Evidence for Parenting Time Determinations[1]

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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 in Indiana courts. The party seeking to restrict parenting time must prove the party's case by a preponderance of the evidence. See Stewart v. Stewart, 521 N.E.2d 956, 963 (Ind. Ct. App. 1988), *trans. denied*. 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; and (11) E-Records and Social Media. It is important to note that many of the cited opinions are appellate decisions from criminal cases, but the rules of evidence and issues are also applicable to family law cases.

A. Photographs

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There are two rules that regulate whether a particular photograph is admissible. First, the photograph must be relevant. Under Indiana Evidence Rule 401 a piece of evidence is relevant "if a) it has any tendency to make a fact more or less probable than it would be without the evidence; and b) the fact is of consequence in determining the action." Ind. Evidence Rule 401. Second, the court may exclude the photograph if the probative value of the photograph is substantially outweighed by "a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Ind. Evidence Rule 403. The photograph is admissible if it is relevant, under Evid. R. 401, and if there is not a danger that substantially outweighs the photograph's probative value, under Evid. R. 403.

An application of these two rules can be seen in Schiro v. State, 888 N.E.2d 828 (Ind. Ct. App. 2008). During a rape trial, the trial court admitted into evidence a photograph of the rape victim and her minor, physically disabled daughter seated in a wheelchair. Id. at 841. During trial the defense objected to the photograph on relevancy grounds under Evid. R. 401. Schiro at 841. However, the Court found that the photograph was relevant to show the rape victim's vulnerable state because it showed that the victim was having to care for her disabled daughter. Id. at 842. On appeal, the defense also challenged this photograph under Evid. R. 403, claiming that any probative value of the photograph was outweighed by the danger of unfair prejudice. Schiro at 841. The Court found that the danger of unfair prejudice did not outweigh the photograph's probative value because the contents of the photograph had already been described on the record in court. Id. Thus the photograph satisfied both Evid. R. 401 and Evid. R. 403 and was properly admitted.

There are two categories of photographs that are generally admissible. First, photographs which show a victim's injuries are usually admissible. See Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005). Such photographs are relevant but still may be excluded under Evid. R. 403. See Pruitt at 117. However, if they are a fair and accurate representation of what they are being offered to show, their gruesome nature will not bar them from admission. Id. at 117-8. The second category of generally admissible photographs are those being used as demonstrative evidence and are supported by other evidence to show that the photographs "are a true and accurate representation of the scene which they purport to represent." Stuckman v. Kosciusko County Bd. of Zoning Appeals, 506 N.E.2d 1079, 1082 (Ind. 1987). If the photograph is not being offered as demonstrative evidence, but rather as substantive evidence itself, it may be able to be admitted as a "silent witness." Pruitt at 117-8. In order to admit a photograph as a "silent witness," without testimony that the photograph fairly represents that which it purports to represent, " a strong showing of the photograph's competency and authenticity must be established." Id.

In certain circumstances testimony about photographs, without the actual photographs themselves, may also be admissible. When trying to offer such testimony it is important to be aware of Ind. Evidence Rule 1002 which is often referred to as the best evidence rule. This rule states that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise." Evid. R. 1002. In a children in need of services (CHINS) determination, the trial court admitted police officers' testimony about the photographs they had seen on a digital camera. In re J.V., 875 N.E.2d 395, 401 (Ind. Ct. App. 2007). The parents objected to this testimony, arguing that it violated the best evidence rule. Id.

The Court found that this testimony was admissible, and did not violate the best evidence rule because it fell within an exception to the rule under Ind. Evidence Rule 1004(1) which states that "[a]n original is not required and other evidence of the content of a writing, recording, or photograph is admissible if (a) all originals are lost or destroyed, and not by the proponent acting in bad faith." In re J.V. at 401. The Court concluded that the memory card containing the pictures on the camera was missing, not because of bad faith on the part of the proponent, DCS, and therefore the officers' testimony about the photographs was permissible. Id. at 401-2. Thus, if a photograph has been lost or destroyed, not in bad faith, then testimony about its contents can be offered in place of the photograph itself.

