MAKING THE INTRODUCTION: *Evidence in Family Court*

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"Yes, Virginia, the Rules of Evidence apply to Family Law Cases just like they do in other legal proceedings." Unfortunately, practitioners often fail to recognize the impact of the Evidence Code on family law cases. In contested family and matrimonial matters evidence is necessary to assist the judge/trier of fact to make decisions on key divorce issues. Evidence is necessary to support a claim or defense, or to discredit the other side's evidence; that evidence is subject to the restrictions imposed by the rules of evidence. For example, the judge will need evidence as to the value and division of marital assets and liabilities as well as for the need for and ability to pay support/alimony. Parents will also need to present evidence regarding a child's best interest, timesharing and parental responsibility for a Parenting Plan.

Evidence is introduced through witnesses which may include expert witnesses, such as forensic accountants, appraisers, investigators, evaluators, psychologists, and physicians and lay or fact witnesses such as family members, co-workers, teachers pediatricians, etc. In family cases we also need documentary evidence such as diaries, journals, calendars, bank statements, credit card statements, tax returns, ledgers, spreadsheets, QuickBooks, letters, emails, etc. In some cases evidence stored in social media accounts such as posts, photos, and videos are relevant to the disputed issues. In cases involving a child's best interest school and/or medical records are relevant and need to be properly introduced.

Any evidence sought to be introduced, over objection, in a legal proceeding is reviewed by the judge and the judge evaluates and adjudicates its admissibility. Basic evidentiary rules require that:

1. the evidence be relevant;
2. the proponent establishes a foundation for the evidence;
3. the evidence avoids hearsay; and
4. the witness used to introduce the evidence has personal knowledge.

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I. *General Guidelines for Admissible Evidence*

1. **Relevance:** Generally, in order for evidence to be admissible, it must satisfy certain criteria:

> ***Practice Tip:*** *A guardian ad litem engaged in the investigative role is the holder of the child's privilege. Thus, the guardian ad litem determines (sometimes as a recommendation to a judge, sometimes within his or her own powers) whether the child's privilege should be asserted or waived with regard to doctors, therapists, and social workers who have treated the child. Garcia v. Guiles, 254 So.3d 637, 640 (Fla. 1st DCA 2018) (deciding that neither parent can waive a child's patient /psycho-therapist privilege, in an action to modify the timesharing of the child, because the subject matter of the litigation is the child's welfare and holding that t*he; *guardian ad litem holds the privilege, citing Brown v. Brown, 180 So.3d 1070, 1072 (Fla. 1st DCA 2015)).*

a. The evidence must be "relevant," i.e., it must tend to prove or disprove a fact at issue. Fla. Stat. Ann. § 90.401; § 90.402. For example, if the issue before the court is child support, then certain parenting decisions may be irrelevant.

b. Included within the statutory definition of relevancy are the related concepts of materiality and competence. The evidence must tend to prove or disprove a material fact, and when evidence is offered to prove a fact which is not a matter in issue, it is said to be immaterial. *Sims v. Brown*, 574 So.2d 131, 134 (Fla. 1991) ("To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable) and must not be excluded for other countervailing reasons."). *Accord Citizens Property Ins. Corp. v. Hamilton*, 43 So.3d 746, 753 (Fla. 1st DCA 2010).

c. However, even relevant evidence can be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Fla. Stat. Ann. § 90.403.

d. Even relevant evidence is inadmissible if it is covered by a statutory privilege, such as attorney-client privilege, Fla. Stat. Ann. § 90.502; psychotherapist-patient privilege, Fla. Stat. Ann. § 90.503; husband-wife privilege, Fla. Stat. Ann. §90.504.

2. **Foundation and Witness with knowledge:** Even if evidence is relevant it cannot be admitted unless a "foundation" for the evidence is laid; foundation is the predicate facts that must be established or proven before the evidence becomes admissible. No rule of evidence explicitly requires a "foundation." The term "foundation" refers to the preliminary questions designed to establish that evidence is admissible.

> **Practice Tip:** *For each item of evidence that you seek to have admitted anticipate the objections your opposing counsel will raise and what arguments you will make or evidence you can proffer to overcome the objections raised.*

a. Evidence must be "authenticated." Fla. Stat. Ann. § 90.901. The rule governing authentication of evidence merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be. *Third Federal Savings & Loan Association of Cleveland v. Koulouvaris*, 247 So.3d 652 (Fla. 2d DCA 2018). Authentication is when you present the additional evidence necessary to establish the facts known by the witness that make the document admissible. The witness must have "personal knowledge" of a matter before he/she is allowed to testify about it. For example, if you are introducing a photograph you would authenticate as follows:

Q: Do you recognize this document?
A: Yes.
Q: What is this document?
A: It is a photograph of our daughter.
Q: Who took this photograph?
A: I did.
Q: When was it taken?
A: December 15, 2022.
Q: How do you remember the date?
A: That was the day I called the police and reported that he hit our daughter.
Q: What device did you use to take this picture?
A: My iPhone.
Q: Did you edit the photograph in any way?

