EXPERTS: WHERE ARE WE NOW?

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CHAPTER 14

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PROFESSIONAL

Diana S. Friedman, P.C. - July 2001 to present

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EDUCATION

Louisiana State University - B.S. - December 1984

Southern Methodist University - J.D. cum laude - May 1991

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Board Certified, Family Law, Texas Board of Legal Specialization - 1996 to present

PROFESSIONAL ACTIVITIES AND AFFILIATIONS

Member, Family Law Council State Bar of Texas

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American Bar Association

State Bar of Texas - Family Law Section

Dallas County Bar Association - Family Law Section

Tarrant County Bar Association - Family Law Section

Association of Trial Lawyers of America

Southern Methodist University - ATLA Mock Trial Team Coach - 1993

Dallas Inn of Court LVI - 1993, 1994

Family Law Practice Manual Committee of the State Bar of Texas - 1993-1994

Dallas Association of Young Lawyers - Chair of CLE Committee - 1995-1997

District 6-A Grievance Committee - 1996-2002

State Bar Mentoring Program

American College Of Barristers - 2001

Dedman School of Law At SMU, Steering Committee

FREQUENT AUTHOR AND SPEAKER THROUGHOUT TEXAS

Speaker - "Case Law Update" - Child Custody and Visitation in Texas, 1992

Speaker - "Ten Top Family Law Cases of the 90s" - Grand Prairie Bar Association, 1992

Speaker - "Case Law Update" - Dallas Bar Family Law Section, 1992-1998

Speaker - "1993 Legislative Update" - Plano Bar Association, 1993

Speaker - "1993 Legislative Changes Affecting Texas Family Law Seminars, Inc., Houston and Dallas, 1993

Speaker - "Relocation" - "Divorce Camp 96" Minnesota Chapter of the American Academy of Matrimonial Lawyers - 1996

Participant - State Bar of Texas Marriage Dissolution Workshop - 1994

Participant - Advanced Family Law Seminar, State Bar of Texas, Workshop on "The Art of Persuasion and Cross-Examination", 1994

Participant - Advanced Family Law Seminar, State Bar of Texas, Workshop on "The Art of Persuasion", 1995

Speaker - "Family Law Overview" - "Bridge-the-Gap" Seminar - Dallas Association of Young Lawyers and Southern Methodist University - 1996

Speaker -"Evidence Without Witnesses" - How to Offer and Exclude Evidence, Houston, 1996

Speaker -"Working as an Expert Witness" - 5th Annual Dallas Chapter TSCPA Divorce Conference - 1996

Speaker - "Child Custody Visitation in Texas" - National Business Institute - 1996

Speaker - "Why Mediation? Rules That Govern Alternatives" - Texas Center for the Judiciary, College of Advanced Judicial Studies - 1997

Speaker - "Trying a Property Case on a Shoestring" - State Bar of Texas Marriage Dissolution Institute - 1997

Speaker - "The Secrets to Preparing for the Certification Exam", Advanced Family Law Course, State Bar of Texas - 1997

Speaker - "Stock Options and Pension Plans", 6th Annual Dallas Chapter TSCPA Divorce Conference - Dallas Chapter TSCPA - 1997

Speaker - "Overview of the Texas Disciplinary Rules of Professional Conduct", "Bridge the Gap" Seminar, Dallas Association of Young Lawyers - 1997

Speaker - "Pre-Nuptial Agreements", Advanced Drafting: Estate Planning and Probate Course, State Bar of Texas - 1997

Speaker - "Sex, Lies and Liabilities", Advanced Family Law Course, State Bar of Texas - 1998

Speaker - "Bankruptcy", American Academy of Matrimonial Lawyers - 1998, 1999, 2000

Speaker - "Family Law and Bankruptcy", Advanced Family Law Course, State Bar of Texas - 2000

Speaker - "Bankruptcy and Family Law", Family Law on the Front Lines, The University of Texas School of Law - 2001

Speaker - "Attorneys Fees", Family Law Conference for General Practitioners and Legal Assistants, South Texas College of Law - 2002

Speaker - “Deal with Debt: Bankruptcy and Beyond,” Family Law On the Front Lines, The University of Texas School of Law - 2003

CO-AUTHORED PUBLICATIONS

“Contempt, Clarification and Enforcement of Child Related Issues” - 1991

“Evaluation” - 1991

“Determination and Proof of Valuation in a Family Law Case” - 1991

“Enforcement of Agreed Decrees and Agreements” - 1992

“Hague Convention” - 1992, 1993

“Habeas Corpus” 1992, 1993

“The Illusion of Goodwill: Now You See It, Now You Don't” - 1992

“Evaluation of a Closely Held Business” - 1993

“Bad Facts Custody” - 1992

“Case Law Update” - 1992

“Interrogatories and Request for Admissions” - 1993

“Methods of Discovery” - 1993

“Requested Admissions and Interrogatories in Property Cases” -1993

“1993 Legislative Update" - 1993

“Case Law Update” - 1992 - 1998

“The Art of Persuasion” - 1995, 1996

“Family Law Overview” - 1996

“Evidence Without Witnesses” - 1996

“Child Custody and Visitation” - 1996

“Working as an Expert Witness” - 1996

“Relocation Litigation” - 1996

“Why Mediation? Rules that Govern Alternatives” - 1997

“Trying a Property Case on a Shoestring” - 1997

“The Secrets to Preparing for a Certification Exam” - 1997

“Stock Options and Pension Plans” - 1997

“Overview of Texas Disciplinary Rules of Professional Conduct” - 1997

“Pre-Nuptial Agreements” - 1997

“Current Admissibility of Expert Witnesses” - 1998

”Sex, Lies and Liabilities” - 1998

“Bankruptcy” - 1999, 2000

“Family Law and Bankruptcy” - 2000

“Bankruptcy and Family Law” - 2001

“Attorneys Fees” - 2002

“Dealing with Debt: Bankruptcy and Beyond” - 2003

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Former DISTRICT JUDGE, 407th District Court, Bexar County, Texas

PROFESSIONAL ACTIVITIES:

Member, State Bar of Texas
Licensed, United States Supreme Court
Member, Judicial Section, State Bar of Texas
Board Certified, Family Law, Texas Board of Legal Specialization
Member, Texas Family Law Council (Term Expires 2008)
Member, Texas Family Law Section
Director, San Antonio Bar Association (2002-2003)
Past Member, Texas Academy of Family Law Specialists
Past Member, San Antonio Bar Association Fee Dispute Committee
Past Chairman, San Antonio Bar Association Fee Dispute Committee (1990-1993)
Member, San Antonio Family Lawyers Association (1988-present)
Past President, San Antonio Family Lawyers Association (1992-1993)
President, Alamo Council of Termination & Adoption Attorneys (1991-present)
Chair, Bexar County Domestic Relations Office Advisory Board (2002-)
Vice-President, San Antonio Family Lawyers Association (2002-)
Volunteer mentor, San Antonio Bar Association Community Justice Program (2002-)

LAW-RELATED PRESENTATIONS & PUBLICATIONS:

Author/Co-Speaker, Lutheran Social Service of Texas, Inc., and Texas Department of Human Resources, March 1991, "Lawsuit-Conscious Documentation", and "Creating an Informed Counsel"

Author/Speaker, National Business Institute, March 1991,"Terminations & Adoptions"

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Author/Speaker, Adoption Development Resources, February 1992, "Legal Forms That Work"

Co-Speaker, Adoption Development Resources, February 1992, "Due Process for Birthparents"

Author/Co-Speaker, Protective Services Annual Training Conference (T.D.H.S.), March 1992, "Lawsuit-Conscious Documentation"

Author/Moderator/Speaker/Panelist, Advanced Family Law Course, State Bar of Texas,1992: "Terminations and Adoptions"
1993: "Terminations and Adoptions"
1994: "Termination, Adoption and Paternity Case Update"
1995: "Adoption/Termination" Workshop
1996: "Minesweepers: Termination and Adoption Practice"
1997: "Adoption/Termination" Workshop and Plenary Session
2000: Discovery Issues Workshop
2001: "Adoption/Termination" Workshop
2002: "Enforcement"

Frequent Guest, KTSA Radio's "Legal Line" on Legal Topics of Interest

Contributing Author, Texas Expert Witness Manual, 1999, Texas Family Law Council

Contributing Author, Family Practice Manual, 1999, Texas Family Law Council

Member, Texas Attorney General's Premarital Education Handbook Advisory Committee (1999)

Speaker, Bexar County Ad Litem Conference Training Seminar, September 2000, "Role of Ad Litem: Back to Basics"

Speaker, Pro Bono Seminar (Texas Family Law Council), October, 2001, Weslaco,Texas

Course Director, Pro Bono Family Law Domestic Violence Seminar (Texas Family Law Council), March 22, 2002, San Angelo, Texas

Panelist, 25th Annual Marriage Dissolution Institute, May 9-10, 2002, Austin, Texas

Witness, Texas Legislature, House of Representatives and Texas Senate, 1997, 1999, 2000, and 2001 Sessions, Family Law Issues

MILITARY SERVICE:
Cadet, U. S. Military Academy, West Point, New York (1971-72)
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EXPERTS: WHERE ARE WE NOW?