B. Child's Statements

Although a child's out-of-court statements offered to prove the truth of the matter asserted are hearsay under Ind. Evidence Rule 801(c), there are several hearsay exceptions that allow children's out-of-court statements to be admitted into evidence.

a. Then Existing Condition

A child's statement about a then-existing mental, emotional, or physical condition can be admitted under Ind. Evidence Rule 803(3) as an exception to the hearsay rule. A statement about a then-existing mental, emotional, or physical conditioned is defined as "[a] statement of the declarant's then-existing state of mind (such as motive, design, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." Evid. R. 803(3).

Statements made about the location of pain or the symptoms of an illness are admissible under this hearsay exception. Simmons v. State, 746 N.E.2d 81, 89 (Ind. Ct. App. 2001). For instance, in Simmons, during a trip to the zoo, a stepmother observed her stepdaughter constantly holding and touching her vaginal area. Id. at 85. After the stepmother asked her stepdaughter what was wrong, the child described having pain in her vaginal area. Id. The stepmother was allowed to testify to her stepdaughter's description of pain. Id. at 88. Testimony by an adult that a child told her during bathtime that the child's bottom was sore was admissible. See Fleener v. State, 648 N.E.2d 1140, 1142 (Ind. Ct. App. 1995) (child told her grandmother during bathtime that she had a sore bottom). See also Arndt v. State, 642 N.E.29 224, 227 (Ind. Ct. App. 1994) (child told mother during bathtime that he had pain on his bottom). However, statements about how the person was injured, or who injured them, are not admissible under this hearsay exception because they are statements of memory about past events. Simmons at 88-89. For example, the stepmother's testimony in Simmons that her stepdaughter said her vagina hurt *because Simmons had been hurting her* was impermissible and should not have been allowed. Id. at 88. Cf. Arndt v. State, 642 N.E.2d 224, 227 (Ind. Ct. App. 1994) (Court noted that child's bathtime statement to parents naming the defendant as the one who made his bottom hurt was *arguably* admissible under Evid. R. 803(3) but the Court decided the issue on other grounds and did not decide whether or not the child's statement was in fact admissible under Evid. R. 803(3)).

b. Excited Utterance

If a child's statement is an excited utterance then it is also admissible under Evid. R. 803(2) as an exception to the hearsay rule. An excited utterance is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it

caused." Evid. R. 803(2). Three elements must be present in order for a statement to be considered an excited utterance: "(1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event." Jones v. State, 800 N.E.2d 624, 627 (Ind. Ct. App. 2003). However, "[t]his is not a mechanical test; admissibility turns on whether the statement was inherently reliable because the witness was under the stress of the event and unlikely to make deliberate falsifications." Id. "The heart of the inquiry is whether the declarant was incapable of thoughtful reflection." Id.

It is important to note that statements made closer in time to the excitement inducing event are more likely to be admitted as an excited utterance. Id. But "the amount of time that has passed is not dispositive." Id. Two examples of excited utterances made soon after the event can be seen in Jones and Purvis v. State, 829 N.E. 2d 572 (Ind. Ct, App. 2005). In Jones the Court found that a three-year-old's statement to a police officer asserting that Jones had hit him in the mouth was an excited utterance. Jones at 628. The Court decided that the statement constituted an excited utterance and was therefore admissible because the child talked to the police officer immediately following the incident and the child was still upset and appeared as if he had been crying. Id. Similarly, in Purvis the Court found that a ten-year-old's statement to his mother's boyfriend about molestation was admissible as an excited utterance because it was made very soon after the molestation occurred and the child was still visibly upset with tears in his eyes when he spoke. Purvis. at 581. In contrast, a longer interval of time had passed in D.G.B. v. State, 833 N.E.2d 519 (Ind. Ct. App. 2005), in which the Court concluded that a six-year-old's statement to her mother about sexual abuse was admissible as an excited utterance. Id. at 526-7. The child made the statement to her mother after she had been sexually molested, had undergone

surgery to repair injuries caused by the molestation, and awoke to see a knife and fork on her breakfast tray, the very instruments used to injure her. Id. at 526. Although a significant period of time had elapsed between the molestation and the child's statement in the hospital, the Court concluded that the statement was still an excited utterance because the molestation was particularly heinous and the excitement of the event would continue to place a six-year-old child under stress even longer than it would for the typical adult. Id. at 527. Therefore, although the amount of time that has passed between the time the event occurred and the time the statement was made is relevant, it is not determinative.

