NAVIGATING THE JUVENILE COURT EVIDENTIARY LABRYINTH

[IPAN BASIC TRAINING]

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I.
STATUTORY/JUDICIAL STANDARDS

The minor who is the subject of the proceeding and his parents, guardian, legal custodian or responsible relative who are parties respondent have the right to be present, to be heard, to present evidence material to the proceedings, to cross-examine witnesses, to examine pertinent court files and records and also, although proceedings under this Act are not intended to be adversary in character, the right to be represented by counsel. 705 ILCS 405/1-5(1) Supreme Court Rule 906 sets forth minimum requirements for attorneys representing children. See also ABA Model Rule 1.1 and Illinois Rule of Professional Conduct 1.1 & 1.3

Though not appointed guardian or legal custodian or otherwise made a party to the proceeding, any current or previously appointed foster parent or relative caregiver, or representative of an agency or association interested in the minor has the right to be heard by the court, but does not thereby become a party to the proceeding. 705 ILCS 405/1-5(2)(a) In addition to the foregoing right to be heard by the court, any current foster parent or relative caregiver of a minor and the agency designated by the court or the Department of Children and Family Services (hereinafter "DCFS") as custodian of the minor who is alleged to be or has been adjudicated an abused or neglected minor under Section 2-3 or a dependent minor under Section 2-4 of this Act has the right to and shall be given adequate notice of hearings. 705 ILCS 405/1-5(2)(a)

II.
SHELTER CARE HEARING [705 ILCS 405/2-10]

A. Burden of Proof:

At a shelter-care hearing, the trial court determines whether there is probable cause to believe that a minor is abused, neglected, or dependent. 705 ILCS 405/2-10(1), (2) A shelter-care hearing is similar to both a probable-cause hearing and a temporary-detention hearing under section 5-501(2) of the Juvenile Court Act (hereinafter "JCA"). 705 ILCS 405/5-501(2); s*ee*, *e.g.*, In re L.M., 189 Ill. App. 3d 392, 395, 545 N.E.2d 319, 322 (1989) (Referring to the shelter-care hearing as a "probable[-]cause hearing") At the shelter-care hearing, the trial court determines whether there is probable cause to believe that a minor is abused, neglected, or dependent. 705 ILCS 405/2-10(1), (2); In re Jacien B., 341 Ill. App. 3d 876, 793 N.E.2d 1009 (2nd Dist. 2003) After a minor has been

removed, the party seeking to modify or vacate the temporary custody order must prove one or more of the following:

> (a) It is no longer a matter of immediate and urgent necessity that the minor remain in shelter care; or
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> (b) There is a material change in the circumstances of the natural family from which the minor was removed and the child can be cared for at home without endangering the child's health or safety; or
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> (c) A person not a party to the alleged abuse, neglect or dependency, including a parent, relative or legal guardian, is capable of assuming temporary custody of the minor; or
>
> (d) Services provided by the Department of Children and Family Services or a child welfare agency or other service provider have been successful in eliminating the need for temporary custody and the child can be cared for at home without endangering the child's health or safety. 705 ILCS 405/2-10(9)

The ICWA addresses the temporary removal of children as follows:

> "Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate." 25 USC §1922

State court proceedings that do not comply with the ICWA may be invalidated by a court of competent jurisdiction. 25 USC §1914

B. Rule(s) of Evidence:

The rules of evidence in the nature of civil proceedings in Illinois are applicable to proceedings under the JCA. 705 ILCS 405/2-18(1) Because the court is not making a finding of abuse or neglect at a temporary custody hearing, §2-18(4)(c) of the JCA does not apply to a minor's out-of-court statement in the temporary custody hearing. In re I.H., 238 Ill. 2d 430, 939 N.E.2d 375 (2010) However, other provisions of §2-18 may apply where the language of the statute is not tied to a finding of neglect or abuse or refers to "any hearing" under the Act (*see e.g.*, §§2-18(2); 2-18(3); 2-18(5), and 2-18(6)). In re

I.H., 238 Ill. 2d 430, 939 N.E.2d 375 (2010) Section 2-18 of the JCA was enacted into law in 1981. 705 ILCS 405/2-18(4)(a) *formerly* 37 Ill. Rev Stat. Ch. 704-6; Public Act 82-223; HB 477. Section 2-18 provides as follows:

> "Evidence.
>
> (1) At the adjudicatory hearing, the court shall first consider only the question whether the minor is abused, neglected or dependent. The standard of proof and the *rules of evidence in the nature of civil proceedings in this State are applicable to proceedings under this Article*. If the petition also seeks the appointment of a guardian of the person with power to consent to adoption of the minor under Section 2-29, the court may also consider legally admissible evidence at the adjudicatory hearing that one or more grounds of unfitness exists under subdivision D of Section 1 of the Adoption Act.
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> (2) In *any hearing* under this Act, the following shall constitute *prima facie* evidence of abuse or neglect, as the case may be:
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> (a) Proof that a minor has a medical diagnosis of battered child syndrome is *prima facie* evidence of abuse;
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> (b) Proof that a minor has a medical diagnosis of failure to thrive syndrome is *prima facie* evidence of neglect;
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> (c) Proof that a minor has a medical diagnosis of fetal alcohol syndrome is *prima facie* evidence of neglect;
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> (d) Proof that a minor has a medical diagnosis at birth of withdrawal symptoms from narcotics or barbiturates is *prima facie* evidence of neglect;
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> (e) proof of injuries sustained by a minor or of the condition of a minor of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent, custodian or guardian of such minor shall be *prima facie* evidence of abuse or neglect, as the case may be;
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> (f) proof that a parent, custodian or guardian of a minor repeatedly used a drug, to the extent that it has or would ordinarily have the effect of producing in the user a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be *prima facie* evidence of neglect;
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> (g) Proof that a parent, custodian, or guardian of a minor repeatedly used a controlled substance, as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, in the presence of the minor or a sibling of the minor is *prima facie* evidence of neglect. "Repeated use", for the purpose of this

subsection, means more than one use of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act;

(h) proof that a newborn infant's blood, urine, or meconium contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of those substances, the presence of which is the result of medical treatment administered to the mother or the newborn, is *prime facie* evidence of neglect;

(i) Proof that a minor was present in a structure or vehicle in which the minor's parent, custodian, or guardian was involved in the manufacture of methamphetamine constitutes *prima facie* evidence of abuse and neglect;

(j) proof that a parent, custodian, or guardian of a minor allows, encourages, or requires a minor to perform, offer, or agree to perform any act of sexual penetration as defined in Section 12-12 of the Criminal Code of 1961 for any money, property, token, object, or article or anything of value, or any touching or fondling of the sex organs of one person by another person, for any money, property, token, object, or article or anything of value, for the purpose of sexual arousal or gratification, constitutes *prima facie* evidence of abuse and neglect;

(k) Proof that a parent, custodian, or guardian of a minor commits or allows to be or trafficking in persons for forced labor or services defined in Section 10-9 of the Criminal Code of 1961, upon such minor, constitutes *prima facie* evidence of abuse and neglect.

(3) In *any hearing* under this Act, proof of the abuse, neglect or dependency of one minor shall be admissible evidence on the issue of the abuse, neglect or dependency of any other minor for whom the respondent is responsible.

(4) (a) Any writing, record, photograph or x-ray of any *hospital* or public or private *agency*, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a minor in an abuse, neglect or dependency proceeding, shall be admissible in evidence as proof of that condition, act, transaction, occurrence or event, if the court finds that the document was made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. A certification by the head or responsible employee of the hospital or agency that the writing, record, photograph or x-ray is the full and complete record of the condition, act, transaction, occurrence or event and that it satisfies the conditions of this paragraph shall be *prima facie* evidence of the facts contained in such certification. A certification by someone other than the head of the hospital or agency shall be accompanied by a photocopy of a delegation of authority signed by both the head of the hospital or agency and by

such other employee. All other circumstances of the making of the memorandum, record, photograph or x-ray, including lack of personal knowledge of the maker, may be proved to affect the weight to be accorded such evidence, but shall not affect its admissibility.

(b) Any indicated report filed pursuant to the Abused and Neglected Child Reporting Act shall be admissible in evidence.

(c) Previous statements made by the minor relating to any allegations of abuse or neglect shall be admissible in evidence. However, no such statement, if uncorroborated and not subject to cross-examination shall be sufficient in itself to support a finding of abuse or neglect.

(d) There shall be a rebuttable presumption that a minor is competent to testify in abuse or neglect proceedings. The court shall determine how much weight to give to the minor's testimony, and may allow the minor to testify in chambers with only the court, the court reporter and attorneys for the parties present.

(e) The privileged character of communication between any professional person and patient or client, except privilege between attorney and client, shall not apply to proceedings subject to this Article.

(f) Proof of the impairment of emotional health or impairment of mental or emotional condition as a result of the failure of the respondent to exercise a minimum degree of care toward a minor may include competent opinion or expert testimony, and may include proof that such impairment lessened during a period when the minor was in the care, custody or supervision of a person or agency other than the respondent.

(5) In *any hearing* under this Act alleging neglect for failure to provide education as required by law under subsection (1) of Section 2-3, proof that a minor under 13 years of age who is subject to compulsory school attendance under the School Code is a chronic truant as defined under the School Code shall be *prima facie* evidence of neglect by the parent or guardian in any hearing under this Act and proof that a minor who is 13 years of age or older who is subject to compulsory school attendance under the School Code is a chronic truant shall raise a rebuttable presumption of neglect by the parent or guardian. This subsection (5) shall not apply in counties with 2,000,000 or more inhabitants.

(6) In *any hearing* under this Act, the court may take judicial notice of prior sworn testimony or evidence admitted in prior proceedings involving the same minor if (a) the parties were either represented by counsel at such prior proceedings or the right to counsel was knowingly waived and (b) the taking of judicial notice would not result in admitting hearsay evidence at a hearing where it would otherwise be prohibited."

Illinois Supreme Court Rule 236 provides for the admission of business records into evidence as follows:

> "(a) Any writing or record, whether in the form of any entry in a book or otherwise, made a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of business, and if it was the regular course of the business to make such an act, transaction, occurrence, or event, or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind. . ."

Illinois Rule of Evidence 803(4) defines statements for purposes of medical diagnosis or treatment as follows:

> "(A) Statements made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment but, subject to Rule 703, **not** including statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial, or (B) . . ." (emphasis added) *compare* Ill. Sup. Ct. Rule 215 (d)(4)

C. Admissible Evidence:

If the court finds probable cause, it must hear evidence and determine whether it is consistent with the health, safety, and best interests of the minor that the minor be released to his parent or placed in shelter care. 705 ILCS 405/2-10(2) If the minor is to be placed in shelter care, the court must find it a matter of immediate and urgent necessity that the minor be placed in a shelter-care facility and find that either reasonable efforts have been made or no reasonable efforts can be made to prevent or eliminate the necessity of removal of the minor from his home. 705 ILCS 405/2-10(2) Essentially, at a shelter-care hearing, the court determines whether a minor requires temporary placement outside the home. *See*, *e.g.*, In re W.B., 213 Ill. App. 3d 274, 283, 571 N.E.2d 1120, 1126 (1991) *see also* In re Austin D., 358 Ill. App. 3d 794, 831 N.E.2d 1206 (4th Dist. 2005) Among the rights of parents at a shelter care hearing is the right to present evidence concerning: (1) whether a child is abused, neglected, or dependent; (2) whether there is immediate and urgent necessity to remove a child from the home, including evidence of the parents' ability to care for the child, conditions in the home, and alternative means of protecting the child other than removal; and (3) the best interests of the child. *See* 705 ILCS 405/2-10(3)

D. Rehearing:

At the rehearing, the court is to "proceed in the same manner as upon the original hearing." 705 ILCS 405/2-10(4) However, nowhere in the Act in general or section 2-10 in particular did the legislature limit the evidence that a court may consider at such a rehearing to the evidence that existed at the time of the original shelter care hearing. In re Niki K., 374 Ill. App. 3d 795, 871 N.E.2d 939 (2nd Dist. 2007) A rehearing on the State's petition is not an effort to modify or vacate the court's prior order. Such a rehearing is a *de novo* hearing on the State's petition, held to allow the parents, who were not given notice of the initial hearing, to exercise their statutory rights. A *de novo* hearing is "[a] new hearing of a matter, conducted as if the original hearing had not taken place." In re Niki K., 374 Ill. App. 3d 795, 871 N.E.2d 939 (2nd Dist. 2007) *citing* Cook County Board of Review v. Property Tax Appeal Board, 339 Ill. App. 3d 529, 537, 791 N.E.2d 8 (2002), *quoting* Black's Law Dictionary 447 (7th ed.1999).

III.
ADJUDICATORY HEARING [750 ILCS 405/2-3 & 2-21]

A. Burden of Proof:

The State must prove allegations of abuse, neglect, or dependence by a preponderance of the evidence and should the State fail to do so; the Court must dismiss the petition. In re N.B., 191 Ill. 2d 338, 343, 730 N.E.2d 1086 (2000); In re Urbasek, 38 Ill.2d 535, 232 N.E.2d 716 (1967); In re A.D.W., 278 Ill. App. 3d 476, 663 N.E.2d 58 (4th Dist. 1996) (dependency); 705 ILCS 405/2-21(1) The burden of proof lies with the State or moving party. In re Nitz, 76 Ill. App. 3d 15, 394 N.E.2d 887 (3rd Dist. 1979); In re Simmons, 127 Ill. App. 3d 943, 469 N.E.2d 215 (5th Dist. 1984) The State must demonstrate that an allegation of neglect is probably more true than not. In re L.M., 319 Ill. App. 3d 865, 747 N.E.2d 440 (2001) "By a preponderance of the evidence is meant the greater weight of the evidence, not necessarily in numbers of witnesses, but in merit and worth that which has more evidence for it than against it is said to be proven by a preponderance. The standard of proof and rules of evidence in the nature of civil proceedings are applicable at an adjudicatory hearing. 705 ILCS 405/2-18(1) Preponderance of the evidence is sufficient if it inclines an impartial and reasonable mind to one side rather than the other. *Compare* New York Life Insurance Co. v. Jennings/Williams v. City of Atlanta, 61 Ga. App. 577, 6 S.E.2d 915(1940)** (Moss-American, Inc. v. Fair Employment Practices Com., 22 Ill. App. 3d 248, 259, 317 N.E.2d 343(5th Dist. 1974)) A proposition proved by a preponderance of the evidence is one that has been found to be more probably true than not. *See generally* Estate of Ragen, 79 Ill. App. 3d 8, 13, 398 N.E.2d 198 (1st Dist. 1979)

The ICWA provides that a court may order an involuntary foster care placement only if it determines by clear and convincing evidence, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 USC §1912(e) It provides as follows:

> "No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 USC §1912(e)

B. Rule(s) of Evidence:

The first step is the adjudicatory hearing on a petition for adjudication of wardship at which "the court shall first consider only the question whether the minor is abused, neglected, or dependent." 705 ILCS 405/2-18(1) The civil rules of evidence apply to adjudicatory hearings in child abuse, neglect, and dependency cases. 705 ILCS 405/2-18(1) Dependency, neglect and abuse proceedings are "appropriately labeled as 'civil' proceedings in both the legal and lay sense of the word." In re Darnell Jr., 196 Ill. App. 3d 510, 554 N.E.2d 313 (1st Dist. 1990) *citing* In re Urbasek, 38 Ill.2d 535, 543, 232 N.E.2d 716 (1967) *see* In re Christenberry, 69 Ill. App. 3d 565, 567, 387 N.E.2d 923 (1st Dist. 1979) (civil rules apply to post-trial motions); In re Harpman, 134 Ill. App. 3d 393, 396, 480 N.E.2d 873 (4th Dist. 1985) (civil rules apply to pleading standards); People v. Davis, 11 Ill. App. 3d 775, 778-79, 298 N.E.2d 350 (1st Dist.1973) (civil rules apply to testimony of adverse witnesses) In making that determination of abuse, neglect or dependency, the rules of evidence in the nature of civil proceedings apply. In re A.W., Jr., 231 Ill. 2d 241, 256, 897 N.E.2d at 741(2008); In re J.B., 346 Ill. App. 3d 77, 803 N.E.2d 997 (1st Dist. 2004); In re R.V., 288 Ill. App. 3d 860, 681 N.E.2d 660 (1st Dist. 1997); People v. Davis, 11 Ill. App. 3d 775, 298 N.E.2d 350 (1st Dist. 1973); 705 ILCS 405/2-18(1) Under the Illinois Rules of Evidence, hearsay is inadmissible unless otherwise allowed by other rule or statute. Ill. R. Evid. 802 Of course, testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not hearsay. People v. Williams, 181 Ill.2d 297, 313, 692 N.E.2d 1109 (1998) Sections 2-18 of the JCA modifies the general rules of evidence of admissibility of evidence at the adjudicatory hearing. 705 ILCS 405/2-18

Part of section 2-18 allows for the admission of certain business or medical records. 705 ILCS 405/2-18(4)(a) Section 2-18(4) provides that where it is established that the medical record is that of a hospital, public agency or private agency, the JCA dispenses with the requirement that a custodian or person familiar with the "business" provide in-court testimony establishing the foundational requirements of a business record. 705 ILCS 405/2-18(4)(a) Instead, the Juvenile Court Act merely requires a certification by the head or responsible employee or certified designee thereof of the hospital or agency that the writing or record is the full and complete record of the condition, act, transaction, occurrence or event and that it satisfies the conditions that the document(s) was (were) made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. 705 ILCS 405/2-18(4)(a) When certification of a record under §2-18(4)(a) of the JCA is incorrect or incomplete, the attorney should object and be prepared to challenge that the records are not authentic, are incomplete or altered. *See* In re Charles W., 2014 IL App. (1st) 131281,

6 N.E.3d 399 (1st Dist. 2014) An "agency" under the JCA means a public or private child care facility legally authorized or licensed by the State for both placement or institutional care. 705 ILCS 405/1-3(3)