I. INTRODUCTION

In theory, since 1983, the admissibility of expert testimony in any civil case has been governed by Rules 702B705 of the Texas Rules of Civil Evidence, which expressly permit the admission of expert testimony only if the witness is qualified and the witness= testimony is relevant, reliable and helpful to the trier of fact. Historically, however, Texas Courts rarely applied the strict standards imposed by the Rules of Evidence and, instead placed much of the responsibility for determining the appropriateness of expert testimony upon the trier of fact. Then, in 1995, the Texas Supreme Court in *E. I. Du Pont De Nemours & Co. v. Robinson* significantly changed the manner in which trial Courts in this state addressed the question of admissibility of expert testimony. At this juncture, there are few appellate court decisions addressing the application of *Robinson* and its progeny within the context of a family law case. The absence of relevant court decisions does not, however, mean that family law practitioners are not having to address the practical realities imposed by *Robinson*. The purpose of this article is to explore the current state of the law and offer practical suggestions to family law practitioners for challenging and defending the admission of expert testimony. A November 2002 Court of Appeals case and a 2001 Texas Supreme Court case are discussed along with the seminal cases that preceded them.

A. Scope of Paper

The purpose of this paper is to provide the family law practitioner with a thorough understanding of the state of experts and proposed expert testimony in the courtroom. This paper extensively reviews the significant cases on this subject, including analysis of a recent Texas Supreme Court and an appellate court decision, and provides a general roadmap for the practitioner to follow in determining what hurdles are before them in trying to determine if their expert testimony will be admitted.

II. THE DEVELOPMENT OF THE STANDARD, DAUBERT AND ROBINSON

The Texas Rules of Civil Evidence expressly provide that expert testimony is admissible only if the expert is qualified and the testimony being offered is relevant, reliable, and helpful to the trier of fact. Prior to 1995, however, Texas Courts for the most part ignored the express requirements of the evidentiary rules. Texas Courts routinely permitted expert testimony solely upon the determination that the proffered testimony was helpful to the jury.

In 1993, the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.* first addressed the standards for admissibility of expert testimony under the Federal Rules of Evidence. Prior to the adoption of the Federal Rules of Evidence, the standard for admissibility of expert testimony was established in the seminal case of *Frye v. United States.*

A. Frye v. United States

In *Frye*, the trial court considered the admissibility of test results from an expert who claimed to be able to tell whether a person was telling the truth by mapping changes in systolic blood pressure. The court excluded the testimony and denied the appellant=s request to conduct the test in the presence of the jury.

On appeal, the Court of Appeals for the District of Columbia set the standard for the admission of expert testimony that remained in place for over 70 years:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained acceptance in this particular field in which it belongs.

Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)

Under *Frye*, expert scientific testimony that was not based upon generally accepted scientific techniques was inadmissible.

B. Daubert v. Merrell Dow Pharmaceuticals, Inc.

In *Daubert*, the United States Supreme Court was called upon to determine whether the 70 year old standard for admissibility established in *Frye* was still applicable in light of the adoption of the Federal Rules of Evidence.

Daubert involved a suit for damages arising from birth defects allegedly caused by an anti-nausea drug produced by Merrill Dow Pharmaceuticals. Because there were no published reports linking the drug (Bendectin) to birth defects in humans, the plaintiffs sought to rely upon animal studies that allegedly established a link between Bendectin and birth defects in laboratory animals. Additionally, the plaintiffs attempted to establish causation "re-analyzing@ previous data from studies involving humans and by claiming that there were similarities between Bendectin and other chemical substances that were known to cause defects.

The Federal District Court concluded that none of the plaintiffs= evidence on this issue of causation met the "general acceptance@ test established in *Frye* and, therefore, granted summary judgment in favor of Merrell Dow on the element of causation.

The case was appealed to the Ninth Circuit Court of Appeals, which affirmed the summary judgment.

On appeal, the United States Supreme Court held that the standard established by *Frye* had been superseded by the adoption of the Federal Rules of Evidence. After determining that *Frye* was no longer applicable, the Supreme Court then considered the express language of the Rules and specified the terms under which a trial court should admit expert testimony. According to the Supreme Court:

> That the *Frye* test was displaced by the Rules of Evidence does not mean . . . that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. To the contrary, under the Rules the trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

Daubert, 113 S. Ct. 2786, 2794-95 (1993)

Specifically, the Supreme Court held that under Rule 702 of the Federal Rules of Evidence, the party offering the expert testimony must establish by a preponderance of the evidence that the proffered testimony is relevant and reliable. The Supreme Court also identified certain nonexclusive factors for the trial court to consider when determining the reliability of the expert testimony being offered at trial. The factors identified are (1) whether the theory or technique has been or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the know potential rate of error; and (4) the general acceptance of the technique in the relevant scientific community.

The Supreme Court also held that in addition to being reliable, the proposed expert testimony must also be relevant to the proceeding before the trial court. The Supreme Court noted that juries could easily be misled by unreliable testimony offered by presumed experts.

On remand, the Ninth Circuit Court of Appeals identified an additional factor for the trial court to consider when evaluating expert testimony. This additional factor is whether or not the information being presented was developed specifically for use at trial.

C. E.I. Du Pont De Nemours & Co. V. Robinson

Two years after the United States Supreme Court considered the issue, the Texas Supreme Court had the opportunity to address the question of the admissibility of expert testimony in the case of *E.I. Du Pont De Nemours & Co. v. Robinson*. In that case, the Robinsons sued Du Pont for damages caused to their pecan orchard from a fungicide that was manufactured by Du Pont. The Robinsons argued that the fungicide, Benlate 50DF, had been contaminated with a herbicide. In support of their contentions, the Robinsons offered the testimony of their expert witness. In its opinion, the Texas Supreme Court noted the extent of the examination and investigation performed by the Plaintiffs= expert.

> Dr. Whitcomb visited [the plaintiffs=] orchard and conducted an inspection that lasted two and a quarter hours. He visually scanned the orchard, which consists of about two hundred trees, and viewed approximately forty to fifty trees (25%) closely. He >dug up roots= on some of the trees that exemplified what he was Atrying to show.= At his deposition, Dr. Whitcomb conceded that there was no consistent pattern of damage to the trees. He did not conduct any soil or tissue testing, did not research relevant weather conditions, and did not test an of the Benlate used by the Robinsons, even though they had one opened box of the fungicide remaining. At the time of this deposition, Dr. Whitcomb had not visited any other pecan orchards for the purpose of investigating for Benlate damage.

Robinson, 923 S.W.2d 549, 551 (Tex. 1995)

After deposing the Robinson=s expert, Du Pont filed a motion to exclude the expert=s testimony on the grounds that the testimony was unreliable. The trial court agreed with Du Pont and concluded that the testimony was unreliable and that it would not help the jury understand any relevant issues in the case. When the case proceeded to trial, Du Pont was granted a directed verdict on the issue of proximate cause. On appeal, the Fort Worth Court of Appeals analyzed the appropriateness of the trial court=s actions against the standard historically relied upon by the courts of this state. The appellate court determined that the trial court had abused its discretion by excluding the expert testimony of the Robinson=s witness. According to the Court of Appeals, Du Pont=s challenge went to the credibility of the witness and the weight to be given to the expert=s testimony, which are issues that are clearly within the sole province of the trier of fact.

Du Pont appealed the intermediate court=s decision and in a five-to-four opinion, the Texas Supreme Court ushered Texas into the *Daubert* era. In its opinion, the Texas Supreme Court noted that there are "hired gun@ professional expert witnesses available to render an opinion on almost any subject matter for the right fee. Specifically, the Court noted:

> Professional expert witnesses are available to render an opinion on almost any theory, regardless of its

> merit. *Chaulk v. Volkswagon of Am., Inc.*, 808 F.2d 639, 644 97th Cir. 1986) (quoting *Keegan v. Minneapolis & St. Louis R.R.*, 76 Minn. 90, 78 N.W. 965, 966 (1899)) (observing that almost anything, no matter how absurd, can "be proved by some so-called >experts=@). While many of these experts undoubtedly hold reliable opinions which are of invaluable assistance to the jury, there are some experts who "are more than willing to proffer opinions of dubious value for the proper fee." *GOODE*, supra ''702.2 at 17; see *Havner v. E-Z Mart Stores, Inc.*, 825 S.W. 2d 456, 465-66 (Tex. 1992) (Cornyn J., Dissenting) (noting the "corrupting influence@ of the use of experts who are paid to conduct an investigation and render an opinion in a case).

Robinson, 923 S.W.2d at 553

The Texas Supreme Court reasoned that because expert witnesses have the potential to unfairly prejudice a jury with unreliable information, the trial court has "a heightened responsibility to ensure that expert testimony have some indicia of reliability.@ The Texas Supreme Court concluded that trial judges should assume a "gatekeeper@ role with respect to evaluating expert testimony.

