

Evidentiary Opportunities: Applicability of the Hearsay Rules in Child Custody Proceedings

by
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I. Introduction

Virtually all contested custody cases involve hearsay evidence. Indeed, courts must rely on out of court statements to fully examine the best interest of children. Many of the statutory factors courts consider involve testimonial or documentary evidence that is characterized as hearsay.¹ This article focuses on the fundamentals of the hearsay evidence rule for lawyers involved in custody litigation. Trial advocacy, like any other endeavor, benefits from a periodic review of the fundamentals. Many family lawyers have not reviewed the hearsay rules since law school. While lawyers use these rules daily, a refresher from a family law perspective is helpful.

Specifically, this article explores some common evidentiary issues facing family lawyers in contested custody matters. It provides an overview on hearsay evidence and the various exceptions commonly used in this type of litigation. I will start with a discussion of hearsay evidence generally, defining hearsay and then exploring the various characteristics of that evidence. I will continue by examining evidentiary admissions, an exemption from the hearsay rule, contrasting this rule with the exception for prior inconsistent statements. The article then will review several common exceptions relied upon in contested custody hearings. Those exceptions include: Federal Rule of Evidence 803(1) “the present sense impression,” Federal Rule of Evidence Rule 803(2) “the excited utterance exception,” Federal Rule of Evidence 803(3) “then existing mental, emotional, or physical condition,”

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¹ *E.g.*, ILL. COMP. STAT. § 750 5/602 (West 2012).

Federal Rule of Evidence 803(4) “statements for the purposes of medical diagnosis or treatment,” and Federal Rule of Evidence 803(5) “recorded recollection.” I will conclude this article by examining the applicability of the hearsay rule to expert witness testimony and other investigative reports commonly used in contested custody litigation.

II. Hearsay Evidence Generally

The notion of hearsay as a rule of evidence originated in England in the seventeenth century as a practical means to keep unreliable evidence away from juries.² All evidence must be reliable and trustworthy, or it is valueless. An unsworn statement made outside the presence of the court and not subject to cross-examination is considered inherently unreliable and ordinarily inadmissible.³ Thus, the prohibitions on the use of out of court statements evolved as an attempt to secure reliable evidence.

A. Hearsay Defined

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Federal Rule of Evidence (“FRE”) 801 defines hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”⁴

Only “statements” qualify as hearsay. According to FRE 801(a), a statement is “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.” Under the rule, a “statement” is synonymous with an “assertion.” While the rule references the term “assert,” it does not define it. According to McCormick, “the word [assertion] simply means *to say that something is so*, e.g., that an event happened or that a condition existed.”⁵ Questions or imperative statements also qualify as assertions.

² 2 GEORGE E. DIX ET. AL., MCCORMICK ON EVIDENCE § 244 at 123-24 (6th ed. 2006) [hereinafter 2 MCCORMICK ON EVIDENCE].

³ *Id.* § 245, at 123-24.

⁴ FED. R. EVID. 801.

⁵ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 246, at 129.

B. *No Assertion—No Problem*

If an out of court statement is not offered to prove the “truth of the matter asserted,” it is not considered hearsay. For example, if an out of court statement is offered to prove knowledge, notice, or the existence of some relevant fact independent of the assertion, it is not considered hearsay.⁶ Other examples of non-assertive statements include, for example, a statement made in a negotiation leading up to the execution of an agreement. These types of statements are considered acts, albeit it verbal ones, that give rise to the legal determination of the enforceability of an agreement; they are thus not considered assertions. When certain words or verbal conduct are integral to the substantive legal claim, the out of court statement or conduct, as the case may be, is not hearsay.

Another example of a non-assertive statement is what McCormick refers to as “verbal parts of acts.” McCormick defines this rule, “Explanatory words which accompany and give character to the transaction are not hearsay when under the substantive law the pertinent inquiry is directed only to objective manifestations rather than to the actual intent or other state of mind of the actor.”⁷ For example, collateral discussions related to the execution of a deed would not be considered an assertion because the execution of the deed itself is the legally significant act. The commentary is superfluous.⁸ Statements that are themselves integral to the legal cause of action are also considered non-assertions. Assume state law requires a parent to give notice to the other parent before removing a child from the state. The remaining parent claims notice was not provided. The communication of the notice is the ultimate legal issue and, hence, not hearsay. Finally, communication offered to show the effect on the observer is not assertive, and thus not hearsay.

C. *Non-verbal Communication as Hearsay*

Again, the policy behind the hearsay rules is to exclude unreliable out of court statements. Non-verbal communication,

⁶ *Id.* § 246, at 130; *id.* § 248, at 132

⁷ *Id.* § 249, at 134.

⁸ As always, a statement not considered hearsay must still be relevant to be admissible.

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which is intended to communicate something, also needs assurances of reliability. Examples of non-verbal conduct include: pointing, head shaking, or waiving someone away. These examples illustrate deliberate non-verbal conduct intended as a communication. These communications are also considered assertions for the purpose of the hearsay rules. Not all non-verbal conduct is intended as an assertion, however. When someone gasps after being startled, the reaction is involuntary non-verbal conduct. The hearsay rule does not apply to involuntary non-verbal conduct.