c. For Purposes of Medical Diagnosis and Treatment

Under Evid. R. 803(4), statements made for the purposes of medical diagnosis or treatment are admissible as exceptions to the rule against hearsay. Such a statement is one that "(A) is made by a person seeking medical diagnosis or treatment; (B) is made for – and is reasonably pertinent to – medical diagnosis or treatment; and (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause." Evid. R. 803(4). Statements made to non-physicians can be covered by this exception "so long as the declarant makes the statements to advance a medical diagnosis or treatment." In Re Paternity of H.R.M., 864 N.E.2d 442, 446 (Ind. Ct. App. 2007). Statements made when no medical professionals are present after the end of a medical examination do not fall under this exception because they are not made for the purpose of advancing a medical diagnosis or treatment. See Mastin v. State, 966 N.E.2d 197, 201 (Ind. Ct. App. 2012).

Indiana has adopted a two-step test, often referred to as the McClain test, to determine if a statement made for medical diagnosis or treatment is admissible. McClain v. State, 675 N.E.2d

329, 331 (Ind. 1996). First, the declarant must be "motivated to provide truthful information in order to promote diagnosis and treatment." Id. "The declarant must subjectively believe that he was making the statement for the purpose of receiving medical diagnosis or treatment." Id. It is very difficult for young children to meet this first requirement. When someone brings a young child to treatment and the child makes a statement to the professional, there must be evidence that the child "understood the professional's role in order to trigger the motivation to provide truthful information." Id. The second prong of the McClain test requires that the statement's content must be "such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment." Id.

The majority of the difficulties in attempting to admit children's statements under this exception are with satisfying the first step of the McClain test. In McClain the statements the child victim made to the therapist did not fall under this exception because there was no evidence that the child "sought the therapist's help or that he believed he was receiving any treatment." Id. The facts that the child referred to the therapist as his "counselor" and the child's assertion that he talked to the therapist about things McClain did to him were insufficient to establish the required motivation. Id. In In Re Paternity of H.R.M. the child's statements to the clinical social worker did not fall under this exception and should not have been admitted because the record gave no indication that the child knew the reason behind the social worker's inquiries and so the child had no motivation to tell the truth. In re Paternity of H.R.M. at 447. Furthermore, the social worker's testimony actually supported a conclusion that the child was not aware of the medical purpose of the interview. Id. In In Re W.B., 722 N.E.2d 522 (Ind. Ct. App. 2002) the children's statements to the therapist also did not satisfy this first requirement and were inadmissible

because the children were both emotionally and mentally incompetent, were unaware of the therapist's purpose, and were not motivated to provide honest facts. Id. at 533. See also VanPatten v. State, 986 N.E.2d 255, 265-6 (Ind. 2013), (finding that statements made by a child to a forensic nurse examiner were not admissible under the medical diagnosis and treatment exception to the hearsay rule because there was no evidence in the record that the child understood the role of the nurse and therefore the child was not motivated to provide truthful and honest information). In contrast, in Cooper v. State**,** 714 N.E.2d 689 (Ind. Ct. App. 1999), the child's statements made to the medical professionals who examined her did satisfy the first part of the McClain test and therefore were admissible because the nurse's testimony sufficiently indicated that the child understood why she was in the emergency room and "understood the professional role of both the nurse and the doctor who examined her, thus triggering the motivation to provide truthful information." Id. at 694.