A: No.

Q: Does the photograph accurately and fairly depict the image of your daughter as it was on that day and at that time?

A: Yes.

You have authenticated the photograph and the evidence was introduced through the person with personal knowledge

2. ***Avoid Hearsay*:** It must not be "hearsay," subject to the exclusions and exceptions to the hearsay rule. Fla. Stat. Ann. §§ 90.801 to 90.805. Mastering the rules of hearsay is not an easy task; it takes lawyers substantial trial practice to understand hearsay and its exceptions. In essence, "hearsay" is an out-of-court statement offered to prove the truth of the matter contained in that statement. Fla. Stat. Ann. § 90.801. Out-of-court statements are not hearsay unless they are being offered to prove the truth of the matter asserted. The second part of the rule is very important because if the statement is not being offered for the truth of what was said but rather to simply show that the statement was made. In other words, an attorney may try to get a statement into the record not for the words "in the statement", but rather to show that the person was able to speak at the time.

Practice Tip: *Don't confuse exclusions from the hearsay rule from exceptions to the hearsay rule.*

The hearsay rule contains definitions of statements that are not considered hearsay, meaning they are excluded from the hearsay rule. *Id.* Remember and use the common hearsay exceptions: 1) statement of party opponent; 2) for purpose of medical diagnosis or treatment; 3) not offered for the truth of the matter asserted; 4) excited utterance; 5) present sense impression. The rules of evidence ***do not*** contain a "the child said it" exception.

In order for a child's hearsay statement to be admitted it must fall within one of the exceptions. Even though a statement comes within the definition of hearsay, it may nonetheless be admitted as an exception to the hearsay rule. Fla. Stat. Ann. § 90.803.

Common Objections to Consider:

1. **Assumes Facts Not in Evidence**: This objection is best suited for when an attorney is conducting direct examination of his/her own witness. When the attorney asks the witness questions based on facts that have not yet been entered into the record, then this objection can be made.

2. **Misstates Prior Testimony/Evidence**: This objection is used when the question misstates prior evidence. The backbone of this objection is that the probative value of the evidence is substantially outweighed by a danger of unfair prejudice, confusing the issues, or that it is misleading.

3. **Calls for a Narrative**: This objection is used when the question is open ended and can produce irrelevant or otherwise inadmissible testimony before the court can receive an objection and rule on it.

4. **Speculation/Witness is not Qualified:** This objection is raised when the question seeks an opinion outside the witness's personal knowledge or expertise.

5. **Compound:** This objection is used when the question requires more than one response. In general compound questions create confusion.

6. **Best evidence:** A party who chooses to prove the content of a writing, recording, or photograph must introduce the item itself, rather than testimony about the item, unless its production is excused by statute or some other rule of evidence.

II. Specific Examples That Arise in Contested Divorce/Child Timesharing Cases.

A. E-mails and Text Messages: A witness can testify, "I received this e-mail or text, and this print-out is an accurate copy of what I received." That, however, will not establish who the sender is. That must be established by the surrounding circumstances. The following is from *Walker v. Harley-Anderson*, 301 So.3d 299 (Fla. 2d DCA 2020), which explains how to establish the authenticity of an email or text for both the sender and recipient:

> "Testimony that a person received a text or email from another is not sufficient, by itself, to authenticate the identity of the sender." Charles W. Ehrhardt, 1 *West's Fla. Practice Series* section 901.1a (2020 ed.). Other factors can circumstantially authenticate the text. *Id. See, e.g., United States v. Siddiqui*, 235 F. 3d 1318, 1322 (11th Cir. 2000) (finding that a number of factors supported the authenticity of the email, that the address bore the defendant's

