Out-of-court testimony by a child

How to protect a child, as well as his parents' constitutional rights, in civil trials

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Jared (not his real name), age 14, had been in Child Protective Services (CPS) care over half his life. A jury terminated both his parents' rights, but the court of appeals reversed as to his father, Victor (also not his real name), a drug addict who admitted he wasn't in a position to raise his son and didn't know if he ever would be. The court said that the best interest evidence was insufficient because Jared was in a residential treatment center (RTC) due to anger issues and meltdowns that would cause him to spiral out of control; Victor had a steady job, paid child support, and had regular visits with Jared before the RTC—and Jared loved his father very much.

By the second trial, Jared had been released from the RTC, was living in an adoptive home with a coach, was making As and Bs in school, and was no longer having meltdowns. He hadn't seen Victor in over a year, but Jared would regress at any mention of his father. Like many children in CPS care, no matter the abuse or neglect, Jared still loved his dad and wanted to see him. Victor's attorney wanted to call Jared, a teenager now, to testify at the second trial in an attempt to defeat the State's argument that termination was in Jared's best interest. The caseworker, court-appointed special advocate (CASA), and Jared's attorney were all concerned that the teen could not emotionally handle testifying in front of his father; they were afraid that, if put in public before a jury of strangers, Jared would simply shut down and physically hide under a desk or chair (something he had done in schools before his current placement). We had to protect Jared while affording Victor the right to have his son testify.

What to do in such a circumstance?

Unusual for kids to testify

Unlike in criminal cases where a child victim usually testifies, it is unusual in CPS cases for children to testify against their parents. Because parents have no right to a blanket invocation of the Fifth Amendment in civil cases, parents are themselves usually the first witnesses called in a trial. In most cases, termination grounds can be proven with that testimony—trial admissions of failure to comply with court orders, drug use, or domestic violence are very common.

The parents' attorneys may not call the child for a variety of reasons: They don't issue the proper subpoenas, the child's testimony will not help their case, or the attorneys know that backlash from the jury (who may see the lawyers as "beating up on the kid") is not worth whatever nugget they may find. The caseworker will almost always admit that the child loves the parent, the parent loves the child, and, in fact, the child has said that she wants to return home to the parent.

However, there are times (as in Jared's case) when the parent's attorney will roll the dice and call the child. How do prosecutors protect the child from the trauma of testifying in court as well as protect the parent's constitutional rights?

A few options

There are a few options when it comes to admitting a child's out-of-court testimony and statements in civil court, but not all protect a child from having to later testify in front of his parents.

For example, while everyone is aware of the availability of depositions under §199 of the Texas Rules of Civil Procedure, taking a deposition does not preclude the appearance of the witness at trial. Instead, and especially in cases dealing with abused and neglected children, a deposition allows the respondent's attorney two bites of the apple, picking at every word or misstatement the child may have made. (I had a case in which the child told her father's attorney, under oath, that she had never been assaulted and then later, once again under oath, she went into details about what her father had done—a point that the father's attorney attacked as impeachment material. It was only when she answered in the negative my question, "Do you know what 'assault' means?" that we were able to explain the discrepancies.)

In addition to depositions, Texas Family Code Chapter 104 outlines other means of introducing a child's statement or testimony in court. (See

the chart on page 38 for an outline of what each section provides.)

Texas Family Code §104.002 ("Prerecorded Statement of Child") makes reference to recordings made prior to trial without attorneys present. These are usually the CAC (Child Advocacy Center) videos taken by a trained forensic interviewer. This taped statement is not to be used in lieu of testimony[1] (such videos are "statements," not "testimony") and, even if found by the judge to be admissible under §104.006(2) (which is, by no means, a settled matter of law), there is nothing that prohibits an attorney from subpoenaing the child to testify at trial too.