The trial court must decide whether non-verbal conduct is assertive or an involuntary response, and whether the actor intends the nonverbal communication as an assertion of fact. According to the Advisory Committee Notes, “The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility.”⁹ Thus, if a party seeks to exclude non-verbal conduct as hearsay that party has the burden to prove that the declarant intentionally communicated some assertion, rather than involuntarily responded to a stimulus.

D. Who Are the Actors?

FRE 801(b) defines a declarant as “the person who made the statement.” Rule 801 (c) excludes all statements made by a declarant, except those they make while testifying at the trial.¹⁰ The witness is the actor who testifies to the declarant’s out-of-court statement. When the declarant and the witness are the same person, and the witness seeks to testify to their own earlier out-of-court statement, the statement is still hearsay. The Federal Rules don’t permit one to testify to their own out-of-court statement unless an appropriate exemption or exception applies.¹¹

⁹ See FED. R. EVID. 801 advisory committee’s note.

¹⁰ There is an exception for a sworn statement made by the witness in an earlier court proceeding. FED. R. EVID. 804(b)(1); *California v. Green*, 399 U.S. 149 (1970).

¹¹ See FED. R. EVID. 801(d) advisory committee’s notes (“The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The judgment is one more of experience than logic. The rule requires in each instance as a general safeguard, that the declar-

For example, prior out-of-court statements are admissible if they were: made under oath and inconsistent with the trial testimony; consistent and offered to rebut a charge of “recent fabrication or improper influence or motive” by the declarant; or offered for the purposes of identification.¹² The rules also exclude out-of-court admissions by a party, used by the party opponent.¹³

In summary, the hearsay rule generally excludes statements made outside of court that are intended as an assertion of fact. An out-of-court statement made by the declarant, even if the declarant later testifies to his or her earlier statement, is still considered hearsay subject to limited exceptions. Non-verbal conduct intended as an assertion is also hearsay.

III. Evidentiary Admissions

Certain rules of evidence apply when the witness is also a party to the case. Specifically, the Federal Rules of Evidence exempt from the hearsay rule “admissions by a party opponent.” Generally, any relevant assertions are admissible by the opponent as an exception to the hearsay rule under FRE 801(d)(2). Due to the nature of family law, most salient evidence comes from the parties themselves and admissions thus provide many evidentiary opportunities in a custody case.

A. Evidentiary Admission Defined

Any statement, act, or assertion made by either party is considered an admission, and permissible for use as substantive evidence by the opposing party. McCormick defines admissions as “words or acts of a party or party’s representative that are offered as evidence by the opposing party.”¹⁴ The admission can be made outside of court at any time, either before or during the proceeding. The statement can be self-serving and not based upon the declarant’s personal knowledge.¹⁵ The term “admission” can be confusing. An admission does not, as it literally im-

ant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay.”)

¹² FED. R. EVID. 801(d)(1)

¹³ FED. R. EVID. 801(d)(2)

¹⁴ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 254, at 178.

¹⁵ *Id.* at 179.

plies, require the party to *admit* or *acknowledge* some fact. Rather, an admission is any assertion made by the party, whether admitting the truth of some fact, denying something, or any other communication regarding anything relevant to the case. Admissions can also include certain actions (or lack of action) and adopted comments by third parties. No exception to the hearsay rule is necessary if the opposing party uses the admission. On the other hand, one cannot seek to admit one's own out-of-court statements, without an appropriate exception to the hearsay rule.¹⁶

B. *Exemptions Distinguished from Exceptions*

Hearsay *exemptions* are different from hearsay *exceptions*. Party admissions (and prior inconsistent statements) are exempt from the hearsay rule; they are not considered hearsay because no guarantee of trustworthiness is required.¹⁷ Historically, the commentators have determined that these exemptions are intrinsically reliable due to the nature of the adversarial system, which provides inherent guarantees of reliability.¹⁸ In contrast, an exception allows admission of out-of-court statements that are considered reliable enough for admission. While some questions exist about its reliability, on balance, the harm of disallowing the questionable evidence in its entirety outweighs the concerns about reliability.

¹⁶ *Id.* A witness's out-of-court statement is still considered hearsay and requires an exception to the hearsay rule for admission. Under what has been called the "Chicago rule", a witness's earlier out-of-court statement is excluded from the hearsay rule. The guarantees of reliability exist and the witness can be cross-examined. The Federal Rules don't allow such a deviation, however. They strictly define the out-of court statement as hearsay, even if the declarant later testifies as a witness. See FED. R. EVID. 801(d)(1) advisory committee's notes.

¹⁷ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 254, at 179-80.

¹⁸ According to Morgan, "The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the trier means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath." *Id.* § 254, at 179 (citing MORGAN, BASIC PROBLEMS OF EVIDENCE 265-66 (1963)).

C. *The Inherent Reliability of Admissions*

While generally the rules of evidence limit a witness's testimony to information within their first-hand knowledge or sensory observations, opinion testimony qualifies as an admission.¹⁹ The Advisory Committee Notes to Rule 801(d)(2) explains the relaxed standard:

The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring first hand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.²⁰

The relief from the personal knowledge requirement stems from the adversary nature of litigation, "A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath."²¹ The rules of evidence generally limit witness's testimony to sensory observations and first-hand knowledge.²² With regard to admissions, however, the law today generally permits admissions not based upon first-hand knowledge. Courts treat the absence of mental capacity of the witness as going towards the weight of the testimony as opposed to its admissibility.²³ Under this principle, the opponent could freely offer the opinions or conclusions of the party opponent as admissions.

