



TIPS FOR LAWYERS

EVIDENCE

To what extent do the Rules of Evidence apply in juvenile court proceedings?

Although there is a perception that the Rules of Evidence do not apply in Juvenile Court proceedings, Connecticut Code of Evidence § 1-1 specifically provides that “the Code applies to all proceedings in the superior court in which facts in dispute are found, except as otherwise provided by the Code, the General Statutes or the Practice Book.”

Accordingly, the Rules of Evidence must be read in conjunction with Conn. P.B. § 32-2 which provides that “testimony may be given in narrative form and the proceedings shall at all times be as informal as the requirements of due process and fairness permit.” Additionally, P.B. § 35a-9 provides that during the dispositional hearing, the court may “admit into evidence any testimony relevant and material to the issue of the disposition, including events occurring through the close of the evidentiary hearing.”

Finally, the Connecticut appellate court in *In re Juvenile Appeal*, said that a juvenile proceeding “is essentially civil in nature and that certain procedural informalities are constitutionally permissible.” 3 Conn App. 184 (1986). The appellate court cautioned, however, that despite the “guise of informality ... procedural safeguards cannot be swept away.” Accordingly, the court determined that a “liberal rather than a strict application of the formal rules of evidence” may be permitted, so long as “due process is observed. ... [Yet] where such evidence is likely to be determinative of the matter, the court should return to the more formal rules of evidence.” *Id.*

HEARSAY

Hearsay standard of review

The standard of review for rulings on admissibility of evidence is ordinarily “abuse of discretion.” *In re Lauren R.*, 49 Conn. App. 763 (1998). A hearsay challenge is a claim of erroneous evidentiary ruling and as such does not implicate the constitution. *State v. Walsh*, 52 Conn. App. 708 (1999). Even if the admission of hearsay was improper, it must also be established that the ruling was improper and likely to affect the result of the trial. *In re Latifa K.*, 67 Conn. App. 742 (2002). Judgment need not be reversed merely because inadmissible evidence has been admitted, if permissible evidence to the same effect has been placed before the trier of fact. *State v. Walsh*, *supra*. If an objection to hearsay is not made at trial, it is probably not appealable. *State v. Golding*, 213 Conn. 233 (1989).

Are there hearsay exceptions specific to juvenile court proceedings?

Yes. Connecticut General Statute § 46b-129(g) specifically provides that during a **contested OTC hearing**, “credible hearsay evidence regarding statement of a child to a mandated reporter or to a parent” may be admissible “upon a finding that the statement is reliable and trustworthy

and that admission of such statement is reasonably necessary.” Additionally, an affidavit provided by a mandated reporter may be admitted as well without the need for the reporter to appear unless called by the respondent or child provided the statement:

1. was provided at the preliminary hearing;
2. reasonably describes the qualifications of the reporter and the nature of his contact with the child; and
3. contains only the direct observations of the reporter and statements made to the reporter that would be admissible if the reporter were to testify to them in court and any opinions reasonably based thereupon.

Additionally, P.B. § 35a-7 provides that during the disposition hearing (not for adjudication purposes), the court “may admit into evidence any testimony relevant and material to the issue of disposition, including events occurring through the close of the evidentiary hearing.” This language is often interpreted by practitioners as permitting hearsay in the dispositional phase of a contested hearing.

Note that the adjudicatory and dispositional phases of a trial are almost always held simultaneously (despite P.B. § 35a-7, which provides that hearings may be bifurcated). Therefore, it is incumbent upon counsel for respondent to ensure that any hearsay evidence (to the extent that such evidence is admitted by court) is considered for dispositional purposes only.

Remember that all of the Code’s hearsay rules and exceptions are still applicable in contested juvenile court hearings. These rules include (but are not limited to):

- Business record foundation C.G.S. 52-180
- Admissions of parties (note that statements of a child are not admissible as party statements, *In re Jason S.*, 9 Conn. App. 98 (1986))
- Need for certification of public records
- Inadmissible of unduly prejudicial information
- Residual hearsay exception, *State v. Sharpe*, 195 Conn. 651 (1985)

Business Record Exception

What records may be admissible as business records as an exception to the rule against hearsay?

- Letter from foster parent to DCF may be admissible as business record. *In re Barbara J.*, 215 Conn. 31 (1990).
- DCF running narrative, investigation protocol, treatment plans
- Documents submitted to DCF by other contracted agencies or service providers and retained in the ordinary course of business may be admissible as a business record.

What foundation must be laid for a document to be admitted as a “business record”?

The document must have been made in the regular course of business and as part of the regular course of business; and the document must be made at the time when the act, transaction or event occurred, or within a reasonable time thereafter. Conn. Gen. Stat. § 52-180.

It is not necessary that the witness herself have made the business record. It is sufficient for the witness to testify that it was the regular business practice to create the document within a

reasonable time after the transaction's occurrence. *Emhart Indus., Inc. v. Amalgamated Local Union 376, U.A.W.*, 190 Conn. 371, 388 (1983).