Texas Family Code §104.004 ("Remote Televised Broadcast of Testimony of Child") bears a resemblance to Texas Code of Criminal Procedure Art. 38.071, §3. As is obvious from the title, §104.004 is not a way to avoid the child testifying at trial because the testimony is taken at trial, just via closed-circuit TV. As with the Code of Criminal Procedure provision, the age for §104.004(a) is 12 or under, but there is no requirement that the court make a finding that the child is "unavailable to testify." Also, while Texas Code of Criminal Procedure Art. 38.071, §3 has been widely litigated, there is a paucity of state court opinions directly dealing with the Family Code provision for closed-circuit presentation of live testimony of a child. Therefore, there is no caselaw indicating whether, after testifying in such a manner, the child may be recalled and required to testify (presumably in the same manner) later in the trial.

The best option

Texas Family Code §104.003 ("Prerecorded Videotaped Testimony of Child") is the best provision for allowing a child to testify without the parent being present, with the important guarantee of §104.005(a) that the child will not be compelled to testify again in open court. As clear by its title, §104.003 immediately distinguishes itself from the CAC interviews so often seen in §104.002 ("Prerecorded Statement of Child"). First, there is no statutory requirement that the child be the victim of abuse or neglect in the suit before the court. This allows a court to order the videotaped testimony of other children in the home or neighborhood children who may be witnesses. Also, there is no age limit in §104.003; the statute simply refers to the witness as "a child."

The child is sworn in and, if necessary, his capacity to testify is proven up before the questioning begins. The courtroom process is the same. Questioning by direct or cross-examination, including a second or even third round if necessary, occurs. Objections are made. Exhibits are shown to the child witness and identified. The video continues until all parties have passed the witness.

While this testimony can be taken in front of a judge, there is no requirement in the statute that a judge actually be present at the time of the video. With modern technology and the ability to edit video recordings, the judge is not necessary. Parties make the same objections as in a courtroom ("Objection, hearsay"; "Objection, asked and answered"; "Objection, assuming facts not in evidence"; etc.) and then the question is answered. At some point prior to playing the video, the court will hold a hearing and rule on the objections made. If needed, the objections and answers may be edited out of the testimony actually shown to the jury (and the original, unedited version can be made a part of the record solely for appellate purposes). At this same hearing, the judge will make rulings on the evidence identified and offered in the video (often photographs or letters) so that the recording can continue without interruption when played before the jury.

There is no requirement that a court reporter be present to take this testimony. Practically, though, the presence of a court reporter (in addition to the videographer) will make the process easier for the attorneys as well as the judge. The court reporter can swear in the witness, and later, the judge can use the reporter's record to rule before showing the video; the record can also assist whoever is doing the editing. And of course, putting sticky notes on a typed page (as opposed to trying to hand-write exact quotes from a moving video) will always help the attorneys in preparing closing argument.

§104.003 allows for an "other person" to be present if that presence would contribute to the child's welfare and well-being during the video testimony. While there is no rule prohibiting a therapist from sitting in, it is often the guardian *ad litem* or CASA who has developed a relationship of trust and reassurance with the child.

And because courtrooms can be large and imposing—and §104.003

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Types of Child Testimony in Civil Cases

Who can testify?	What kind of testimony and how?	When and where?	Who else is present?	Does the child appear at trial?	What else should we know?
Child 12 or under, alleged in a suit to have been abused	Video statement; video [Family Code §104.002 (Prerecorded Statement of Child)]	Prior to trial; outside the courtroom, usually at a CAC	No lawyers and no parents	Yes; the videotaped statement may not be used in lieu of testimony, but see Tex. Fam. Code §104.006 regarding hearsay statements about abuse or neglect.	These are usually forensic interviews, and they require non-leading questions.
Any child	Video testimony; video [Family Code §104.003 (Prerecorded Videotaped Testimony of Child)]	Prior to trial; outside the courtroom	Videographer, attorneys, child, and "other person whose presence would contribute to the welfare and well-being of the child" (usually CASA or guardian *ad litem*); no parents	Child may *not* be compelled to testify at trial [Fam. Code §104.005(a)]	Objections just like in court; if possible, have a court reporter there as well; motion and order are required.
Child 12 or under, alleged in a suit to have been abused	Closed-circuit testimony; video/ closed-circuit TV [Family Code §104.004 (Remote Televised Broadcast of Testimony of Child)]	During trial; outside the courtroom but close by in the courthouse	In the room with the child: videographer, court reporter (usually), judge (maybe), and attorneys (same as §104.003); in the courtroom: parents, jury, audience, and judge (maybe)	This testimony *is* the appearance by the child at trial.	Can be very hard to set up in small counties, requiring additional notice; the court may require a hearing (as in a criminal procedure) with a showing that the child cannot testify in court.
Any child	Any manner provided by Family Code Ch. 104; video/closed-circuit TV [Family Code §104.005(b) (Substitution for In-Court Testimony of Child)]	Prior to or during trial; outside the courtroom	Any of the above	Child may *not* be compelled to testify at trial [Fam. Code §104.005(a)].	No existing caselaw here, and child must have a "medical condition" that makes him incapable of testifying in open court.
Anybody	Deposition; court reporter, video recording, and/or audio recording [T.R.Civ.Proc. 199 (Depositions Upon Oral Examination)]	Prior to trial; outside the courtroom, usually in the attorney's office	Attorneys, reporter, videographer, parents, and CASA	Yes, it can be used instead of live testimony, but there's nothing prohibiting calling the child in court too.	Notice of deposition; specific objections (not standard courtroom)