> address and when the witness replied to the email the "reply function" of the witness's email system automatically put the defendant's address as the sender; the context of the email showed details of the defendant's conduct and an apology that correlated to the defendant's conduct; and the email referred to the author by defendant's nickname and the witnesses confirmed that in phone conversations the defendant made the same requests as in the emails); *Pavlovich v. State*, 6 N.E. 3d 969, 978-79 (Ind. Ct. App. 2014) (finding text messages had been properly authenticated by circumstantial evidence by a witness who confirmed that the 2662 number was used to arrange a meeting with the defendant; that the witness recognized the defendant's voice on the outgoing voicemail; and that the messages from the 2662 number indicated familiarity with the witness' escort business, the prior meeting between the witness and defendant and their prior discussion); *compare Commonwealth v. Koch*, 39 A. 3d 996, 1005 (Pa. Super. Ct. 2011) (finding the trial court erred in admitting text messages into evidence; there was no testimony from the persons who sent or received the text messages and no contextual clues).
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> "Circumstances recognized as sufficient to meet the test of authenticity include when a letter is written disclosing information which is likely known only to the purported author." *State v. Love*, 691 So. 2d 620, 621 (Fla. 5th DCA 1997) (citing *ITT Real Estate Equities v. Chandler Ins. Agency, Inc.*, 617 So. 2d 750, 751 (Fla. 4th DCA 1993)). In *Love*, the letter "contained specific details concerning the crime, the relationship between the co-defendants, incriminating evidence, and a proposed plan to fabricate testimony. This information was likely known only by the three co-defendants." *Id.* The court cited other details in the letter and concluded that the trial court erred by excluding the letter because there was prima facie evidence that the defendant or someone acting as his scribe wrote the letter.

See also, Symonette v. State, 100 So.3d 180 (Fla. 4th DCA 2012) (photographs of text messages were sufficiently authenticated; photographs of text messages were admissible hearsay evidence as admissions; and any error in admitting photographs of text messages was harmless; co-defendant driver testified that she texted the defendant while they were sitting next to each other and then

continued to text the defendant later after they were separated; the driver identified the text messages between her and the defendant and testified as to the context of the text messages; court concluded that "[t]he extrinsic evidence offered by the State, as well as the circumstances surrounding the procurement of the phone and pictures, is sufficient to show that the matter in question is genuinely what the State claims – pictures of the defendant's text messages to the driver"); *State v. Lumarque*, 44 So.3d 171 (Fla. 3d DCA 2010) (text messages and photos were authenticated, because those images were found on the defendant's phone which was seized pursuant to a search and extracted from it by a forensic expert who testified).

B. Photographs and Videos: The following is from *City of Miami v. Kho*, 290 So.3d 942, 944-45 (Fla. 3d DCA 2019), which lays out the admission of photographs and videos:

> "There are two methods of authenticating photographic evidence." *Dolan v. State*, 743 So. 2d 544, 545 (Fla. 4th DCA 1999). The first is the "pictorial testimony" method, which requires a witness with personal knowledge to testify that the image fairly and accurately depicts a scene. *Id.* The second is the "silent witness" method, under which the photograph "may be admitted upon proof of the reliability of the process which produced the tape or photo." *Id.* at 545–46 (citing *Hannewacker v. City of Jacksonville Beach*, 419 So. 2d 308 (Fla. 1982)). A trial judge may admit a photograph under the silent witness method after considering the following factors:
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> (1) evidence establishing the time and date of the photographic evidence;
> (2) any evidence of editing or tampering;
> (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product;
> (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and

(5) testimony identifying the relevant participants depicted in the photographic evidence.

Any witness with knowledge that the photograph is a fair and accurate representation may lay the necessary foundation for admission of a photograph. *Scarlett v. Ouellette*, 948 So.2d 859 (Fla. 3d DCA 2007). These same requirements apply to computer screen shots. *Maslak v. Wells Fargo Bank, N.A.*, 190 So.3d 656, 658-59 (Fla. 4th DCA 2016), overruled in part *Jackson v. Household Finance Corporation III*, 298 So.3d 531 (2020); *Sanchez v. Suntrust Bank*, 179 So.3d 538 (4th DCA 2015). These same requirements apply to videos. *Lerner v. Halegua*, 154 So.3d 445 (Fla. 3d DCA 2014) (a witness responsible for the videotape system, able to confirm the accuracy of the time and date on which the tape was made, and able to confirm that the tape was not edited or tampered with, should be presented if there is no stipulation on these points to provide the indicia of reliability required to authenticate a videotape for purposes of the "silent witness" theory).