D. *Admissions Distinguished from Prior Inconsistent Statements*

Admissions must be distinguished from prior inconsistent statements. Like admissions, prior inconsistent statements are excluded from the hearsay rule. Prior inconsistent statements are prior statements made by a witness that are inconsistent with present testimony. This hearsay exemption allows an examination of the nature of the inconsistency, and allows the trier of fact

¹⁹ 2 MCCORMICK ON EVIDENCE, *supra* note 2, § 256, at 184-85.

²⁰ *Id.* § 255, at 183

²¹ *Id.* § 254, at 179 (quoting MORGAN, BASIC PROBLEMS OF EVIDENCE 265-66 (1963))

²² Fed. R. Evid. 701

²³ 2 MCCORMICK ON EVIDENCE, *supra* note 2, § 255, at 183; Trombello v. Dibuono, 132 F. Supp. 2d 82 (E.D.N.Y. 2000); People v. Alexander, 724 P. 2d 1304 (Colo. 1986).

to hear the circumstances of both statements. To qualify, the earlier statement must have been given under oath and at a court proceeding such as a trial, hearing, or deposition. Assuming those conditions are met, the earlier inconsistent statement can be offered as substantive evidence (distinguished from impeachment evidence) in the latter proceeding. Prior inconsistent statements require a foundation establishing that there was a prior inconsistency while admissions require no such foundation: any statement by the opponent is admissible, subject only to relevancy or other appropriate evidentiary rules.

E. *Qualification of Admissions*

FRE 801 defines an admission as any statement that:

- (A) was made by the party in an individual or representative capacity;
- (B) is one the party manifested that it adopted or believed to be true;
- (C) was made by a person whom the party authorized to make a statement on the subject;
- (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
- (E) was made by the party's coconspirator during and in furtherance of the conspiracy.²⁴

Admissions are those statements made either by parties or their agent, as well as statements they have adopted as their own. As we will see in the discussion below, the case law and commentary have expanded the definition to include actions (or inaction) as well.

1. *Admissions Made by the Party Individually*

This category addresses admissions made by the parties themselves or their representatives, including their lawyers. The most obvious example is any statement one of the parties may have made to the other, at any time, on a subject that is relevant to the present proceeding. Admissions are replete in party testimony in an earlier phase of the proceeding, including temporary hearings and depositions. Any admissions made by a party during the preliminary hearings can be substantively admitted as an evidentiary admission at a subsequent hearing or trial.

Jurisdictions differ concerning the effect of testimonial admissions. Some courts permit a witness to contradict his or her

²⁴ FED. R. EVID. 801.

earlier admission, or allow other witnesses to be called to contradict it.²⁵ Other courts allow a party to contradict an earlier admission, but disallow contradictions concerning the witness's subjective beliefs or opinions.²⁶ Finally, some courts treat testimonial admissions as judicial admissions, conclusive on the issue and cannot be contradicted.²⁷ McCormick notes that this third approach often comes with a number of qualifiers reducing its impact.²⁸ McCormick suggests that allowing contradiction of an admission is the most sensible approach.²⁹ But even if a contradiction is allowed, an admission, particularly when made under oath, is powerful evidence.

2. Admissions in Pleadings

Evidentiary admissions must be distinguished from judicial admissions. Judicial admissions are not evidence; they are legal constructs designed to limit issues from contention. A judicial admission is a contention made in a pleading or other court document that conclusively resolves a particular issue.³⁰ Statements made by attorneys can also be judicial admissions if they are clear and unequivocal.³¹ Once a party (or the party's attorney) makes a judicial admission, that party cannot later present evidence contradicting the statement. In contrast, evidentiary admissions typically can be controverted and explained.

Judicial admissions in pleadings are conclusive until the pleading is amended or withdrawn.³² If a pleading is withdrawn or amended, the assertions in the earlier pleading remain as evidentiary admissions, which means evidence may be offered to explain or refute them.³³ Generally, any allegations in pleadings may be used as evidentiary (distinguished from judicial) admis-

²⁵ See, e.g., *Alamo v. Rosario*, 98 F. 2d 328, 330-31 (D.C. Cir. 1938); 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 258, at 190.

²⁶ *Bell v. Harmon*, 284 S.W. 2d 812, 815-17 (Ky. 1955); 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 258 at 191.

²⁷ *Chaplain v. Dugas*, 80 N.E. 2d 9, 11-12 (Mass. 1948).

²⁸ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 258, at 191.

²⁹ *Id.*

³⁰ *Malaukas v. Tishman Constr. Corp.*, 81 Ill. App. 3d 759, 761 (1980).

³¹ FED. R. EVID. 801(d)(2).

³² 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 257, at 185 (citing *In re Foxmeyer Corp.*, 286 B.R. 546, 567-68 (Bankr. D. Del.2002)).