It remains unsettled whether or not §2-18(4)(c) of the Juvenile Court Act applies strictly to abuse or neglect proceedings. In re Charles W., 2014 IL App. (1st) 131281, 6 N.E.3d 399 (1st Dist. 2014) (Section 2-18(4)(c) applies to abuse, neglect and dependency proceedings); In re I.H., 238 Ill.2d 430, 939 N.E.2d 375 (2010)(Because the court is not making a finding of abuse or neglect at a temporary custody hearing, §2-18(4)(c) of the JCA does not apply to a minor's out-of-court statement in the temporary custody hearing)

Until In re J.Y., 2011 Ill. App. 3d 100727, 962 N.E.2d 1 (3rd Dist. 2011), the admissibility of Pediatric Resource Center ("PRC") letters/reports had not been directly addressed. In re J.Y. did reject the wholesale admission of PRC medical opinion letters/records absent proper foundation. It was subsequently determined that such PRC records were not business records and, therefore, not admissible under §2-18(4) of the JCA. In re A.P. & J.P., 2012 Ill. App. 3d 110191, 965 N.E.2d 441 (3rd Dist. 2012) *aff'd* In re A.P., 2012 IL 113875, 981 N.E.2d 336 (2012)

Because this is a civil proceeding, the State or moving party may call the respondent parent(s) or guardian(s) as adverse witnesses. *Compare* People v. Davis, 11 Ill. App. 3d 775, 298 N.E.2d 350 (1st Dist. 1973); In re Wheeler, 86 Ill. App. 3d 564, 408 N.E.2d 424 (3rd Dist. 1980) A finding as to what is in the best interest of the child at the adjudicatory stage is premature. In re N.B., 191 Ill.2d 338, 343, 730 N.E.2d 1086 (2000)

The test to be applied in determining if a matter is collateral is whether the matter could be introduced for any purpose other than to contradict. In re Julie Q. v. DCFS, 2011 IL App (2d) 100643, 963 N.E.2d 401 (2nd Dist. 2011) ¶50 *citing* People v. Santos, 211 Ill.2d 395, 404, 813 N.E.2d 159 (2004)

Stipulation to the wardship petition can support a finding of neglect. In re R.B., 336 Ill. App. 3d 606, 714 N.E.2d 400 (4th Dist. 2003) Similarly, an admission by a parent or guardian is admissible evidence. In re Walter B., 227 Ill. App. 3d 746, 592 N.E.2d 274 (1st Dist. 1992); In re Jackson, 81 Ill. App. 3d 136, 400 N.E.2d 1087 (4th Dist. 1980); In re Johnson, 102 Ill. App. 3d 1005, 429 N.E.2d 1364 (1st Dist. 1981) *but see* 705 ILCS 405/2-10(2)("Acceptance of services shall not be considered an admission of any allegation in a petition made pursuant to this Act, nor may a referral for services be considered as evidence in any proceeding pursuant to this Act. . .") A stipulation by the child's parent, Indian custodian, or tribe, or a failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the party has been fully advised of the requirements of the ICWA and has knowingly, intelligently, and voluntarily waived them.

C. Admissible Evidence:

Generally:

All evidence must be relevant to be admissible. In re Kenneth J., 352 Ill. App. 3d 967, 980, 817 N.E.2d 940, 950 (1st Dist. 2004) Evidence is relevant if it tends to prove a

fact in controversy or render a matter at issue more or less probable. In re Kenneth J., 352 Ill. App. 3d 967, 980, 817 N.E.2d 940, 950 (2004) "Admissible evidence" under the JCA is not synonymous with "*prima facie* evidence." In re S.R., 349 Ill. App. 3d 1017, 811 N.E.2d 1285 (4th Dist. 2004) "[A]dmissible evidence" means some evidence, but not necessarily sufficient evidence to prove the allegation. In re S.R., 349 Ill. App. 3d 1017, 811 N.E.2d 1285 (4th Dist. 2004) Evidence of any words spoken must be presented in context. In re E.M., 328 Ill. App. 3d 633, 641, 766 N.E.2d 1149 (4th Dist. 2002) Evidence of good character would be admissible in favor of a parent. In re Morris, 331 Ill. App. 417, 73 N.E.2d 337 (1947); In re B.J., 316 Ill. App. 3d 193, 735 N.E.2d 1058 (4th Dist. 2000) Also, grounds for finding of unfitness under Adoption Act may be admissible. 705 ILCS 405/2-18(1)

Section 2-3 of the Act describes what constitutes neglect and abuse. 705 ILCS 405/2-3 In so doing, §2-3 describes what may be admissible to prove abuse or neglect. For example, §2-3 provides that "any newborn infant whose blood, urine, or meconium contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, as now or hereafter amended, or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of such substances, the presence of which in the newborn infant is the result of medical treatment administered to the mother or the newborn infant. 705 ILCS 405/2-3(1)(c) Additionally, §2-3 indicates what evidence may be considered in assessing whether a minor was improperly left without proper supervision. 705 ILCS 405/2-3(1)(e) Similarly, general factors that may be considered to establish abuse of a minor is set forth in §2-3 of the Act. 705 ILCS 405/2-3(2)

Anticipatory Neglect:

Section 2-18(3) of JCA provides that proof of neglect as to one minor is admissible on the issue of neglect of any other minor for whom the parent is responsible. 705 ILCS 405/2-18(3) It is this section that has given rise to the theory of "anticipatory neglect." Under the theory of "anticipatory neglect," the State seeks to protect not only children who are the direct victims of neglect or abuse, but also those who have a probability to be subject to neglect or abuse because they reside, or in the future may reside, with an individual who has been found to have neglected or abused another child. 705 ILCS 405/2-18(3); In re Arthur H., 212 Ill.2d 441, 819 N.E.2d 734 (2004) Thus proof of neglect or abuse or dependency of one minor may be admitted as evidence of another minor in the household. However, the mere admissibility of evidence does not constitute conclusive proof of neglect of another minor. In re Arthur H., 212 Ill.2d 441, 468, 819 N.E.2d 734, 750 (2004) Anticipatory neglect should take into account not only the circumstances surrounding the previously neglected sibling, but also the care and condition of the child named in the petition. In re Arthur H., 212 Ill.2d 441, 468, 819 N.E.2d 734, 750 (2004) There is no *per se* rule that the neglect of one child conclusively establishes the neglect of another child in the same household. In re Arthur H., 212 Ill.2d 441, 468, 819 N.E.2d 734, 750 (2004); In re J.C., 396 Ill. App. 3d 1050, 1056-57, 920 N.E.2d 1285, 1290-91 (3rd Dist. 2009) Also, just as a prior neglect finding is not evidence of *per se* neglect of another child (Arthur H., 212 Ill.2d at 468, 819 N.E.2d at 749), a

prior finding of unfitness does not prove *per se* neglect. (*See* In re A.W., 231 Ill.2d at 105, 896 N.E.2d at 324 (2008) (affirming finding of unfitness where respondent had been previously found unfit and failed to produce evidence that he had taken steps to correct the conditions that led to the previous unfitness determination); *compare also* In re D.C., 209 Ill.2d 287, 807 N.E.2d 472, 478-80 (2004) (rejecting State's argument that "unfitness as to one child is unfitness as to all" and holding that when deciding whether a parent is unfit under section 1(D)(m)(iii) of the Adoption Act courts must find "clear and convincing evidence of a lack of reasonable progress during the applicable time period with respect to each child")

When the treatment of the minor's siblings is employed as a basis for finding neglect, the trial court should consider the current care and condition of the child in question and not merely the circumstances that existed at the time of the incident involving the child's sibling. In re S.S., 313 Ill. App. 3d 121, 728 N.E.2d 1165 (2nd Dist. 2000) *citing* Edricka C., 276 Ill. App. 3d 18, 657 N.E.2d 78 (1st Dist. 1995)

Change in Minor's Condition/Failure to Thrive/Medical Neglect :

Proof that a minor's condition improved or impairment lessened when the minor was no longer in the care, custody or supervision of the respondent parent or guardian but in someone else's care could be introduced as evidence that the respondent parent or guardian failed to exercise a minimum degree of care toward the minor. 705 ILCS 405/2-18(4) *see also* In re Prough, 61 Ill. App. 3d 227, 376 N.E.2d 1078 (4th Dist. 1978); In re Dalton, 98 Ill. App. 3d 902, 424 N.E.2d 1226 (2nd Dist. 1981) However, the mere fact that a child had medical diagnosis of failure to thrive syndrome constituting *prima facie* evidence of neglect was rebutted by showing that the mother had adequate and appropriate food in the home and there were independent observations of minor's propensity to reject food and other potential causes for weight loss were possible for which parent sought medical treatment. In re Barion S., 2012 Ill. App. (1st) 113026, 983 N.E.2d 57 (1st Dist. 2012) There is no statutory requirement that requires a finding of medical neglect to be supported by expert medical testimony. In re Erin A., 2012 IL App (1st) 120050 (1st Dist. 2012) Evidence of missed medical appointments and failure to comply with treatment suggestions may be admitted to evidence of medical neglect. See In re Stephen K., 373 Ill. App. 3d at 20-21 (1st Dist. 2007); In re N., 309 Ill. App. 3d 996, 1006-1009, 723 N.E.2d 678 (2nd Dist. 1999) It is noteworthy that proof of the failure to thrive of one child may not always provide sufficient grounds for finding neglect as to other children where there has been sufficient evidence presented to show that the other children were not neglected. *Compare* In re Edaward T., 343 Ill. App. 3d 778, 799 N.E.2d 304 (1st Dist. 2003)

Rebuttable Presumptions/*prima facie* Evidence:

Prima facie evidence means "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." In re S.R., 349 Ill. App. 3d 1017, 811 N.E.2d 1285 (4th Dist. 2004) *citing* Black's Law Dictionary 579 (7th ed.1999) Presumptions of neglect or abuse created by *prima facie* evidence only creates a rebuttable presumption that may be overcome by other evidence. In re K.G., 288 Ill. App.

3d 728, 682 N.E.2d 95 (1st Dist. 1997); In re Edrika C., 276 Ill. App. 3d 18, 657 N.E.2d 78 (1st Dist. 1995) A presumption is a legal device that either permits or requires the fact finder to assume the existence of an ultimate fact, after basic or predicate facts have been established. People v. Pomykala, 203 Ill.2d 198, 203, 784 N.E.2d 784, 787 (2003) The phrase "rebuttable presumption" is defined as "an inference drawn from certain facts that establishes a prima facie case, which may be overcome by the introduction of contrary evidence. People v. Jordan, 354 Ill. App. 3d 294, 820 N.E.2d 1083 (1st Dist. 2004) *citing* Black's Law Dictionary 1205 (7th Ed. 1999) It appears that a rebuttable presumption must be overcome by whatever burden of proof is required of the case and chief. *See example* In re C.M.J., 278 Ill. App. 3d 885, 663 N.E.2d 498 (5th Dist. 1996) (Upon showing that Respondent was convicted of first degree murder of the mother of his children, the burden shifted to respondent to show by clear and convincing evidence that he was not unfit) *see also* In re Alyssa Jo B., 354 Ill. App. 3d 1173, 883 N.E.2d 1155 (3rd Dist. 2005) (rebuttable presumption may only be overcome by clear and convincing evidence)

The United States Supreme Court has held that mandatory conclusive presumptions do not pass constitutional muster because such presumptions directly conflict with the presumption of innocence. Sandstrom v. Montana, 442 U.S. 510, 523, 99 S.Ct. 2450 (1979) Similarly, the United States Supreme Court has held that mandatory rebuttable presumptions that shift the burden of persuasion to the defendant are *per se* unconstitutional as they alleviate the State's burden to prove every element of a crime beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 523, 99 S.Ct. 2450 (1979) Therefore, in Illinois all mandatory rebuttable presumptions are considered to be *per se* unconstitutional. People v. Watts, 181 Ill.2d 133, 692 N.E.2d 315 (1998); People v. Pomykala, 203 Ill.2d 198, 203, 784 N.E.2d 784, 787 (2003); People v. Jordan, 354 Ill. App. 3d 294, 820 N.E.2d 1083 (1st Dist. 2004) An impermissible mandatory presumption may be created notwithstanding that the language of the statute does not contain the word "shall but provides that there is a "rebuttable presumption." People v. Jordan, 354 Ill. App. 3d 294, 820 N.E.2d 1083 (1st Dist. 2004)

Evidence that a minor subject to compulsory school attendance is a chronic truant raises a rebuttable presumption of neglect. 705 ILCS 405/2-18(5) Section 2-18(2) of the JCA sets forth various medical conditions/diagnosis and drug related situations that if proven by a preponderance of the evidence constitutes *prima facie* evidence of abuse or neglect. 705 ILCS 405/2-18(2) Additionally, section 2-18(2)(e) addresses unexplained injuries or conditions of a minor on what might be commonly equated to a *res ipsa loquitur* type of situation (e.g., child with sexually transmitted disease and no blood transfusion, etc.). 705 ILCS 405/2-18(2)(e)

In the "extremely few" Illinois cases in which a summary determination of unfitness has been upheld, almost all of those cases involved a judgment of unfitness based on the fact that the parent had committed a crime that serves as a *per se* factor establishing parental unfitness. In re J.B., 328 Ill. App. 3d 175, 765 N.E.2d 1093 (1st Dist. 2002) *citing* In re T.J., 319 Ill. App. 3d 661, 745 N.E.2d 608 (2001); In re Ray, 88 Ill. App. 3d 1010, 411 N.E.2d 88 (1980) (murder of one of parent's children); In re J.H., 292

Ill. App. 3d at 1103, 687 N.E.2d 105 (1997) (murder of any child); In re A.M.F., 311 Ill. App. 3d 1049, 726 N.E.2d 661 (2000) (aggravated battery to a child) The First District Court of Appeals has determined that there can be *per se* factors for finding of unfitness as a matter of law under the Adoption Act. In re J.B., 328 Ill. App. 3d 175, 765 N.E.2d 1093 (1st Dist. 2002) *citing* In re T.J., 319 Ill. App. 3d 661, 745 N.E.2d 608 (2001) However, the question of whether the *per se* factor is narrowly tailored to express the State's interest in protecting children from abuse and whether it is the minor's best interest to terminate parental rights remains open for consideration. In re J.B., 328 Ill. App. 3d 175, 765 N.E.2d 1093 (1st Dist. 2002) *citing* In re T.J., 319 Ill. App. 3d 661, 745 N.E.2d 608 (2001)

Judicial Notice:

Courts may take judicial notice of matters of record in its own proceedings. In re J.R.Y., 157 Ill. App. 3d 396, 510 N.E.2d 541 (4th Dist. 1987) *citing* People v. Knight, 75 Ill. 2d 291, 296, 388 N.E.2d 414, 417 (1979); People v. Davis, 65 Ill. 2d 157, 161, 357 N.E.2d 792, 794 (1976) The Juvenile Court may take judicial notice of sworn testimony from any hearing under the JCA involving the same minor where the parties were represented by counsel or waived counsel and it would not result in the admission of prohibited hearsay. 705 ILCS 405/2-18(6) *compare* In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) (termination/ adoption); In re H.C., 305 Ill. App. 3d 869, 713 N.E.2d 784 (4th Dist. 1999) Trial court can take judicial notice of matters *sua sponte*. In re C.M.J., 278 Ill. App. 3d 885, 663 N.E.2d 498 (5th Dist. 1996) (court took judicial notice of murder conviction and earlier evidence in juvenile proceeding identifying victim as mother of children) It is incumbent upon the party opposing the taking of judicial notice to make an objection. In re A.T., 197 Ill. App. 3d 821, 555 N.E.2d 402 (4th Dist. 1990) *citing* In re Johnson, 134 Ill. App. 3d 365, 480 N.E.2d 520 (4th Dist. 1985)

Although the juvenile court has a duty to consider a child's best interest in proceedings under the JCA, the JCA does not impose any obligation on the court to do its own factual investigation. In re S.R., 349 Ill. App. 3d 1017, 811 N.E.2d 1285 (4th Dist. 2004) *citing* In re D.S., 198 Ill.2d 309, 324, 763 N.E.2d 251, 259 (2001); In re Ashley F., 265 Ill. App. 3d 419, 424, 638 N.E.2d 368, 371 (1st Dist. 1994); 705 ILCS 405/1-1 through 7-1.

Post-Petition Evidence:

Neither the Juvenile Court Act nor any case law mandates that evidence from after a petition for adjudication is filed is irrelevant at the adjudicatory hearing. The Juvenile Court Act states that in all proceedings, "the court may direct the course thereof so as promptly to ascertain the jurisdictional facts and fully to gather information bearing upon the current condition and future welfare of the minors involved." 705 ILCS 405/1-2(2) The Act also states that at an adjudicatory hearing, the court shall "first consider only the question whether the minor is abused, neglected or dependent." 705 ILCS 405/2-18(1) A case proceeding on a theory of anticipatory neglect by its very nature [276 Ill. App. 3d 32] seems to require considering the present and the future care of the child at

the adjudicatory phase. For example, in In re Brooks, several witnesses testified at the adjudicatory hearing about how the minors were relating to their parents for months after the original petitions in the case were filed. In re Brooks, 63 Ill. App. 3d 328, 379 N.E.2d 872 (1st Dist. 1978) *see also* In re Edricka C., 276 Ill. App. 3d 18, 657 N.E.2d 78 (1st Dist. 1995)(" Respondent persuasively argues that the court below conducted the trial with a bright-line rule that any post-petition evidence was irrelevant. The petitions were filed on December 2, 1992, and the court repeatedly made comments like: "I certainly don't see what the relevance would be of anything that happened after the day of the petition." The court also sustained several objections made solely on the basis that the testimony concerned "information after the petitions in this case were filed.") The test of admissibility of post-petition evidence will depend on whether it is relevant to the allegations of the petition. In re Kenneth D., 364 Ill. App. 3d 797, 847 N.E.2d 544 (1st Dist. 2006) *citing* In re S.W., 342 Ill. App. 3d at 451, 794 N.E.2d at 1042 (2003); In re Edward T., 343 Ill. App. 3d 778, 799 N.E.2d 304 (2003) (Expert evidence on improving health of child in inorganic failure to thrive)

Sui Generis:

Cases involving an adjudication of wardship are *sui generis*, and each case must ultimately be decided on the basis of its own particular facts. In re M.Z., 294 Ill. App. 3d 581, 691 N.E.2d 35 (1998)

D. Directed Finding:

When a motion for a directed finding is made, the trial court must determine whether the plaintiff (State) has made out a prima facie case and then weigh the evidence, including the evidence that favors the defendant (respondent). If this weighing process negates some of the evidence necessary to the petitioner's *prima facie* case, the court should grant respondent's motion and enter judgment for the respondent. *Compare* Orbeta v. Gomez, 315 Ill. App. 3d 687, 690, 733 N.E.2d 1287 (2000) *see also* Dwyer v. Love, 346 Ill. App. 3d 734, 805 N.E.2d 719 (2nd Dist. 2004) (trial court does not view the evidence most favorably to the petitioner); 735 ILCS 5/2-1110.

