

Noteworthy Evidentiary Issues in Divorce Cases (792 words)

By Kathryn Murphy

Before any hearing or trial, you should know what evidence you will need to introduce, prepare the predicates necessary to get that evidence admitted, and possibly prepare a brief on the law for important evidentiary issues. It is also a good practice to review the rules of evidence before every hearing or trial. The hard work you put in before getting to the courthouse helps you think quickly on your feet.

Generally, to be admissible, evidence must be relevant, not be hearsay or meet a hearsay objection, be authentic, have probative value that is not outweighed by its unfair prejudice, and a privilege does not apply. The same rules of evidence apply to electronic evidence.

Evidentiary issues that may come up in a divorce case include hearsay, an owner spouse testifying regarding the value of property, the litigation exception to the physician-patient or mental health privilege, and the privilege against self-incrimination.

Hearsay

If you think your evidence will be met with a hearsay objection, and it does not qualify as a statement that is not hearsay, such as an opposing party's statement, you should first argue it is **not offered to show the truth of the matter asserted**. The key to successfully making this argument is to argue what the statement is offered to prove, such as to show notice or information acted on. If it cannot be shown that you are offering the statement for some purpose other than the truth of the matter asserted, then argue which hearsay exception might apply.

If you know in advance there is critical testimony or evidence that the judge should exclude on a hearsay objection, **prepare in advance**. Just because evidence or testimony makes it past the hearsay hurdle, remember there are other rules of evidence you can use to exclude the evidence, such as relevance, prejudice, authenticity, or improper opinion testimony.

There are several ways to attempt to get around the hearsay rule to admit into evidence the **statement of a child**. These include the following exceptions to the hearsay rule: present sense impression, excited utterance, state of mind, and statements made for medical diagnosis or treatment. Additionally, a statement made by a child twelve years of age or younger that describes alleged child abuse against the child is generally admissible if the court finds the statement is reliable.

Property Owner Rule

The Property Owner Rule provides that a property owner is generally qualified to testify to the value of their property even if the owner would not be qualified to testify to the value of the property as an expert witness. The Property Owner Rule requires that the owner be personally familiar with the property and its fair market value.

The Texas Supreme Court has held that a witness is not required to be designated as an expert to testify as to the market value of property as a property owner under Texas Rule of Evidence 701 pursuant to the Property Owner Rule.

Litigation Exception to Physician-Patient Privilege and Mental Health Privilege

In a civil case, a patient has a privilege to refuse to disclose confidential communications with his physician or mental health professional, as well as medical or mental health records. The **litigation exception** to the physician-patient privilege or mental health privilege applies if any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense, and the communication or record is relevant to that condition. Both parts of the test must be satisfied.

The litigation exception to these privileges is not absolute in custody proceedings and a general request for primary custody is not enough for the litigation exception to apply. The issue of the emotional or mental condition of the parent must be included in a party's pleadings and linked to the issue of custody in a meaningful way.

Privilege Against Self Incrimination

A party in a divorce case can assert the privilege against self-incrimination if they reasonably fear their answers would lead to criminal prosecution. The witness cannot refuse to testify; the privilege must be asserted in response to each specific question.

A witness's decision to invoke the privilege against self-incrimination is not absolute. The trial court may determine whether assertion of the privilege is based on the good faith of the witness and is justifiable under all the circumstances.

If a party asserts the privilege, the court has the discretion to permit an **adverse inference** if there is other evidence to support the claim. Attorneys should advise their clients of the benefits and disadvantages of invoking the Fifth Amendment before their testimony.

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