Relying upon the reasoning of the United States Supreme Court in *Daubert* and the Texas Court of Criminal Appeals in *Kelly v. State*, the Texas Supreme Court held that in addition to establishing an expert=s qualifications, a party seeking to introduce expert testimony must establish by a preponderance of the evidence that the testimony is both relevant and reliable. The Court wrote:

> Therefore, we hold that in addition to showing that an expert witness is qualified, Rule 702 also requires the proponent to show that the expert=s testimony is relevant to the issues in the case and is based upon a reliable foundation. The trial court is responsible for making the preliminary determination of whether the proffered testimony meets the standards set forth today. See Tex.R.Civ.Evid. 104(a)(stating that the trial court is to decide preliminary questions concerning the admissibility of evidence). Rule 702 contains three requirements for the admission of expert testimony: (1) the witness must be qualified; (2) the proposed testimony must be scientific . . . knowledge; and (3) the testimony must >assist the trier of fact to understand the evidence or to determine a fact in issue.= Tex.R.Civ.Evid. 702. In order to constitute scientific knowledge which will assist the trier of fact, the proposed testimony must be relevant and reliable. *Id*. at 556.

In *Robinson*, the Texas Supreme Court rejected the argument that granting the trial court the discretion to exclude expert testimony impermissibly infringes upon the fact finder=s right to assess credibility and weigh evidence. Instead, the Court specifically noted that trial courts are responsible for making the initial interpretation of the relevance and reliability of proposed testimony. In addressing the issue, the Texas Supreme Court noted the following:

> Moreover, under the standards enunciated today, the jury will continue to assess the weight and credibility of the proffered testimony. The trial court=s role is not to determine the truth or falsity of the expert=s opinion. Rather, the trial court=s role is to make the initial determination whether the expert=s opinion is relevant and whether the methods and research upon which it is based are reliable. There is a difference between the reliability of the underlying theory or technique and the credibility of the witness who proposes to testify about it. An expert witness may be very believable, but his or her conclusions may be based upon unreliable methodology. As DuPont points out, a person with a degree should not be allowed to testify that the world is flat, that the moon is made of green cheese, or that the earth is the center of the solar system.

Robinson, 923 S.W.2d at 558 (citation omitted)

The Court in *Robinson* specifically directed trial courts to utilize the provisions of Rule 104 of the Texas Rules of Civil Evidence to conduct preliminary determinations regarding the admissibility of expert testimony.

To assist the trial court in making initial determinations regarding the admissibility of expert testimony, the Texas Supreme Court adopted the factors of reliability originally espoused in *Daubert* and added two more. In addition to the *Daubert* standards, the Texas Supreme Court reasoned that it was important to explore (1) the degree to which interpretation of the data requires the subjective interpretation of the expert and, (2) to inquire into the use of the witness= techniques and theories outside the courtroom.

The court in *Robinson* stressed that the factors outlined by the court are non-exclusive and that any additional factors that may be considered by the trial court would vary from case to case.

In addition to requiring the trial court to make the determination that the expert=s testimony is both relevant and reliable, the Texas Supreme Court imposed an additional requirement on the trial courts:

> If the trial judge determines that the proffered testimony is relevant and reliable, he or she must then determine whether to exclude the evidence because its probative value is outweighed by the ›danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.= Tex.R.Civ.Evid. 403; see *Daubert*, 509 U.S. at 595-96, 113 S.Ct. at 2798; *Kelly*, 834 S.W.2d at 572; *Dudley v. Humana Hosp. Corp.*, 817 S.W.2d 124, 127 (Tex.App.–Houston [14th Dist.] 1991, no writ).

Robinson, 923 S.W.2d at 557

Based upon its analysis and interpretation of the law, the majority in *Robinson* concluded that the testimony of the Robinson=s expert was not reliable and that it was not an abuse of discretion to exclude the testimony. The court noted that Robinson=s expert had not attempted to rule out other possible causes for the injuries to the Robinson=s orchard. Additionally, it appeared from the face of the record that the expert=s methodology of comparative symptomology was not generally accepted by other members of the scientific community.

III. FURTHER DEVELOPMENT AND APPLICATION OF *ROBINSON*

Since *Robinson*, the Texas Supreme Court has had a limited number of occasions to address the issue of expert testimony and refine the process for challenging expert evidence. To date, while subsequent cases have permitted the Texas Supreme Court to clarify some issues, the Court has not chosen to clarify many of the procedural issues relating to the application of *Daubert* and *Robinson*.

A. Burroughs Wellcome Co. v. Frye

In a concurring opinion in *Burroughs Wellcome Co. v. Frye*, 907 S.W. 2d 497 (Tex. 1995) Justice Gonzalez, joined by Justices Hecht and Owen, discussed the application of the *Robinson* reliability factors to the testimony of one of the Plaintiff=s expert witnesses. *Frye* involved a products liability action for damages allegedly incurred from the use of antifungal foot spray. One of the plaintiff=s expert witnesses was a civil engineering professor who had been retained to establish that the application of the spray significantly reduced skin temperature. To prove this hypothesis, the expert conducted a series of experiments on pig=s feet. In concluding that the expert=s findings and conclusions were unreliable, the concurring Justices took note of the fact that the professor himself admitted he had done "real sloppy investigative work.@ The Justices also noted other factors that touched upon the unreliability of the test results and the expert=s testimony.

B. Merrell Dow Pharmaceuticals, Inc. v. Havner

The Texas Supreme Court next addressed the standard for the admissibility of expert testimony in *Merrell Dow Pharmaceutical, Inc. v. Havner* 953 S.W.2d 706 (Tex. 1997). *Havner* involved the same products liability claim asserted in *Daubert*. As was the case in *Daubert*, the Havners brought suit against Merrell Dow, claiming that the drug Bendectin was responsible for causing their daughter=s birth defect. Merrell Dow alleged that the analysis of the Havner=s expert witnesses was flawed and unreliable and moved to exclude the expert=s testimony. Because the challenge to the Havner=s expert was addressed by the trial court at a time prior to the Supreme Court=s decision in *Robinson*, the trial court=s analysis went no further than the question of whether the Havner=s expert=s testimony would be helpful to the jury. The jury returned a verdict in favor of the Havners and Merrell Dow appealed.

The appellate court=s original decision was handed down before the Texas Supreme Court issued its opinion in *Robinson*. Although the court of appeals had originally reversed the case on the grounds that there was no evidence of causation, upon rehearing, the appellate court *en banc* reconsidered its original opinion in light of *Daubert* and reversed its previous decision and affirmed the judgment of the trial court.

The Texas Supreme Court concluded that the evidence presented at trial was not legally sufficient to support the jury=s verdict. In reaching its conclusion that the evidence was legally insufficient, the Texas Supreme Court concluded that it was not sufficient for the Havners= expert to simply testify to the fact that Merrell Dow=s product cause the Havners= damages. The Court explained that, a fact is not proven "simply because an expert says it is so.@ The trial court must look beyond the expert=s opinion and independently evaluate the underlying data in order to determine if the expert=s opinion is reliable. The Court in *Havner* reviewed a number of reported decisions involving Bendectin and extensively discussed the use of epidemiological studies to establish causation. Placing particular emphasis on the fact that the evidence of causation had not been subject to peer review, which was a *Robinson* factor, the Court concluded that the evidence was not reliable.

C. Maritime Overseas Corp. v. Ellis

In *Maritime Overseas Corp. v. Ellis* 971 S.W.2d 402 (Tex. 1998), the Texas Supreme Court addressed the issue of whether or not a complaint regarding the reliability of expert evidence could be addressed for the first time on appeal. In *Maritime Overseas*, the plaintiff sued Maritime Overseas for injuries he allegedly sustained while working aboard one of Maritime=s ships. On appeal, the defendant ship owner argued for the first time that the plaintiff=s causation evidence was unreliable. In

considering the merits of Maritime Overseas= argument, the court noted:

> To preserve a complaint that scientific evidence is unreliable and thus, not evidence, a party must object to the evidence before trial or when the evidence is offered. Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush. Reviewing courts may not exclude expert scientific evidence after trial to render a judgment against the offering party because that party relied on the fact that the evidence was admitted. *Babbitt*, 83 F.3d at 1067. As the *Babbitt* court explained: >[P]ermitting [a party] to challenge on appeal the reliability of [the opposing party=s] scientific evidence under *Daubert*, in the guise of an insufficiency-of-the-evidence argument, would give [appellant] an unfair advantage. [Appellant] would be >free to gamble on a favorable judgment before the trial court, knowing that [it could] seek reversal on appeal [despite its] failure to [object at trial].= *Babbitt*, 83F.3d at 1067 (citations omitted). Thus, to prevent trial or appeal by ambush, we hold that the complaining party must object to the reliability of scientific evidence before trial or when the evidence is offered.

Maritime Overseas, 971 S.W.2d 402, 409 (Tex. 1998) (citations omitted)

D. Gammill v. Jack Williams Chevrolet, Inc.

In *Gammill v. Jack Williams Chevrolet, Inc.*, the Texas Supreme Court again had the opportunity to address the question of the admissibility of expert witnesses. *Gammill* involved a products liability case in which the Gammills sued to recover damages resulting from the death of their daughter. At trial, the defense moved to exclude expert testimony regarding whether or not the child was wearing a seat belt and whether or not the seat belt was defective. The trial court excluded the expert=s testimony and then granted summary judgment in favor of defendants. On appeal, the court of appeals affirmed the trial court=s order. In their appeal to the Texas Supreme Court, the Gammills asserted that the requirements of *Robinson* only applied in cases involving novel scientific issues. The Court rejected this argument and expressly held that the requirements of Rule 702 applied to all expert testimony.