IV.
DISPOSITIONAL HEARING [705 ILCS 2-22 & 2-23]

A. Burden of Proof:

If the State's burden is met at Adjudication, the Court must determine whether it is consistent with the health, safety and best interests of the minor and the public that the child be made a ward of the Court. In re N.B., 191 Ill.2d 338, 343, 730 N.E.2d 1086 (2000); 705 ILCS 405/2-21(2) All findings at the disposition must be supported by a preponderance of the evidence. In re Christopher S., 364 Ill. App. 3d 76, 845 N.E.2d 830 (1st Dist. 2006) Of course, where the evidence at the Adjudicatory hearing is insufficient, it is likely insufficient on the same issue at a Dispositional hearing. In re J.H., 212 Ill. App. 3d 22, 570 N.E.2d 689 (3rd Dist. 1991) (It would be incongruous to hold that

evidence which is insufficient to find sexual abuse at an adjudicatory hearing is sufficient to support a *de facto* finding of abuse at a dispositional hearing.) *cf*. In re Rider, 113 Ill. App. 3d 1000, 447 N.E.2d 1384 (1983)

B. Unfitness/Fitness (Juvenile Act-Dispositional) Motions:

It is noteworthy that the fact of a previous finding of unfitness of a parent is not conclusive evidence of unfitness in a new juvenile case. In re J.C., 396 Ill. App. 3d 1050, 1056-57, 920 N.E.2d 1285, 1290-91 (3rd Dist. 2009) However, when a parent's dispositional fitness is being considered, "the standard of proof in a trial court's section 2-27 finding of unfitness that does not result in a complete termination of all parental rights is [the] preponderance of the evidence." In re April C., 326 Ill. App. 3d 225, 257, 760 N.E.2d 85, 110 (1st Dist. 2001); In re P.F., 265 Ill. App. 3d 1092, 638 N.E.2d 716 (1st Dist. 1994) Because a determination of unfitness pursuant to section 2-27 does not result in a termination of parental rights, the standard of proof is the less rigorous preponderance of the evidence and the court's determination of unfitness under that section will be disturbed on review only when found to be against the manifest weight of the evidence. In re M.B. 332 Ill. App. 3d 996, 773 N.E.2d 1204 (1st Dist. 2002) *citing* In re Lakita B., 297 Ill. App. 3d 985, 992, 994, 697 N.E.2d 830, 835, 836 (1st Dist. 1998); In re D.S., 326 Ill. App. 3d 586, 762 N.E.2d 16 (3rd Dist. 2001); In re T.B., 215 Ill. App. 3d 1059, 574 N.E.2d 893 (4th Dist. 1991) Naturally, the standard of proof for finding a parent fit to have the children returned is by a preponderance of the evidence. In re Lakita B., 297 Ill. App. 3d 985, 697 N.E.2d 830 (1st Dist. 1998) *see also generally* In re M.W., 199 Ill. App. 3d 1050, 557 N.E.2d 959, 963 (3rd Dist. 1990) (Where a parent has made reasonable and arguable significant progress and has willingly taken part in recommended programs, such constitutes a sufficient refutation of the State's claim of unfitness). See discussion of "Modification of Dispositional and Custody Orders" below.

C. Rule(s) of Evidence:

If the trial court determines that the minor child is abused, neglected, or dependent, the court shall then proceed to the second step—the dispositional hearing—and determine whether the minor should be made a ward of the court. In re Timothy T., 343 Ill. App. 3d 1260, 799 N.E.2d 994, 996 (4th Dist.2003); 705 ILCS 405/2-21(2) The civil rules of evidence modified by §2-18 of the JCA apply to dispositional hearings. Also, proceedings at the dispositional hearing are governed by section 2-22 of the JCA, which provides in pertinent part as follows:

> "Dispositional hearing; evidence; continuance.
>
> (1) At the dispositional hearing, the court shall determine whether it is in the best interests of the minor and the public that he be made a ward of the court, and, if he is to be made a ward of the court, the court shall determine the proper disposition best serving the health, safety and interests of the minor and the public. The court also shall consider the permanency goal set for the minor, the nature of the service plan for the minor and the services delivered and to be

delivered under the plan. *All evidence helpful in determining these questions, including oral and written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purposes of the adjudicatory hearing*.

(2) Once all parties respondent have been served in compliance with Sections 2-15 and 2-16, no further service or notice must be given to a party prior to proceeding to a dispositional hearing. *Before making an order of disposition the court shall advise the State's Attorney, the parents, guardian, custodian or responsible relative or their counsel of the factual contents and the conclusions of the reports prepared for the use of the court and considered by it, and afford fair opportunity, if requested, to controvert them. The court may order, however, that the documents containing such reports need not be submitted to inspection, or that sources of confidential information need not be disclosed except to the attorneys for the parties*. Factual contents, conclusions, documents and sources disclosed by the court under this paragraph shall not be further disclosed without the express approval of the court pursuant to an in camera hearing.

(3) A record of a prior continuance under supervision under Section 2-20, whether successfully completed with regard to the child's health, safety and best interest, or not, is admissible at the dispositional hearing. . ." [Emphasis added] 705 ILCS 405/2-22

D. Admissible Evidence:

The plain language of section 2-22(1) (formerly section 705-1(1)) of the Juvenile Court Act shows the legislature's intent to give trial courts wide latitude in admitting evidence at the dispositional hearing. In re April C., 326 Ill. App. 3d 245, 760 N.E.2d 101, 114 (1st Dist. 2001) *see also* In re D.L., 226 Ill. App. 3d 177, 589 N.E.2d 680, 686 (1st Dist. 1992) ("Although hearsay and other types of incompetent evidence may not be admissible at the adjudicatory hearing, they are admissible at the dispositional hearing"); In re Brooks, 63 Ill. App. 3d 328, 379 N.E.2d 872 (1st Dist. 1978) (hearsay evidence may not be admissible at the adjudicatory hearing, but is admissible at the dispositional hearing); In re L.M., 189 Ill. App. 3d 392, 545 N.E.2d 319 (1st Dist. 1989) (Evidence may include oral or written reports though it may not be competent at adjudicatory stage) *but see* In re J.B., 346 Ill. App. 3d 77, 803 N.E.2d 997 (1st Dist. 2004) (Section 2-22(1) of the JCA does not provide that hearsay testimony is allowed at a best interest hearing or dispositional hearing) The trial court may consider evidence beyond the conditions requiring removal at that time but may consider other serious matters that have come to light following removal. *See generally* In re Chyna B., 331 Ill. App. 3d 591, 772 N.E.2d 301 (4th Dist. 2002) This can include matters not necessarily raised in the petition. In re J.H., 212 Ill. App. 3d 22, 570 N.E.2d 689 (3rd Dist. 1991) Also, any record of a prior continuance under supervision is admissible at a dispositional hearing. 705 ILCS 405/2-22(3) Thus, all helpful evidence may be considered by the trial court at the dispositional hearing. In re White, 103 Ill. App. 3d 105, 429 N.E.2d 1383 (4th Dist. 1982)

The court can order an investigation and preparation of a dispositional report concerning the minor and the family. 705 ILCS 405/2-21(2); In re J.H., 212 Ill. App. 3d 22, 28, 570 N.E.2d 689 (3rd Dist. 1991) (Statute contemplates admission of a dispositional report) *see also* In re Calkins, 96 Ill. App. 3d 74,78, 420 N.E.2d 861 (3rd Dist. 1981) (Social history containing hearsay statements admissible but subject to contravention under Act) Where the trial court considers reports, the parties shall have the opportunity to review the reports and cross-examine the authors on the record. In re Rosmis, 26 Ill. App. 2d 226, 167 N.E.2d 826 (2nd Dist. 1960)(Right to cross-examine child representative who prepared report for court)

DCFS has an affirmative duty to provide full, accurate and timely reports and case plans to the court and the parties. In re K.C., 325 Ill. App. 3d 771, 759 N.E.2d 15 (1st Dist. 2001) *see also* Reports required by court. In re F.B., 206 Ill. App. 3d 140, 564 N.E.2d 173 (1st Dist. 1990)

E. Modification of Dispositional and Custody Orders:

Dispositional orders are subject to modification in a manner consistent with the provisions of §2-28 of the JCA. 705 ILCS 405/2-28; In re Austin W., 214 Ill.2d 31, 823 N.E.2d 572 (2005) It has been stated that any modification of a dispositional order must be made pursuant to a properly filed motion. 705 ILCS 405/2-12(6) & 705 ILCS 405/2-23(2) & & 705 ILCS 405/2-28(5) The rules of evidence applicable to dispositional hearings applies to motions and petitions to modify and review prior dispositional orders. In re S.M., 223 Ill. App. 3d 543, 585 N.E.2d 641 (4th Dist. 1992) The trial court may modify a prior dispositional order if it is in the best interests of the minor to do so. In re Austin W., 214 Ill.2d 31, 823 N.E.2d 572, 580 (2005) On a petition for change of custody, the burden of proof is on the person who filed the petition for change of custody to show, by a preponderance of the evidence, that a change of custody is in the best interest of the minor. In re Austin W., 214 Ill.2d 31, 823 N.E.2d 572 (2005); 705 ILCS 405/2-28(4)

V.
PERMANENCY HEARINGS/REVIEWS [705 ILCS 405/2-28]

A. Burden of Proof:

Permanency hearings do not concern themselves with the issue of parental unfitness. Permanency hearings (1) contain no burden of proof or standard of proof, (2) are designed to hear probative evidence, and (3) result in no final orders. In re Curtis B., 203 Ill.2d 53, 55, 784 N.E.2d 219 (2002); In re R.L., 352 Ill. App. 3d 985, 817 N.E.2d 954 (1st Dist. 2004)

B. Rule(s) of Evidence:

It has been noted that the evidentiary rules that apply to the dispositional hearing also apply to subsequent permanency review hearings. In re S.M., 223 Ill. App. 3d 543, 585 N.E.2d 641 (4th Dist. 1992) Any evidence sought to be introduced at a Permanency Review hearing must be relevant to the stated purposes of §2-28. 705 ILCS 405/2-28

Section 2-28 provides in pertinent part as follows:

> "(1) The court may require any legal custodian or guardian of the person appointed under this Act to report periodically to the court or may cite him into court and require him or his agency, to make a full and accurate report of his or its doings in behalf of the minor. The custodian or guardian, within 10 days after such citation, shall make the report, either in writing verified by affidavit or orally under oath in open court or otherwise as the court directs.
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> * * *
>
> (2) The first permanency hearing shall be conducted by the judge. . . If not contained in the plan, *the agency shall also include a report* setting forth (i) any special physical, psychological, educational, medical, emotional, or other needs of the minor or his or her family that are relevant to a permanency or placement determination and (ii) for any minor age 16 or over, a written description of the programs and services that will enable the minor to prepare for independent living. The agency's written report must detail what progress or lack of progress the parent has made in correcting the conditions requiring the child to be in care; whether the child can be returned home without jeopardizing the child's health, safety, and welfare, and if not, what permanency goal is recommended to be in the best interests of the child, and why the other permanency goals are not appropriate. *The caseworker must appear and testify at the permanency hearing*.
>
> * * *
>
> The court shall consider (i) the permanency goal contained in the service plan, (ii) the appropriateness of the services contained in the plan and whether those services have been provided, (iii) whether reasonable efforts have been made by all the parties to the service plan to achieve the goal, and (iv) whether the plan and goal have been achieved. *All **evidence** relevant to determining these questions, including oral and written reports, may be admitted and may be relied on to the extent of their probative value*.
>
> * * *
>
> (5) Whenever a parent, guardian, or legal custodian files a motion for restoration of custody of the minor, and the minor was adjudicated neglected, abused, or dependent as a result of physical abuse, the court shall cause to be made an investigation as to whether the movant has ever been charged with or convicted of any criminal offense which would indicate the likelihood of any further physical

abuse to the minor. *Evidence of such criminal convictions shall be taken into account in determining whether the minor can be cared for at home without endangering his or her health or safety and fitness of the parent, guardian, or legal custodian.*" (Emphasis added) 705 ILCS 405/2-28

Section 2-28.1 of the Act relating to permanency hearings conducted by hearing officers provides in pertinent part that the hearing officer shall:

"* * *

(1) Conduct a fair and impartial hearing.

(2) Summon and compel the attendance of witnesses.

(3) Administer the oath or affirmation and take testimony under oath or affirmation.

(4) Require the production of evidence relevant to the permanency hearing to be conducted. *That **evidence** may include, but need not be limited to case plans, social histories, medical and psychological evaluations, child placement histories, visitation records, and other documents and writings applicable to those items*.

(5) Rule on the admissibility of evidence using the standard applied at a dispositional hearing under Section 2-22 of this Act." (Emphasis added) 705 ILCS 405/2-28.1

Duration of Permanency Review:

Although there are a number of cases holding that the trial court has wide discretion in handling the cases on its own docket, there appears to be no case in which a trial court imposed a predetermined time limit on the length of an evidentiary hearing. Hilgenberg v. Kazan, 305 Ill. App. 3d 197, 207, 711 N.E.2d 1160 (1999) Given the importance of establishing a permanency goal, it is inappropriate for the trial court to establish an artificial time limit to present evidence. Hilgenberg v. Kazan, 305 Ill. App. 3d 197, 207, 711 N.E.2d 1160 (1st Dist. 1999) Although the trial court has the authority to limit repetitive and irrelevant evidence, the trial court cannot properly predetermine the appropriate length of the proofs. Hilgenberg v. Kazan, 305 Ill. App. 3d 197, 207, 711 N.E.2d 1160 (1st Dist. 1999) Fairness requires that the parties have the opportunity to introduce all relevant evidence at a permanency hearing, regardless of the resulting length of the proceeding. In re E.I., 309 Ill. App. 3d 392, 722 N.E.2d 779 (2nd Dist. 1999)

C. Admissible Evidence:

Pursuant to the JCA, permanency goals are to be set every six (6) months in order to determine the future status of a child. 705 ILCS 405/2-28(2) At the permanency review, the trial court is to set a permanency goal that is in the best interest of the child,

review the child's placement status, and set a placement goal for the child. 705 ILCS 405/2-28(2); In re Curtis B., 203 Ill.2d 53, 55, 784 N.E.2d 219 (2002) The purpose of a permanency review hearing is to determine, *inter alia*, "the appropriateness of the services delivered and to be delivered to effectuate the permanency plan and goal." In re Chiara C., 279 Ill. App. 3d 761, 665 N.E.2d 404 (1st Dist. 1996)

Ample case law as set forth in the dispositional hearing section hereinabove suggests that hearsay and otherwise incompetent evidence is admissible at a dispositional hearing and, therefore, also admissible at a permanency review. This may be an unfortunate extrapolation and, in some cases, dictum, as the language of §2-22 and §2-28 concerning admissible evidence is materially different. When the General Assembly uses a particular phrase in one provision and different language in another, we must assume that it intended different results for each. In re S.R., 349 Ill. App. 3d 1017, 811 N.E.2d 1285 (4th Dist. 2004) *citing* In re K.C., 186 Ill.2d 542, 549-50, 714 N.E.2d 491, 495 (1999) Thus, although in many jurisdictions it may be customary to allow the introduction of virtually any information in a Permanency Review hearing purportedly based on the language contained in §2-28(2) of the JCA, such a practice is not entirely supported by statute or universally recognized by case law. The use of the word "evidence" rather than "information" throughout §2-28 is an important consideration. *See generally* In re J.B., 346 Ill. App. 3d 77, 803 N.E.2d 997 (1st Dist. 2004) (Section 2-18(1) of the JCA states that the rules of evidence is applicable to proceedings under this Article) *but see* In re A.L., 409 Ill. App. 3d 492, 949 N.E.2d 1123 (4th Dist. 2011) (The same civil rules of evidence applicable to fitness hearings under the Adoption Act do not apply at either dispositional hearings or permanency review hearings, which are governed, in part, by sections 2–22(1) and 2–28(2) of the Juvenile Court Act of 1987) Also, the use of the term "relevant" in §2-28 of the JCA further implies that a relevancy determination would be made by the court. In re C.H., 398 Ill. App. 3d 603, 925 N.E.2d 1260 (3rd Dist. 2010)(Even relevant evidence must be properly admitted) Again, it is likely that such relevancy determinations would typically arise only where the party seeking to tender the evidence has asked the court to admit the evidence and opposing counsel has had an opportunity to object. Assuming that the moving party has met the foundational requirements for admission and demonstrated that the evidence is relevant to the specific purpose of a permanency review, a court is still not obligated to admit it or give it any weight whatsoever. *See* 705 ILCS 405/2-28(2) For example, it could be cumulative or sufficiently collateral to the matter at hand. Likewise, the language of §2-28 clearly relates back to the defined purposes of the Permanency Review hearing (not the dispositional hearing) which pertain to the selection of a permanency goal, the appropriateness of the service plan, the reasonable efforts of the parents and the Department and whether (or not) the permanency goal has been achieved. 705 ILCS 405/2-28 Arguably, evidence pertaining to any non-permanency review matter before the court is not statutorily covered by the liberal evidentiary standard in §2-28 of the JCA. 705 ILCS 405/2-28 At minimum, all evidence must be properly admitted in order to be considered by a trial court. In re C.H., 398 Ill. App. 3d 603, 925 N.E.2d 1260 (3rd Dist. 2010)(Even relevant evidence must be properly admitted) *citing* Belfield v. Coop, 8 Ill.2d 293, 134 N.E.2d 249 (1956) Moreover, even in a Permanency Review hearing, proper foundation should be established to support the admission of evidence. In re C.H., 398 Ill.