It is important to note that statements which reveal the identity of a perpetrator are "rarely admissible under the medical diagnosis exception to hearsay, as identity is not normally relevant to a medical diagnosis or treatment." In re Paternity of H.R.M. at 447. "However, in the context of physical or sexual child abuse, 'knowledge of the perpetrator is important to the treatment of psychological injuries that may relate to the identity of the perpetrator and to the removal of the child from the abuser's custody or control" and therefore the court has the discretion to admit them. Id. (citing Nash v. State, 754 N.E.2d 1021, 1024 (Ind. Ct. App. 2001)).

C. Noncustodial Parent's Statements

A noncustodial parent's out-of-court statement can be admitted under the party opponent exception to the hearsay rule as long as:

> The statement is offered against an opposing party and: (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. The statement does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Evid. R. 801(d)(2). Statements made by a party opponent do not have to be against the party's interests to be admissible under this rule. The only requirement is that the statement be offered against the party who made it. Therefore, as long as the noncustodial parent is a party to the case, then any other party to the case can admit any and all statements made by the noncustodial parent under this exception to the hearsay rule. See Etten v. Van Fegaras, 803 N.E.2d 689, 692 (Ind. Ct. App. 2004).

One way a noncustodial parent's statements may be admitted into court is through recordings of the noncustodial parent's telephone conversation with his/her child. In Apter v. Ross a father recorded the phone conversations between his child and his child's mother, in which the mother coached the child on what to say to the Guardian ad Litem, the social worker, and the judge. Apter v. Ross, 781 N.E.2d 744, 750 (Ind. Ct. App. 2003). "[I]n civil cases, a tape recording is admissible if only these three foundational requirements are met: (1) that it is authentic and

correct; (2) that it does not contain matter otherwise not admissible into evidence; and (3) that it is of such clarity as to be intelligible and enlightening to the jury." Id. at 753. Under the Indiana Wiretap Act, the Court determined that the father did not need prior permission from the mother in recording conversations while on the telephone with the child, as he was concerned for his child's welfare and a parent can consent to recording phone conversations on behalf of his minor child. Id. at 757. As such, he did not violate any regulations and therefore the recording was admissible. Id.

D. Medical Records

A medical record can be admitted under the business record exception to hearsay which exempts records of a regularly conducted activity including:

> A record of an act, event, condition, opinion, or diagnosis if: (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Evid. R. 803(6). Additionally, "[n]otwithstanding the hearsay rule, but subject to all other objections, photostatic copies of hospital medical records certified under section 7 of this chapter

are admissible into evidence in any civil action or administrative proceeding without testimony from the custodian of the hospital medical records." IC 34-43-1-4.

For example, in Estate of Dyer v. Doyle, 870 N.E.2d 573 (Ind. Ct. App. 2007), a doctor's medical records were admitted as business records under Evid. R. 803(6). Estate of Dyer at 577. Although the records included a passenger's statement to the emergency room doctor regarding the cause of the car accident he was in, they were properly admitted under Evid. R. 803(6) because they were nothing more than a restatement of how the patient was injured. Estate of Dyer at 579. Similarly in Weis v. State, 825 N.E.2d 896 (Ind. Ct. App. 2005), the trial court admitted into evidence medical records recorded by a nurse during an initial intake evaluation regarding a child's molestation. Id. at 900. Although the nurse did not testify, the doctor testified about the nurse's procedure. Id. The trial court explained that the nurse's notes, read by the doctor, were not hearsay because they explained why the doctor performed a physical examination on the child. Id. As a result, the Court opined that the trial court did not err in admitting the medical records into evidence. Id. at 901. See also Richardson v. State, 856 N.E.2d 1222, 1229 (Ind. Ct. App. 2006) (the Court held that the trial court properly admitted the child's medical records as business records).

Even if medical records satisfy the elements of Evid. R. 803(6) they must be otherwise admissible. Schloot v. Guinevere Real Estate Corp., 697 N.E.2d 1273, 1277 (Ind. Ct. App. 1998). Medical records that include medical opinions and diagnoses must also satisfy the requirements outlined in Ind. Evid. R. 702 for expert opinions. Schloot at 1277. See also Schaefer v. State, 750 N.E.2d 787, 793-4 (Ind. Ct. App. 2001). Expressions of opinion contained within medical records are not admissible under Evid. R. 803(6) "because their accuracy cannot

be evaluated without the safeguard of cross-examination of the person offering the opinion." Schloot at 1277.