> We agree with the Fifth, Sixth, Ninth and Eleventh Circuits that Rule 702's fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule. Nothing in the language of the rule suggests that opinions based on scientific knowledge should be treated any differently than opinions based on technical or other specialized knowledge. It would be an odd rule of evidence that insisted that some expert opinions be reliable but not others. All expert testimony should be shown to be reliable before it is admitted.

Gammill, 972 S.W.2d 713, 726 (Tex. 1998)

The court in *Gammill* also addressed the argument of whether or not the standards set forth in *Robinson* should be used in all cases to evaluate the reliability of an expert=s testimony. In recognizing the limitations of the factors established in *Robinson*, the Court noted:

> That said, it is equally clear that the considerations listed in *Daubert* and in *Robinson* for assessing the reliability of scientific evidence cannot always be used with other kinds of expert testimony. To borrow the *Berry* court=s analogy, a beekeeper need not have published his findings that bees take off into the wind in a journal for peer review, or made an elaborate test of his hypotheses. Observations of enough bees in various circumstances to show a pattern would be enough to support his opinion. But there must be some basis for the opinion offered to show its reliability. Experience alone may provide sufficient basis for an expert=s testimony in some cases, but it cannot do so in every case. More experienced experts may offer unreliable opinions, and a lesser experienced expert=s opinions may have solid footing. The court in discharging its duty as gatekeeper must determine how the reliability of particular testimony is to be assessed. As the United States Supreme court recently stated in *General Electric Co. v. Joiner*: [N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Gammill, 972 S.W.2d, at 727

It appears that the appellate courts have been mindful of the court=s opinion in *Gammill* and have avoided strictly applying the reliability factors enumerated in *Daubert* and *Robinson*. An example of the approach being taken by the appellate courts in this respect is the opinion of the San Antonio Court of Appeals in *Ford Motor Company v. Aguiniga*. That case involved a product liability action brought against Ford Motor Company for damages arising out of a single-vehicle accident in Mexico. The plaintiffs in *Aguiniga* claimed that a fuel pump relay switch on the plaintiffs= 1991

Aerostar van had failed to properly operate and had caused the van to stall and tumble into a ravine. At trial, the plaintiffs offered the testimony of a metallurgy professor and an electrical engineer to establish the condition of the fuel pump relay and to offer an opinion that the pump had failed as a result of a corroded relay. On appeal, Ford contended that the testimony of both the metallurgist and the electrical engineer were inadmissible because the testimony lacked a reasonable scientific basis. Specifically, Ford asserted that the experts= testimony did conform to the factors enumerated in Daubert and Robinson. In considering Ford=s argument, the Fourth Court of Appeals, noted:

> In *Gammill*, the Texas Supreme Court acknowledged that the *Daubert* / *Robinson* factors cannot always be used with non-scientific expert testimony. *Gammill*, 972 S.W.2d at 726-27. In deciding whether the trial court in *Gammill* abused its discretion, the Texas Supreme Court added a more general analysis whether "there is simply too great an analytical gap between the data and opinion proffered.@ Id. (Citing *General Elec. Co. v. Joiner*, 522 U.S 136, 118 S.Ct. 512, 519, 139 L.Ed.2d 5008 (1997)). Ultimately, this test assigns the trial court the role of gatekeeper of determining reliability of particular testimony to be assessed. *Gammill*, 972 S.W.2d at 727. We agree with appellees that the testimony of Swint and McLellan does not fit all the enumerated factors of *Robinson*, and therefore apply to the more general reliability test espoused by *Gammill*. In doing so, we must determine whether there is an "analytical gap@ between the data and the opinions proffered.

Ford Motor Company v. Aguiniga, 9 S.W.3rd 252, 264 (Tex.App.**B**San Antonio, 1999, review denied)

While expert testimony offered with respect to questions of characterization and value can often be tied to recognized principles, much of the expert opinion testimony offered in family law cases is based on subjective analysis and would not conform to the factors enumerated in *Daubert* and *Robinson*. Accordingly, in light of *Gammill* and its progeny, much of the debate regarding the admissibility of expert testimony in family law cases will no doubt focus less on conformity with the *Daubert* / *Robinson* and more on determining the existence of any analytical gap between the facts and the opinions offered.

E. Gibbs v. Gibbs

An example of just how far *Daubert* and *Robinson* have changed the legal landscape can be found in the Fifth Circuit opinion in *Gibbs v. Gibbs* 210 F.3d 491 (5th Cir. 2000). The underlying claim in *Gibbs* involved a suit to recover proceeds from life insurance policy. The insurance company, General American Life, suspected that the beneficiary, (the decedent=s estranged wife) might be involved in the death of their insured and interplead the insurance proceeds into the registry of the court. On appeal, the Fifth Circuit was called upon to review the question of whether or not the district court correctly concluded that American General Life was justified in interpleading the insurance proceeds. At trial, part of the evidence submitted by American General Life was the result of a polygraph test indicating that the beneficiary had given deceptive answers with respect to questions regarding the possibility of her involvement in her estranged husband=s death. On appeal, the beneficiary alleged that the district court had erred in admitting the results of the polygraph examination. Instead of simply adhering to the long-standing rule that polygraph results are not admissible, the Fifth Circuit applied the standards announced in *Daubert*, and affirmed the district court=s conclusion that the polygraph results were scientifically valid. Additionally, the court concluded that most of the safeguards provided for in *Daubert* are not as essential in a case where the judge sits as the trier of fact.

What is significant about the *Gibbs* decision is that it represents a departure from the longstanding rule in Texas that the results of polygraph tests are inadmissible in a civil case. Additionally, the case apparently reflects a loosening of the standards for the admissibility of expert testimony in bench trials.

F. Helena Chemical Co. v. Wilkinson

In *Helena Chemical Co. v. Wilkinson* 47 S.W.3rd 486 (Tex. 2001), the Texas Supreme Court affirmed the appellate court=s ruling that the trial in Starr County did not abuse its discretion by admitting the Wilkinsons= expert=s testimony. The trial court and jury heard testimony regarding the Wilkinsons farming on non-irrigated dry land. The Wilkinsons purchased a particular variety of seed from Helen Chemical Co. in the years 1992, 1993 and 1994. The Wilkinsons sued Helena alleging deceptive trade practices **B** consumer protection act (DTPA) violations, breach of expressed and implied warranties and fraud. The Wilkinson purchased the seed from Helena Chemical based upon Helena=s advertising that their seed had Aexcellent dryland yield potential,@ and "good field tolerance.@ The jury found for the Wilkinsons on all claims except fraud. Helena appealed the decision on a number of grounds, including their belief that the trial court abused its discretion by admitting the expert testimony of the Wilkinson=s expert.

The expert in this case testified that the seed was not appropriate for dryland farming and therefore did not perform as represented in Helena=s advertising. Helena claimed that the expert lacked the necessary qualifications and that his testimony was unreliable. Both

the court of appeals and the Texas Supreme Court held that the trial court did not abuse its discretion by admitting the expert=s testimony.

This case has been cited repeatedly since it was published because it incorporates the *Robinson* factors and clearly sets out the two part test that governs whether expert testimony is admissible. The expert must be qualified and the testimony must be relevant and based upon a reliable foundation. *Id.* at 499; *E.I. Du Pont De Nemours and Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). The court reaffirmed that the trial court has broad discretion to determine admissibility and this discretion is only reversed if a clear abuse of discretion exists. *Id.*; *Robinson*, 923 S.W.2d at 558.

In the case at hand, the Texas Supreme Court went through a detailed analysis and found that the expert=s experience conducting crop trials, experience as a plant-science consultant, and experience identifying environmental factors affecting crops could have been helpful to the jury. The Court concluded that the court of appeals correctly found that the trial court did not abuse its discretion in finding the expert to be qualified. Additionally, the expert=s experience, "coupled with his thorough testimony about the methodology he employed, demonstrate that the opinions he drew from the underlying data are reliable.@ *Id.* at 501. Thus, the Texas Supreme Court found that the testimony of the expert was both qualified and reliable.

G. In the Interest of J.B.,

In the *In the Interest of J.B.* case 93 S.W.3rd 609 (Tex.App.BWaco, 2002, no writ), the Waco Court of Appeals reviewed the *Gammill*, *Robinson* and *Helena Chemical* decisions, along with other supporting case law. After reviewing the case law authority, the court concluded that a trial court should first apply the *Robinson* factors to the proposed expert testimony. The court wrote, "Perhaps only a few of the factors will be useful in a particular case. In other cases, none of the factors will be helpful. In either case, the trial court must exercise its discretion to identify and employ other factors as necessary to assess the reliability of the proffered testimony. *Id.* at 621.

