

Children's Law Center of Indiana



Evidentiary Issues in Parenting Time Cases¹

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I. Introduction

This paper discusses evidence issues which are relevant in proving why parenting time should be limited, supervised, or denied. Indiana case law requires the party seeking to terminate parenting time to prove the party's case by a preponderance of the evidence. Stewart v. Stewart, 521 N.E.2d 956, 963 (Ind. Ct. App. 1988), *trans. denied*. Certain types of evidence are inexpensive to obtain and readily available to attorneys who provide pro bono and modest means representation. The types of evidence discussed herein are: (1) photographs; (2) child's statements; (3) noncustodial parent's statements; (4) medical records; (5) records of criminal convictions; (6) police incident reports; (7) social services records; (8) Department of Child Services caseworker testimony and records; (9) business records and school records; (10) computer, cell phones, and text messages. Although many of the cited opinions are appellate decisions from criminal cases, the evidence rules and issues would also be relevant to family law.

II. Case Law, Evidence Rules, and Statutes

A. Photographs

1. Schiro v. State, 888 N.E.2d 828, 842 (Ind. Ct. App. 2008) (Court found no abuse of discretion in admission of photograph of rape victim and her physically disabled daughter where rape victim had described what was pictured and picture was relevant to victim's vulnerability), *trans. denied*.
2. In Re J.V., 875 N.E.2d 395, 401-02 (Ind. Ct. App. 2007) (admitting into evidence testimony regarding police officer's observations of digital camera photographs without offering the missing photographs into evidence was not an

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abuse of discretion; it was consistent with the exception to best evidence rule which allows for admission of evidence of contents of photographs where original is lost or destroyed unless proponent lost or destroyed original in bad faith), *trans. denied*.

3. Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005) (generally photographs depicting injuries of victim or demonstrating witness testimony are relevant and admissible, citing Ind. Evidence Rules 401 and 402).
4. Stuckman v. Kosciusko County Bd. Of Zoning Appeals, 506 N.E.2d 1079, 1082 (Ind. 1987) (generally, photographs offered as demonstrative evidence are admissible when it can be shown that they are a true and accurate representation of the scene which they purport to represent).

B. Child's Statements – Then Existing Condition (Ind. Evidence Rule 803(3))

1. Simmons v. State, 746 N.E.2d 81, 88-89 (Ind. Ct. App. 2001) (stepmother's testimony regarding child's statement to stepmother describing locality of child's pain could be admissible under Ind. Evidence Rule 803(3), then existing mental, emotional, or physical condition; stepmother's testimony about child's reference to defendant's sexual abuse as cause of child's pain was not admissible under Evid. R. 803(3)), *trans. denied*.
2. Fleener v. State, 648 N.E.2d 652, 655 (Ind. Ct. App. 1995) (grandmother's testimony concerning child's complaint while being bathed that "her bottom was sore" admissible under Ind. Evid. R. 803(3)), *affirmed at* 656 N.E.2d 1140 (Ind. 1995).
3. Arndt v. State, 642 N.E.2d 224 (Ind. Ct. App. 1994) (Court noted that child's bathtime statement to parents that his bottom hurt and child's naming of defendant as person who touched child was arguably admissible under Ind. Evid. R. 803(3)).

C. Child's Statements – Excited Utterance (Ind. Evidence Rule 803(2))

1. Purvis v. State, 829 N.E.2d 572, 581 (Ind. Ct. App. 2005) (testimony of mother's live-in boyfriend concerning ten-year-old's statement about very recent molestation admissible; child was crying and upset about experience), *trans. denied*.
2. D.G.B. v. State, 833 N.E.2d 519, 526 (Ind. Ct. App. 2005) (six-year-old child sexual abuse victim's statement to mother regarding abuse after child awoke from surgery to repair vaginal damage was admissible as excited utterance under Ind. Evidence Rule 803(2) because child was still under stress of excitement caused by "particularly hideous" event).
3. Jones v. State, 800 N.E.2d 624, 628 (Ind. Ct. App. 2003) (three-year-old battery victim's statements to police officer that defendant had hit him in the mouth with her fist were admissible as excited utterance under Ind. Evidence Rule 803(2); officer responded immediately).

