

Common Evidence Issues in Family Part Trials (Part IV)

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In our three prior articles, we addressed substantive evidence issues, including completeness, hearsay exceptions, cross-examination, and business and public records. The first two focused on substantive evidence issues. The third addressed the “in-court” use of the rules. This fourth installment returns to substantive evidence.

N.J.R.E. 702: From Frye to Daubert

For decades, New Jersey courts applied the Frye test, see *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), asking whether science had “gained general acceptance in the particular field in which it belongs.” New Jersey retained that test even after *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), adopted a methodology-based approach under Federal Rule of Evidence 702. In 2023, New Jersey transitioned to a Daubert jurisdiction, which provides the trial court with a greater gatekeeping function that may eliminate—or allow—the introduction of evidence through the convincing nature of expert testimony.

The court in *In re Accutane Litigation*, 234 N.J. 340 (2018), brought New Jersey’s approach in line with Daubert. It distilled the Daubert factors: (1) whether the scientific theory can be, or has been, tested; (2) whether it has been subjected to peer review/publication; (3) whether there is a known or potential rate of error; and (4) whether the scientific community generally accepts it. These factors “provide a helpful—but not necessary or definitive—guide for our courts to consider when performing their gatekeeper role concerning the admission of expert testimony.” In *State v. Olenowski*, 253 N.J. 133 (2023), the court extended the Daubert standard to criminal cases. The court concluded that “Daubert’s focus on methodology and reasoning ... is a superior approach to criminal cases.” It explained that, under Daubert, “trial courts directly examine the reliability of expert evidence by considering all relevant factors, not just general acceptance,” and that “[f]ocusing on testing, peer review, error rates, and other considerations better enables judges to assess the reliability of the theory or technique in question.” Most recently, in *State v. Lee*, 264 N.J. 313 (2026), the court confirmed that the current reliability inquiry was “established in *State v. Olenowski*.” It reiterated that “[t]rial judges must assess whether expert testimony is sufficiently reliable before it can be presented to a jury,” and that “[t]hat gatekeeping function prevents the jury from being exposed to unsound science through the compelling voice of an expert.”

For family part cases, a custody evaluator, forensic accountant, or mental-health expert faces a more rigorous initial inquiry than “general acceptance,” although Daubert may permit evidence that is not “generally acceptable” under the factor-based approach. Can

the methodology be tested? Has it been peer-reviewed? What is its error rate? If you are seeking to challenge the admissibility of the proposed expert, file a motion in limine, brief the Daubert factors, and request an N.J.R.E. 104 hearing pursuant to N.J.R.E. 702.

State of Mind: N.J.R.E. 803(c)(3)

In our earlier articles, we discussed hearsay and the use of out-of-court statements for their “effect on the listener.” The state-of-mind exception under N.J.R.E. 803(c)(3) permits admission of “[a] statement made in good faith of the declarant’s then existing state of mind, emotion, sensation or physical condition ... but not including a statement of memory or belief to prove the fact remembered or believed.” In *State v. Scharf*, 225 N.J. 547, 569 (2016), the court emphasized that “[t]he exception is applied carefully; hearsay testimony is admissible on state of mind when it is relevant and bears a logical connection to the issues at trial.” The court also held that the “state-of-mind exception to the hearsay rule does not broadly allow admission of a victim’s recounting of a defendant’s threats.”

By way of example, a plaintiff seeking a final restraining order may offer a statement through the testimony of a friend: “I am terrified that he is going to come to the house.” That statement reflects the plaintiff’s then-existing fear and may be admissible under N.J.R.E. 803(c)(3) to show she was afraid. Subject to N.J.R.E. 403, the plaintiff may be able to testify about her fear, and the friend may be able to testify about the plaintiff’s statement regarding her fear, especially so if the plaintiff’s credibility is tested on cross-examination. On the other hand, the plaintiff may have difficulty offering the following statement through her friend: “He told me he was going to come to the house and hurt me.” Here, the plaintiff has moved beyond her own state of mind and into recounting a threat and the state of mind of a third party (i.e., to hurt her). The plaintiff could certainly testify about the defendant’s statements to her—pursuant to N.J.R.E. 803(b)(1)—but would have more difficulty calling the friend to recount the plaintiff’s statement.