In this case, the majority of the appellate court found that the expert testimony should not have been admitted. The expert in this case was a psychologist who was called to testify regarding the mother=s parenting abilities. The expert was called by Child Protective Services to establish the fact that the mother was unfit, and that her parental rights should be terminated. In this case, the expert was a psychologist with almost 30 years experience. His Master=s research had focused on issues of abuse and neglect, he held memberships with the Texas Psychological Association and the American Psychological Association, as well as several other professional groups. His area of practice focused "almost exclusively on the areas of abuse and neglect.@ The psychologist conducted a "parenting assessment@ of the mother prior to trial.

Despite his background, the appellate court found that the testimony of the expert should not have been admitted because his parenting assessment has never been tested by an independent organization. The court also found that his parenting assessment was subjective in nature because he did not make his questionnaire available for independent review. The expert did not identify or produce a brochure purportedly published by the Academy of American Pediatricians, which weighed against the reliability of his methodology. The doctor=s failure to cite any particular studies or reports supporting his assertion weighed against the reliability of his methodology according to the appellate court. The court also specifically noted, "The fact that Dr. Schinder employs his parenting assessment almost exclusively in connection with judicial proceedings weighs against the reliability of his methodology.@ *Id.* at 625.

The Court summed up its opinion by stating that Child Protective Services only offered the testimony of their expert to establish his own methodology. The expert offered no specific, independent sources that would support his claim that the methodology was reliable. A number of courts have held that an expert=s self-serving statements that their methodology was generally accepted would not be sufficient to establish the reliability of the technique. *Id.* at 626; *Robinson*, 923 S.W.2d at 559. For all of these reasons, the appellate court concluded that the trial court abused its discretion by admitting the psychologist=s testimony.

IV. THE GATEKEEPER PROCESS

On remand, the 9th Circuit Court of Appeals had the following comment regarding the United States Supreme Court=s decision to make trial courts the gatekeepers for expert testimony:

> As we read the Supreme Court=s teaching in *Daubert*, therefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those expert=s proposed testimony amounts to >scientific knowledge,= constitutes >good science= and was >derived by the scientific method.=
>
> Our responsibility, then unless we badly misread the Supreme Court=s opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not >good science= and occasionally reject such expert testimony because it was not >derived by the scientific method.= Mindful of our

> position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.

43 F 3d. 1311, 1315-16 (9th Cir. 1995)

A. Form of the Challenge

In his dissent in *Maritime Overseas Corp. v. Ellis*, Justice Hecht observed that the Texas Supreme Court has given very little direction regarding the exact method for raising a challenge to the admission of expert evidence. As Justice Hecht noted, the court has not explained "what this hearing is, how it is invoked, when it is to be conducted relative to the commencement of trial, and whether it is required.@ Apparently, the Texas Supreme Court is still in the process of evaluating the best procedure for addressing challenges to expert evidence. That of course leaves open the question of the best form for bringing a challenge to the attention of the trial court. Generally speaking, in family law cases, a challenge to the admissibility of expert testimony would be presented to the trial court through a motion to strike, or motion to exclude testimony.

B. Burden of Proof

The party seeking to offer expert evidence has the burden of establishing the admissibility of the expert=s testimony by a preponderance of the evidence. However, there is one exception to this rule. If a party seeks to challenge the admissibility of expert testimony on the grounds of unfair prejudice under Rule 403 of the Texas Rules of Civil Evidence, the burden of proof rests upon the objecting party.

It is worth noting that the question of where to place the burden of proof was a divisive one for the Texas Supreme Court. The majority in *Robinson* placed the burden upon the party presenting the expert witness. The four dissenting justices noted that they would require the party challenging the expert witness to prove that the expert=s testimony was unreliable.

C. Presenting the Challenge

Although Texas has not yet addressed the proper method for raising a challenge to the admission of expert evidence, it is a fairly safe assumption that a simple blanket challenge to all of an expert=s opinions would not be proper. Rule 103(a)(1) of the Texas Rules of Civil Evidence requires specific objections. One commentator has compared the procedure to that of filing a Ano evidence@ motion for summary judgment. A party seeking a no evidence summary judgment is required to specify the elements being challenged. Another commentator has suggested that an objecting party should be required to more than simply make a specific objection. In her article, AProcedural Paradigms for Applying the Daubert Test@, Professor Margaret A. Berger has advanced the proposition that a party challenging the admissibility of expert testimony should bear the burden of production to present some evidence that the offered testimony is unreliable. As Professor Berger states,

> The evidentiary policies underlying Daubert=s competing rationales, efficiency and fairness concerns, and the structure of the discovery rules, all dictate placing a burden on the opponent of the evidence to make a prima facie showing that the proponent=s evidence suffers from the deficiencies identified in Daubert, before the court has any obligation to undertake an admissibility determination.

78 Minn. L. Rev. 1345, 1365 (1994)

Placing the burden of production on the party challenging the admissibility of the evidence would assure the existence of a bona fide dispute and would limit potentially meritless motions.

D. When to Raise the Challenge

As noted by Justice Hecht in his dissenting opinion in *Maritime Overseas Corp. v. Ellis*, there are essentially two different times that a party could assert a challenge to expert evidence. A party challenging the admission of expert evidence could raise the issue with a pretrial motion. A second option would be to object to the admission of the evidence at the time of trial.

Although the Texas Supreme Court in Robinson held that, pursuant to Rule 104 of the Texas Rules of Civil Evidence, the trial court is responsible for determining whether expert testimony meets the standards imposed by the Texas Rules of Civil Evidence, the Court did not explain exactly how the trial court should perform its gatekeeping function. Consequently, there is no clear-cut established procedure for contesting the admissibility of expert testimony.

Traditionally in Texas, any challenge to the qualifications or opinions of an expert witness was generally raised at trial. Although not specifically provided for in the Texas Rules of Civil Evidence, the process of taking an expert witness on *voir dire* at the beginning of his testimony in order to challenge his qualifications or opinions is a well-recognized procedure. At least one Texas court has implied that post-*Daubert* challenges to the admissibility of an expert=s testimony should continue to be addressed through *voir dire* examination at the time of trial.

Although no appellate court has held that a challenge to expert testimony must be brought as a pretrial motion, it would appear that presenting the issue as a pretrial motion would be the preferred procedure. In addressing the issue in his concurring opinion in *Maritime Overseas*, Justice Gonzalez noted:

> [a] court should not be required to interrupt trial and conduct a Robinson hearing which could have been held at pretrial.

Maritime Overseas, 971 S.W.2d at 414-415 (Gonzalez, J. concurring)

Obviously, there are inherent disadvantages to waiting until trial to assert a challenge to the admissibility of an expert=s evidence. The first is that the trial court may not have sufficient time to fully consider the motion. If the judge has a jury panel waiting in the hallway outside his courtroom, or he or she is required to recess the jury while he or she conducts a hearing, the judge may not be inclined to take a great deal of time to consider the merits of the motion. Secondly, if a successful challenge is asserted during trial, there is insufficient time to retain another expert. Finally, if the effort to exclude the expert is successful, the loss of an expert witness during trial court has devastating effects. For these reasons, most family law practitioners should consider filing pretrial motions to exclude the expert, rather than wait until the time of trial to attempt to exclude the expert.

E. Evidentiary Hearing?

In *Kumho Tire Co. v. Carmichael* 119 S. Ct. 1167, 1176 (1999), the United States Supreme Court held that trial courts have the discretion on whether or not to conduct evidentiary hearings on challenges to expert evidence. Simply because the trial court may choose not to conduct an evidentiary hearing regarding a challenge to expert testimony does not mean that the trial court has the discretion to refuse to consider the challenge in it its entirety. In *Tanner v. Westbrook* 174 F.2d 542, 545 (5th Cir. 1999), the Fifth Circuit court of Appeals remanded the case to the trial court because the court had refused to conduct a Rule 104 hearing.

If the trial court permits an evidentiary hearing, Rule 104 of the Texas Rules of Civil Evidence provides that the trial court in not bound by the Rules and may consider inadmissible evidence in determining whether to permit an expert to testify. Regardless of this fact, prudent family law practitioners should strive to present admissible evidence in light of the fact that counsel may want the opportunity to offer the same evidence at trial for the benefit of the jury.

It should be noted that the argument of counsel does not constitute evidence. This issue was discussed in the case of *In re Wallingford*, 64 S.W.3d 22 (Tex.App**B**Austin 1999, orig. proceeding). In that case, the trial court entertained argument from the husband=s counsel on the husband=s motion to disqualify wife=s attorney. At the conclusion of his argument, the trial court asked husband=s counsel if he had anything further to present in connection with his motion. Husband rested without putting on any evidence and the trial court granted the motion to disqualify. On petition for writ of mandamus, the husband asserted that his argument to the trial court was evidence because he was an officer of the Court. The court of appeals rejected this argument, finding that the husband had offered no evidence in support of his motion.

F. Procedure at the Gatekeeper Hearing

Whatever the exact format of the gatekeeper proceeding, it is clear from *Robinson* and its progeny that the party seeking to admit the expert testimony will be required to establish by a preponderance of the evidence that the expert is qualified, that the expert=s testimony is relevant and that the expert=s testimony is reliable.