³³ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 257, at 186.

sions. Also while pleadings from an earlier case cannot be used as a judicial admission, they can be used in a later case as an evidentiary admission.³⁴

3. *Guilty Pleas as Admissions*

Generally, guilty pleas in criminal cases are admissible as admissions in civil cases. The authorities allow the person making the plea to explain it away, however.³⁵ If a guilty plea is later withdrawn, the withdrawn plea cannot be used as an admission. Likewise, if one makes a plea of *nolo contendere* or no contest, the plea is not considered an admission.³⁶

4. *Representative Admissions*

FRE 801 (d)(2)(C) and (D) considers statements made by an authorized representative admissions if the statement is made during the scope of the employment or agency. When authorized representatives speak, their statements may bind the principal. Generally, formal statements by attorneys in pleadings or opening statements, not specifically withdrawn, are considered conclusive judicial admissions. In contrast, general statements made by the lawyer on the client's behalf are evidentiary admissions. For example, a letter sent by an attorney describing his client's unwillingness to contribute towards a child's expense could be used as an evidentiary admission against the client.³⁷

5. *Admissions by Conduct*

a. *Adoptive admissions*

Admissions are not limited to actual words spoken and can be extended to one's conduct. FRE 801 (D)(2)(b) allows adoptive admissions, defined as a statement that "is one the party manifested that it adopted or believed to be true." For example, one may adopt the statement of another person and the adopted

³⁴ See *Walker v. Dorn*, 240 Cal. App. 2d 118, 120 (1996).

³⁵ See, e.g., *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 375 P. 2d 439 (Cal. 1962) (Cited by 2 McCORMICK ON EVIDENCE, *supra* note 2 § 255 at 188).

³⁶ 2 McCORMICK ON EVIDENCE, *supra* note 2 § 266, at 237.

³⁷ But remember, settlement negotiations are normally inadmissible and the rules of relevance still apply. FED. R. EVID. 408. See *In re Interest of Doe*, 900 P.2d 1332 (Haw. Ct. App. 1995). See also G. Ross Anderson Jr. & James A. Patrick, III, *Discovery Sanctions*, 7 S. C. LAW. 20 (May/June 1995).

statement can be considered an admission. To qualify as an admission, there must be clear proof that someone accepted the statement as his or her own. For example, assume a mother attends a lecture on some unorthodox diet for children promoting limiting children's caloric intake to 500 calories per day. Assume that printed materials are handed out at the lecture summarizing these views. The mother tells a friend that she believes this system ensures optimum health for the children. The statements made by the lecturer or the printed materials are admissible as adoptive admissions and exempt from the hearsay rule.³⁸

The mere act of hearing the statement is insufficient for the adoptive admission—the court must determine if a statement was actively adopted, rather than passively acknowledged. The party seeking to use an adoptive admission against the opponent bears the burden to establish a clear acceptance of the fact communicated in the adopted statement. To use an adopted admission, evidence requires proof of the original statement as well as its ultimate adoption by a party.³⁹

Also, evidence presented by a party in one suit may be considered an adoptive admission in a later suit:

When a party offers in evidence a deposition or an affidavit to prove the matters stated therein, the party knows or should know the contents of the writing so offered and presumably desires that all of the contents be considered on its own behalf. . . . it is reasonable to conclude that the writing so introduced may be used against the party as an adoptive admission in another suit.⁴⁰

Thus admissions from the original divorce proceeding, may be used in a modification or latter proceeding, subject again to rules of relevance or other separate evidentiary objections.⁴¹

b. *Admission by silence*

Silence can be an admission when a party fails to deny a particular statement. Courts are generally reluctant, however, to

³⁸ FED. R. EVID. 801(d)(2)(B)

³⁹ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 261, at 209.

⁴⁰ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 261, at 211.

⁴¹ For example, in Illinois, the court can only consider events occurring since the entry of the last order. *In re Marriage of Connors*, 707 N.E. 2d 275, 281 (Ill. App. Ct. 1999). Admissions to a salient fact would likely be irrelevant to a subsequent modification proceeding.

let a non-response qualify as an admission. A number of reasons could explain the failure to respond (confusion, distraction, etc.). Nevertheless, according to McCormick, courts allow silence to serve as an adoptive admission under the following circumstances:

- (1) The statement must have been heard by the party claimed to have acquiesced.
- (2) It must have been understood by the party.
- (3) The subject matter must have been within the party's knowledge. . . .
- (4) Physical or emotional impediments to responding must not be present.
- (5) The personal makeup of the speaker, e.g. young child or the person's relationship to the party or the event, e.g., bystander, may be such as to make it unreasonable to expect a denial.
- (6) Probably most important of all, the statement itself must be such as would, if untrue, call for a denial under the circumstances.⁴²

The question of whether a non-response qualifies as an evidentiary admission is determined as a matter of conditional relevancy, with the fact finder weighing the circumstances to determine the propriety of the admission.⁴³ The court needs to consider these non-exclusive safeguards to evaluate the propriety of an inference from silence.⁴⁴ Also non-responses to correspondence can qualify as an admission.⁴⁵ Failing to respond could theoretically be construed as an admission by silence if a denial would be expected.⁴⁶

⁴² 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 262, at 213-14.

⁴³ *Id.* § 262 at 214-215 (“Most preliminary questions of admissibility in connection with admissions by acquiescence fall within the category of conditional relevancy. While some preliminary questions involved with admission by silence are entrusted to final determination by the court, questions such as whether the statement was made in the person's hearing and whether there was an opportunity to reply should be submitted for jury determination if the court concludes sufficient evidence has been introduced so that a reasonable jury could find that those facts have been established.”) In bench trials, the court would determine the initial validity of the evidence subject to later rebuttal evidence of either intent or qualification of the silence.