App. 3d 603, 925 N.E.2d 1260 (3rd Dist. 2010) The failure of counsel for a party to object to the admission of evidence at a permanency review sought to be introduced without proper foundation could result in a finding of ineffective assistance of counsel. In re C.H., 398 Ill. App. 3d 603, 925 N.E.2d 1260 (3rd Dist. 2010) *citing* Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) Presumably the failure to establish a proper foundation properly authenticating evidence not only prevents its admission but would simultaneously diminish its probative value to such a degree that it should hold little or no sway in the court's decision.

VI.

UNFITNESS HEARING (1ST STEP-TERMINATION) [750 ILCS 50/1]

A. Burden of Proof:

The burden of proving unfitness is upon those who have petitioned for adoption of the child. In re Adoption of Syck, 138 Ill.2d 255, 276, 562 N.E.2d 174 (1990) The United States Supreme Court has determined that, due to the importance of the parental relationship, the decision to terminate parental rights must be supported by clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982); In re Adoption of Syck, 138 Ill.2d 255, 276, 562 N.E.2d 174 (1990) A finding of parental unfitness must be supported by clear and convincing evidence. 750 ILCS 50/8(a)(1); In re Katrina, 364 Ill. App. 3d 834, 842, 847 N.E.2d 586 (2006); Paul v. Steele, 101 Ill.2d 345, 352, 461 N.E.2d 983 (1984); In re F.S., 322 Ill. App. 3d 486, 749 N.E.2d 1033 (1st Dist. 2001) (determining that because State failed to prove by clear and convincing evidence that mother failed to make reasonable efforts and reasonable progress towards correction of conditions that led to removal of child within nine months of the neglect adjudication, trial court's finding of unfitness was against the manifest weight of the evidence); In re C.M., 305 Ill. App. 3d 154, 711 N.E.2d 809 (4th Dist. 1999) (same); In re Dixon, 81 Ill. App. 3d 493, 401 N.E.2d 591 (3rd Dist. 1980) Accordingly, if the State's evidence is not clear and convincing, it cannot withstand review on appeal. *See* In re D.T., 338 Ill. App. 3d at 155, 788 N.E.2d 133 (1st Dist. 2003) A hearing on a petition to terminate must be based solely upon the evidence presented during the hearing. In re H.C., 305 Ill. App. 3d 869, 713 N.E.2d 784 (4th Dist. 1999) Termination of an eligible Native American's parental rights requires proof beyond a reasonable doubt pursuant to the Indian Child Welfare Act of 1978. 25 U.S.C. §1912(f)

Courts have reached different conclusions concerning the meaning of "clear and convincing evidence." For example, in P.A. Bergner & Company of Illinois v. Lloyds Jewelers, Inc., 130 Ill. App. 3d 987, 474 N.E.2d 1256 (3rd Dist. 1984) *rev'd other grounds* 112 Ill.2d 196, 492 N.E.2d 1288 (1986), the Court noted that "courts have not yet settled on a single definition of clear and convincing evidence. For example, clear and convincing evidence has been variously defined as; "evidence which leaves the mind well satisfied of the truth of a proposition" *citing* Hotze v. Schlanser , 410 Ill. 265, 102 N.E.2d 131 (1951); evidence which "strikes all minds alike as being unquestionable" P.A. Bergner & Company of Illinois v. Lloyds Jewelers, Inc., 130 Ill. App. 3d 987, 474 N.E.2d 1256 (3rd Dist. 1984) *rev'd other grounds* 112 Ill.2d 196, 492 N.E.2d 1288 (1986) *citing*

Lines v. Willey, 253 Ill. 440, 97 N.E. 843 (1912); evidence which "leads to but one conclusion" Johnson v. Johnson, 1 Ill.2d 319, 115 N.E.2d 617 (1953); "more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense" Estate of Ragen, 79 Ill. App. 3d 8, 398 N.E.2d 198 (1st Dist.1979) There are also a number of cases which define clear and convincing evidence as proof which leaves no reasonable doubt in the mind of the trier of fact. Galapeaux v. Orviller, 4 Ill.2d 442, 123 N.E.2d 321 (1954); In Interest of Drescher, 91 Ill. App. 3d 658, 415 N.E.2d 636 (1st Dist.1980); In Interest of Jones, 34 Ill. App. 3d 603, 340 N.E.2d 269 (1st Dist. 1975) Although stated in terms of reasonable doubt, clear and convincing evidence is considered to be more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense. Estate of Ragen, 79 Ill. App. 3d 8, 14, 398 N.E.2d 198 (1st Dist. 1979); In re Timothy H., 301 Ill. App. 3d 1008, 704 N.E.2d 943 (2nd Dist. 1998) *citing* Bazydlo v. Volant, 164 Ill.2d 207, 213, 647 N.E.2d 273 (1995) "Clear and convincing evidence is defined, according to Illinois Pattern Jury Instructions, Criminal, No. 4.19, as 'that degree of proof which, considering all the evidence in the case, produces the firm and abiding belief that it is highly probable that the proposition on which the defendant has the burden of proof is true.'" In re Timothy H., 301 Ill. App. 3d 1008, 704 N.E.2d 943 (2nd Dist. 1998) *citing* Illinois Pattern Jury Instructions, Criminal, No. 4.19 (3d ed. Supp.1996) Mere suspicion does not rise to the level of clear and convincing evidence. In re J.J., 316 Ill. App. 3d 817, 737 N.E.2d 1080 (3rd Dist. 2000) Because wardship proceedings and termination proceedings have different standards of proof, it is better practice to not have consolidated hearings but to bifurcate them although it is not necessarily reversible error to do so. In R.G., 165 Ill. App. 3d 112, 518 N.E.2d 691 (2nd Dist. 1988)

A higher standard of proof is required to remove an Indian child from his or her parents or Indian custodian or to terminate an Indian parent's parental rights. 25 USC §1912(f) The ICWA provides:

> "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 USC §1912(f)

Thus, the ICWA provides that a court may order an involuntary termination of parental rights only if it determines, based on evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 USC §1912(f).

The ICWA also provides that: "In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard." 25 USC §1921

B. Rule(s) of Evidence:

The rules of evidence, as modified by the Juvenile Court Act of 1987, apply in proceedings for the termination of parental rights. In re J.G., 298 Ill. App. 3d at 629, 699 N.E.2d at 175 (4th Dist. 1998); In re M.F., 304 Ill. App. 3d 236, 710 N.E.2d 519, 523 (5th Dist. 1999) *citing* In re M.S., 210 Ill. App. 3d 1085, 1095, 569 N.E.2d 1282 (2nd Dist. 1991)

Section 20 of the Adoption Act [750 ILCS 50/20] provides in pertinent part as follows:

> "Practice.
>
> The *provisions of the Civil Practice Law* and all existing and future amendments of that Law and the Supreme Court Rules now or hereafter adopted in relation to that Law *shall apply to all adoption proceedings* except as otherwise specifically provided in this Act.
>
> Proceedings under this Act shall receive priority over other civil cases in being set for hearing.
>
> No matters not germane to the distinctive purpose of a proceeding under this Act shall be introduced by joinder, counterclaim or otherwise.
>
> * * *"

Also, §2.1 of the Adoption Act provides that it shall be construed in concert with the Juvenile Court Act of 1987 and other child related statutes. 750 ILCS 50/2.1 This has been deemed by one court to mean that the rules of evidence under the JCA are incorporated into the Adoption Act. In re Yasmine P., 767 N.E.2d 867, 328 Ill. App. 3d 1005 (3rd Dist. 2002) Other Illinois courts have held that the rules of evidence to be applied in civil cases also apply to parental rights termination proceedings. In re J.B., 346 Ill. App. 3d 77, 803 N.E.2d 997 (1st Dist. 2004) Due process of law required a trial court to determine whether a factual basis existed for an allegation that a parent was unfit, before a court accepts a parent's admission of unfitness. In re M.H., 196 Ill. 2d 356, 751 N.E.2d 1134 (2001) *see also* In re A.L., 2012 IL App (2d) 110992, 969 N.E.2d 531 (2nd Dist. 2012)

The petitioner must specify the nine-month period it intends to rely on in prosecuting the charge of failure to make reasonable progress not later than three weeks before discovery cutoff. 750 ILCS 50/1(D)(m)(iii); In re S.L., 2012 Il App. (5th) 120271, 980 N.E.2d 796 (5th Dist. 2012) *but see* In re A.L., 409 Ill. App. 3d 492, 949 N.E.2d 1123 (4th Dist. 2011) The Petitioner cannot rely on a parent's waiver of the issue to rectify the failure to specify the nine-month time period. In re S.L., 2012 Il App. (5th) 120271, 980 N.E.2d 796 (5th Dist. 2012) The nine month period in statute applies to reasonable

progress issues. In re D.L., 191 Ill.2d 1, 10, 727 N.E.2d 990, 994 (2000) The trial court may not consider conduct outside the statutorily prescribed time periods for each ground of parental unfitness. In re D.F., 317 Ill. App. 3d 461, 465, 740 N.E.2d 60 (2000) (Court should not have considered conduct that occurred before the adjudicatory hearing and before the trial court's order making DCFS the custodian of the child); In re J.D., 314 Ill. App. 3d 1109, 734 N.E.2d 93 (2000); In re R.L., 352 Ill. App. 3d 985, 817 N.E.2d 954 (1st Dist. 2004) Court can consider evidence of parent's conduct after termination petition filed where nine month period was selected including subsequent period. In re A.J., 323 Ill. App. 3d 607, 753 N.E.2d 551 (3rd Dist. 2001)

It goes without saying that a trial court's decision regarding a parent's fitness should be based only on evidence properly admitted at the fitness hearing. In re J.J., 316 Ill. App. 3d 817, 737 N.E.2d 1080 (3rd Dist. 2000) *citing* In re J.G., 298 Ill. App. 3d 617, 699 N.E.2d 167 (1998) and In re L.L.S., 218 Ill. App. 3d 444, 577 N.E.2d 1375 (4th Dist. 1991) Under certain circumstances, parental rights may not be terminated when all the evidence is hearsay. In re M.F., 304 Ill. App. 3d 236, 710 N.E.2d 519 (5th Dist. 1999) Also, the court may not consider the child's best interests when ruling on the issue of parental unfitness. In re Doe, 159 Ill.2d 347, 638 N.E.2d 181 (1994); In re Burton, 43 Ill. App. 3d 294, 356 N.E.2d 1279 (5th Dist. 1976)

Lack of clarity in record as to what evidence the circuit court considered and the time period/frame within which such evidence occurred necessitated remand in proceeding to terminate parental rights. In re E.B., 313 Ill.App.3d 672, 730 N.E.2d 617 (4th Dist. 2000)

C. **Admissible Evidence:**

Unless hearsay falls within a recognized exception, it is inadmissible. In re M.F., 304 Ill. App. 3d 236, 710 N.E.2d 519, 523 (5th Dist. 1999) *citing* In re A.J., 296 Ill. App. 3d 903, 916, 695 N.E.2d 551 (2nd Dist. 1998) (Social worker's unsubstantiated allegations that man with whom mother resided had a history of abuse and criminality constituted inadmissible hearsay). It has been recognized that hearsay statements have been excluded in proceedings to terminate parental rights. *See* In re A.J., 296 Ill. App. 3d 903, 916, 695 N.E.2d 551, 560 (1998) (reversing judgment of circuit court which had allowed admission of hearsay of caseworkers that respondent had positive drug tests). Thus, except as to what may be allowed under JCA, hearsay evidence is inadmissible during unfitness stage of termination proceeding. In re J.B., 346 Ill. App. 3d 77, 803 N.E.2d 997 (1st Dist. 2004) (Statements made to caseworker by parents excluded) However, hearsay exceptions contained in section 2-18(4)(a) of the JCA would apply equally, whether suit to terminate parental rights is initiated under the JCA or the Adoption Act. In re Yasmine P., 328 Ill. App. 3d 1005, 767 N.E.2d 867 (3rd Dist. 2002) The admissibility of hearsay evidence under §2-18(4) in a termination or adoption proceeding may be called into question where the plain language of the statute provides that the record, document or statement is to relate to a minor in an abuse, neglect or dependency proceeding. 705 ILCS 405/2-18(4) *compare* In re Charles W., 2014 IL App.

(1st) 131281, 6 N.E.3d 399 (1st Dist. 2014) (Section 2-18(4)(c) applies to abuse, neglect and dependency proceedings); In re I.H., 238 Ill.2d 430, 939 N.E.2d 375 (2010)(Because the court is not making a finding of abuse or neglect at a temporary custody hearing, §2-18(4)(c) of the JCA does not apply to a minor's out-of-court statement in the temporary custody hearing) There are, of course, very different State interests at play in termination and adoption matters as compared to a wardship proceeding.

A prior finding of unfitness does not prove *per se* unfitness as to another child. *Compare* In re A.W., 231 Ill.2d at 105, 896 N.E.2d at 324 (2008) (affirming finding of unfitness where respondent had been previously found unfit and failed to produce evidence that he had taken steps to correct the conditions that led to the previous unfitness determination); *see also* In re D.C., 209 Ill.2d 287, 807 N.E.2d 472, 478-80 (2004) (rejecting State's argument that "unfitness as to one child is unfitness as to all" and holding that when deciding whether a parent is unfit under section 1(D)(m)(iii) of the Adoption Act courts must find "clear and convincing evidence of a lack of reasonable progress during the applicable time period with respect to each child") However, evidence supporting a finding of unfitness as to one of a parent's children may be relevant and serve as a basis for a finding of unfitness as to another child. In re D.F., 201 Ill.2d 476, 777 N.E.2d 930 (2002) citing In re G.V., 292 Ill. App. 3d 301, 307, 685 N.E.2d 406 (1997) (Evidence of failure to protect child who was killed by boyfriend could serve as basis for termination of parental rights of other child); In re S.H., 284 Ill. App. 3d 392, 400-01, 672 N.E.2d 403 (1996) (evidence of parent's sexual abuse of one child may serve as basis for terminating parental rights to other children, even if prior to second child's birth); In re Henrly, 175 Ill. App. 3d 778, 792, 530 N.E.2d 571 (1988) (neglect of some children prior to birth of some did to prevent finding of unfitness as to all)

Guilty pleas are regarded as judicial admissions that are admissible, if relevant, in proceedings to terminate parental rights. In re J.R.Y., 157 Ill. App. 3d 396, 510 N.E.2d 541 (4th Dist. 1987) *citing* People v. Powell, 107 Ill. App. 3d 418, 437 N.E.2d 1258 (1982) *but see* In re R.G., 165 Ill. App. 3d 112, 518 N.E.2d 691 (2nd Dist. 1988) (certified copy of parent's conviction for aggravated criminal sexual assault against son would not have, standing alone, supported circuit court's finding of unfitness based on depravity in termination proceeding)

D. Rebuttal Evidence:

Notwithstanding that the State may have established a parent is depraved due to multiple felony convictions under 750 ILCS 50/1(D) of the Adoption Act, a parent may still present evidence showing that despite the convictions, the parent is not depraved and has been rehabilitated. In re Shanna W., 343 Ill. App. 3d 1155, 799 N.E.2d 843 (1st Dist. 2003) *citing* In re J.A., 316 Ill. App. 3d 553, 562, 736 N.E.2d 678, 686 (2000) *compare* In re T.S., 312 Ill. App. 3d 875, 728 N.E.2d 98 (2000)

VIII.