1. The Expert is Qualified

At the hearing, the first thing that the party offering the expert will need to establish is that the expert is qualified. One of the clear requirements of Rule 702 and of *Daubert* and *Robinson* is that experts be qualified. Consequently, a party must show that the expert=s knowledge, experience, skill, training or education renders the expert qualified to give an opinion regarding the specific issue before the court. This is usually accomplished by establishing the expert=s credentials and background. A party can also seek to qualify an expert by requesting that the trial court take judicial notice of the expert=s qualifications.

2. The Evidence is Relevant

Second the party seeking the admission of the expert testimony will have to be able to show the trial court that the testimony of the expert is relevant. In other words, the testimony to be offered at trial must have probative value and it must have some connection to an issue at trial. In determining this issue, the general requirements of Rule 403 of the Texas Rules of Civil Evidence apply.

3. The Evidence is Reliable

The most important element to establish at a gatekeeper hearing is that the testimony offered by the expert is reliable. As the Texas Supreme Court in *Robinson* explained, to be reliable, the underlying scientific technique or principle must be grounded in methods and procedures of science. As previously noted, the Court in *Robinson* set out several factors to consider in determining the reliability of expert testimony. As noted in *Gammill*, certain of these factors set forth in *Robinson* may not be applicable to the testimony being offered. Nonetheless, a party seeking to establish the right to call their expert should try to establish the reliability by conforming to the applicable standards set forth in *Robinson*.

First and foremost, the courts appear to have trouble with expert witnesses that reach their conclusions without ruling out alternative causes. For example, the Court in *Robinson* specifically noted that although the Robinsons= expert had identified several possible reasons for damage to the Robinsons= orchard, the expert made no effort to rule out any of these alternate causes. By jumping to a conclusion without ruling out other viable possibilities, the Robinsons= expert put into question the reliability of the methodology that he used to reach the conclusion that Du Pont was responsible for the Robinsons= damages. While few Texas cases to date have discussed the issue, other jurisdictions seem to take the same view with respect to the testimony of experts who fail to rule out possible alternatives.

Second, it appears that courts are less likely to view as reliable any opinions that appear to be based on anything less than a thorough and detailed investigation. For example, the court in *Robinson* was critical of the fact that the Robinsons= expert had only made a brief inspection of the Plaintiffs= pecan orchard and had failed to perform any analysis of the chemical that allegedly damaged the Robinsons= pecan trees. *Robinson* was critical of a situation where it appeared that the expert had Acome to a firm conclusion and then [did] research to support it.@ These same types of concerns were addressed in a case that arose contemporaneously with *Robinson*. In *North Dallas Diagnostic Center v. Dewberry* 900 S.W.2d 90, 96 (Tex.App.—Dallas, 1995, writ denied), the Dallas Court of Appeals excluded the expert=s testimony because the expert failed to document the conditions under which he was conducting critical testing.

Finally, it appears that an inherent concern for the courts will always be the fact that expert testimony almost always involves the proffering of opinions created solely for the purpose of litigation. In family law cases, many experts are hired for the sole purpose of providing opinions regarding custody and access. The fact that an expert may offer opinions created solely for the purposes of trial does not automatically render the testimony as unreliable. It simply means that the courts are going to pay stricter attention to opinions offered by such advocates.

4. The Absence of Undue Prejudice

The last issue to be considered at a gatekeeper hearing is whether the probative value of the evidence that is being offered is outweighed by the danger of unfair prejudice, confusion, or delay. As noted previously, the burden of proof on this issue rests with the party seeking to strike the expert evidence.

V. RESOURCES

There are many fantastic resources available to the family law practitioner to help understand this difficult topic. The following resources can be relied upon to help gain a basic understanding of the *Daubert* challenge (Appendix A), a sample examination at trial that Mr. Negron will discuss during his portion of the speech (Appendix B), as well as a list of expert witnesses each attorney can use as a resource when trying to find an expert for their case (Appendix C).

VI. CONCLUSION

Courts continue to wrestle with applying the *Daubert* or *Robinson* factors to a variety of proposed experts. From the recent cases that were set forth in this paper, it seems clear that Courts will continue to both allow and exclude testimony based upon the standard set out in *Robinson*. The *Helena Chemical* case is the most recent affirmation of the Supreme Court's reliance on the *Robinson* factors. Similarly, just months ago the Waco Court of appeals applied these factors and found that the testimony of a psychologist with over 30 years of experience should not be admitted. These cases continue to be guides for the family law practitioner to use in determining where the state of expert testimony is today. While this topic continues to be complex, each additional court decision has helped flesh out the status of the law and the path attorneys need to take to be successful in presenting expert testimony.

APPENDICES

DAUBERT/ROBINSON

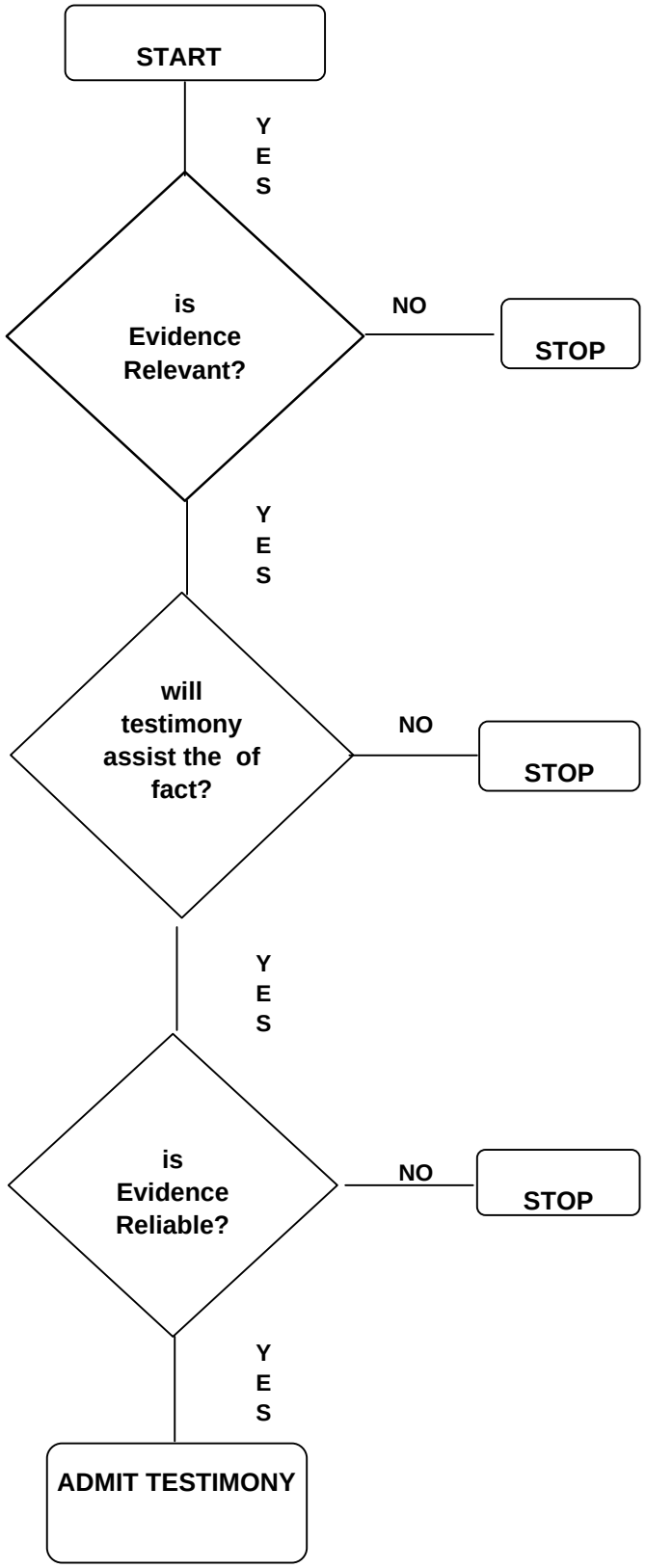
FLOWCHART

TRE 401, 402-Relevancy
Testimony must be sufficiently tied to the facts that is will aid the jury in resolving a factual dispute. See, Robinson, at 556.

TRE 702.
The knowledge, skill, education & training of expert must assist the trier of fact.

TRE 702.
RELIABILITY:

The technique or principle underlying the scientific opinion must be reliable. Scientific evidence which is not grounded in the methods and procedures of science is no more than subjective belief or unsupported speculation. Unreliable evidence does not assist the trier of fact and is therefore inadmissable under TRE 702. See, Robinson, at 556. See next page for factors in hard social sciences.



RELIABILITY FACTORS

HARD SCIENCES:

Non-exclusive factors to consider:

1. The extent to which the theory has been or can be tested;

2. The extent to which the technique relies upon the subjective interpretation of the expert;

3. Whether the theory has been subjected to peer review and/or publication;

4. The technique's potential rate of error [e.g., false positives or negatives];

5. Whether the underlying theory or technique has generally been accepted as valid by the relevant scientific community; and

6. The non-judicial uses which have been made of the theory or technique.

SOCIAL SCIENCES:

Non-exclusive factors to consider:

1. Is the field of expertise a legitimate one?

2. Do the expert's evaluation methods comport with applicable professional ethical codes and standards for forensic evaluations?