E. Records of Criminal Conviction

Evidence of criminal convictions can be very important to a parenting time determination. First, if:

> (a) … a noncustodial parent has been convicted of a crime involving domestic or family violence that was witnessed or heard by the noncustodial parent's child. (b) There is created a rebuttable presumption that the court shall order that the noncustodial parent's parenting time with the child must be supervised: (1) for at least one (1) year and not more than two (2) years immediately following the crime involving domestic or family violence; or (2) until the child becomes emancipated; whichever occurs first.

IC 31-17-2-8.3 [dissolution]; IC 31-14-14-5 [paternity]. A "[c]rime involving domestic or family violence" is defined to include homicide offenses, battery, kidnapping/confinement, sex offenses, robbery, arson/mischief, burglary/trespass, disorderly conduct, intimidation/harassment, voyeurism, stalking, offenses against the family, human/sexual trafficking, and animal cruelty crimes. IC 31-9-2-29.5. 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 child victim's eleven-year-old sister, who heard beatings and yelling but did not see the beatings, was a witness and could testify because "she sensed the beatings adequately enough to be considered a witness to the abuse").

The noncustodial parent's criminal convictions are also important in parenting time decisions because: "(a) noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time might: (1) endanger the child's physical health and well-being; or (2) significantly impair the child's emotional development." IC 31-14-14-1(a). See also IC 31-17-4-2 [dissolution]. In such a hearing on a paternity case, a rebuttable presumption exists that a parent "might endanger the child's physical health and well-being or significantly impair the child's emotional development" if they have been convicted of child molestation or child exploitation. IC 31-14-14-1(c). Additionally, if a court decides in a paternity case to grant parenting time rights to a parent with either a child molestation or child exploitation conviction, then a rebuttable presumption exists that the parenting time must be supervised. IC 31-14-14-1(d).

A criminal conviction can be admitted into evidence as an exception to hearsay in three ways. First, the Judgment of a Previous Conviction is an exception to hearsay and is admissible evidence if:

> (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; (B) the conviction was for a crime punishable by death or by imprisonment for more than a year; (C) the evidence is admitted to prove any fact essential to the judgment; and (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility.

Evid. R. 803(22).

A criminal conviction can also be admitted as a public record which is admissible as an exception to hearsay under Evid. R. 803(8) if

> (A) A record or statement of a public office if: (i) it sets out: (a) the office's regularly conducted and regularly recorded activities; (b) a matter observed while under a legal duty to [observe and] report; or (c) factual findings from a legally authorized investigation; and (ii) neither the source of information nor other circumstances indicate a lack of trustworthiness.
>
> (B) Notwithstanding subparagraph (A), the following are not excepted from the hearsay rule: (i) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (ii) investigative reports prepared by or for a public office, when offered by it in a case in which it is a party; (iii) factual findings offered by the government in a criminal case; and (iv) factual findings resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

Evid. R. 803(8). See 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 Evid. R. 803(8)). For authentication purposes under Ind. Evidence Rule 902(1) certified copies of court records showing prior convictions need to contain the original court clerk's seals/certifications. Suggs v. State, 883 N.E.2d 1188, 1193 (Ind. Ct. App. 2008).

In order to determine the admissibility of a criminal conviction with respect to the exclusions enumerated in Evid. R. 803(8) the court applies the Ealy three-step test. See Ealy v. State, 685 N.E.2d 1047 (Ind. 1997); Rhone v. State, 825 N.E.2d 1277, 1283 (Ind. Ct. App. 2005). The Ealy

test requires the court to answer three question (1) Does the record contain "findings that address a materially contested issue in the case?" (2) Does the record contain factual findings (meaning does the report contain an investigator's conclusions drawn from the facs)? and (3) Was the record "prepared for advocacy purposes or in anticipation of litigation?". Rhone v. State at 1283-4. If the answer to any of the three questions is no, then the record is not hearsay and can be admitted (as long as no other evidence rules bar its admission). Id. If the answer to all three questions is yes, then the record is inadmissible hearsay. Id. In Rhone v. State the piece of evidence at issue was an Affidavit for Probable Cause and it was found to be inadmissible because all three steps of the Ealy test were answered in the affirmative since the affidavit contained factual findings made by a law enforcement officer and it was created for advocacy purposes. Id. at 1284.