Can a document that is otherwise admissible as a “business record” still be objectionable?

Yes. The document may be:

- Irrelevant. Conn. Evid. Code § 4-1.
- Prejudicial. Conn. Evid. Code § 4-3
- Evidence of an inadmissible fact, such as inadmissible character evidence or criminal history. Conn. Evid. Code § 4-4.
- Contain inadmissible opinion testimony. Conn. Evid. Code § 7-1, 7-2
- Contain inadmissible hearsay. Conn. Evid. Code § 8-3.

Consider admissibility of documents commonly found in a DCF case file:

Psychological Evaluation:

Admissible per order of the court and as a document prepared by expert witness. Evaluator may rely on hearsay for expert opinion. Other information contained in report may still be subject to removal in a contested hearing provided information is irrelevant, unduly prejudicial, or opinion information exceeding scope of evaluator's established expertise. Hearsay contained in document must be subject to cross-examination. See *In re Stacey G.*, 94 Conn. App. 348 (2006).

DCF Investigation Protocol:

Admissible as a business record. Conn. Gen. Stat. § 52-180. However, business records are still subject to other rules of evidence. Hearsay contained in business record must still be otherwise admissible. It may be possible to qualify the Social Worker as an expert witness and therefore allow for the admission of hearsay as information reasonably relied upon by the expert witness. The offeror must identify the worker's specific area of expertise. For example: the social worker may be an expert in the area of investigations, and therefore the hearsay statements are central to his/her conclusions. Remember however that the statements still can't be admitted for the truth of the matter asserted. Remember also that third party statements within the business record are admissible so long as the proponent of the statement had a business duty to report.

Drug test analysis/report:

Admissible as a business record through creator of the report. It will often be stipulated to by the parties.

DCF Running Narrative:

Similar to the DCF Investigation Protocol, the narrative contains numerous hearsay statements and other statements of questionable admissibility. Opponent of document must identify specific objections and DCF must explain applicable hearsay exceptions. Specific pages may be redacted prior to admission as a full exhibit. *State v. Palozie*, 165 Conn. 294 (1973).

Hospital social worker affidavit:

Affidavit only admissible per C.G.S. §46b-129 and certain statements in affidavit might be admissible while others are not. For example, if the affiant is an LCSW and the document contains statements such as “lab test positive for cocaine,” such statement lies outside the scope of the statutory hearsay exception. Consider whether affiant can offer a statement as to the ultimate issue, such as a statement regarding the grounds for the Order of Temporary Custody (i.e. imminent danger.) Arguably, only an expert may testify as to seriousness or imminence.

Affidavit by social worker:

Again, not admissible unless specific requirements of Conn. Gen. Stat. § 46b-129 are met. Subject to numerous admissibility challenges in OTC and other contested hearings.

Police record:

Admissible if provided as certified public document. Remember to consider admissibility of convictions that have been nolle prossed or that are too remote in time or circumstance to be relevant. The Connecticut Supreme Court has not established an absolute time limit on the admissibility of certain convictions, but the Court has suggested a ten year limit. *State v. Carter*, 228 Conn. 431 (1994). Evid. Rule 6.7

Certificates of program completion:

Hearsay unless identified by service provider.

Social Study:

The social study will be a multi-page document outlining all of DCF's findings about the family, each parent's strengths and weaknesses, and DCF's dispositional recommendation (i.e. child should go home with parent, child should be committed to DCF, etc). The document, while in some ways useful, may contain multiple hearsay statements or allegations with imprecise foundation. All parties are entitled to a copy of the Social Study in advance of a hearing or Case Status Conference, and are entitled to cross examine the author prior to the admission of the document. P.B. § 35a-10. The Social Study is also subject to motions in limine for the purpose of challenging inadmissible contents.

- Is the Social Study admissible?
Practice Book § 35a-9 requires that the court receive a social study prior to issuing a dispositional ruling. Section 35a-9 also provides that the court may consider all evidence that is relevant and material to disposition. Therefore, the Social Study is an admissible document, and relevant hearsay contained therein may be permitted.
- What if you want to limit the admissibility of the Social Study?
P.B. § 35a-9 does not explicitly provide that hearsay is permissible in the Social Study and appellate case law provides that while the rules of evidence or procedure may be relaxed somewhat in juvenile court, the court must still observe the requirements of due process and where the "evidence is likely to be determinative of the matter, the court should return to the more formal rules of evidence." *In re Juvenile Appeal*, 3 Conn. App. 184 (1986). Thus, you can argue to remove hearsay from the Social Study document prior to admitting. Remember, however, that the Practice Book permits the court to consider any evidence "relevant and material" to disposition. P.B. §35a-9. Note that a court may admit a Social Study under the "business record" exception to the hearsay rule. *In re Ellis V.* 120 Conn. App. 523 (2010). The business record foundation must be laid and the statements contained therein must emanate from those with a business duty to report.
- Additionally, although case law provides that the court may rely on the social study for both adjudicatory and dispositional purposes (*In re Tabitha*, 39 Conn. App. 353 (1995)), if hearsay statements contained within the social study are admitted you may ask the court to consider such statements for dispositional purposes only.
- Prepare a redacted version of the Social Study or submit a motion in limine seeking to strike irrelevant or hearsay statements from the document altogether.