3. Is the subject matter of the expert's testimony within the scope of that field?

4. Does the expert's testimony properly rely upon and/or utilize the principles involved in the field?

5. Is there a connection between the evaluation conclusions and the proffered expert opinion?

APPENDIX B

Expert of What? Who Qualifies As An Expert?

As noted above, *Daubert* lends itself more easily to the hard sciences and non-family law cases, than it does to the social sciences. Additionally, anyone who has handled a matter that required the valuation of a collection of Hummel figurines, or a stamp, coin or butterfly collection, or football memorabilia did not worry about anything other than simply locating a known authority on the particular item of personalty, then submitting that "expert" to examination at trial. A typical exchange might have gone something like this, after the usual introductory testimony:

[Questioning by the proponent of the expert on valuation of jewelry items:]

Q. So, Mr. Dresden, where did you acquire your expertise in the jewelry business?
A. I learned it from my Daddy, who learned it from his Daddy.
Q. Are you degreed or certified in any way?
A. No, sir.
Q. Did you study gemology?
A. No, sir.
Q. Do you, then, feel qualified to render an opinion as to the value of jewelry?
A. Yes, sir, I do.
Q. Why do you feel qualified to render such an opinion?
A. I figure after bein' in the business of makin', buyin', and sellin' jewelry for 50 years, I know a little somethin' about it.

A point well taken. But is this line of questioning sufficient to qualify this particular expert and overcome any *Daubert* challenges? Do the Texas Rules of Evidence allow Mr. Dresden's testimony for the purpose of valuation of jewelry? If not, why not? Do Daubert and Robinson apply here? If not, why not?

Like Julie Andrews' song in "The Sound of Music",

Let's start at the very beginning
A very fine place to start.
If you read, you begin with ABC,
If you sing you begin with DO-RE-MI…"

Of course, ultimately, it will be up to the court, the "gatekeeper", to determine whether an expert's testimony will be admitted. However, the careful practitioner will first examine Texas Rules of Evidence, Rules 401 and 402 (relevant evidence generally admissible), 702 (experts with scientific, technical or other specialized knowledge will be heard if such knowledge will assist the trier of fact), 703 (bases of opinion testimony by experts), 704 (expert can testify on ultimate issue of fact), and 705 (court's gatekeeping function).

Having examined these rules, Mr. Dresden, the old jewelry appraiser examined in the example above, could well have the requisite specialized knowledge, skill, experience, or training that will assist the trier of fact; therefore, and so long as his testimony is relevant to the particular issues in the case, should be heard to testify.

1. ACCREDITATION AND WHAT DO THE INITIALS MEAN?

While accreditation by a particular group or society of appraisers is not required for someone to be qualified an expert, it may likely help in the expert witness qualifying process. Listed below are some explanatory comments about the American Association of Appraisers. The ASA covers appraisal accreditations primarily in personal property and business valuation. Accreditation in other areas are discussed at the beginning of each appraisal topic.

a. American Society of Appraisers (ASA). Other specialized areas of appraisers, such as real estate, have their own certification standards, but any appraiser can be accredited by more than one organization.

i. Requirements for Accreditation

X Written exam in the field of expertise
X Submit representative appraisal reports for peer review
X Peer screening for ethical reputation and behavior.

ii. Candidate Membership

X Prospective candidate must be interviewed and approved by local chapter
X Candidate must pass the ASA Ethics Examination and the Uniform Standards of Professional Appraisal Practice (USPAP) exam within a specified period of time
X Technical appraisal proficiency and understanding of the fundamentals of appraisal ethics, principles and concepts are evaluated by written and oral exams

iii. Membership in ASA. When the candidate has met all of the requirements, and gained the necessary experience, he/she may apply for advancement for the following accreditations:

1. Accredited Member (AM). An accredited member must have at least 2 years of full-time equivalent appraisal experience and a college degree or equivalent.

2. Accredited Senior Member (ASA). Member is required to have at least 5 years experience full-time equivalent appraisal experience and a college degree or equivalent.

3. Master Gemologist Appraiser. The individual must:

X be a Graduate Gemologist (GG) from the Gemological Institute of America or hold the designation of Fellow, Gemmological Association of Great Britain (FGA);
X own or be employed by an owner of an ASA registered gemological laboratory;
X pass the Farnsworth-Munsell 100-hue test for color discrimination; and
X successfully complete the Master Gemologist Appraiser Program.

4. Fellow (FASA) . To be designated as a Fellow, the individual must be an Accredited Senior Appraiser and be recognized by ASA=s international Board of Governors for outstanding service to the appraisal society or profession.

2. APPRAISAL AND APPRAISAL SERVICES

a. Airplanes

Abilene Aero
2850 Airport Blvd.
Abilene, Texas 79602
Phone: 915-677-2601
Fax: 915-671-8018
www.abileneaero.com

Apollo Aviation, Inc.
Houston Hobby Airport
8402 Nelms, Suite 210
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Phone: 713-641-0171
Fax: 713-641-2520
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Aurora Aviation, Inc.
Jim Allmon
Waco Regional Airport
355 McGregor Airport Road
McGregor, Texas 76657
Phone: 254-848-2345
Fax: 254-848-2555

Austin Jet Int=l
Horseshoe Bay Resort Airport
Horseshoe Bay, Texas 78657
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Fax: 830-596-1112
Aircraft: Don Starling
Helicopter: Jerry Edwards

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Rich Porter
Montgomery County Airport
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Conroe, Texas 77303
Phone: 409-756-6568
Fax: 409-456-6568
www.craviation.com

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Phone: 214-631-4707
Fax: 214-638-7579
lmilesjr@aol.com
www.mbval.com

Par Avion, Ltd.
6524 San Felipe, Suite 446
Houston, Texas 77057
Phone: 713-681-0075
Fax: 713-681-0035
www.paravionltd.com

b. Automobiles

William Avila ASA
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10600 Montana
El Paso, Texas 79935
Phone:915-598-2583
Fax: 915-599-8800
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d. Business Valuation

i. Designations and Accreditations

1. American Society of Appraisers (ASA). The ASA, which is discussed in more detail above, provides for accreditation in business valuation.

2. Accredited in Business Valuation (ABV).The American Institute of Certified Public Accounts (AICPA) offers accreditation in business valuation in which the successful candidate can used the designation, ABV. Those who earn this accreditation have truly had their experience and knowledge tested. The requirements for accreditation are:

- X Applicant must be a member in good standing in AICPA;
- X Must possess an unrevoked CPA license;
- X Must submit 10 prior business evaluation reports which demonstrate substantial experience and competence as a business evaluator;
- X Must pass a written exam.
- X For re-accreditation, the applicant must have at least 60 hours of CPE, within last 3 years, and submit documentation of 5 business valuations performed in the last 3 years.

ii. Appraisers-Business Valuation

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e. Gems & Jewelry

i. Associations and titles.

1. Gemological Institute of America (GIA).International recognized as the leading organization in gem and jewelry study and training.

2. Gemologist. (G) The designation given by he Gemological Institute of America to those individuals who have successfully completed courses in gem identification of both diamonds and colored stones. It required completion of a home study course and passing a written examination.

3. Graduate Gemologist. (GG). A classification given to persons who have met all of the requirements and attended classes in diamond appraising and gem identification. The classes are usually one week in duration. Classes are conducted by GIA instructors and are offered in most U.S. cities.

4. Graduate Gemologist in Residence Diploma. A prestigious credential which is achieved by attending classes, in residence, at one of the GIA campuses located in New York or California. The course covers all subjects taught at the gemologist and graduate gemologist levels. The length of time required to complete the course is approximately seven months. If additional courses are included such as retail, jewelry training, pearls, appraisals, and design. The course can take up to a year to complete.

5. Certified Gemologist. (CG). Title awarded by the American Gem Society (AGS). AGS is a non-profit organization with membership in the U.S. and Canada. One can be certified by AGS members who have already qualified as registered jewelers and completed advanced courses in gemology. Candidates must have: 1) functioned as registered jewelers for at least one year prior to certification, and 2) a gemologist or graduate gemologist title from the GIA. Although the individual is given the title, membership is held by the employing firm. If the title holder leaves the firm, the certified designation can no longer be used by the individual.

6. Professional Gemologist. (PG) The title awarded to those who successfully completed the 4 1/2 month course of study at the Columbia School of Gemology in Maryland. The passing of a practical and written examination is required before certification as a professional gemologist.

7. Fellow of the Gemological Association. (FGA) Title awarded to successful candidate for the gemological diploma of the Gemological Association of Great Britain. Attainment of this title involves two years of correspondence study and is given very high professional and scientific recognition internationally.