Container Versus Contents: N.J.R.E. 803(c)(4) and 803(c)(27)

The business-records exception addresses the container, meaning the record without regard to the contents. Once a record clears that threshold, however, the material within it must be scrutinized. N.J.R.E. 803(c)(4) and (c)(27) concern those records. Simply put, each statement needs its own hearsay passport. The appellate division drew this distinction in *New Jersey Division of Child Protection and Permanency v. N.T.*, 445 N.J. Super. 478 (App. Div. 2016). In that case, the division built its abuse and neglect case entirely on out-of-court statements contained in a caseworker’s report and in a psychological evaluation, and it never called the psychologist to testify. The court held that a division report may be admissible as a business record under N.J.R.E. 803(c)(6) (also discussing N.J.S.A. 9:6-8.46(a)(3)), but that statements in the report “made by any

other person are inadmissible hearsay, unless they qualify under another hearsay exception.” Those other exceptions are where N.J.R.E. 803(c)(4) and N.J.R.E. 803(c)(27) do their independent work.

N.J.R.E. 803(c)(4) covers statements made for purposes of medical diagnosis or treatment. The rationale is simple: a person seeking medical care has a strong motive to tell the truth, because the quality of the diagnosis or treatment depends on accurate information, i.e., the person seeking care must be truthful in order to get the most appropriate care. Consider a practical example. A division report contains a child’s disclosure of abuse to a treating psychologist. The report itself may come in as a business record under N.J.R.E. 803(c)(6). But the child’s statement inside the report needs its own basis for admission, such as N.J.R.E. 803(c)(4) if the child made it for purposes of medical diagnosis or treatment. That exception imposes requirements that N.J.R.E. 803(c)(6) does not: the statement must have been made for the purpose of diagnosis or treatment, and it must be pertinent to the diagnosis or treatment. In practice, if you represent a party in a custody dispute involving abuse allegations, do not assume that a child’s statements to a therapist or doctor will come in simply because the division’s report came in as a business record. Additionally, be mindful of whether the child is speaking to a physician or therapist in a clinical setting, or for a forensic examination. Be prepared to establish (i) that the statement was made for the purpose of diagnosis or treatment; (ii) that it was pertinent to the diagnosis or treatment; and (iii) if abuse or neglect is at issue, there is independent corroborating evidence beyond the statement. If you oppose admission, you have several points of attack: (i) challenge the record itself under 803(c)(6); (ii) challenge the embedded statement under 803(c)(4); and challenge the sufficiency of corroboration.

The same distinction between “container and contents” applies with equal force to the tender years exception to the hearsay rules. In cases involving allegations of child sexual abuse, N.J.R.E. 803(c)(27) provides a pathway for admitting an out-of-court statement by a child under the age of twelve relating to sexual misconduct. If, for example, a report contains a child’s disclosure of sexual abuse, the report may be admissible under N.J.R.E. 803(c)(6), but the child’s statement needs its own basis for admission. If N.J.R.E. 803(c)(4) does not apply, perhaps because the child did not make the statement in a treatment setting, the proponent must look to N.J.R.E. 803(c)(27). That exception imposes procedural requirements far more demanding than those of the business records rule. As the Supreme Court explained in *State v. D.G.*, 157 N.J. 112, 124 (1999), a tender years exception was considered “necessary and appropriate in order to authorize, under certain circumstances, the admissibility in a criminal prosecution, of a child’s out-of-court statement concerning acts of sexual abuse.” The court also recognized, however, that the exception “threatens the equally significant interests of the defendant, who seeks to exercise the basic rights of confrontation and

cross-examination.” For that reason, “only out-of-court statements that possess ‘sufficient indicia of reliability’ should be admitted.”

The rule imposes strict procedural requirements. First, the proponent must notify the adverse party of the intent to offer the statement. Second, the court must find that the time, content, and circumstances of the statement show a probability that it is trustworthy. Third, either the child must testify at the proceeding, or the child must be unavailable and the proponent must offer admissible evidence corroborating the abuse. If you are the proponent, lay the groundwork early: give proper notice, prepare for the Rule 104(a) hearing, and have corroborating evidence ready in case the child cannot testify. If you are opposing admission, challenge the trustworthiness of the statement, question the circumstances in which it was obtained, and insist on the procedural safeguards the rule requires. Above all, remember that 803(c)(4), 803(c)(27), and 803(c)(6) are distinct analytical steps, and treating them as one is where cases are lost. As the proponent, you must lay a separate foundation for each layer of hearsay. As the opponent, you have points of attack at every layer and folding them into a single objection leaves arguments on the table.

Conclusion

After four articles, we hope it is clear that the rules of evidence are not mere suggestions in the family part. They are the framework for evaluating every contested fact. Know them, use them, and keep sharpening your skills.

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