Child's statement regarding abuse or neglect:

These statements are not the admission of a party opponent. *In re Jason S.*, 9 Conn. App. 98 (1986).) However, possible hearsay exceptions may allow for admissibility, including (but not limited to):

- Statement made for purposes of medical treatment, *State v. Martin*, 38 Conn. App. 731 (1995); Conn. Evid. Code §8-3(5).
- Spontaneous utterance. Conn. Evid. Code §8-3(2).
- Present sense impression. Conn. Evid. Code §8-3(4).
- Statement showing declarant's state of mind .
- Statement showing effect on the hearer. *State v. Hull*, 210 Conn. 481(1989) (victim's fear of defendant).
- Child's "statement to mandated reporter may come in during a contested OTC hearing per provisions of C.G.S. § 46b-129(g). This exception applies only to OTC hearings. In a neglect trial or termination trial, the affiant must be present or the opponent of the statement must object on hearsay and deprivation of right to confront witnesses.
- The appellate court held that child's statement that he wanted to "make love" to his sister was admissible as a "verbal act." *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184 (1985).
- Statements made regarding abuse by a child younger than age 12 are subject to the "tender years" exception rules and procedures. Conn. Evid. Code §8-10. These statements may be admissible through a third party if certain conditions regarding the reliability of the statements are met. Statements that are subject to the "tender years" rule but that do not meet the rule's criteria for admissibility may not be admitted through the "residual hearsay" exception. *Id.*
- A child's statements not subject to the "tender years" rule may be admitted through the "residual hearsay" exception. See *In re Tayler F.*, 296 Conn. 524 (2010). *Tayler F.* provides a detailed discussion of what must be demonstrated to invoke the "residual hearsay" exception in such cases.

JUDICIAL NOTICE

What does it mean for the court to take "judicial notice" of information during a trial?

Connecticut Code of Evidence § 2-1(c) provides that a judicially noticed fact "must be one not subject to reasonable dispute in that it is either:

1. within the knowledge of people generally in the ordinary course of human experience, or
2. generally accepted as true and capable of ready and unquestionable demonstration."

When may judicial notice be taken during a proceeding?

Judicial notice may be taken at any stage of the proceeding. Conn.Code.Evid. § 2-1(d).

However, the opposing party is entitled to notice and a right to be heard. § 2-2; *State v. Zayas*, 195 Conn. 611, 615, 490 A.2d 68 (1985).

Does the court have to take judicial notice when asked?

The Connecticut Code of Evidence § 2-1 provides that a court “may, but is not required to, take notice of matters of fact.”

May a court take judicial notice of previous proceedings within the same case?

Yes, a trial court may take judicial notice of facts contained in the court file; *Brockett v. Jensen*, 154 Conn. 328, 336, 225 A.2d 190 (1966); and may take notice of court files in other actions between the same parties. *Carpenter v. Planning & Zoning Commission*, 176 Conn. 581, 591, 409 A.2d 1029 (1979).

Can the court take judicial notice of the factual findings in an earlier neglect proceeding involving the same parent?

Sometimes. A court could take judicial notice of factual findings in an earlier case, but only if the requirements of collateral estoppel were met. In many juvenile court cases, those requirements are indeed met. See *In re Juvenile Appeal (83-DE)*, 190 Conn. 310, 316 (1983) (collateral estoppel, or issue preclusion, prohibits re-litigation of an issue that “was actually litigated and necessarily determined in a prior action between the same parties on a different claim”).

Does this mean that the court can adopt all of the exhibits, in their entirety, from a previous proceeding?

Not necessarily. Although a trial court may take judicial notice of a file of another action in the same court, not every statement or conclusion found in the file is evidentiary because such statements may be hearsay and offered to prove the truth of the matter asserted. *Aponte v. Jeffcoat*, 1997 WL 753398; Tait and LaPlante's Handbook of Connecticut Evidence § 6.2.2(a) (2nd Ed.1988).

May the court take judicial notice of psychological evaluations?

In *In re Stacy G.*, 94 Conn. App. 348 (2006), the court took judicial notice of a psychological evaluation (3 reports), with no live witness to cross, and stated that it read the reports prior to rendering an opinion. The appellate court held that the admission of reports was improper. In addition to the reports themselves being hearsay, they also contained inadmissible hearsay from other individuals who were not the respondent or author. The court held that “we recognize ... that reports [like these] may find their way into the court file particularly in family and juvenile cases. It does not entitle the judge to take judicial notice of them.”