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BEST PRACTICES

Best Practices: New Texas Law Mandates Audiovisual Recordings of Child Custody Interviews

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Lawyers who handle cases involving custody disputes should be aware of a new law that impacts how child custody evaluations are to be conducted. Currently, [Texas Family Code Section 107](#) establishes certain criteria in order for individuals to be considered qualified to be court appointed to conduct a child custody evaluation. Those criteria include obtaining a certain level and type of education, followed by two years of

full-time, or a comparable amount of part-time experience, and “two years of full-time experience or equivalent supervised part-time work involving the evaluation of physical, intellectual, social, and psychological functioning and needs and developed an understanding of the social and physical environment, both present and prospective, to meet those needs.” Effective Sept. 1, 2023, HB 4062 mandates that child custody evaluators must create an audiovisual recording of any interviews of children. This mandate, even if waived by agreement of counsel, child custody evaluators and parties, creates new bait for cross-examination in child custody disputes.

The original version of HB 4062 included disjunctive alternatives regarding recording methodology:

(b-1) A child custody evaluator shall create an audio or video recording of each interview the evaluator conducts with a child who is the subject of a suit seeking conservatorship of, possession of, or access to the child unless the interview is conducted in the presence of all parties to the suit.

The version of the bill that was enacted does not use the disjunctive. Instead, the enrolled version of the bill simply mandates “audiovisual recording”:

(b-1) A child custody evaluator shall create an audiovisual recording of each interview the evaluator conducts with a child who is the subject of a suit seeking conservatorship of, possession of, or access to the child. A recording created under this subsection is confidential and may not be released after the completion of the suit in which the evaluator conducted the evaluation, except by court order for good cause shown.

The AFCC Guidelines provide that evaluators create and maintain a means of recordkeeping and communication that “safeguards applicable privacy, confidentiality, and legal privilege.” Why? Child custody evaluators’ records will be reviewed. Child custody evaluators’ reports will likely include evidence gleaned from collaterals, including school records, medical records, and counseling records. Records must be maintained that are legible, and stored in a way that allows for ease of transmission.

It’s not just about *making* the audiovisual recordings. In Dallas, the Preston Royal area has long been a favorite for mental health professionals to establish an office. In October 2019, many lost their offices and records in a tornado that decimated the area. What backup systems does the mental health professional have in place to assure not only maintenance of records, but to prevent the destruction of records?

Why are so many mental health professionals who conduct child custody evaluations opposed to the new law requiring audiovisual recordings of interviews with children? On the one hand, mental health professionals tasked with interviewing young children fear that the already difficult burden of bonding with minors, and building sufficient trust for the children to open up is dramatically compromised if those minor children realize that the mental health professionals are taping their conversations. On the other hand, Child Advocacy Centers have been recording interviews with children for years. When you have a child custody dispute at the core of a case, you have parents who do not see eye to eye. Those litigants/parents likely would not be enmeshed in a child custody evaluation if they could co-parent. One or both parents may have a diagnosed mental health issue, cognitive impairment,

physical impairment, or an addiction issue. One or both parents are likely to be quite angry if their respective case goals are not obtained, such as when one party is not chosen as the party who has the exclusive right to establish the child's primary domicile, or if the parties are ordered into a shared custody arrangement that neither finds an acceptable alternative (alternating weeks of possession, or a 2-2-5 possession schedule).

As much as an evaluator tries to ease the process for the children involved, going through a child custody evaluation can be traumatizing for those involved, particularly the children. Evaluators must win the trust of children of varying ages. At one end of the custody-seeking parent continuum, children may be being subtly coerced by one or both of their parents during the process. Or, at the other end, a serious type of coercion or threat may be present. Such threats may be direct: "You won't get that Switch game you want if you don't say you want to live with me." Or, "If you don't say you want to live with me, I'll be so disappointed because that means you don't love me." Alternatively, the threats may be indirect: "I'll send the dogs to live with grandpa in New Jersey if you don't tell the doctor everything I told you to say about Mom." If children are aware they are being recorded, they may be intimidated. If a child is the subject of an audiovisual recording, the child may not share important information that the evaluator must have in order to complete the evaluation. What if the child asks, "But will my parents see this?" What is the mental health professional to say? "Yes, but it's the law." Or, "Yes, but don't worry they won't be mad, I'm sure they'll want you to tell the truth." This situation puts the child exactly where so many mental professionals say they should not be—in the middle. Many parents profess they don't want to put their children

through the evaluation process, but they have to because the other parent won't be fair. The lawyers and custody evaluators describe the best interests, issues and procedures to their clients who say they understand and only wish the other parent would be reasonable and fair.

When the evaluation starts the child should be told the interviews will be recorded and that it will be provided to the attorneys. If the child asks if their parents will see it, what should the professional do? Sadly, the child is put exactly in the middle. No matter what they are told, they will bear a burden. They are where so many authors and practitioners have said for decades they should not be.

Dr. Evan Stark has written on [“tangential spouse \(partner\) abuse.”](#) In an attempt to lash out at their partner, one partner in a relationship hurts their child in a veiled attempt to hurt the other partner.