⁴⁴ *Jenkins v. Anderson*, 447 U.S. 231 (1980).

⁴⁵ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 262, at 215.

⁴⁶ *Mahoney v. Kennedy*, 205 N.W. 407, 411 (Wis. 1925).

6. Other Admissions by Conduct

Failing to produce evidence or a witness in your control may draw negative inferences from the court. This principle is known as an “admission by omission.” McCormick observes that the inference should be used judiciously:

The appellate courts often counsel caution. A number of factors support a conservative approach. Conjecture or ambiguity of inference is often present. The possibility that the inference may be drawn invites waste of time in calling unnecessary witnesses or in presenting evidence to explain why they were not called. Failure to anticipate that the inference may be invoked entails substantial possibilities of surprise. Finally the availability of modern discovery procedures . . . serves to diminish both its justification and the need for the inference.⁴⁷

Some courts require advance notice by a litigant intending to argue that the court should draw an adverse inference from a missing witness. This allows the opponent to dispel the implication by calling the witness.⁴⁸

If the witness is potentially beneficial to both parties, courts are reluctant to allow a negative inference from either party's failure to call a witness.⁴⁹ Failing to call the witness may be less indicative of an admission and more suggestive of tactical reluctance to benefit the opponent's case. Likewise, when a privilege exists, failing to call the witness is not considered an admission by most courts.⁵⁰

A litigant's improper conduct can also be an admission by conduct. Family court is rife with litigants acting underhandedly. To a limited degree, the law allows a remedy. If wrongdoing amounts to an obstruction of the process, one can argue that the behavior is an admission by conduct.⁵¹ A party's misconduct arguably reflects an acknowledgement of its weak position and implicitly recognizes that the truth favors the opponent. The misconduct must rise to the level of bad faith—mere negligence

⁴⁷ 2 MCCORMICK ON EVIDENCE, *supra* note 2, § 264, at 222-23 (citing *Simmons v. Univ. of Chicago Hosps. and Clinics*, 642 N.E. 2d 107, 111 (Ill. 1994)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* § 265, at 226-30 (footnotes omitted).

is not enough to create an admission because it does not reflect conscious recognition of the case's deficiencies.⁵²

Examples of conduct warranting this treatment include: spoliation of evidence, failure to produce evidence, perjury, falsification of documents or evidence, subornation of perjury, transfer of assets or other conduct that is improper.⁵³ Some controversy exists concerning an admission under these circumstances. Earlier decisions reflect courts unwillingness to consider this conduct as proof of a fact in controversy.⁵⁴ Modern trends, however, reflect courts' intolerance for this type of conduct, shifting the burden to the transgressor to provide proof to avoid a negative inference.⁵⁵

IV. Hearsay Exceptions

Admissions and prior inconsistent statements are excluded from the hearsay rule because of their inherent reliability. The rules also provide particular exceptions for certain out-of-court statements, thought to be less reliable, but important enough to consider when balanced against their complete exclusion. As noted above, admissions are the easiest way to admit out-of-court statements by the parties. But where a non-party is the witness, admissions are unavailable. Here is a review of a few of the most frequently used exceptions in custody litigation:

A. Present Sense Impression

FRE 803(1) allows an out-of-court statement communicating a present sense impression. The rule defines a present sense impression as "A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Distinguished from the excited utterance exception, discussed below, a mundane observation can be the basis of the testimony under this rule; the present sense impression exception is not limited to a description of an exciting event or circumstance. The out-of-court statement must describe or explain the event. A critical judgment about the event, even one contempo-

⁵² *Id.*

⁵³ *Id.* § 265, at 226-30 (footnotes omitted)

⁵⁴ *Id.* § 265, at 229-30

⁵⁵ *See Richardson v. State*, 130 P.3d 634 (Mont. 2006).

raneously made, is inadmissible as a present sense impression. A direct sensory observation is thought to be more reliable than the evaluative comments that may accompany the observation. According to McCormick, “the lack of a startling event makes the assumption of spontaneity difficult to maintain unless the statements directly pertain to perception.”⁵⁶

The statement describing the event must have been made at the time of the event or immediately after. A statement made several days or weeks after the event does not qualify under this exception. If too much time has elapsed, the observation becomes spoiled: the opportunity for reflection interferes with its spontaneity. Reliability comes from spontaneity—spontaneous and non-evaluative reports of sensory observations are considered reliable enough for admission.

Although somewhat controversial, this exception applies to communications via social media as well as oral statements. A Facebook or Twitter post concerning an observation or event would theoretically qualify under this exception. As Professor Jeffrey Bellin observes:

While of course not the intention of Twitters creators, the service is in essence, a vast electronic present sense impression (e-PSI) generator, constantly churning out admissible out-of-court statements. The same characterization applies to Facebook, a wildly popular social networking site that continually broadcasts autobiographical “status update”: short summaries of what users are currently seeing, doing, and feeling.⁵⁷

Bellin argues the impropriety of reliance on this rule for admission of social media. He asserts that the originators of the rule allowed its limited use based upon their belief that corroborative witnesses would be available. An oral impression would need to be communicated to someone and the person who hears the statement would be present at the same event or circumstance provoking the statement. Electronic present sense impressions, on the other hand, are communicated independent of the listener, and the communicator is likely to be done alone. Regardless of these concerns, social media is frequently used in

⁵⁶ 2 MCCORMICK ON EVIDENCE, *supra* note 2, § 271, at 253 (footnote omitted).