8. Gemologist, Accredited Gemologist, Accredited Jewelry Appraiser. (G, AG, AJA). Titles given by the Pacific Institute of Gemology in Vancouver, Canada. Gemologist certificate is awarded to students who have successfully completed the introductory course in gemology and courses on diamond grading and advanced gemology. Diplomas require the gemologist

certificate or equivalent and successful completion of color stone grading and practical gemology. The AJA rating requires 4 additional courses on appraisal

9. Master Gemologist Appraiser. (MGA)The MGA program is part of the American Society of Appraisers (ASA). The highest title which can be held in the gems and jewelry division of the ASA is that of "Master Gemologist Appraiser."

The candidate must:

- X have an accredited gemological laboratory;
- X have 3 to 5 years of documented appraisal experience;
- X be a graduate gemologist or equivalent;
- X pass an investigation of character, integrity, and past appraisal performance;
- X submit to policing of appraisal practice. The examination which the candidate must successfully complete is the most rigorous in the gem and jewelry industry.

10. American Gem Society Certified Gemologist Appraiser. (CGA) There is an examination which the candidate must successfully complete to achieve the CGA title. There is no formal training program prescribed by the AGS for this certification. The primary requirement is that the candidate be a certified gemologist.

11. International Society of Appraisers. (ISA) International appraisal organization of which approximately 20 percent of its members are gems and jewelry appraisers. More generalized than specialized, the candidate is required to attend certain core courses covering the legal, ethical, and theoretical aspects of personal property appraisal.

12. Appraisers Association of America. (AAA) This is a membership organization only and offers no titles signifying certification. Program usually consists of seminars and monthly meetings.

13. The National Association of Jewelry Appraisers. (NGJA, NJA) This organization offers no certification titles, but grants accreditation to members with proper educational and appraisal experience.

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f. Livestock & Agricultural Equipment

The leading organization governing the qualifications of livestock and farm equipment is the American Society of Agricultural Appraisers (ASAA). The ASAA was founded in 1980 and is the only appraisal association for livestock and farm equipment. The ASAA consist of 3 divisions: 1) The International Society of Livestock Appraisers; 2) The American Society of Farm Equipment Appraisers;, and 3) The American Society of Equine Appraisers. Membership is based solely upon application stating the experience level of the applicant. If approved, the member must adhere to the Uniform Standards of Professional Appraisal Practice (USPAP). The level of membership are:

X Accredited Member: An individual with current full-time or part-time agricultural or agriculture-related experience who possesses a sound working knowledge of the livestock and/or farm equipment industry. Individuals with prior agriculture-related experience also may qualify.

X Senior Appraiser: An accredited member who has successfully completed ASAA's Professional Appraisal Seminars and meets the AQB Minimum Qualification Criteria for Personal Property Appraisers. Senior Appraiser members must meet Appraisal Qualification Board (AQB) continuing education requirements every five years in order to retain Senior Appraiser status.

X Associate Member: An individual who does not have the practical experience necessary to qualify as an accredited member, but has the desire to enter the livestock and/or farm equipment appraisal profession, and is committed to attend the ASAA Professional Appraisal Education Courses.

X

Affiliate Member: A member who is not interested in becoming an appraiser, but has a business-related interest in the appraisal field such as bankers, insurance agents, attorneys, etc.

A list of member appraisers was not available, but information can be obtained from the website at www.amagappraisers.com

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i. The Appraisal Institute. This organization of professional real estate appraisers, has general appraisal members who hold the MAI, SRPA, or SREA designations and residential appraisal members who hold the SRA or RM designation. Identified by their experience and knowledge of real estate valuation, these members must adhere to a strictly enforced Code of Professional Ethics and Standards of Professional Appraisal Practice. Currently, the Appraisal institute confers one general designation, the MAI, and one residential designation, the SRA. The Appraisal Institute is the most well known and credible accreditation association of real estate appraisers.

1. Designations. The designations and brief description are as follows:

X **MAI** - held by appraisers who are experienced in the valuation and evaluation of commercial, industrial, residential, and other types of properties, and who advise clients on real estate investment decisions.

X **SRPA** - held by appraisers who are experienced in the valuation of commercial, industrial, residential, and other types of property

X **SREA** - held by appraisers who are experienced in real estate valuation and analysis and advise clients on real estate investment decisions.

X **SRA** - held by appraisers who are experienced in the valuation of single-family homes, townhouses, and residential income properties of up to and including four units.

X **RM** - held by appraisers who are experienced in the valuation of single-family dwellings and two, three, and four-unit residential properties

2. Requirements for MAI Designation

X Must meet the minimum Appraiser Qualification Board (AQB) criteria (i.e., be a general State Certified Appraiser or provide documentation of meeting the AQB minimum requirements).

X College Degree: must submit an official transcript evidencing a 4-year degree.

X Demo Report: must receive credit for a demonstration appraisal report on an income-producing property.

X Comprehensive Exam: must pass this 2-day, 4-part modular examination prior to final level of experience.

X Experience: must receive credit for 3,000 hours of Specialized Appraisal Experience.

3. Requirements for SRA Designation

X Comprehensive Exam: must pass this exam prior to final level of experience.

X Experience: must receive credit for 2,000 hours of Residential Appraisal Experience.

ii. The National Association of Real Estate Appraisers. This organization does not provide accreditation through exam. As seen below, the designations and requirements are must less strenuous than the Appraisal Institute.

1. CREA - Certified Real Estate Appraiser

X Applicant must be one of the following: 1. State licensed real property appraiser (or its equivalent) 2. State certified residential real property appraiser (or its equivalent) 3. State certified general real property appraiser (or its equivalent)

X Applicant must provide a copy of applicant's state license or certification.

X Applicant must submit an "Application Form".

X Applicant must submit membership dues of $215.00 (check or credit card charge) with "Application Form"

2. CCRA - Certified Commercial Real Estate Appraiser.

X Applicant must be a state certified general real property appraiser (or its equivalent).

X Applicant must provide a copy of applicant's state license or certification.

X Applicant must submit an "Application Form".

X Applicant must submit membership dues of $245.00 (check or credit card charge) with "Application Form"

3. RPM - Registered Professional Member

X Applicant must a minimum of one (1) year of Real Estate experience.

X Applicant must submit an "Application Form".

X Must meet minimum Appraiser Qualification Board (AQB) criteria (i.e., be a general State Certified Appraiser or provide documentation of meeting the AQB minimum requirements).

X College Degree: must submit an official transcript evidencing a 4-year degree, or may complete an acceptable alternative.

X Demo Report: must receive credit for a demonstration appraisal report.

X Applicant must submit membership dues of $195.00 (check or credit card charge) with "Application Form"

4. Affiliate Member

X Applicant has an interest in Appraising or Real Estate or Finance areas.

X Applicant must submit an "Application Form". Applicant must submit membership dues of $195.00 (check or credit card charge) with "Application Form"

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Hotel/Motel
Multifamily
Commercial

3. WEBSITES

a. Experts in General

www.expert4law.org
www.experts.com
www.expertwitness.com
www.mother.com/~randy/tools.html
www.expertpages.com
www.divorcesource.com
www.claims.com
www.divorcecentral.com
www.refdesk.com
www.appraisalinstitute.org

b. Artwork

www.artbrokerage.com

c. Automobiles

www.nadaguides.com
www.edmunds.com
www.kbb.com

d. Boats

www.boatvalue.com

www.aicpa.org

e. Business Valuations

f. RealEstate

i. Organizations

www.iami.org
www.frea.com

ii. Appraisal District Websites

www.taxnetusa.com/archer-Archer County
www.taxnetusa.com/bandera/ - Bandera County
www.bcad.org - Bexar County
www.brazoriacad.org - Brazoria County
www.taxnetusa.com/brazos - Brazos County
www.caldwellcad.org - Caldwell County
www.cameroncad.org - Cameron County
www.chamberscad.org - Chambers County
www.collincad.org - Collin County
www.dallascad.org - Dallas County
www.dentoncad.org - Denton County
www.elliscad.org - Ellis County
www.elpasocad.org - El Paso County
www.erathcad.org - Erath County
www.taxnetusa.com/fannin/ - Fannin County
www.taxnetusa.com/franklin/ - Franklin County
www.galvestoncad.org - Galveston County
www.graysoncad.org - Grayson County
www.gcad.org - Gregg County
www.guadalupecad.org - Guadalupe County
www.taxnetusa.com/hardin/ - Hardin County
www.hcad.org - Harris County
www.harrisoncad.org - Harrison County
www.taxnetusa.com/hays/ - Hays County
www.hendersoncad.org - Henderson County
www.taxnetusa.com/hidalgo/ - Hildago County
www.hillcad.org - Hill County
www.taxnetusa.com/jack/ - Jack County
www.jcad.org - Jefferson County
www.kaufmancad.org - Kaufman County
www.kendallcad.org - Kendall County
www.taxnetusa.com/mclennan/ - McClennan County
www.prad.org-Potter Randall Counties
www.taxnetusa.com/rockwall/ - Rockwall County
www.taxnetusa.com/rusk/ - Rusk County
www.scad.org - Smith County
www.tad.org - Tarrant County
www.taylorcad.org - Taylor County
www.traviscad.org - Travis County
www.vanzandtcad.org - Van Zandt County
www.webbcad.org - Webb County
www.taxnetusa.com/wf/ - Whicita Falls
www.taxnetusa.com/williamson/ -Williamson County