C. Tape-recordings: Fla. Stat. Ann. § 934.06 prohibits the use of "intercepted oral communications" in any trial or proceeding. Thus, the tape recording of a face-to-face conversation (not over wire) in which one is participating, without prior consent from all participants, constitutes an unlawful interception of an oral communication. *Guilder v. State*, 899 So.2d 412 (Fla. 4th DCA 2005), rehearing denied. *See also Smith v. State,* 261 So.3d 714 (2018), rehearing denied (recording of a phone conversation, which was recorded using an app on mother's cell phone, between defendant and child's mother that occurred on the day of child's death was prohibited by wiretap statute, and thus inadmissible in first-degree murder prosecution, even though defendant admitted to officer that he knew mother recorded phone conversations, where there was no evidence that defendant gave mother permission to record the conversation or that he had reason to know that she would record the call); *Markham v Markham*, 272 So.2d 813 (Fla. 1973) (husband had no right to invade wife's right of privacy by utilizing electronic devices, and in absence of court authorization for husband's recording of wife's telephone conversations, or the consent of a party to the conversations, husband's recordings of such conversations made by tapping lines coming into the marital home were inadmissible in dissolution of marriage action).

This prohibition includes electronic communications. *O'Brien v. O'Brien*, 899 So.2d 1133 (Fla. 5th DCA 2005), rehearing denied (wife illegally "intercepted" husband's electronic communications with another woman via electronic mail and instant messaging, within meaning of Security of Communications Act, when she installed spyware program on computer which simultaneously copied electronic

communications as they were being transmitted).

D. Hearsay and GAL Reports: Guardian ad Litem reports are generally and necessarily filled with hearsay. The official line is that a Guardian ad Litem cannot testify to hearsay. *G.T. v. Dep't. of Children & Family Servs.*, 935 So.2d 1245, 1252 (Fla. 1st DCA 2006) (observing that requirement in rules of juvenile procedure that court consider written findings of an evaluator "does not by implication strip out of the Rule the provisions expressly granting the right to an evidentiary hearing.... Even when hearsay can be considered over objection, hearsay ... is not deemed competent, substantial evidence sufficient to support a factual finding."); *C.J. v. Dep't of Children & Families*, 756 So.2d 1108, 1110 (Fla. 3d DCA 2000) (finding Guardian Ad Litem's report was inadmissible hearsay); *Scaringe v. Herrick*, 711 So.2d 204, 204–05 (Fla. 2d DCA 1998) (noting, in a modification of custody case, that a guardian ad litem's report, which was required to be filed with the court by statute, was not in evidence simply because it was filed, and that a valid hearsay objection to the report should have been sustained as the rules of evidence applied).

Nonetheless, there is a general recognition that hearsay in a Guardian ad Litem's report does make it into evidence under relaxed standards of evidence accorded a child custody hearing. *See* Jacqueline M. Valdespino, Laura W. Morgan, *Guardians Ad Litem: Confidentiality and Privilege*, 33 J. Am. Acad. Matrim. Law. 517, 523 n. 11 (2021).

The reports also have sometimes made it into evidence, though containing hearsay, under Fla. Stat. Ann. § 90.803(6)(a), which provides as an exception to the hearsay rule:

> *Practice Tip: §90.803 includes a Business Record exception, how-ever, remember that even if you have and affidavit of authenticity, if you are not bringing in a live witness you must also file a Notice of Intent to Rely Upon Business Record Certification.*

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, 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 such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

See In re M.L., No. 2D22-3959, 2023 WL 3260155 (Fla. 2d DCA May 5, 2023). *See also Bahl v. Bahl*, 220 So.3d 1214 (Fla. 2d DCA 2016) (in the stipulated order appointing the guardian ad litem, the parties agreed that the court could "consider the information contained" in the guardian ad litem's report, but they also agreed that the guardian ad litem could "testify before the [c]ourt" and that the guardian ad litem's report *would not be excluded by the hearsay rules*).

III. Closing Thoughts: If you were unsuccessful in persuading the judge that the evidence was admissible, remember Rule 12.450, Fla.Fam.Law.R.P. which provides:

> **(a) Record of Excluded Evidence.** If, during trial, an objection to a question propounded to a witness is sustained by the trier of fact, the examining attorney may make a specific offer of what the attorney expects to prove by the answer of the witness. The court may add such other and further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court on request must take and report the evidence in full unless it clearly appears that the evidence is not admissible on any ground or is privileged. The court may require the offer to be made outside the hearing of the trier of fact.

Don't forget to preserve your record by making an offer of proof; an offer of proof also provides you an additional last ditch effort to convince the judge of the evidence's admissibility. An offer of proof tells the judge what the evidence would be if it were admitted. If you master the rules of evidence you will have an effective cudgel to use to both successfully admit and obstruct your opponent's ability to present his/her case. Having command of the rules of evidence, the proper objections and responses to objections raised against you makes you appear prepared and can help you disrupt the flow of the opposing attorney's presentation. In the end, if you get the necessary evidence before the judge you have told your client's story and increased the possibility of prevailing.