⁵⁷ Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 335 (2012).

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contested custody litigation and this exception serves as a basis for admission of these out of court statements.⁵⁸

B. *Excited Utterance*

FRE 803(2) allows admission of a statement made by a declarant in response to the stress of a startling event. In order for a statement to qualify as an excited utterance:

First, there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought . . . a third requirement [is] that the statement must “relate to” the event.⁵⁹

This exception relies on the belief that the stress of an exciting event ensures its veracity.

To decide if an event is sufficiently startling to qualify for admission under this exception, the court must determine the likely effect on the declarant. The rule does not require an earthquake or tsunami—a wide range of events can qualify as sufficiently startling, including seeing a photograph in a newspaper.⁶⁰ Also, the declarant need not personally be involved with the startling event: a bystander’s statement qualifies as well as statements by a direct participant.⁶¹

Similar to the present sense impression exception, spontaneity is key to admission of this out-of-court statement. For the excited utterance exception to apply, the statement describing the startling event must be made contemporaneously and before the declarant had an opportunity to reflect. Passage of time imposes a higher burden on the party offering the statement.⁶² McCormick provides a useful test: “Where the time interval

⁵⁸ Nadine Brozan, *Divorce Lawyers’ New Friend: Social Networks*, N.Y. TIMES, May 15, 2011, at ST17; Stephanie Chen, *Divorce Attorneys Catching Cheaters on Facebook*, CNN.com, (June 1, 2010), <http://www.cnn.com/2010/TECH/social.media/06/01/facebook.divorce.lawyers/index.html>; Leanne Italie, *Facebook Is Divorce Lawyers’ New Best Friend*, MSNBC.com, June 28, 2010, <http://www.msnbc.msn.com/id/37986320>

⁵⁹ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 272, at 255 (footnote omitted).

⁶⁰ United States v. Napier, 518 F.2d 316 (9th Cir. 1975).

⁶¹ See, e.g., People v. McNeal, 410 N.E. 2d 480 (Ill. App. Ct. 1980).

⁶² 2 MCCORMICK ON EVIDENCE, *supra* note 2, § 272, at 258.

between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not fact engage in a reflective thought process.”⁶³ For example, testimony that the declarant was bright red, hyperventilating and upset when he or she made the out-of-court statement might constitute this proof. Also, the court needs to consider the context of the statement. A statement made by a petrified child, who was found cowering under her covers at her parents’ home twelve hours after a murder, was admissible as an excited utterance despite the passage of time since the actual murder.⁶⁴

Unlike the present sense impression exception, the excited utterance exception is not limited to declarants’ descriptions of the event. Their conclusions and opinions are also admissible if they qualify as excited utterances under this exception. As noted above, the present sense impression exception limits admissibility of declarants’ out-of-court statement to their observations and precludes admission of their judgments or opinions.⁶⁵ Thus, if an event is sufficiently startling to someone, and that person makes a statement in response to the event, a witness can testify to the hearsay statement, even if that statement contains conclusions, opinions, or other critical commentary.

The witness must provide some context for the declarant’s statement. In other words, the witness must provide foundational testimony establishing that the declarant had first-hand knowledge of the event he or she described.⁶⁶ Conclusive proof of the declarant’s personal observation is unnecessary.⁶⁷ It is sufficient if the witness provides evidence of the general circumstances of the declarant’s observation, so the court can weigh the reliability of the declarant’s observation. When there is doubt about whether the declarant directly observed the event, a lawyer seeking admission, or one arguing against admissibility will need to persuade the judge to balance the probative value of the out-of-court statement against the likelihood that the declarant did not directly observe the event.

⁶³ *Id.*

⁶⁴ *Gross v. Greer*, 773 F.2d 116 (7th Cir. 1985).

⁶⁵ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 271, at 253.

⁶⁶ *Id.* § 271, at 252.

⁶⁷ *Id.* § 272, at 261.

Child custody cases sometimes involve sexual abuse claims. The excited utterance exception allows a witness to testify to a child's report of abuse. Again, the court's focus is on the spontaneity of the statement. Trends reflect courts nationwide accepting longer time periods between the trauma and the child's description of it.⁶⁸ Some courts focus on when the child first had the opportunity to report the trauma rather than the interval between the event and its report.⁶⁹ Because of the sensitivity to child abuse, many states have drafted special hearsay legislation to address these circumstances.⁷⁰ In family court, a party may be able to offer reliable evidence of abuse without a child's live testimony. Legislative trends also reflect heightened sensitivity to child witnesses, and courts are reluctant to compel their appearance.⁷¹ These trends balance the child witness's rights against due process considerations.