A court can also take judicial notice of a criminal conviction. "A court may judicially notice a law, which includes: …(5) records of a court of this state." Ind. Evidence R. 201(b)(5). In Christie v. State, 939 N.E.2d 691 (Ind. Ct. App. 2011), the Court held that it was proper for the trial court to take judicial notice of the defendant's new conviction and therefore the trial court had sufficient evidence that the defendant had violated the conditions of his community correction placement. Id. at 694. Therefore a court can admit evidence of a criminal conviction under Evid. R. 803(22), Evid. R. 803(8), or through judicial notice under Evid. R. 201(b)(5).

Additionally, it is important to know that the court does not have to allow a parent to re-litigate his/her culpability in the current proceeding when evidence of a conviction is entered. In an estate proceeding regarding a murder victim's life insurance benefits, Angleton v. Estate of Angleton, 671 N.E.2d 921 (Ind. Ct. App. 1996), the trial court did not allow Angleton to re-

litigate his culpability with respect to his prior murder conviction which was offered into evidence. Id. at 927-8. The Court found that Angleton already had an opportunity to defend himself with respect to the murder charge and so this was not impermissible collateral estoppel. Id. at 927. But while the conviction may be admitted, and cannot be re-litigated in the civil trial, "such conviction is not necessarily conclusive proof in the civil trial of the factual issues determined by the criminal judgment." Kimberlin v. DeLong, 637 N.E.2d 121, 124 (Ind. 1994).

F. Police Incident Reports

Although police incident reports may be useful, they are barred as hearsay evidence in civil cases. Evid. R. 803 "specifically excludes investigative reports by police and other law enforcement personnel, unless the reports are offered by an accused in a criminal case." In Re Paternity of P.E.M., 818 N.E.2d 32, 38 (Ind. Ct. App. 2004). Therefore, police incident reports themselves would be inadmissible hearsay in evidence determinations of parenting time.

G. Social Services Reports

Social services reports can be admitted into evidence if they comply with the requirements outlined in the business records exception to hearsay, which states that a business record is:

> A record of an act, event, condition, opinion, or diagnosis if: (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of

the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Evid. R. 803(6). In In Re Termination of Parent-Child Relationship of E.T., 808 N.E.2d 639 (Ind. 2004) records from a social services agency which provided supervised visits for children did not qualify as business records. Id. at 643-5. The records did not qualify because they violated the specifications of Evid. R. 803(6) in that not all the information was a result of first-hand observations from the agency's staff, the records contained conclusory lay opinions, and the records were not prepared for systematic conduct of the social services agency's business. In Re Termination of Parent-Child Relationship of E.T. at 643-5.

In order for a social service report to be admissible as a business record under Evid. R. 803(6), it also must comply with Evid. R. 902(11) (or Evid. R. 902(12) if it is a foreign record) which states that the record needs to be certified "under oath of the custodian or another qualified person." See In Re Paternity of H.R.M., 864 N.E.2d 442, 448-450 (Ind. Ct. App. 2007) (document the specialist had prepared containing her observations of the child's behavior during home visits was inadmissible because the business records affidavit was not certified under oath). Thus it is important to make sure any affidavits offered into evidence by social service agencies are in complete compliance with both Evid. R. 803(6) and Evid. R. 902(11) or (12).

H. Department of Child Services Caseworker Testimony and Records

A social worker may testify in court, even as an expert witness. Although IC 25-23.6-4-6 states that "[a] social worker licensed under this article may provide factual testimony but may

not provide expert testimony," Evid. R. 702 does not exclude social workers from giving expert testimony. If an Indiana Evidence Rule conflicts with a statute, such as here, the Indiana Evidence Rule controls. B.H. v. Indiana Dept. of Child Services, 989 N.E.2d 355, 357 (Ind. Ct. App. 2013). Therefore, social workers may testify both as lay witnesses and expert witnesses. Id.