BEST INTEREST HEARING (2ND STEP-TERMINATION)

[750 ILCS 50/15.1(b)]

A. Burden of Proof:

At the best interest stage of termination, the State is required to prove by a preponderance of the evidence that it is in the child's best interest to terminate parental rights. In re R.L., 352 Ill. App. 3d at 1001, 817 N.E.2d 954 (1st Dist. 2004) *citing* In re D.T., 338 Ill. App. 3d 133, 154, 788 N.E.2d 133 (2003), *aff'd*, 212 Ill. 2d 347, 366, 818 N.E.2d 1214, 1228 (2004) see also In re M.F., 326 Ill. App. 3d 1110, 762 N.E.2d 701 (4th Dist. 2002)

"By a preponderance of the evidence is meant the greater weight of the evidence, not necessarily in numbers of witnesses, but in merit and worth that which has more evidence for it than against it is said to be proven by a preponderance. Preponderance of the evidence is sufficient if it inclines an impartial and reasonable mind to one side rather than the other. New York Life Insurance Co. v. Jennings/Williams v. City of Atlanta, 61 Ga. [App.] 557, 6 S.E.2d 431 (1939)" (Moss-American, Inc. v. Fair Employment Practices Com. (1974), 22 Ill. App. 3d 248, 259, 317 N.E.2d 343) "A proposition proved by a preponderance of the evidence is one that has been found to be more probably true than not. (*See generally* Illinois Pattern Jury Instructions, Civil Nos. 21.00 and 21.01 (2d ed. 1971).)" (In re Estate of Ragen, 79 Ill. App. 3d 8, 13, 398 N.E.2d 198 (1979))

Removal of an Indian child from his or her family must be based on competent testimony from one or more experts who are qualified to speak specifically to the issue of whether continued custody by the child's parents or Indian custodian is likely to result in serious physical or emotional damage to the child. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg. 67584 (Nov. 26, 1979), §D.4(a);

B. Rule(s) of Evidence:

The best interest hearing is subject to the same relaxed standard regarding the admission of evidence as those rules of evidence in the dispositional hearing in a wardship proceeding. In re Jay H., 395 Ill. App. 3d 1063, 918 N.E.2d 284 (4th Dist. 2009) In making this determination, the Court is required to consider the factors set forth in section 1-3 of the Juvenile Court Act. 705 ILCS 405/1-3(4.05); In re Dominique W., 347 Ill. App. 3d 557, 568-69, 808 N.E.2d 21 (1st Dist. 2004); In re R.L., 352 Ill. App. 3d 985, 817 N.E.2d 954 (1st Dist. 2004)

C. Admissible Evidence:

At the best interest hearing, all evidence helpful in the trial court's judgment in determining the questions before the court may be admitted and may be relied upon to the extent of its probative value, even though that evidence would not be admissible in a proceeding where the formal rules of evidence applied. In re Jay H., 395 Ill. App. 3d 1063, 918 N.E.2d 284 (4th Dist. 2009) *citing* 705 ILCS 405/2-22(1) All relevant evidence

that would be helpful to the judge in making the best-interest decision is admissible. In re Jay H., 395 Ill. App. 3d 1063, 918 N.E.2d 284 (4th Dist. 2009) (e.g. criminal history, documented intoxication by mother) *but see* In re A.W. Jr., 231 Ill.2d 241, 897 N.E.2d 733 (2008)(Son barred from testifying at best interest hearing)

The best interest factors to be considered by the court are set out in §1-3(4.05) of the JCA as follows:

> "(4.05) Whenever a "best interest" determination is required, the following factors shall be considered in the context of the child's age and developmental needs:
>
> (a) the physical safety and welfare of the child, including food, shelter, health, and clothing;
>
> (b) the development of the child's identity;
>
> (c) the child's background and ties, including familial, cultural, and religious;
>
> (d) the child's sense of attachments, including:
>
> (i) where the child actually feels love, attachment, and a sense of being valued (as opposed to where adults believe the child should feel such love, attachment, and a sense of being valued);
>
> (ii) the child's sense of security;
>
> (iii) the child's sense of familiarity;
>
> (iv) continuity of affection for the child;
>
> (v) the least disruptive placement alternative for the child;
>
> (e) the child's wishes and long-term goals;
>
> (f) the child's community ties, including church, school, and friends;
>
> (g) the child's need for permanence which includes the child's need for stability and continuity of relationships with parent figures and with siblings and other relatives;
>
> (h) the uniqueness of every family and child;
>
> (i) the risks attendant to entering and being in substitute care; and
>
> (j) the preferences of the persons available to care for the child." 705 ILCS 405/1-3(4.05)

Evidence relating to the best interests factors set forth under §15.1 of the Adoption Act would be as follows:.

"* * *

(b) Such guardian shall give preference and first consideration to that application over all other applications for adoption of the child but the guardian's final decision shall be based on the welfare and best interest of the child. *In arriving at this decision, the guardian shall consider all relevant factors including but not limited to*:

(1) the wishes of the child;

(2) the interaction and interrelationship of the child with the applicant to adopt the child;

(3) the child's need for stability and continuity of relationship with parent figures;

(4) the wishes of the child's parent as expressed in writing prior to that parent's execution of a consent or surrender for adoption;

(5) the child's adjustment to his present home, school and community;

(6) the mental and physical health of all individuals involved;

(7) the family ties between the child and the applicant to adopt the child and the value of preserving family ties between the child and the child's relatives, including siblings;

(8) the background, age and living arrangements of the applicant to adopt the child;

(9) the criminal background check report presented to the court as part of the investigation required under Section 6 of this Act.

(c) *The final determination of the propriety of the adoption shall be within the sole discretion of the court, which shall base its decision on the welfare and best interest of the child*. In arriving at this decision, the court shall consider all relevant factors including but not limited to the factors in subsection (b). . ." (Emphasis added) 750 ILCS 15.1(b-c)

Parental behavior following an adjudication of abuse or neglect is potentially relevant and admissible at a best interest hearing relating to the termination of parental rights. *See generally* In re S.B., 348 Ill. App. 3d 61, 808 N.E.2d 1094 (1st Dist. 2004) Evidence that a parent substantially completed offered services, or otherwise refrained from objectionable conduct following the removal of the child is appropriately

considered at the second stage of the termination proceeding and Dispositional hearing. In re Kenneth D., 364 Ill. App. 3d 797, 847 N.E.2d 544 (1st Dist. 2006) *citing* In re C.W., 199 Ill.2d 198, 217, 766 N.E.2d 1105, 1116 (2002) A parent possesses the right and opportunity at a best interests hearing to present evidence of her rehabilitation and her desire and ability to be a parent to her children. In re O.R., 2-01-1084 (2nd Dist. 2001); In re J.B., 328 Ill. App. 3d 175, 765 N.E.2d 1093 (1st Dist. 2002) A Parenting/bonding Assessment Report is relevant and admissible in a best interest hearing. In re C.B., 248 Ill. App. 3d 168, 618 N.E.2d 598 (1st Dist. 1993) Also, the court may consider the nature and length of the child's relationship with the child's current caretaker and the effect that a change of placement would have upon the child's emotional and psychological well-being. *See generally* In re J.L., 308 Ill. App. 3d 859, 865, 721 N.E.2d 638 (1999) Trial court need not state each factor in its ruling, however. In re Jaron Z., 348 Ill. App. 3d 239, 810 N.E.2d 108 (1st Dist. 2004) *citing* McMahon v. Chicago Mercantile Exchange, 221 Ill. App. 3d 935, 950-51, 582 N.E.2d 1313 (1991); In re Marriage of Lehr, 317 Ill. App. 3d 853, 862, 740 N.E.2d 417 (2000) Evidence that the agency or the court undertook a course of conduct that undermined a parent's ability to maintain a bond with the parent's child such as preventing visitation or placing unreasonable restrictions on visitation is admissible at the best interest hearing. In re O.S., 364 Ill. App. 3d 628, 848 N.E.2d 130 (3d Dist. 2006)

IX.
SPECIAL ISSUES UNDER JUVENILE COURT ACT

A. DCFS Indicated Reports:

Section 2-18(4)(b) of the JCA provides that any indicated report filed pursuant to the Reporting Act shall be admissible in evidence at the adjudicatory hearing. 705 ILCS 405/2-18(4)(b) However, admission of "indicated reports" does not include entire investigative record and are not business records and are not admissible hearsay under the section 2-18(4) exception. In re J.C., 2012 Ill. App. (4th) 110861, 966 N.E.2d 453 (4th Dist. 2012) Also, the Legislature merely made indicated reports admissible and nothing more. There is nothing in section 2-18(4)(b) that suggests that the indicated reports are *prima facie* evidence of abuse or neglect.

An indicated report standing alone may not, as a matter of law, constitute proof by a preponderance of the evidence. At the completion of the investigation by DCFS, an indicated report is made if the findings are determined to be supported by credible evidence. *See* Lyon v. DCFS, 209 Ill.2d 264, 279-280, 807 N.E.2d 423 (2004) Thus, the indication itself in it's unappealed and untested state represents a finding based on credible evidence. *See* Lyon v. DCFS, 209 Ill.2d 264, 279-280, 807 N.E.2d 423 (2004) "Credible evidence" means that the available facts, when viewed in light of the surrounding circumstances, would cause a reasonable person to believe that a child was abused or neglected. *See* Lyon v. DCFS, 209 Ill.2d 264, 279, 807 N.E.2d 423 (2004)

If nothing else, the finding of abuse or neglect on the sole basis of indicated reports may impinge upon Appellant's due process rights. The notion of leveraging prior findings proven by a lower burden of proof to prove a case requiring a higher standard of proof is not novel and further implicates a violation of due process. *See generally* In re Enis, 121 Ill.2d 124, 520 N.E.2d 362 (1988) (Using prior finding based on preponderance of the evidence to prove termination of parental rights requiring proof by clear and convincing evidence a violation of due process).

There is pending legislation that authorizes state's attorneys to receive unfounded reports of child abuse or neglect to screen and prosecute a subsequent allegation of abuse or neglect relating to the same child, sibling of the child, or the same perpetrator. Allows the unfounded report to be admissible in prosecuting a petition for abuse or neglect in those circumstances. (Senate Bill 1335 Lightford, D-Chicago)

B. Testimony of Minors:

Section 2-18 of the Juvenile Court Act was enacted into law in 1981. 705 ILCS 405/2-18. Section 2-18(4) provides in pertinent part as follows:

Evidence.

(1) At the adjudicatory hearing, the court shall first consider only the question whether the minor is abused, neglected or dependent. The standard of proof and the rules of evidence in the nature of civil proceedings in this State are applicable to proceedings under this Article. If the petition also seeks the appointment of a guardian of the person with power to consent to adoption of the minor under Section 2-29, the court may also consider legally admissible evidence at the adjudicatory hearing that one or more grounds of unfitness exists under subdivision D of Section 1 of the Adoption Act.

* * *

(3) In any hearing under this Act, proof of the abuse, neglect or dependency of one minor shall be admissible evidence on the issue of the abuse, neglect or dependency of any other minor for whom the respondent is responsible.

* * *

(4) (c) ***Previous statements made by the minor relating to any allegations of abuse or neglect shall be admissible in evidence. However, no such statement, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect.***

(d) There shall be a *rebuttable presumption that a minor is competent to testify in abuse or neglect proceedings*. The court shall determine how much weight to give to the minor's testimony, and may allow the minor to testify in chambers with only the court, the court reporter and attorneys for the parties present.

* * *"

Section 2-18(4)(c) of the Act states that "[p]revious statements made by the minor relating to any allegations of abuse or neglect shall be admissible in evidence. However, no such statement, if uncorroborated and not subject to cross-examination shall be sufficient in itself to support a finding of abuse or neglect." 705 ILCS 405/2-18(4)(c) The Illinois Supreme Court in In re A.P., 179 Ill.2d 184, 196, 688 N.E.2d 642, 649 (1997) *compare* In re Gabriel, 372 Ill. App. 3d 817, 867 N.E.2d 69 (1st Dist. 2007), analyzed the plain language of this section concluding that "a minor's hearsay statement is sufficient to support a finding of abuse or neglect where the statement either is subject to cross-examination or is corroborated by other evidence." The Illinois Supreme Court stated that "[c]orroboration is particularly important given the fact that the minor who made the statement will not be subject to cross-examination." In re A.P., 179 Ill.2d 184, 197, 688 N.E.2d 642, 649 (1997) *see also* In re Custody of Brunken, 139 Ill. App. 3d 232, 487 N.E.2d 397 (1985) *but compare* In re T.L., 254 Ill. App. 3d 230, 625 N.E.2d 930 (4th Dist. 1993) In defining the phrase "corroborating evidence," the Illinois Supreme Court stated that it is "evidence that makes it more probable that a minor was abused or neglected." In re A.P., 179 Ill.2d 184, 197, 688 N.E.2d 642, 649 (1997) Corroborating evidence of abuse or neglect requires independent evidence which would support a logical and reasonable inference that the alleged acts described in the minor's hearsay statement occurred. In re K.O., 336 Ill. App. 3d 98, 782 N.E.2d 835 (1st Dist. 2002) *citing* In re A.P., 179 Ill.2d 184, 199, 688 N.E.2d 642(1997) (case-by-case basis) The form of corroboration will vary depending on the facts of each case and can include physical or circumstantial evidence." In re A.P., 179 Ill.2d 184, 199, 688 N.E.2d 642, 650 (1997)

However, the fact that two or more witnesses testify to what the minor said is not sufficient corroboration (In re Brunken, 139 Ill. App. 3d 232, 487 N.E.2d 397 (1985)), nor may evidence which is itself hearsay provide the corroboration required by the statute. In re Alba, 185 Ill. App. 3d 286, 540 N.E.2d 1116 (2d Dist. 1989) Absent cross-examination or corroboration, no conclusions can be drawn with respect to the detail or consistency of the child's statements." In re Custody of Brunken, 139 Ill. App. 3d 232, 240, 487 N.E.2d 397 (1985) Where the minor's out-of-court statement is corroborated; its admission does not violate parent's due process rights. *Compare* In re Marcus E., 183 Ill. App. 3d 693, 539 N.E.2d 344 (1st Dist. 1989)

In order for a statement to fall within the excited utterance or spontaneous declaration exception, there must have been: (1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) a statement which relates to the circumstances of the occurrence. People v. Merideth,

152 Ill. App. 3d 304, 503 N.E.2d 1132 (2nd Dist. 1987) *citing* People v. Poland, 22 Ill.2d 175, 181, 174 N.E.2d 804 (1961) The contents of an excited utterance or spontaneous declaration may be shown *in toto*. People v. Merideth, 152 Ill. App. 3d 304, 503 N.E.2d 1132 (2nd Dist. 1987) *citing* People v. Damen, 28 Ill.2d 464, 474, 193 N.E.2d 25 (1963) Moreover, the exception is premised on the notion that the excitement caused by the event or condition temporarily stills the capacity for reflection, thus producing statements free of conscious fabrication. People v. Pointer, 93 Ill. App. 3d 1064, 418 N.E.2d 1 (1981) Absent some evidence of the existence of an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, the testimony relating the out-of-court statement should be excluded. People v. Leonard, 83 Ill.2d 411, 418, 415 N.E.2d 358 (1980) Although not conclusive as to nonspontaniety, it is true that one of the circumstances to be taken into account is whether the statement made was volunteered or was in response to a question. People v. Merideth, 152 Ill. App. 3d 304, 503 N.E.2d 1132 (2nd Dist. 1987) Although not controlling, elapsed time is material in determining spontaneity. People v. Merideth, 152 Ill. App. 3d 304, 503 N.E.2d 1132 (2nd Dist. 1987) *citing* People v. Davis, 130 Ill. App. 3d 41, 55-56, 473 N.E.2d 387 (1984); People v. Smith, 127 Ill. App. 3d 622, 628, 469 N.E.2d 634 (1984)

Section 2-18(4)(d) of the JCA permits a trial judge to allow the minor to testify in chambers with only the court, the court reporter, and attorneys for the parties present. 705 ILCS 405/2-18(4)(d) That privilege has been extended to nonparty minors. In re M.D.H., 297 Ill. App. 3d 181, 697 N.E.2d 417 (4th Dist. 1998) However, the trial court will need to be prepared to grant liberal breaks and recesses to attending attorneys to enable them to consult with their clients and they must be given an opportunity to cross-examine the minor. *Compare* In re Brandon L., 348 Ill. App. 3d 315, 809 N.E.2d 763 (2nd Dist. 2004) This is similar to dissolution proceedings where the court may interview children in chambers but Counsel for the parties must be present unless otherwise agreed upon by the parties. 750 ILCS 5/604(a)

The minor must be sufficiently mature to receive correct impressions from senses, be able to recollect those impressions, to comprehend questions, and to narrate answers intelligently. The minor must also be capable to appreciate the moral duty to tell the truth. In re M.B., 241 Ill. App. 3d 697, 609 N.E.2d 731 (1st Dist. 1992) *overruled other grounds* In re I.H., 238 Ill.2d 430, 939 N.E.2d 375 (2010) *citing* People v. Ballinger, 36 Ill.2d 620, 225 N.E.2d 10 (1967) Still, it is presumed that witnesses aged 14 and over are competent to testify. In re M.B., 241 Ill. App. 3d 697, 609 N.E.2d 731 (1st Dist. 1992) *overruled other grounds* In re I.H., 238 Ill.2d 430, 939 N.E.2d 375 (2010) *citing* In re E.S., 145 Ill. App. 3d 906, 495 N.E.2d 1334 (1986) Fear and youth are factors to be considered in determining whether a child witness is unavailable. In re T.T., 384 Ill. App. 3d 147, 892 N.E.2d 1163 (1st Dist. 2008) (delinquency) Reliability is judged based on the totality of the circumstances (*Wright,* 497 U.S. at 819-20, 110 S.Ct. at 3148-49, 111 L.Ed.2d at 654-55(1990)), but relevant factors include consistent repetition, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. People v. McMillan, 231 Ill. App. 3d 1022, 1026, 597 N.E.2d 923 (1992)

Minor's Out-of-Court Statement(s)

See testimony of minors section above. Previous statements made by the minor relating to any allegation of abuse or neglect shall be admissible in evidence. However, no such statement, if uncorroborated and not subject to cross-examination shall be sufficient in itself to support a finding of abuse or neglect. 705 ILCS 405/2-18(4)(c) *see also* In re A.P., 179 Ill.2d 184, 688 N.E.2d 642 (1997); In re N.S., 255 Ill. App. 3d 768, 627 N.E.2d 1178 (4th Dist. 1994) (uncorroborated) Section 2-18(4)(c) has been extended to include the statements of any child not party to the juvenile court proceedings. In re B.W., 216 Ill. App. 3d 410, 576 N.E.2d 346 (1st Dist. 1991) Assuming that the minor's statement does come into evidence under an exception, it is unclear whether the out-of-court statement would be barred where the child is not available for cross-examination. *See* People v. Learn, 396 Ill. App. 3d 891, 919 N.E.2d 1042 (2nd Dist. 2009); In re Brandon P., 2014 IL 116653, 10 N.E.3d 910 (2014)(unwillingness to testify does not constitute unavailability)

Statements made by a victim to a grandmother concerning a sexual assault were testimonial in nature and inadmissible under the confrontation clause of the Sixth Amendment. In re E.H., 377 Ill. App. 3d 406, 883 N.E.2d 1 (1st Dist. 2007) (delinquency) *citing* In re Rolandis G., 352 Ill. App. 3d 776, 817 N.E.2d 183 (2nd Dist. 2004)

In addition to the above authority, Professor Friedman has written directly on the issue of child witnesses:

"the younger and less mature and understanding a child is, the less likely her statement should be considered testimonial, subject to the Confrontation Clause, and therefore, all other things being equal, the more likely the statement should be admitted. This conclusion, however, is really not paradoxical at all. Even statements by very young children may be highly probative. But very young children are not yet at a stage where they can be expected to take the responsibility of being a witness—the responsibility of speaking under oath, subject to questioning by the accused, under the implicit injunction, `Look me in the eye and say that.' With respect to very young children—I will not try to say here just how young—we should admit their statements for what they are worth, without pretending that the children have the capacity to act like adults." (Emphasis omitted.) R. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 Law & Contemp. Prob. 243, 251-52 (2002).