D. Child's Statements – For Purposes of Medical Diagnosis and Treatment (Ind. Evidence Rule 803(4))

1. In Re Paternity of H.R.M., 864 N.E.2d 442, 447 (Ind. Ct. App. 2007) (child's statements to clinical social worker about child abuse were inadmissible hearsay and did not fall within scope of Ind. Evidence Rule 803(4), statements made for purposes of medical diagnosis and treatment, because evidence did not show child was aware of social worker's treatment role).
2. In Re W.B., 772 N.E.2d 522, 523 (Ind. Ct. App. 2002) (therapist's testimony concerning children's statements of sexual and physical abuse by parents was not admissible because evidence did not show that children were aware of therapist's purpose).
3. Cooper v. State, 714 N.E.2d 689, 694 (Ind. Ct. App. 1999) (young child molestation victim's statement to nurse, including identity of perpetrator, admitted under Ind. Evidence Rule 803(4) because nurse's testimony indicated victim understood why she was in emergency room and roles of nurse and doctor who examined her), *trans. denied*.
4. McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996) (trial court's admission of children's hearsay statements about abuse to therapist was error; declarant must be motivated to provide truthful information in order to promote diagnosis and treatment, and this exception to hearsay rule does not lend itself easily to the statements of young children).

E. Noncustodial Parent's Statements

1. Statements by party opponents do not have to be against the party's interests. The only requirement is that the statement be offered against the party who made it. Ind. Evidence Rule 801(d)(2).
2. VanEtten v. Fegaras, 803 N.E.2d 689, 692 (Ind. Ct. App. 2004) (plaintiff's different accounts of causes of his injuries to emergency room medical technicians and police were admissions by a party opponent and exceptions from the hearsay rule pursuant to Ind. Evidence Rule 801(d)(2)), *trans. denied*.
3. Apter v. Ross, 781 N.E.2d 744, 755-57, 766 (Ind. Ct. App. 2003) (trial court erred in failing to admit recording of phone conversation between mother and child where mother gave child advice about what to say to the Guardian ad Litem, social worker, and judge; father's concern for child's welfare supported by child's appearance and actions while on telephone with mother resulted in his recording phone calls which did not violate federal or Indiana wiretap acts).

F. Medical Records

1. Medical records which are certified and are regularly maintained by a hospital are admissible as business records. IC 34-43-1-1 et. seq.

2. Estate of Dyer v. Doyle, 870 N.E.2d 573, 578-79 (Ind. Ct. App. 2007) (victim passenger's statement to emergency room doctor regarding cause of car accident qualified under business record hearsay exception), *trans. denied*.
3. Richardson v. State, 856 N.E.2d 1222, 1226 (Ind. Ct. App. 2006) (trial court did not abuse discretion in admitting child's medical records into evidence pursuant to Ind. Evidence Rule 803(6) in criminal methamphetamine dealing, possession, and neglect of dependent case; business records are not testimonial and Crawford v. Washington, 541 U.S. 36 (2004) did not apply), *trans. denied*.
4. Weis v. State, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005) (trial court did not error in admitting medical record which contained notes by nurse who did not testify, but doctor testified about nurse's procedures).
5. Schaefer v. State, 750 N.E.2d 787, 794 (Ind. Ct. App. 2001) (expressions of opinion within medical or business records historically have not been admissible under the business records exception because their accuracy cannot be evaluated without cross-examination of person offering opinion).
6. Schlout v. Guinevere Real Estate Corp., 697 N.E.2d 1273, 1277 (Ind. Ct. App. 1998) (hospital records which include medical opinions and diagnoses must meet the requirements for expert opinions set forth in Ind. Evidence Rule 702).

G. Records of Criminal Conviction

1. Judgments of conviction are an exception to hearsay under Ind. Evidence Rule 803(22).
2. Rebuttable presumption for supervised parenting time if child witnesses or hears domestic or family violence and noncustodial parent is convicted. IC 31-17-2-8.3; IC 31-14-14-5. Many different crimes are included in domestic or family violence defined at IC 31-9-2-29.5; including homicide offenses, battery, kidnapping, criminal confinement, rape, child molesting, sexual misconduct with a minor and other sex crimes, robbery, arson, burglary, trespass, disorderly conduct, intimidation or harassment, voyeurism, stalking, human and sexual trafficking, and animal cruelty. Note that this statute includes the situation of a child who hears, but does not see the domestic or family violence. See Lloyd v. State, 669 N.E.2d 980, 985 (Ind. 1996), (the testimony of the child victim's eleven-year-old sister, who heard beatings and yelling, constituted witness testimony because "she sensed the beatings adequately enough to be considered a witness to the abuse.")
3. Rebuttable presumption for supervised parenting time in paternity cases if person has been convicted of child molesting or child exploitation. IC 31-14-14-1(c)(d).
4. Suggs v. State, 883 N.E.2d 1188, 1193 (Ind. Ct. App. 2008) (admission of copies of certified court records instead of originals did not constitute fundamental error).