Although records produced by the Department of Child Services may be admitted into court in some circumstances they are generally not admissible. The records are always confidential, and the provisions of Ind. Administrative Rule 9 should be followed with respect to the records. See In Re T.B., 895 N.E.2d 321, 338 (Ind. Ct. App. 2008). IC 31-33-18-2(9) requires the court to only conduct an in camera review of DCS records "unless the court determines that public disclosure of the information contained in the records is necessary for the resolution of an issue then pending before the court." If the records are deemed to be necessary under IC 31-33-18-2(9), then it may be possible to admit them into evidence under the business records exception to hearsay. See Evid. R. 803(6). It is important to note that a record is only admissible under Evid. R. 803(6) if a member of the business' staff made the record with first-hand knowledge. See D.W.S. v. L.D.S., 654 N.E.2d 1170, 1173 (Ind. Ct. App. 1995) (a caseworker's records regarding a child abuse investigation should not have been admitted into evidence under the business records hearsay exception because the caseworker did not have personal knowledge of everything in the record). See also Hinkle v. Garrett-Keyser-Butler Sch. D., 567 N.E.2d 1173, 1179 (Ind. Ct. App.1991). Additionally, every hearsay statement in the record must also qualify under a separate hearsay exception. For this reason it is extremely difficult to admit records of the Department of Child Services into evidence.

I. Business Records and School Records

Both business records and school records must comply with the requirements of Evid. R. 803(6) in order to be admitted into evidence as exceptions to the hearsay rule. The rule states that a business record is:

> [a] record of an act, event, condition, opinion, or diagnosis if: (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Evid. R. 803(6). This rule requires the records to be made by an employee with personal knowledge of the information recorded. See Speybroeck v. State, 875 N.E.2d 813, 820 (Ind. Ct. App. 2007). This rule does not require the person whose statements are recorded to be present because the record is admitted as an exception to hearsay. See Lasater v. Laster, 809 N.E.2d 380, 396 (Ind. Ct. App. 2004) (the trial court properly admitted a child's counseling report pursuant to Evid. R. 803(6) when a school counselor testified that she was familiar with the record and that it was normally kept in the ordinary course of business, regardless of the fact that the teacher was not there to testify).

The records also must comply with the authentication requirements in Evid. R. 902(11) or (12) as instructed in Evid R. 803(6). Evid. R. 902(11) states that "[u]nless the source of information or the circumstances of preparation indicate a lack of trustworthiness, the original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification under oath of the custodian or another qualified person" is considered to be self-authenticated. See Speybroeck v. State, 875 N.E.2d 813, 820 (Ind. Ct. App. 2007) (a business records affidavit was inadmissible because it did not specify the number of pages included with the affidavit nor identify the included documents that it was supposed to authenticate in violation of what is now Evid. R. 902(11)). See also J.L. v. State, 789 N.E.2d 961, 962-4 (Ind. Ct. App. 2003) (a student's computerized school attendance records were admissible and the foundational requirements were established by the attendance officer who qualified as the records custodian).

J. Computers, Cell Phone Records, and Text Messages

The biggest concern when trying to admit, computers, cell phone records, text messages, or emails is properly authenticating the evidence. In general "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Ind. Evidence Rule 901(a).

Data contained on a computer needs to be authenticated before being admitted into evidence. In Bone v. State, 771 N.E.2d 710 (Ind. Ct. App. 2002) images from the defendant's computer were admissible evidence because the FBI agent's testimony that he observed a computer

program retrieve the records from the defendant's computer by a process that he was able to explain to the court was sufficient to authenticate the images. Id. at 716.