The admissibility of evidence of out-of-court statements made by a child under age of 13 describing any act of child abuse or any conduct involving an unlawful sexual act performed in the minor's presence of, with or on the declarant child or a complaint to another is admissible in a civil proceeding where the court determines that the statements are reliable and the child testifies or the minor is unavailable to testify and the testimony is corroborated. 735 ILCS 5/8-2601

C. Privileged Communications:

Attorney-Client Privilege.

"The privileged character of communication between any professional person and patient or client, except privilege between attorney and client, shall not apply to proceedings subject to this Article." 705 ILCS 405/2-18(4)(e)

Spousal Privilege.

Statute intended to preserve privacy of personal communication between spouses could not be invoked to prohibit mother from testifying in hearing held for purpose of determining whether her children were neglected. In re Baby Boy Butt, 76 Ill. App. 3d 587, 395 N.E.2d 1 (2nd Dist. 1979) *see also* 705 ILCS 405/2-18(4)(e)

Physician-Patient Privilege/Privacy.

The physician-patient privilege is designed to help patients feel comfortable when making disclosures to their physicians and to protect their privacy from invasion. Giangiulio v. Ingalls Memorial Hospital, 365 Ill. App. 3d 823, 850 N.E.2d 249 (1st Dist. 2006) A patient's medical records, even when relevant, are generally entitled to protection from discovery under the physician-patient privilege. Kraima v. Ausman, 365 Ill. App. 3d 530, 850 N.E.2d 840 (1st Dist. 2006) In Illinois, the physician-patient privilege is generally regarded as a statutory created privilege. *See generally* Cronin v. Court of Honor, 187 Ill. App. 480 (1st Dist. 1914); 735 ILCS 5/8-802. The legislature has accepted certain proceedings from the physician-patient privilege such as actions arising from a report of abuse or neglect. 735 ILCS 5/8-802(9); 705 ILCS 405/2-18(4)(e). Testimony concerning a parent's mental capacities was not barred by Mental Health and Developmental Disabilities Confidentiality Act ("MHDDCA") because section 11 of the MHDDCA provides that records and communications may be disclosed in connection with the Abused and Neglected Child Reporting Act and proceedings stemming from such disclosure. In re Jackson, 81 Ill. App. 3d 136, 400 N.E.2d 1087 (4th Dist. 1980) Section 2-18(4)(e) of the Juvenile Court Act provides that the "privileged character of communication between any professional person and patient or client, except privilege between attorney and client shall not apply to proceedings subject to [the Juvenile Court Act.]" In re M.S., 210 Ill. App. 3d 1085, 569 N.E.2d 1282 (2nd Dist. 1991) Parent's personal medical records also admissible under JCA as they relate to the minor. In re M.S., 210 Ill. App. 3d 1085, 569 N.E.2d 1282 (2nd Dist. 1991) A parent's medical and mental health records may be admitted in a termination proceeding if made in the regular course of the hospital's or agency's business. In re Jamarqon C., 338 Ill. App. 3d 639, 788 N.E.2d 344 (2nd Dist. 2003) Health care records of a sibling may be admissible during a termination proceeding if it concerns the conditions that caused the child to be removed from the parent. In re Precious W., 333 Ill. App. 3d 893, 776 N.E.2d 794 (3rd Dist. 2002)

Notwithstanding the JCA's relaxed view concerning medical information, it is noteworthy that the confidentiality of personal medical information is, however, without question, at the core of what society regards as a fundamental component of individual privacy. There is a "fiducial quality" to the physician-patient relationship that requires the disclosure of medical data to a patient or his agent on request and the patient need not

engage in legal proceedings to attain a loftier status in the quest to obtain such information. Cannell v. Medical and Surgical Clinic, S.C, 21 Ill. App. 3d 383, 315 N.E.2d 278 (3rd Dist. 1974) (although the information must be given the physician's records need not be turned over to the patient) Under the Illinois Constitutional guarantee recognizing a zone of privacy, there must be good and sufficient cause shown that the evidence sought to be obtained through civil discovery is pertinent to the issues in the case and cannot be used to procure a general investigation of a transaction not material to the issue. Kunkel v. Walton, 179 Ill.2d 519, 689 N.E.2d 1047 (1997) (735 ILCS 5/2-1003(a) (waiving privilege of confidentiality of medical information is unconstitutional); Ill. Const. Art. I, §6 (1970) Thus, disclosure of highly personal medical information having no bearing on the issues of the lawsuit is a substantial and unjustified invasion of privacy. Kunkel v. Walton, 179 Ill.2d 519, 689 N.E.2d 1047 (1997); Ill. Const. Art. I, §6 (1970) The Kunkel court is not alone in finding a privacy aspect to the physician-patient privilege. There is a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing intimate details of a person's medical situation. *Compare* Bloch v. Ribar, 156 F. 3d 673 (6th Cir. 1998)

> The Illinois Constitution is unique in granting an explicit right to privacy.
>
> "The people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, ***invasions of privacy*** or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." Ill. Const. Art. 1 §6 (Emphasis added)

In fact, there is a right to and an expectation of privacy related to an individual's medical information which is reflected in the State's public policy. Coy v. Washington County Hosp. Dist., 372 Ill. App. 3d 1077, 866 N.E.2d 651 (5th Dist. 2007); 735 ILCS 5/8-802. This is particularly the case where the party asserting the privilege has not waived that privilege. *Compare* People v. Givans, 83 Ill. App. 2d 423, 228 N.E.2d 123 (1st Dist. 1967) The physician-patient privilege exists both to encourage disclosure between a physician and a patient and to protect the patient from an invasion of privacy. Tomczak v. Ingalls Memorial Hospital, 359 Ill. App. 3d 448, 834 N.E.2d 549 (1st Dist. 2005) The disclosure of medical records, therefore, constitutes a clear invasion of personal privacy. Trent v. Office of Coroner of Peoria Co., 349 Ill. App. 3d 276, 812 N.E.2d 21 (3rd Dist. 2004) *appeal denied* 212 Ill.2d 556, 824 N.E.2d 292 (2004) *but see* Hope Clinic for Women, Ltd. v. Flores, 2013 IL 112673, 991 N.E.2d 745 (2013)(Illinois Supreme Court declined to find privacy right under Illinois Constitution broader than under Federal Constitution) Consequently, the privacy clause of the Illinois Constitution is implicated when the State seeks access to medical records that are within the scope of applicable protections. People v. Caballes, 221 Ill.2d 282, 851 N.E.2d 26 (2006) In this case, the court failed to balance Respondent's interest in the non-disclosure of her private medical information against the State's interest in the need to invade her privacy in order to generate additional information to bolster the State's juvenile court case. *See* People v. Caballes, 221 Ill.2d 282, 851 N.E.2d 26 (2006)

Accusatory statements contained in medical records identifying the alleged perpetrator implicate the core concerns of the protected by the confrontation clause. In re T.T., 384 Ill. App. 3d 147, 892 N.E.2d 1163 (1st Dist. 2008) (When a victim's statement concerned fault or identity, then such testimonial statements are only admissible if the declarant testifies at trial and is subject to cross-examination) Still, just because DCFS refers the victim to a physician doesn't make the physician's examination a prosecutorial function. In re T.T., 384 Ill. App. 3d 147, 892 N.E.2d 1163 (1st Dist. 2008)

D. Police Reports:

Generally, a police report of an investigation of an offense may not be admissible at common law. *See* Hall v. Checker Taxi Co., 109 Ill. App. 2d 445, 248 N.E.2d 721 (1969); Kelly v Chicago Transit Auth., 69 Ill. App. 2d 316, 217 N.E.2d 560 (1966) *see also* Illinois Supreme Court Rule 236(b) The ban against police reports includes any reports prepared to aid in a police investigation such as DCFS investigative reports of abuse and neglect. *See e.g.* People v. Casey, 225 Ill. App. 3d 82, 587 N.E.2d 511 (1st Dist. 1992) The mere attempt to introduce police reports is reversible error. *See generally* Jacobs v. Holly, 3 Ill. App. 3d 762, 279 N.E.2d 186 (2nd Dist. 1972); Cranwill v. Donahue, 132 Ill. App. 3d 873, 478 N.E.2d 22 (3rd Dist. 1985) Police reports are generally inadmissible except for past recollection recorded. People v. Andrews, 101 Ill. App. 3d 808, 428 N.E.2d 1048 (1st Dist. 1981) *see also* Ill Sup. Ct. R. 236(b) Testimony concerning the contents of a police report is an impermissible means of placing highly prejudicial material before the fact finder. Giraldi v. Community Consolidated School Dist. #62, 279 Ill. App. 3d 679, 665 N.E.2d 332 (1st Dist. 1996) *app'l denied* 168 Ill.2d 589, 671 N.E.2d 730 (1996)

E. Hearsay Evidence:

Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. People v. Carpenter, 28 Ill.2d 116, 190 N.E.2d 738 (1963) The rule against hearsay evidence, that a witness can testify only as to facts within his personal knowledge and not as to what somebody else told him, is founded on necessity of opportunity for cross-examination, and is a basic, not a technical, rule. Novicki v. Department of Finance, 373 Ill. 342, 26 N.E.2d 130 (1940) Prohibitions against hearsay grew out of the concern that such testimony may not be reliable because it is not made under oath, in court, subject to cross-examination. (*See generally,* McCormick on Evidence § 245 p. 581 (West 2d Ed.1972))

Burden

An out-of-court statement offered for the truth of the matter asserted therein, is hearsay and is inadmissible unless it meets one of the exceptions to the hearsay rule. Galindo v. Riddell, Inc., 107 Ill. App. 3d 139, 437 N.E.2d 376 (3rd Dist. 1982) The proponent of the hearsay evidence bears the burden of proving that hearsay statements

are reliable. *See* People v. Zwart, 151 Ill.2d 37, 45, 600 N.E.2d 1169 (1992) Generally, an objection to the admission of evidence must be made when the evidence is offered. People v. Trefonas, 9 Ill.2d 92, 98, 136 N.E.2d 817 (1st Dist. 1956) It is well established that when hearsay evidence is admitted without an objection, it is to be considered and given its natural probative effect. In re K.H., 346 Ill. App. 3d. 443, 804 N.E. 2d 1108 (2nd Dist. 2004) *quoting* Jackson v. Board of Review of the Department of Labor, 105 Ill.2d 501, 508, 475 N.E.2d 879 (1985) Generally, in criminal and quasi-criminal matters, testimonial statements of a witness who does not appear at trial would not be admissible unless the witness was unavailable to testify and the defendant had an opportunity for cross-examination. In re E.H., 377 Ill. App. 3d 406, 883 N.E.2d 1 (1st Dist. 2007) (delinquency); Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004)

Motion in Limine

When a *motion in limine* is made, the trial judge must exercise his discretion in granting the motion or in denying it, thereby leaving to the unsuccessful movant the procedure of specially objecting to the evidence when it is offered at trial. People v. McClain, 60 Ill. App. 3d 320, 324, 376 N.E.2d 774 (4th Dist. 1978), *citing* Department of Public Works & Buildings v. Roehrig, 45 Ill. App. 3d 189, 195, 359 N.E.2d 752 (5th Dist. 1976)

Client Service Plans

Prior to testimony being offered at the unfitness hearing, the State asked the trial court to take judicial notice of the entire underlying court file, which contained the original adjudicatory petitions and orders, numerous agency reports, letters, and other documents pertaining to the case. Over respondent's hearsay objection, the trial court granted the request. In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) A case supervisor testified that client service plans are prepared in the ordinary course of the agency's business and are made contemporaneously with the events recorded. In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) After establishing this, the prosecutor said, "Your Honor, at this point, before even asking any specifics as to this—the tasks and objectives of this plan, the State would ask to admit that part of the [client service plan] into evidence." In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) Over respondent's objection that it did not qualify as a business record, the trial court admitted the service plan into evidence pursuant to section 115-5 of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/115-5 (West 1996)) In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) The case supervisor was then permitted to testify regarding specifics of the service plans. This pattern was repeated with numerous other service plans. In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) The Appellate Court held that in that case, the trial court improperly determined that the client service plans were business records pursuant to section 115-5 of the Code of Criminal Procedure. In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) However, the court in In re A.B. stated that section 2-18(4)(a) was the appropriate statute to consider and that section 2-18(4)(a) of the Juvenile Court Act is a variation of the common-law "business records" exception to the hearsay rule. In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) *see also* In re

Brandon A., 395 Ill. App. 3d 224, 916 N.E.2d 890 (5th Dist. 2009); In re Kenneth D., 364 Ill. App. 3d 797, 847 N.E.2d 544 (1st Dist. 2006) The Appellate Court reiterated that business records are considered reliable, and thus admissible, because of the regular, prompt, and systematic manner in which they are kept and the fact that they are relied upon in the operation of the business. In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) *citing* In re N.W., 293 Ill. App. 3d 794, 688 N.E.2d 855 (1997) In re A.B. stands for the proposition that any document sought to be admitted as a business record must have the indicia of a business record – namely – that it was: 1) made as a memorandum or record of the event; (2) made in the ordinary course of business; and (3) made at the time of the event or within a reasonable time thereafter. These are the same well established criteria for any document to be regarded as a "business record." *Compare* Ill. S. Ct. Rule 236 In effect section 2-18(4)(a) merely spells out what has been the long-established criteria differentiating an admissible business record from an inadmissible and unreliable document containing hearsay. *Compare* Ill. S. Ct. Rule 236 *but see* 705 ILCS 405/2-28.1(4) It is noteworthy that a Respondent may exercise influence over and appeal an unsatisfactory service plan under DCFS regulations.

A trial court's determination that a particular statement is or is not hearsay (either under the common law or pursuant to statute) is a question of law because it does not involve the exercise of discretion, fact finding, or credibility assessments. In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) *citing* Halleck v. Coastal Building Maintenance Co., 269 Ill.App.3d 887, 891, 647 N.E.2d 618 (1995) Only after a trial court has made the legal determination that a particular statement is or is not hearsay is it vested with the discretion to admit or bar the evidence (*see* Halleck, 269 Ill.App.3d at 891, 647 N.E.2d 618) based upon relevancy, prejudice, or other legally appropriate grounds. In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348 (2nd Dist. 1999) A trial court's exercise of discretion is subject to an abuse of discretion standard of review. In re V.T., III, 306 Ill.App.3d at 819, 715 N.E.2d 314 (2nd Dist. 1999) On the other hand, questions of law are subject to a de novo standard of review. *See* Halleck, 269 Ill.App.3d at 891, 647 N.E.2d 618.