C. *State of Mind Exception*

FRE 803(3) allows as an exception to the hearsay rule: A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health). Sometimes referred to as the "state of mind exception," a witness may testify to a declarant's out-of-court statement concerning the declarant's mental, emotional, or physical condition at the time the statement was made. This broad exception is a useful tool in any family law case, including custody litigation. Immediacy is vital: the declarant's statement about his or her condition must again be spontaneous: a declarant's reminiscence about an earlier condition is not admissible under this exception; only testimony reporting a declarant's statement about conditions at the time the statement is made is admissible. Rule 803(3) does not require that a statement about a present medical condition come from a

⁶⁸ *Id.* § 272.1, at 263-64.

⁶⁹ *United States v. Rivera*, 43 F.2d 1291 (9th Cir. 1995). *See also* 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 272 at 263 n.9

⁷⁰ *See* Ohio Evid. R. 807 (LexisNexis 2012); Miss. Code Ann. § 13-1-403 (2012). *See generally* Catherine Paquette, *Handling Sexual Abuse Allegations in Child Custody Cases*, 25 New Eng. L. Rev 1415 (1991). *See also* MCCORMICK ON EVIDENCE, *supra* note 2 § 272, at 264 n.11.

⁷¹ *Id.* § 273 at 265.

physician or health care provider. Any person who heard the declarant's statement can testify to it.

Some courts and commentators have voiced concerns about allowing admission of a self-serving statement made by a declarant who "has an agenda."⁷² This concern does not automatically invalidate the evidence. The rules provide remedies for illegitimate testimony beyond the hearsay rules. FRE 401 and 402, the rules of relevancy, allow a court to determine whether the evidence serves any legitimate purpose before allowing its admissions. Rule 403, further excludes, even relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." While most child custody matters are tried before judges without juries, the principles of this rule nevertheless allow a court at a bench trial to exclude, for other reasons, otherwise relevant and admissible evidence. The value of the evidence must be distinguished from its technical admissibility.

The state of mind exception is helpful in family law cases, including custody litigation. This exception is a way to seek admission of evidence of a child's feelings or what that child has experienced; it is a way to present the child's perspective, without actually involving the child as a witness in the proceeding. But as noted above, the question of relevance or materiality must be considered. A child's spontaneous complaint that "I have a stomach ache whenever I visit daddy," suggesting the child's state of mind concerning her relationship with her father, is quite different than "I got a stomach ache" on one occasion after eating too much ice cream at dad's house. The latter comment, again while technically admissible under this rule, has little probative value.

A child's mental state is frequently relevant in a family court proceeding. For example, in custody or visitation matters, the court may consider the child's wishes. Keep in mind, however, that the credibility of the witness is always at issue and a court will closely scrutinize a report by a parent with a vested interest, describing the child's comments in support of the parent's individual position. This is the reason judges frequently employ

⁷² *Id.* § 274, at 267-68 n.8.

guardians ad litem or interview the child themselves to get an unbiased report of the child's preferences.

D. *Statement Made for Medical Diagnosis or Treatment*

FRE 803(4) allows a statement made by a patient to a physician, related to the patient's treatment. This type of out-of-court statement is presumed reliable because patients would not likely fabricate symptoms, hampering their own treatment. Under this exception, admission is not limited to a statement made to a treating physician. The court can admit a declarant's statement made to any person helping the declarant get treatment, such as a family member or admitting nurse. The declarant's intent is more important than to whom the statement is made. "The test for admissibility is whether the subject matter of the statements is reasonably pertinent to diagnosis or treatment—an apparently objective standard."⁷³

This exception may be used to offer into evidence a statement made by a child to a physician, as long as the statement is relevant. Some courts have allowed a third party witness to testify to a statement of a child to identify the perpetrator of sexual abuse on the basis that the statement is necessary to treat the child's injury.⁷⁴

E. *Recorded Recollection*

The recorded recollection exception allows a witness to rely on a memorandum or record when a lack of memory limits the ability to testify with specificity. FRE 803(5) provides that a recorded recollection is a record that:

- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge.

The rule is interpreted expansively; "memorandum" has been construed to include a videotape or audio recording.⁷⁵

⁷³ 2 MCCORMICK ON EVIDENCE, *supra* note 2, § 277 at 287 (footnote omitted).

⁷⁴ See, e.g., *id.* § 278, at 290 n.8.

⁷⁵ *Id.* § 281, at 296 n.3. (citing *State v. Locke*, 663 A.2d 602 (N.H. 1995); *State v. Marcy*, 680 A.2d 76, 82 & n.4 (Vt. 1996)).

In order to admit a recorded recollection, the exhibit must be from the first-hand knowledge of the witness who is laying the foundation for the exhibit. The witness need not necessarily prepare the document, but he or she must be able to identify it as accurate. Also, the exhibit needs to be prepared close enough to the information being recorded as to ensure the accuracy of the memorandum or recorded document. Notes taken about an event several months later would not likely qualify. In order to lay the foundation the witness must testify that he or she has an insufficient recollection of the event impairing his or her ability to accurately testify from memory. The memory need not be fully exhausted to use this type of exhibit.⁷⁶

