *Mays*, 285 S.W.3d at 889 (stating that to preserve error regarding trial court's decision to exclude evidence, complaining party must make offer of proof setting forth substance of proffered evidence). The Court found that the reason appellant made his offer of proof was because the trial court had already excluded all of this evidence. *Jones v. State*, 540 S.W. 3d. 16 (Tex.App.-Houston [1st Dist.], August 1, 2017, no pet.).

Still, it may be a good idea to seek a second ruling to give the Court an opportunity to admit previously excluded evidence. A secondary purpose (of an offer of proof) is to permit the trial judge to reconsider his ruling in light of the actual evidence. *Mays v. State*, 285 S.W.3d 884, 890 (Tex. Crim. App. 2009).

The following link might be of assistance when deciding whether – and how – to make an offer of proof.

http://apps.americanbar.org/litigation/committees/trialpractice/articles/summer2016-0816-a-guide-to-the-offer-of-proof.html