Parenting Assessment Team Reports

The issue presented in In re Kenneth J. was whether the trial court erred in admitting into evidence a "Parenting Assessment Report" (Report) as relevant and as a business record. In re Kenneth J., 352 Ill. App. 3d 967, 817 N.E.2d 940 (1st Dist. 2004) In that case *the trial court ordered a parenting assessment evaluation to be done of respondent.* In re Kenneth J., 352 Ill. App. 3d 967, 817 N.E.2d 940 (1st Dist. 2004) (Emphasis added) Respondent and her children were evaluated by Kathleen Pesek, M.Ed. This assessment was undertaken in late 1999 by members of a team from Thresholds Mothers' Project, an agency funded by the Department of Children and Family Services (DCFS), whose purpose was to assist DCFS and the juvenile court in evaluating parenting capabilities of mentally ill parents. In re Kenneth J., 352 Ill. App. 3d 967, 817 N.E.2d 940 (1st Dist. 2004) The Report, consisting of a summary and four individual evaluations, was subsequently entered into evidence at respondent's termination hearing over respondent's objection. Respondent argued that the Report was not admissible as a

business record because it was prepared for litigation. Specifically, respondent argued that it was prepared by a team of experts to assist in litigation and was *done at the request of the trial court*. As such, respondent argues that it is not a business record. Respondent also maintained that the Report contained expert opinions that were not subject to cross-examination. The respondent in In re Kenneth J. maintained that an expert opinion must be given by live testimony. The Guardian contended that the Report was properly admitted as a business record since it was similar to services plans in nature and purpose. The Guardian further contended that the current trend of authority allows opinions to be admitted as part of business records. In this regard, the Guardian maintains that the Report in fact did not contain expert opinions because none of the authors were qualified as experts. The State presented arguments similar to the Guardian's. The Appellate Court in In re Kenneth J. found that the trial court did not err in admitting the Report as a business record because the requirements for admission under section 18(4)(a) of the Juvenile Court Act were met. The In re Kenneth J. court noted that evidence was presented during the hearing that the document was prepared in the agency's regular course of business and it was clearly made contemporaneously with the events the Report recorded. With respect to respondent's argument that the Report was prepared for litigation and, therefore, is not a business record, the In re Kenneth J. court disagreed relying on In re A.B. *supra* it noted that "[s]imply because they [client service plans] are used in an adversarial-type proceeding is of no consequence." In re A.B., 308 Ill. App. 3d at 236, 719 N.E.2d 348 (1999) Accordingly, because the Report in the instant case was used in the In re Kenneth J. termination proceeding *and, in fact, was requested by the trial court itself,* does not control whether it is a business record. The In re Kenenth J. court further noted that under the Juvenile Court Act, *agencies* are required to "`assist a Circuit Court during all stages of the court proceeding in accordance with the purposes of the Juvenile Court Act of 1987 by providing full, complete, and accurate information to the court.'" In re A.B., 308 Ill. App. 3d at 236, 719 N.E.2d 348 (2nd Dist. 1999) The Court concluded that the Report served the purpose of assisting the circuit court. The Court further noted that the Report was created with family preservation and the best interests of all parties in mind. More importantly, the In re Kenneth J. court determined that the Report was "created as a direct result of the ongoing juvenile proceeding and relate[d] to a condition which [was] also directly related to that proceeding." In re M.S., 210 Ill. App. 3d 1085, 569 N.E.2d 1282 (1991) A Parenting/Bonding Assessment Report is relevant and admissible in a best interest hearing. In re C.B., 248 Ill. App. 3d 168, 618 N.E.2d 598 (1993)

Medical Opinion Reports

A record is prepared in anticipation of litigation if it is prepared with an eye toward pending and anticipated litigation of any kind. In re A.B., 308 Ill. App. 3d 227, 719 N.E.2d 348, 355 (2nd Dist. 1999) *citing* In re N.W., 293 Ill. App. 3d at 798, 688 N.E.2d 855 (1st Dist. 1997) Until In re J.Y., 2011 IL App (3d) 100727, 962 N.E.2d 1 (3rd Dist. 2011), the admissibility of Pediatric Resource Center ("PRC") letters/reports had not been directly addressed. In re J.Y. did reject the wholesale admission of PRC opinion letters/records absent proper foundation. It was subsequently determined that such PRC records were not business records and, therefore, not admissible under §2-18(4) of the

JCA. In re A.P. & J.P., 2012 IL App. 3d 110191, 965 N.E.2d 441 (3rd Dist. 2012) *aff'd* In re A.P. & J.P., 2012 IL 113875 (Ill 2012) In some cases, a medical record of a parent's chemical dependency evaluation may be admissible if generated pursuant to the underlying juvenile case or per court order. *See* In re M.S., 210 Ill. App. 3d 1085, 569 N.E.2d 1282 (2nd Dist. 1991); 705 ILCS 405/2-28.1(4) It has also been held that a doctor's written report is hearsay and is not admissible in evidence. Oard v. Dolan, 320 Ill. 371, 151 N.E. 244 (1926)

It was not error to admit the testimony of a neuroradiologist that a child's death was caused by shaken impact statement even though the evidence was based on unproven information from an attorney that the child had been shaken prior to death. Dupreee on Behalf of Estate of Hunter v. County of Cook, 287 Ill. App.3d 135, 677 N.E.2d 1303 (1st Dist. 1997)

As a general rule, an examining physician may not testify about a patient's statements of pain, subjective symptoms and history, although an exception to the hearsay rule allows a treating physician to state information obtained either from the patient or from outside sources for purposes of diagnosis and treatment. In re Wheeler, 86 Ill. App. 3d 564, 408 N.E.2d 424 (3d Dist. 1980) *citing* Jensen v. Elgin, Joliet & Eastern Ry. Co., 24 Ill.2d 383, 182 N.E.2d 211 (1962); 94 A.L.R.2d 904) It is also error to permit a non-treating/consulting physician to relate hearsay information obtained from the guardian and or third party. In re Wheeler, 227 Ill. App. 3d 746, 592 N.E.2d 274 (1st Dist. 1992)

The fact that incompetent testimony by a physician was admitted does not justify a reversal where the testimony was merely corroborative of matters established by other testimony. Hastings v. Abernathy Taxi Assoc., Inc., 16 Ill. App. 3d 671, 306 N.E.2d 498 (1st Dist.1973); Becherer v. Best, 74 Ill.App.2d 174, 219 N.E.2d 371(5th Dist.1966) *see also* In re Wheeler, 86 Ill. App. 3d 564, 408 N.E.2d 424 (3d Dist. 1980) Here one of the foster parents testified without objection about Jackie's nightmares, and several witnesses described the scars that appeared to be burn marks on the boys' bodies. Dr. Cappitelli's conclusion that the children had been abused was expressly stated to be based upon his examination. Furthermore, in a trial without a jury, error in admitting incompetent testimony will be regarded as harmless if there is sufficient competent evidence to sustain the judgment of the court. (McFail v. Braden (1960), 19 Ill.2d 108, 166 N.E.2d 46) Such, we believe, is the case here.

Disposition Reports

705 ILCS 405/2-21(2)

Recorded Conversations

Recordings of conversation not consented to by all the parties may be inadmissible under the Illinois eavesdropping statute. 720 ILCS 5/14-1 *et. seq. see also* In re C.H., 398 Ill. App. 3d 603, 925 N.E.2d 1260 (3rd Dist. 2010)

Drug Tests

In re A.J., 296 Ill. App. 3d 903, 695 N.E.2d 551 (2nd Dist. 1998) (report of positive drug test inadmissible) *citing* In re S.J., 233 Ill. App. 3d 88 at 120, 598 N.E.2d 456 (2nd Dist. 1992)

Guardian ad Litem Report

The preparation and presentation to the trial court of a guardian *ad litem* report containing recommendations appears to be contemplated by the JCA. 705 ILCS 405/17(1)

Court-Ordered Psychological Evaluations/Assessments

Mental examination reports ordered by the court pursuant to a party's motion for same would likely be admissible. *Compare* In re C.S., 376 Ill. App. 3d 114, 878 N.E.2d 110 (3rd Dist. 2007) Court can order DCFS to pay for a psychological evaluation in a juvenile case. In re Brandon E.H., 335 Ill. App. 3d 366, 780 N.E.2d 736 (4th Dist. 2002); 705 ILCS 405/2-28.1(4) Reports required by court. In re F.B., 206 Ill. App. 3d 140, 564 N.E.2d 173 (1st Dist. 1990) *compare* Ill. Sup. Ct Rule 215(a) (impartial medical expert)

State of Mind

The statements made by a child to another person expressing the child's then existing wishes (state of mind), through hearsay, are admissible only if made under conditions assuring trustworthiness. Rizzo v. Rizzo, 95 Ill. App. 3d 636, 420 N.E.2d 555, 560 (1st Dist. 1981)

Spontaneous Declaration

Must be (1) an occurrence sufficiently startling to produce an unreflecting statement with (2) little or no time to fabricate which (3) statement relates to the circumstances or occurrence. In re Marriage of Theis, 121 Ill. App. 3d 1092, 460 N.E.2d 912, 916-918 (3d Dist. 1984) *see also* In re Marriage of Dunn, 155 Ill. App. 3d 247, 508 N.E.2d 250, 253 (4th Dist. 1987)

Admissions

Hospital records containing a history of the cause of a person's injury at variance with the injured's testimony at trial are not admissible as an admission without evidence showing that the injured party made the statement and to whom. Stewart v. DuPlessis, 42 Ill. App. 2d 192, 191 N.E.2d 622 (1st Dist. 1963)

Confrontation Clause

"As a practical matter, actual treatment of hearsay in Illinois should rarely conflict with the confrontation clause's search for trustworthiness. Statements to be admitted pursuant to a hearsay exception must possess the 'indicia of reliability' and provide the

'satisfactory basis for evaluating the truth of the prior statement' mandated in Dutton v. Evans 400 U.S. 74, 91 S.Ct. 210 (1970)," M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 807.1, at 616-17 (4th ed. 1984). Confrontation clause applied to civil proceedings. In re E.P., 167 Ill. App. 3d 534, 521 N.E.2d 603 (4th Dist. 1988) The rule against hearsay evidence is founded on the necessity of opportunity of cross-examination and is a basic, not a technical rule. In re Marriage of Dunn, 155 Ill. App. 3d 247, 508 N.E.2d 250, 253 (4th Dist. 1987)

Certified Records:

Illinois Rule of Evidence 902 allows for the self-authentication of records of regularly conducted activity (i.e. business records) under Rule 803(6) provided that it does not lack trustworthiness and comports with the foundational requirements for the introduction of a business record. Ill. R. Evid. 902(11)

F. Judicial Notice:

Section 2-18(6) of the JCA provides for the taking of Judicial Notice of prior proceedings. 705 ILCS 405/2-18(6); In re McDonald, 144 Ill. App. 3d 1082, 495 N.E.2d 78 (4th Dist. 1986) However, wholesale judicial notice of an entire wardship file in a termination case is discouraged and can be inappropriate. In re J.G., 298 Ill. App. 3d 617, 699 N.E.2d 167 (4th Dist. 1998) *see also* In re Jay H., 395 Ill. App. 3d 1063, 918 N.E.2d 284 (4th Dist. 2009); In re J.G., 298 Ill. App. 3d 617, 699 N.E.2d 167 (4th Dist. 1998) (Judicial notice of an entire child's file was error) Party requesting judicial notice should try to tailor request to only relevant materials necessary to provide background or benchmark for trial court. *See generally* In re A.L., 409 Ill. App. 3d 492, 949 N.E.2d 1123 (4th Dist. 2011)

G. *Res Judicata*/Collateral Estoppel:

Evidence from prior proceedings under the JCA may be admissible in subsequent juvenile proceedings if it involves the same minor. See 705 ILCS 405/1-10; 705 ILCS 405/2-18(6); In re McDonald, 144 Ill. App. 3d 1082, 495 N.E.2d 78 (4th Dist. 1986*) but see* In re J.G., 298 Ill. App. 3d 617, 699 N.E.2d 167 (4th Dist. 1998) *see also* In re Jay H., 395 Ill. App. 3d 1063, 918 N.E.2d 284 (4th Dist. 2009) (wholesale notice of juvenile file discouraged)

Sections 2-23(3) and 2-28(3) mandate that "[a]n order depriving the parents of the custody of a child is a continuing order which is only *res judicata* as to the facts which existed at the time the order was entered and the parents have a right to petition the court for a restoration of their parental rights and change of custody until the court terminates all of their legal rights to the child." In re S.J.K., 149 Ill. App. 3d 663, 673, 500 N.E.2d 1146 (5th Dist. 1986) However, courts should be cautious in determining when to apply *res judicata* in child custody cases. In re Marriage of Weaver, 228 Ill. App. 3d 609, 616 592 N.E. 2d 643 (4th Dist. 1992)

The doctrine of *res judicata* or collateral estoppel does not apply to bar evidence that was or could have been considered at a previous termination proceeding, when a second petition to terminate parental rights is supported by evidence of activities that occurred after the first hearing. In re J'America B., 346 Ill. App. 3d 1034, 1043, 806 N.E.2d 292 (2nd Dist. 2004) However, estoppel principles do not apply as between juvenile wardship proceedings and termination proceedings inasmuch as there is difference in the burdens of proof between the proceedings. It is axiomatic that, because the burden of proof in the former proceeding is lower than in the latter proceeding, a court's ruling on a factual issue when determining whether a child is an abused or neglected minor is not binding in the proceeding to determine the fitness of the parents. In re Clarence T.B., 215 Ill. App. 3d 85, 574 N.E.2d 878, (2nd Dist. 1991) *citing* People v. Golden, 117 Ill. App. 3d 150, 155, 453 N.E.2d 15 (5th Dist. 1983); *see also* People v. Zeravich, 64 Ill. App. 2d 150, 157, 212 N.E.2d 282 (1965)

A prior conviction is admissible where the conviction was directly relevant on the question of parental fitness, and was obtained in a proceeding between the same parties involved in the custody proceeding, and was not appealed. In re McMullen, 29 Ill. App. 3d 284, 287, 331 N.E.2d 403 (1975) *see also* Smith v. Andrews, 54 Ill. App. 2d 51, 203 N.E.2d 160 (1964) (rape relevant to fitness)

H. Expert Opinions:

In order to introduce an expert's opinion, foundation must first be laid to demonstrate that the trier of fact needs the assistance of an expert opinion, as contrasted with evidentiary facts, in order to decide the issue. In re Marriage of Theis, 121 Ill. App. 3d 1092, 460 N.E.2d 912 (3rd Dist. 1984) The decision to admit expert testimony is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. Snelson v. Kamm, 204 Ill. 2d 1, 24, 787 N.E.2d 796 (2003)

Expert testimony is admissible if the proffered expert is qualified as an expert by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence. Reed v. Jackson Park Hospital Foundation, 325 Ill. App. 3d 835, 842, 758 N.E.2d 868 (1st Dist. 2001)

A trial court cannot disregard expert medical testimony that is not countervailed by other competent medical testimony or medical evidence. In re F.S., 347 Ill. App. 3d 55, 64, 806 N.E.2d 1087 (1st Dist. 2004) *citing* In re Ashely K., 212 Ill. App. 3d 849, 890, 571 N.E.2d 905 (1st Dist. 1991) *see also* In re Marcus H., 297 Ill. App. 3d 1089, 1096, 697 N.E.2d 862 (1st Dist. 1998); In re C.B., 248 Ill. App. 3d 168, 179, 618 N.E.2d 598 (1st Dist. 1993) (testimony by physician that loop marks on child were consistent belt); In re Juan M., 2012 IL App (1st) 113096, 968 N.E.2d 1184 (1st Dist. 2012)

The trial judge, like a jury, as the trier of fact is not bound to accept the opinion of an expert on an ultimate issue. Harris v. Bethlehem Steel Corp., 124 Ill. App. 3d 449, 453, 464 N.E.2d 634 (1st Dist. 1984) Where there is insufficient basis for an expert opinion, the trial court should not abdicate its duty to exercise its own discretion and

defer to the opinion of the expert. In re C.B., 248 Ill. App. 3d 168, 618 N.E.2d 598 (1st Dist. 1993) *see also* In re Yohan K., 2013 Ill. App. (1st) 123472, 993 N.E.2d 877 (1st Dist. 2013) An expert witness may not base his or her opinion upon guess, conjecture or speculation; and that where the expert's opinion is the only evidence of proximate cause he or she must base his or her opinion on a reasonable degree of medical certainty to establish the element of causation. *See e.g.*, Sommers v. American Economy Ins. Co., 8 Ill. App. 3d 450, 452—53, 289 N.E.2d 712 (2nd Dist. 1972); Susnis ex rel. Susnis v. Radfar, 317 Ill. App. 3d 817, 826-27, 739 N.E.2d 960 (1st Dist. 2000) (proximate cause medical malpractice) Experts' opinions are only as valid as the bases or reasons for them. In re Monica S., 263 Ill. App. 3d 619, 637 N.E.2d 728 (1st Dist. 1994) *citing* In re J.H., 153 Ill. App. 3d 616, 505 N.E.2d 1360 (1987); In re C.B., 248 Ill. App. 3d 168, 618 N.E.2d 598 (1st Dist. 1993) *citing* In re Violetta B., 210 Ill. App. 3d at 535, 568 N.E.2d 1345 (1991) *see also* In re Yohan K., 2013 Ill. App. (1st) 123472, 993 N.E.2d 877 (1st Dist. 2013) The trial judge is to analyze and evaluate the factual basis for the expert's opinion rather than rely on the ultimate opinion itself. In re T.D.W., 109 Ill. App. 3d 852, 855, 441 N.E.2d 155 (4th Dist. 1982) *overruled other grounds* 351 Ill. App. 3d 872, 815 N.E.2d 27 (4th Dist. 2004)

A clinical psychologist has been allowed to testify as to the parenting skills of a parent based on consultations and sessions. In re L.M., 205 Ill. App. 3d 497, 563 N.E.2d 999 (4th Dist. 1990) A trial court is, however, free to disregard psychiatric testimony and that the opinions of a psychiatrist are only as valid as the bases or reasons supporting them. In re T.D.W., 109 Ill. App. 3d 852, 855, 441 N.E.2d 155 (4th Dist. 1982) In contrast, there is no authority that has been determined pursuant to Frye v. U.S., 293 F. 1013, 54 App. D.C. 46 (D.C. Cir. 1923) that a sexual offender evaluation is generally accepted. In re K.S., 365 Ill. App. 3d 566, 850 N.E.2d 335 (2nd Dist. 2006) *see also* People v. Shanahan, 323 Ill. App. 3d 835, 753 N.E.2d 1028 (1st Dist. 2001) (Frye hearing required in juvenile proceedings) Likewise, a doctor's expert opinion regarding the defendant's honesty during interviews conducted by the doctor was held to be inadmissible because the doctor's testimony would have lent his professional credibility to the defendant's statements, unfairly affecting the credibility of the case. People v. Pertz, 242 Ill. App. 3d at 900, 610 N.E.2d at 1344-45 (2nd Dist. 1993) It is noteworthy that the Appellate Court in In re Kenneth J. did address favorably the ruling of the court in In re C.B. where the court ruled that the trial court erred in unreasonably relying on the expert's conclusion simply because it was un-contradicted. In re Kenneth J., 352 Ill. App. 3d 967, 817 N.E.2d 940 (1st Dist. 2004) *citing* In re C.B., 248 Ill. App. 3d at 178-79, 618 N.E.2d 598 (1st Dist. 1993)

I. Telephonic Appearance by Out-of-State Respondent:

See generally In re A.C., 354 Ill. App. 3d 799, 821 N.E.2d 1253 (3rd Dist. 2005) (permissible where court adequately protects Respondent's rights if telephone system is disrupted)

J. DCFS Administrative Hearings:

DCFS procedures are governed by the Illinois Administrative Procedures Act. In re Julie Q. v. DCFS, 2011 IL App (2d) 100643, 963 N.E.2d 401 (2nd Dist. 2011) ¶47 citing 5 ILCS 100/1-1 et. seq. Under the Illinois Administrative Procedures Act, in a contested hearing, the rules of evidence and privilege as applied in civil cases in the circuit court shall be followed. In re Julie Q. v. DCFS, 2011 IL App (2d) 100643, 963 N.E.2d 401 (2nd Dist. 2011) ¶47 citing 5 ILCS 100/10-40(a) *see also* Montalbano v. DCFS, 343 Ill. App. 3d 471, 797 N.E.2d 1078 (4th Dist. 2003)