When all of these requirements are met, the proponent of the evidence may read the memorandum into the record. The adverse party has the choice to offer the memorandum itself into evidence. Rule 803(5) allows only the adverse party to offer the memorandum into evidence. Neither McCormick nor the Rule commentaries provide any satisfactory explanation of the prohibition on a party offering into evidence the party or the party's witness's own recorded recollection.⁷⁷ The authors of *The New Wigmore. A Treatise on Evidence: Impeachment and Rehabilitation*, offer slightly more detail, stating that the prohibition "avoids the ironic result that a jury may accord greater emphasis to the statement of a forgetful witness because a written version of the statement is available in the jury room." The Treatise further explains that the prohibition deters the proponent from mischaracterizing the evidence. Some states, however, have relaxed the prohibition to allow either party to offer the evidence at the judge's discretion.⁷⁸

V. Expert Testimony — Rule 703

FRE 703 allows an expert to base an opinion on inadmissible statements of facts or data if experts in their field ordinarily rely on such statements in formulating an opinion. These state-

⁷⁶ 2 MCCORMICK ON EVIDENCE, *supra* note 2 § 279, at 293-94 (footnote omitted).

⁷⁷ Roger Park & Tom Lininger, *The New Wigmore. A Treatise on Evidence: Impeachment and Rehabilitation*, § 9.5.3 (Aspen Publishers 2012),

⁷⁸ See D.R.E., Rule 803 (5) & comment to D.R.E. Rule 803(5); W.S.A. 908.03 (5) & comment to W.S.A. 908.03 (5)

ments of fact are not admitted for the truth of the matters asserted; rather, they serve as the basis of the expert's opinion. As a result, the expert's testimony that relies on these out-of-court statements is not hearsay. The rule further provides that the court can exclude from consideration facts an expert relied upon if "their probative value in assisting the jury to evaluate the [expert's] opinion substantially outweighs their prejudicial effect."⁷⁹ Again, a judge without a jury decides most child custody cases. Nevertheless, the same principles apply to bench trials. If an expert's report contains references that can be argued to be prejudicial, pretrial motions can be brought to limit or disqualify all or portions of the expert's report.

Experts can serve as a convenient way to admit hearsay statements.⁸⁰ Often courts appoint custody evaluator experts to determine the best interest of the children. Likewise, parties hire their own experts to opine concerning the best interest of children. In determining the best interest of children, these evaluations consider a large range of information, including statements by third parties regarding the claims and circumstances surrounding the case. Similarly, judges often appoint guardians ad litem, who serve as court investigators and take on a quasi-expert role in rendering opinions concerning the best interest of the children.⁸¹ The rationale for allowing hearsay from the guardian is similar to an expert as defined by the rules: the out-of-court statements serve as the basis for their opinions rather than for the truth of the matter asserted.⁸² Courts have allowed guardians to testify to hearsay statements concerning the best interests of children.⁸³

⁷⁹ Fed. R. Evid. 703 (2011).

⁸⁰ ILL. R. EVID. 703; Justin D. Scheid, *The Expert's Way to Avoid the Hearsay Rule*, 100 ILL. B. J. 260 (May 2012).

⁸¹ Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 Geo. Mason L. Rev. 255, 279 (1998)

⁸² See, e.g., *In re Marriage of Hefer*, 667 N.E.2d 1094, 1097 (Ill. App. Ct. 1996) ("A better way than an *in camera* hearing to get the child's preferences before the court may be through admission of the child's hearsay statements, through the testimony of a guardian *ad litem*, or through professional personnel.")

⁸³ *Id.*

Reliance on an expert or guardian ad litem allows the parties to present information to a court in a cost effective manner. When the evaluators interview teachers, neighbors etc., the third party accounts can conveniently come before the court through the expert's report. Sometimes however, controversial and prejudicial information is admitted in this manner. If a witness, for example, was outside the jurisdiction and gave a phone interview to the expert who relied on the statement, it may be unfair to allow the reliance on the statement when the witness cannot be independently examined or the information cannot be practically corroborated.⁸⁴As a tactical manner, experts may be hired for the sole purpose of offering questionable out of court statements that are prejudicial and inflammatory. But the rules allow a remedy if the statements relied upon are deemed improper or should not properly be considered.

VI. Concluding Thoughts

Because of the nature of family court proceedings, where judges rather than juries predominate, the rules of evidence are often relaxed. But they nevertheless apply to these sensitive proceedings. The purpose of the rules is to ensure fairness and sober assessment of the facts. Reliable evidence is no less important in family court than in a commercial or injury proceeding. But often in family court, practicality rules the day. Time constraints and other factors require court reliance on experts, court investigators and guardians ad litem, who regularly testify to out of court statements. Often many collateral witnesses need to be interviewed to get a comprehensive sense of the best interest of children. Allowing a central person to report concerning findings saves court time and resources. However, fair play dictates that courts consider the impact and origin of these various hearsay statements from court experts where no means are available to challenge the testimony.

A balancing test is in order before hearsay testimony comes before the court in an expert or guardian ad litem report. Does the party harmed by the testimony have an ample opportunity during discovery to examine the out of court statement? Is the declarant subject to court process? Is the expert's reliance on the

⁸⁴ See generally *In re Therese B.*, 671 N.W.2d 377 (Wis. Ct. App. 2003)

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statement objectively reasonable? Are questions of bias present? These are just a few questions that should be answered before hearsay statement comes before the court through an expert. Reliability is the essence of the hearsay rules and if there are questions about the trustworthiness of a particular source, courts must exercise their discretion to disregard the questionable out of court statements.