Dr. Cynthia Lischick notes that coercive control is often present “during many survival-oriented traumatic experiences over time used to manipulate, coerce, and dominate the victim. Some kids are resilient and some are not. The effects on their child’s cognition, their sense of self, their level of autonomy and their decision-making are cumulative. Their decision-making is under duress and survival oriented.”

How does all this impact a lawsuit affecting the parent-child relationship? The new statute maintains the confidentiality of an audiovisual recording created by a child custody evaluator of their interview with a minor child, unless “good cause” exists for the audiovisual recording to be shared. There is no definition in the statutory scheme of what constitutes good cause. If a child custody evaluation is ordered, perhaps the parties, their attorneys, and the child custody

evaluator may agree to waive the statutory requirement mandating audiovisual recordings of minor children. Consider language being added to the Order Appointing Child Custody Evaluator such as the following:

“In this child custody evaluation, the term, ‘child interview,’ as referenced in Texas Family Code Section 107.109 (c)(2), shall refer to any individual interview of a minor child and shall not be construed as applying to other elements of the evaluation in which the minor child is a participant, such as but not limited to the parent-child interviews or any observations of the children or parents that are part of this child custody evaluation, AND IT IS SO ORDERED.

“By signing below, the parties to this action and their respective attorneys agree that the individual child interviews shall not be audiovisually recorded by the child custody evaluator, and IT IS SO ORDERED. For purposes of satisfying the requirements of Tex. Fam. Code 107.109, this agreement between the parents and their respective attorneys shall be considered good cause for the child custody evaluator’s procedures not including the element of audio-visual recordings of the individual child interviews, AND IT IS SO ORDERED.”

Fodder for cross-examination might include:

1. Has the mental health professional undermined their veracity if they choose to mandate language waiving the right to record child(ren) interviews via audiovisual means as required by Texas HB 4062?
2. What backup does the mental health professional have for such audiovisual recordings?

3. If a psychologist, has the mental health professional complied with AFCC guidelines in the way they conducted the interview? In the way they created and maintained records?
4. If the child's back is to the camera, and the child's face is not visible, what if their responses are indiscernible? How are we to determine the authenticity of the mental health professional's observations?
5. What was the child's body language during the interview?
6. Would the average, reasonable person interpret the child's body language in the same way that the mental health professional did?
7. What does the child's body language tell a neutral third party, or a judge or jury about whether they were acting under duress versus freely volunteering information?
8. What are the child's "tells" in the event the evaluator concludes that the child was acting under duress or coercion?
9. What do the child's psychological test results, if any, reflect about the child's reliability and veracity?
10. If the child is fearful of one or both parents, do the child's statements – recorded – have any real impact on the evaluator's report?
11. If there are audiovisual tapes, does the child appear to have a blunted affect?
12. Is the child nonresponsive and paralyzed with fear?

13. Would the child have acted differently had the child not realized that the interview was being filmed?

14. How reliable was the child custody evaluator's recording device(s)?

15. If the child had their back to the camera, spoke in a low volume, and their words are unintelligible, does that automatically indicate to the judge – as gatekeeper – that the recording should be inadmissible, along with the resulting reports?

16. Is the child custody evaluator leading the child in the interview, rather than asking open-ended questions that allow the child to speak freely?

17. Is the child silenced by the fear of retribution from one or both parents simply by knowing that their words may be replayed for their parents?

18. Can trust be established if the child is aware of the presence of recording devices?

19. While mental health professionals like to assure their patients that their records will be kept confidential, will confidentiality be breached or maintained as a result of a party attempting to show good cause exists to release all audiovisual recordings of the child?

20. Are many mental health professionals refusing court appointed work, due to the costs and ramifications of failing to produce a clean, crisp, intelligible recording?

21. Are experienced child custody evaluators opting out of court appointments for custody evaluations because they are not willing to place the child “in the middle”?
22. Will this revision to Texas law result in the appointment of lesser qualified evaluators?
23. If all we know from the statute is that “a recording created under this subsection is confidential and may not be released ... except by court order for good cause shown,” why was/wasn’t the audiovisual recording released in the instant case?
24. How can the integrity of a recording ever be maintained with a four-year-old child bouncing about the interviewer’s play therapy area?
25. Is the mere recording of a child abusive or coercive?
26. Will the cost of audiovisual devices impact the overall cost of SAPCR litigation?
27. Is it actually an asset to have the check and balance that audiovisual recording can provide, particularly when much of the child custody evaluator’s opinion is based on subjective data?
28. Has the evaluator violated canons that govern their procedures by waiving the duty to record mandated by statute?
29. How is this new requirement distinguishable from standard operating procedures at child advocacy centers, which have been quietly interviewing their interviews with minor children for many years?

Whether the new statute is truly the bane of child custody evaluators remains to be seen in new cases that are filed on or after September 1, 2023. Parties and their attorneys may opt to include language in their orders waiving the statutory requirement mandating the audiovisual recording of children. Will the new statute fall on the basis of being an undue infringement on a child's right to privacy? We are certainly in uncharted territory.

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