K. Motion for Directed Finding:

When a motion for a directed finding is made, the trial court must determine whether the plaintiff (State) has made out a *prima facie* case and then weigh the evidence, including the evidence that favors the defendant (respondent). Orbeta v. Gomez, 315 Ill. App. 3d 687, 690, 773 N.E.2d 1287 (2000) If the trial court finds after weighing the evidence that the plaintiff's *prima facie* case has been negated, the court should grant the defendant's motion for a directed finding and enter a judgment for the defendant. Orbeta, 315 Ill. App. 3d at 690 On appeal, the reviewing court will not disturb the trial court's finding unless it is against the manifest weight of the evidence. Orbeta, 315 Ill. App. 3d at 690 A finding is against the manifest weight of the evidence if the facts clearly show that the trial court should have reached the opposite result. In re N.B., 191 Ill.2d 338, 346, 730 N.E.2d 1086 (2000)

L. MISC:

Gang Activity:

Evidence of a defendant's involvement in gang activity is regarded as prejudicial for the reason that such evidence may lead to the defendant's conviction "merely because of his membership in an organization that is unpopular." People v. Hairston, 46 Ill.2d 348, 372, 263 N.E.2d 840 (1970) As a result, "proof of membership is admissible only if there is also sufficient proof to show that membership is related to the crime charged, for example, to show common design or purpose." (46 Ill.2d at 372, 263 N.E.2d 840)

Prior Misconduct/Criminal History:

A party's prior misconduct is not admissible for the purpose of establishing his or her bad character or propensity to commit illegal or immoral acts. In re Julie Q. v. DCFS, 2011 IL App (2d) 100643, 963 N.E.2d 401 (2nd Dist. 2011) ¶50 *citing* People v. Hendricks, 137 Ill.2d 31, 52, 560 N.E.2d 611 (1990) However, at common law evidence of other crimes is admissible if relevant for any purpose other than to show a defendant's propensity to commit crimes. People v. Chapman, 2012 IL 111896, 965 N.E.2d 1119 (2012*) citing* People v. Wilson, 214 Ill.2d 127, 135-136, 824 N.E.2d 191 (2005); Ill R. Evid. 404(a) However, such evidence is admissible pursuant to 725 ILCS 5/115-7.3; 115-7.4 and 115-20. In a criminal case prior sex offenses may be admissible. 725 ILCS 5/115-7.3 In a criminal case other offenses of domestic violence may be admissible. 725

ILCS 5/115-7.4 Evidence of a prior conviction may be admissible if the probative value does not outweigh the prejudicial effect. 725 ILCS 5/115-20 Of course a conviction of a crime may be used to impeach a witness. Ill. R. Evid. 609

Credibility:

Questions of credibility are to be resolved by the trier of fact. People v. Davis, 97 Ill.2d 1, 452 N.E.2d 525 (1983); People v. Davis, 95 Ill.2d 1, 447 N.E.2d 353 (1983) As a reviewing court, we will not substitute our judgment for that of the trier of fact. People v. Williams, 75 Ill. App. 2d 50, 221 N.E.2d 48 (1966) Matters directly concerning the credibility of a party witness are not collateral. (Cleary, page 140) Facts admissible to discredit a witness as to bias, corruption or the like are not collateral. (98 C.J.S. Witnesses § 633; McCormick on Evidence Sec. 47) Moreover, credibility of evidence is distinguishable from credibility of witnesses. Miller v. Pillsbury Co., 56 Ill. App. 2d 403, 206 N.E.2d 272 (4th Dist. 1965) *aff'd* 33 Ill.2d 514, 211 N.E.2d 733 (1965)

Occasionally, a court's decision may turn on the credibility of the witnesses. It is important to note that credibility determinations are left to judges who are able to measure a witness in person and observe his or her demeanor. Lyons v. Illinois Dept. of Children and Family Services, 368 Ill. App. 3d 557, 858 N.E.2d 542 (3rd Dist. 2006) *citing* City of Chicago v. Old Colony Partners, L.P., 364 Ill. App. 3d 806, 847 N.E.2d 565 (2006) (Appellate Court bewildered by credibility finding of person not present at hearing) It is also well established that collateral impeachment is not allowed in Illinois. In re Julie Q. v. DCFS, 2011 IL App (2d) 100643, 963 N.E.2d 401 (2nd Dist. 2011) ¶50 *citing* People v. Santos, 211 Ill.2d 395, 404, 813 N.E.2d 159 (2004) In assessing credibility, the trier of fact may consider the witness' occupation as a factor bearing on credibility. People v. Winchester, 352 Ill. 237, 244, 185 N.E. 580 (1933) ("it was proper for defendant to bring out this fact on cross-examination as a matter affecting the credibility of the witness"); People v. Bond, 281 Ill. 490, 499, 118 N.E. 14 (1917) ("It is permissible to inquire of a witness as to his or her occupation. If a witness is engaged in a disreputable occupation, in justice and fairness he should not be permitted to appear before the jury as a person of high character who is engaged in a lawful and respectable occupation"); People v. Suriwka, 2 Ill. App. 3d 384, 391, 276 N.E.2d 490 (1971) ("it is proper to show a witnesses' occupation [clergyman] as reflecting on his credibility")) Narcotics addiction is an important factor in determining the credibility of a witness. People v. Mitchell, 34 Ill. App. 3d 311, 340 N.E.2d 226 (1st Dist. 1975) In fact, the law is well settled that the testimony of a narcotics addict is subject to suspicion due to the fact that habitual users of narcotics become notorious liars. People v. Strother, 53 Ill.2d 95, 290 N.E.2d 201 (1972) *citing* People v. Boyd, 17 Ill.2d 321, 326, 161 N.E.2d 311 (1959) Error will be found, however, if the record demonstrates that the trial judge based his or her determination of credibility upon preconceived notions regarding certain witnesses. People v. Kennedy, 191 Ill. App. 3d at 91, 547 N.E.2d 634 (1st Dist. 1989) ("the trial judge harbored preconceived notions regarding the veracity of the defense witnesses which led him to reject defendant's alibi defense without due consideration"), was prejudiced for or against certain witnesses, People v. Williams, 75 Ill. App. 2d at 58-59, 221 N.E.2d 48 (1966) (record did not "conclusively demonstrate that the trial judge was

prejudiced in favor of the police")), or relied on matters outside the record. People v. Kennedy, 191 Ill. App. 3d at 91, 547 N.E.2d 634 (1st Dist. 1989)

An appropriate method for testing credibility of a witness is to show that at a prior time a witness has made statements inconsistent with the trial testimony on material matters. Sommese v. Maling Brothers, Inc., 36 Ill.2d 263, 222 N.E.2d 468 (1966) *citing* Schneiderman v. Interstate Transit Lines, 401 Ill. 172, 81 N.E.2d 861 (1948) It is axiomatic that prior inconsistent statements of a witness would certainly challenge the credibility of a witness. *See generally* People v. Moses, 11 Ill.2d 84, 87, 142 N.E.2d 1 (1957)

It is not error for a trial judge, at the close of the evidence in a bench trial, to comment on the credibility of the witnesses. People v. Kennedy, 191 Ill. App. 3d 86, 91, 547 N.E.2d 634 (1st Dist. 1989) (in a bench trial "at the close of the evidence a trial judge may comment upon the credibility of the witnesses"); People v. Williams, 75 Ill. App. 2d 50, 59, 221 N.E.2d 48 (1966) ("upon such a trial a judge's comments only make explicit what would otherwise be implicit in a finding adverse to the defendant")

Competent Evidence:

It is presumed that the trial court relied only upon competent evidence in making its determination. *See* Prough, 61 Ill. App. 3d at 232, 376 N.E.2d at 1082 In a bench trial it is presumed that the trial judge has considered only competent evidence in reaching his verdict. People v. Harris, 57 Ill.2d 228, 231, 314 N.E.2d 465 (1974); People v. Pelegri, 39 Ill.2d 568, 575, 237 N.E.2d 453 (1968); People v. Robinson, 30 Ill.2d 437, 439, 197 N.E.2d 45 (1964) This presumption may be rebutted where the record affirmatively shows the contrary. People v. Wallenberg, 24 Ill.2d 350, 181 N.E.2d 143 (1962); People v. Grodkiewicz, 16 Ill.2d 192, 157 N.E.2d 16 (1959)

Judicial Investigation/Inquiry:

Where a trial court departs from its role and becomes an advocate for the State's position, no objection by opposing counsel is necessary to preserve the issue for review. In re Maher, 314 Ill. App. 3d 1088, 1097, 734 N.E.2d 95 (4th Dist. 2000) Generally, a trial judge may question witnesses to elicit truth, clarify ambiguities in a witnesses testimony, or shed light on material issues. In re N.T., 2015 IL App (1st) 142391 *citing* In re Tamesha T., 2014 IL App. (1st) 132986, 16 N.E.3d 763 (2014) *citing* Obernauf v. Haberstich, 145 Ill. App. 3d 768, 771, 496 N.E.2d 272 (2d Dist. 1986); Ill. R. Evid. 614(b) The propriety of a juvenile court's questioning is under the abuse of discretion standard. In re Tamesha T., 2014 IL App. (1st) 132986, 16 N.E.3d 763 (2014) It has been claimed that a juvenile court has an affirmative duty to ferret out information to determine what is ion a child's best interest. In re Patricia S., 222 Ill. App. 3d 585, 592, 584 N.E.2d 270 (1991) However, the trial judge must not depart from its function as a judge and may not assume the role as an advocate for either party. In re Tamesha T., 2014 IL App. (1st) 132986, 16 N.E.3d 763 (2014) The rule in Illinois and other jurisdictions is that it is improper for the trier of fact to conduct experiments or private

investigations which have the effect of producing evidence which was not introduced at trial. (*e. g.*, Harris; Wallenberg, 24 Ill.2d 350, 181 N.E.2d 143 (1962) (The defendant's alibi included a statement that there were no gas stations on a certain road. In commenting on the testimony, the trial judge stated that he knew from his own private knowledge that there were gas stations on the road in question. The conviction was reversed on the ground that the trial court had relied on private knowledge rather than facts in evidence) *see also* People v. Thunberg, 412 Ill. 565, 107 N.E.2d 843 (1952); People v. Rivers, 410 Ill. 410, 102 N.E.2d 303 (1951); People v. McMiller, 410 Ill. 338, 102 N.E.2d 128 (1951); People v. Cooper, 398 Ill. 468, 75 N.E.2d 885 (1947) (The record showed that the trial judge had not only explored the background of certain of the defendant's character witnesses by reference to other cases in which he had seen and heard them testify but that he had also conducted a private view of the scene of the crime); Annot., 95 A.L.R.2d 351 (1964); 75 Am.Jur.2d Trial sec. 991 (1974); 58 Am.Jur.2d New Trial sec. 93 (1971)); People v. Gilbert, 68 Ill.2d 252, 369 N.E.2d 849 (1977)

Judicial In-Court Observation:

While it has been recognized that it is the trial judge's function to observe the demeanor of witnesses in the courtroom, the primacy of the parent-child relationship in the area of visitation rights must also be recognized. In re Marriage of Neat, 101 Ill. App. 3d 1046, 428 N.E.2d 1093 (1st Dist. 1981) *citing* Frail v. Frail, 54 Ill. App. 3d 1013, 370 N.E.2d 303 (3rd Dist. 1977) (At the close of the hearing, the trial judge noted that "the lady here has been swaying back and forth. Her eyes are glazed. She is under medication. The (social worker) was holding her elbow." The court then denied petitioner visitation rights)

Motion to Change Custody:

It is absolute black letter law that when a hearing is held to change custody, the burden of proof is on the person who filed the petition to show, by a preponderance of the evidence that the change in custody is in the best interests of the child. In re Austin W., 214 Ill.2d at 51, 823 N.E.2d 572 (2005)

Impeachment:

The purpose of impeachment is to destroy credibility, not to prove the facts stated in the impeaching statement. People v. Bailey, 60 Ill.2d 37, 322 N.E.2d 804 (1975)

Evidence showing bias must be direct and positive rather than remote or uncertain. People v. Ware, 96 Ill. App. 3d 923, 422 N.E.2d 148 (1st Dist. 1981) *citing* People v. Nowak, 76 Ill. App. 3d 472, 395 N.E.2d 28 (1979) Financial bias is a legitimate method of impeaching the credibility of a witness. People v. Conely, 187 Ill.

App. 3d 234, 543 N.E.2d 138 (1st Dist. 1989) *citing* People v. Thompson, 75 Ill. App. 3d 901, 903, 394 N.E.2d 422, 425 (1979)

The rule for impeachment by omission is that it is permissible to use prior silence to discredit a witness' testimony if: (1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a person would normally have made the statement. People v. Conely, 187 Ill. App. 3d 234, 543 N.E.2d 138 (1st Dist. 1989) *citing* People v. McMath (1968), 104 Ill. App. 2d 302, 315, 244 N.E.2d 330, *aff'd* 45 Ill.2d 33, 256 N.E.2d 835, *cert. denied* McMath v. Illinois, 400 U.S. 846, 91 S.Ct. 92 *but see* People v. Conely, 187 Ill. App. 3d 234, 543 N.E.2d 138 (1st Dist. 1989)(use of this silence was improper) *citing* Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976) In Doyle v. Ohio, the United States Supreme Court held that use of a defendant's post-arrest silence to impeach his exculpatory testimony offered for the first time at trial is a deprivation of due process of law. Doyle v. Ohio 426 U.S. 610, 96 S.Ct. 2240 (1976) The Court reasoned that silence following recitation of the Miranda warnings may be nothing more than the arrestee's exercise of those rights and therefore, post-arrest silence is always "insolubly ambiguous." Doyle v. Ohio 426 U.S. 610, 96 S.Ct. 2240 (1976) The Court further reasoned that implicit in the Miranda warnings is the promise that silence will carry no penalty should the accused invoke that right. Doyle v. Ohio 426 U.S. 610, 96 S.Ct. 2240 (1976)

Evidence of juvenile adjudications is generally not admissible. Ill. R. Evid. 609(d) A court may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. Ill. R. Evid. 609(d) *see also* People v. Villa, 2011 IL 110777, 959 N.E.2d 634 (2011); 705 ILCS 405/5-150(1)(c)

Cross-Examination:

Illinois has long recognized that the principal safeguard against errant [expert] testimony is the opportunity of opposing counsel to cross-examine, which includes the opportunity to probe bias, partisanship or financial interest. Trower v. Jones, 121 Ill.2d 211, 520 N.E.2d 297 (1988) *citing* Sears v. Rutishauser, 102 Ill.2d 402, 407, 466 N.E.2d 210 (1984); Chicago City R. Co. v. Handy (1904), 208 Ill. 81, 69 N.E. 917) The scope of cross-examination, even with regard to bias, rests in the discretion of the trial court. People v Ware, 96 Ill. App. 3d 923, 422 N.E.2d 148 (1st Dist 1981) *citing* People v. Jones, 70 Ill.App.3d 338, 387 N.E.2d 1010 (1979). It is well established in Illinois that the decision to recall a witness for further cross-examination after the close of the adversary's case is within the sound discretion of the trial court. People v. Conely, 187 Ill. App. 3d 234, 543 N.E.2d 138 (1st Dist. 1989) *citing* (People v. Smith (1986), 149 Ill.App.3d 145, 152, 500 N.E.2d 605) The trial court's decision on this matter will not be reversed absent a clear abuse of discretion. (*Smith*, 149 Ill.App.3d at 152, 500 N.E.2d 605)

Prenatal Activity:

Evidence that a mother had a drinking problem prior to the minor's birth was admissible not to show that the mother provided an injurious environment for the fetus, nor to show that the mother's drinking caused the babies physical problems after birth; rather, it was relevant to the issue of whether the mother had a drinking problem that made her child's evironment after birth injurious. In re J.W., 289 Ill. App. 3d 613, 682 N.E.2d 300 (1st Dist. 1997)

Juvenile Delinquency History:

The Juvenile Court Act, as adopted in 1965, prohibited the admission of a juvenile adjudication against the minor "for any purpose whatever in any civil, criminal or other cause or proceeding except in subsequent proceedings under this Act concerning the same minor." People v. Villa, 2011 IL 110777, 959 N.E.2d 634 (2011) *citing* 965 Ill. Laws 2585, 2590 (§ 2-9); Ill. Rev. Stat. 1965, ch. 37, ¶ 702-9(1). In 1982, the legislature amended the Juvenile Court Act and rewrote the provision concerning the admissibility of juvenile adjudications in other proceedings. The amended statute provided, in pertinent part, that juvenile adjudications "shall be admissible *** in criminal proceedings in which anyone who has been adjudicated delinquent *** is to be a witness, and then only for purposes of impeachment and pursuant to the rules of evidence for criminal trials." Pub. Act 82-973 (eff. Sept. 8, 1982); Ill. Rev. Stat. 1983, ch. 37, ¶ 702-10(1)(c). When the legislature adopted the Juvenile Court Act of 1987 (Act), the provision restricting the admission of juvenile adjudications remained the same. Pub. Act 85-601 (eff. Jan. 1, 1988); Ill. Rev. Stat. 1987, ch. 37, ¶ 801-10(1)(c). The statute was next amended as part of the Juvenile Justice Reform Provisions of 1998. Pub. Act 90-590 (eff. Jan. 1, 1999). The amended provision is identical to the prior provision, with one addition. The amended provision states that juvenile adjudications "shall be admissible *** in criminal proceedings in which anyone who has been adjudicated delinquent *** is to be a witness including the minor or defendant if he or she testifies, and then only for purposes of impeachment and pursuant to the rules of evidence for criminal trials." (Emphasis added.) Pub. Act 90-590 (§ 2001-10) (eff. Jan. 1, 1999)

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