5. Tate v. State, 835 N.E.2d 499, 509 (Ind. Ct. App. 2005) (Court found that certified criminal charging information, certified commitment record, certified plea agreement, and certified abstract of judgment were appropriately admitted into evidence by trial court under Ind. Evidence Rule 803(8)), *trans. denied*.
6. Rhone v. State, 825 N.E.2d 1277, 1284 (Ind. Ct. App. 2005) (probable cause affidavit was inadmissible because it contained factual findings selected by law enforcement officer and was created for advocacy purposes), *trans. denied*.
7. Angleton v. Estate of Angleton, 671 N.E.2d 921, 927 (Ind. Ct. App. 1996) (trial court's refusal to allow convicted murderer to relitigate his culpability in estate proceeding regarding victim's life insurance benefits was not impermissible collateral estoppel).
8. Kimberlin v. DeLong, 637 N.E.2d 121, 124-125 (Ind. 1994) (criminal felony judgment is admissible but conviction is not necessarily conclusive proof in civil trial of factual issues determined by criminal judgment).

H. Police Incident Reports

1. In Re Paternity of P.E.M., 818 N.E.2d 32, 28 (Ind. Ct. App. 2004) (Court affirmed trial court's order denying admissibility of police reports because Ind. Evidence Rule 803(8) specifically excludes investigative reports by police and other law enforcement personnel unless the reports are offered by the accused in a criminal case).

I. Social Services Reports

1. In Re Paternity of H.R.M., 864 N.E.2d 442, 448-450 (Ind. Ct. App. 2007) (business records affidavit of family support specialist regarding documents specialist had prepared containing her observations of child's behavior during home visits did not comply with Ind. Evidence Rule 902(9); therefore, records were inadmissible).
2. In Re Relationship of E.T., 808 N.E.2d 639, 643-645 (Ind. 2004) (Court held that records of social services agency which provided supervised visits for children under Allen County OFC jurisdiction did not qualify as business records because not all the information was a result of first-hand observations, records contained conclusory lay opinions, and records were not prepared for systematic conduct of social services agency's business).

J. Department of Child Services Caseworker Testimony and Records

1. IC 25-23.6-4-6 states that a social worker licensed under this article may provide factual testimony but not expert testimony.
2. IC 31-34-18-2(9) requires the court to first conduct an in camera review of DCS records to determine whether public disclosure of the information is necessary for the resolution of an issue then pending before the court. Juvenile court

records are confidential, and the provisions of Administrative Rule 9 should be followed. In Re T.B., 895 N.E.2d 321, 338 (Ind. Ct. App. 2008)

3. D.W.S. v. L.D.S., 654 N.E.2d 1170, 1173 (Ind. Ct. App. 1995) (Court determined that trial court's admission of Allen County Office of Family and Children records regarding child abuse investigation was harmless error because records did not comply with Ind. Evidence Rule 803(6) due to lack of personal knowledge by the persons who made the records).
4. Hinkle v. Garrett-Keyser-Butler Sch. D., 567 N.E.2d 1173, 1179 (Ind. Ct. App. 1991) (in suit to reinstate teacher fired for alleged sexual abuse of students, Court ruled that DeKalb County Welfare reports were not admissible under business records or official records exception to hearsay rule), *trans. denied*.

K. Business Records and School Records

1. Speybroeck v. State, 875 N.E.2d 813, 820-822 (Ind. Ct. App. 2007) (business records affidavit which did not specify number of pages included nor identify documents it purported to authenticate was insufficient to comply with Ind. Evidence Rule 902(9); business records must have been created by employee with personal knowledge of information recorded to meet the hearsay exception requirement of Ind. Evidence Rule 803(6)).
2. Lasater v. Laster, 809 N.E.2d 380, 396 (Ind. Ct. App. 2004) (Court affirmed admission of child's counseling report in dissolution case pursuant to Ind. Evidence Rule 803(6) despite mother's objection that teacher was not present to testify; school counselor testified that she was familiar with record and it was normally kept in ordinary course of business).
3. J.L. v. State, 789 N.E.2d 961, 964-965 (Ind. Ct. App. 2003) (Court found that computerized school attendance records, offered into evidence by appointed school attendance officer, were admissible pursuant to Ind. Evidence Rule 803(6); evidence rule permits foundational requirements to be established by custodian or another qualified witness).

L. Computers, Cell Phone Records, and Text Messages

1. Bone v. State, 771 N.E.2d 710, 716 (Ind. Ct. App. 2002) (testimony before court must be sufficient to establish authenticity of exhibits as depicting images contained in defendant's computer).
2. Fry v. State, 885 N.E.2d 742, 749 (Ind. Ct. App. 2008) (court did not abuse discretion when it deemed cell phone records properly authenticated and admitted records as evidence; certification from cell phone companies that attached records were true and accurate created reasonable probability that records were what they purported to be).
3. Hape v. State, 903 N.E.2d 977, 990 (Ind. Ct. App. 2009) (text messages must be separately authenticated from the telephones in which they are stored before being admitted into evidence; proponent may offer substance of text message

for evidentiary purposes unique from purpose served by phone itself), *trans. denied.*