Although cell phone records are hearsay, they can be admitted under Evid. R. 803(6) as a business record if they meet the requirements outlined in that rule. Additionally, the records must be authenticated before they can be admitted into evidence. Fry v. State, 885 N.E.2d 742, 749 (Ind.Ct.App.2008). "Absolute proof of authenticity is not required" but rather only evidence sufficient to establish "a reasonable probability that the document is what it is claimed to be" is required. Id. Cell phone records can be self-authenticated by evidence that shows "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Evid. R. 901(b)(4). In Fry the cell phone records were admissible because the distinctive line item data points were sufficient for self-authentication and the cell phone companies' certification that the records were both true and accurate could also be considered for authentication purposes. Fry at 749.

Cell phone records of phone conversations also may be authenticated if the proponent of the evidence provides:

> evidence that a call was made to the number assigned at the time to: (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

Evid. R. 901(b)(6).

Text messages must be authenticated separately from the telephone that stores the text message when the substance of a text message is being admitted for a different evidentiary purpose than the phone itself. Hape v. State, 903 N.E.2d 977, 990 (Ind. Ct. App. 2009).

Even if the proponent of the evidence is unable to establish a direct link between the text messages and a particular person, they can still be authenticated by circumstantial evidence and admitted. In Pavlovich v. State, 6 N.E.3d 969 (Ind. Ct. App. 2014), in which the defendant was convicted of child solicitation, the Court found that the defendant's text messages and emails were sufficiently authenticated although there was no direct connection between the defendant and the text messages or emails. Id. at 976-8. The child victim's older sister had previously met with the defendant while working as a prostitute. Id. at 972. The circumstantial evidence here, that the child's older sister identified the phone number she used to meet the defendant, that the messages showed familiarity between the child's older sister and the defendant, that the messages identified the defendant's location on the day of his arrest, and that the messages and emails went silent after the defendant's arrest, was sufficient to authenticate the messages. Id. at 978-9.

When trying to admit text messages it is important to note that the rule of completeness applies. In In re Paternity of B.B., 1 N.E.3d 151 (Ind. Ct. App. 2013), the trial court properly admitted text messages exchanged between the mother and father into evidence. Id. at 153. The father appealed, claiming that the mother deleted certain texts to seem more sympathetic to the court. Id. However, the Court observed that the father never identified the content that he believed was removed from the messages. Id. at 158. The Court determined that the doctrine of completeness, a common law doctrine, would apply stating that "[w]hen one party introduces

part of a conversation or document, the opposing party is generally entitled to have the entire conversation or entire instrument placed into evidence." Id. at 159. See Ind. Evidence Rule 106. However, since the father did not attempt to submit evidence of the alleged deleted test messages, the Court found that the trial court did not abuse its discretion in admitting the text messages. In re Paternity of B.B. at 159.

K. E-Records and Social Media

Social media messages can also be admitted into evidence if authenticated. "Authentication of an exhibit can be established by either 'direct or circumstantial evidence.'" Strunk v. State, 44 N.E.3d 1, 5 (Ind. Ct. App. 2015) (citing Newman v. State, 675 N.E.2d 1109, 1111 (Ind. Ct. App. 1996)). In Strunk, a prosecution of sexual misconduct with a child, the Court held that screenshots of the defendant's Facebook profile and a screenshot of a Facebook message were properly admitted. Strunk v. State at 5. The child testified that she had used the Facebook profile to communicate with the defendant. Id. The child identified the defendant's profile by his wolf profile picture and also identified two mutual friends between the defendant's page and her own, one of whom was her mother. Id. This testimony was sufficient to authenticate the Facebook page and message. Id.

In Wilson v. State, 30 N.E.3d 1264 (Ind. Ct. App. 2015) the Court found that a witness' testimony about social media posts on Twitter was sufficient to authenticate the posts and therefore the posts were admissible. Id. at 1268-9. The witness testified that she communicated with the defendant on Twitter often and that she posted pictures of the two of them online many times. Id. The witness also identified the account that belonged to the defendant based on the

account name and identified particular terms the defendant often used on the internet which matched those used by the account in question. Id. This testimony sufficiently authenticated the Twitter posts. Id. See also Clark v. State, 915 N.E.2d 126 (Ind. 2009) (the Court affirmed the admission of the defendant's MySpace page as evidence in a murder case).