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mentions taking the testimony "outside the courtroom"—I like to take that literally. A comfortable room allowing the attorneys and child to sit around a conference table is a non-threatening atmosphere. Microphones make all the questions and answers audible so the entire testimony takes on a more conversational tone.

Questioning the child

If a child's testimony is being recorded to be played before a judge or jury during a trial, put the child at ease while letting the jury know this witness is more than a name on a piece of paper in a jury charge. I've asked about favorite school subjects, pets, and sports teams to get the child talking. It is the 21st Century and just about every child who can talk has been videotaped multiple times and will rarely be nervous about talking on camera. Ask the foster parent or placement if the child has made something that can be introduced into evidence (and explain that they probably won't get it back). Homework and artwork are excellent ways to connect with the child, have the child talk about something that isn't scary, and give the jury members something to "hold onto" when in the jury room. A drawing of a rose done by an abused child while in foster care can show the amazing resiliency of the human spirit.

Be prepared for answers you don't like, and understand that this is not the time to be aggressive. If the 8-year-old says he loves his dad and wants to live with him, don't try to change his mind. Instead, get him to talk about how different his life is now than it was when he lived "at home": Does he get to go to the movies? Is he afraid anymore? Does he see anyone hit anyone else in his new home? Does someone make him do his homework and see that he gets to school on time? Ask about all those moments of childhood the jury members probably take for granted.

The attorney needs to make the big decision about whether you actually ask the child if the parental rights should be terminated. I personally do not recommend asking that question. "Termination" is a difficult concept to explain to a child, even a teenager. If the child is in an adoptive home, ask the general questions about whether he would like to continue to live there and, if he has voiced a desire to be adopted (even if he also has the contradictory wish to see his parents), ask him about that.

Finally, a provision in §104.005(b) permits taking the testimony of any child in any manner prescribed in Chapter 104 as long as the court finds that the child has a medical condition which does not allow the child to testify in court. There is no caselaw on this provision, but it seems to require a hearing, much like the one required for CCP Art. 38.071 with testimony and evidence that some medical condition exists of such a debilitating nature that the child cannot testify in a courtroom.

Conclusion

Though it is uncommon for parents' attorneys to call a child to testify in a termination case, it does occasionally happen, and testifying against one's parents can be very traumatic for a child. Prosecutors have a solid option in Family Code §104.003 to take a child's out-of-court testimony that not only prevents the child from confronting his parents but also protects his parents' constitutional rights to call and question the child witness.

As an addendum to Jared's case, just before I finished writing this article, the court of appeals affirmed the termination of Victor's rights during Jared's second trial. Though the opinion mislabeled Jared's §104.003 testimony as a "video deposition," it was obvious from the court's comments that the court not only reviewed the reporter's record of Jared's testimony but also watched the video, observed the teenager's demeanor, and was able to contrast it with the stories of his behavior before he was placed in the coach's home. Providing the court with videotaped evidence of the changes in Jared since his placement in a healthy home environment is a by-product of §104.003 I had not thought about before. ❇

Endnote

1 *In re S.P.*, 168 S.W.3d 197, 209-10 (Tex.App.—Dallas 2005, no pet.).