Unedited transcript of

Evidence Admissibility in Family Law Cases: Offers of Proof and Judicial Notice

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Speaker(s)

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>>: Hey, Mick.

>>: All right, I'm back. Julie had asked that I speak about two other topics, which we'll probably get to pretty quickly. And then we'll hopefully still have time for something else. But the other two topics are offers of proof and judicial notice. So judicial notice is something that usually is in almost - it's a fact. It's almost indisputable. The most common example that I have had that came up in a trial is - it was a contempt matter. Parties had reached a separation agreement. The judgement in divorce had entered. And, of course, the first Christmas comes around and the terms and language of the separation agreement did not say that the holiday or the vacation schedule superseded the regular weekly parenting plan. One party took the position that since it was his weekend, that he got to keep the children. So now mother took the position that Christmas Day was her time. And therefore, it was unambiguous even though it didn't say it superseded. The issue came up. There was lots of emails between the parties that referenced Christmas Day, Christmas Day, Christmas Day. A request was made for a judicial notice that Christmas Day was not only December 25 but also that December 25 of that year was a Saturday. And so the request is made for judicial notice to be made that Christmas Day that was reference in all of these emails, which, frankly, should have been done by stipulation among contested facts. But it wasn't - was that it be acknowledged and judicial notice be taken that it was a Saturday and it

was December 25. And that was done. That's about as rudimentary an example as I can give on what judicial notice is. I've also used it in - on family law cases to establish things like whether on certain days, times, dates, et cetera. So it's probably an underused tool. But I always have sort of taken the position that if it's something that a judge can take judicial notice of and it's salient to the case, I would hope that it could be in the stipulation among contested facts prior to the trial. But sometimes we do come in from multi-day trials with the stipulation being the parties names. And hopefully, they can agree upon the dates of birth of the children. The next is... Can I just comment on that because I think that...

>>: Yes.

>>: ...Judicial notice is one of the things that people sort of, like, love to, like, say. But it's so overused, so overutilized - is that anything that they sort of just want me to say out loud, they want me to, like, take judicial notice of, like, I don't need to take judicial notice of anything in the file. You also don't need to put anything - any pleading that might need to be an exhibit. They put them in the same vein. So you don't - I could get a - something where they say I want to put my complaint in as an exhibit. And I say you don't need to. It's a - it's in my file. I have it right here. It's in the dockets on the docket sheet. And they'll say, well, then can you take judicial notice of it? No, no, I don't need to take judicial notice on something that's already, like, in the file. So there's two - you know, you can take judicial notice of facts, and you can take judicial notice of a law. And they are in the rules. You should read them. And - because they can be helpful also. So I can take judicial notice of the - something within the IRC, for example. And I do that all the time. I can't, however, interpret them. So that's the difference, also - is that you - the judge cannot interpret what the application of the - I can take judicial notice that the - there is a section of the IRC that says X, but I cannot apply it, necessarily, to the case without expert testimony, right? That's my two cents.

>>: Interesting, Judge. If I could just keep you on. I'm sorry, you raise the issue, so I'm going to come back. But...

>>: Now you're going to challenge me?

>>: No, no, no, not a challenge, just, how do we do this? If I ask you to take judicial notice and our alimony statute says 30% to 35% of the difference in income, you can take judicial notice of that. But are you going to want testimony from an expert? In most cases, that come up for trial as it relates to alimony. That was entered in the tax code as changed as it relates to the includability, deductibility of that alimony to the recipient and /or payor.

>>: So I think that Judge Connolly would agree with me that we can take judicial notice of the Alimony Reform Act, we can take judicial notice of a federal statute that change this, and that we can take judicial notice of the state regulations that it is still includable and deductible. But then I would want to hear testimony from a tax expert relative to the facts of this specific case and their specific tax status, et cetera, so...

>>: Perfect.

>>: I do agree with Judge Allen. I think you can take judicial notice of the existence of the tax cut and Jobs Act. You can take judicial notice of the Alimony Reform Act as codified. And then - but without the expert testimony that's going to shed light on what the implications of the TCGA are on a potential alimony order, then - which I can't take any judicial notice, then I'm not going to be able to sort through what the position is. And quite frankly, there are some judges who would say then I have only recourse to the statute itself. And it says 30% to 35%. And that may be what's actually implied. So it's really an important piece that - when you take this particular example, for instance, that there's expert testimony there to explain why 30%, 35% percent is not the appropriate percentage to be applied under the current circumstances, the change in the tax deductibility/includability.

>>: And also you have to make - you have to put in the record exactly what statute, federal law, et cetera you want to take judicial notice of, like with specificity. So section and all of that. And you want to preserve the record that way. So please don't ask us to take judicial notice of the Trump Act. We don't know what that is. So it has to be preserved specifically on the

record.

>>: If I could also ask you one question. Judge Connelly had raised this earlier. And I think he just raised it again - or Judge Allen, maybe - as it relates to our proposed findings of fact. Judge Connelly was referencing it when we were talking about voluminous records. These are business - either bank records or text messages, et cetera. And Judge Connelly recommended to all of us practitioners that we make specific reference to those during the elimination and highlight those either by an exhibit a number or a big sample number. If something goes in as an uncontested exhibit, do you require that we have - that we elicit testimony at the trial? Or can we also just make reference to it since it's an uncontested exhibit and everybody's agreed it in for all purposes, that we reference it just specifically in our findings of fact? And if we put - rather than propounding it chock at trial, can we put it chock right into our findings? What if we haven't had it raised as part of our examination at trial?

>>: I don't see any reason why you could not just rely on the exhibit itself and point to passages within the exhibit to draw my attention to that particular point. Perhaps testimony might just underscore the point a little bit. But if that doesn't come in, it's still very much available for all purposes. So a reference in a proposed finding would certainly direct my attention to that portion of the exhibit itself. And I don't see any reason that can't be done.

>>: So the reason that I have my uncontested exhibits delivered before the trial is that I try it either, you know, immediately before, the morning of to read a lot of the uncontested exhibits that I can - so that I have a - I know what's already in. And so there's some likelihood that I may - when the trial starts, that I will have already read some of that - some of those exhibits depending on how voluminous they are - certainly, the GAL report and other exhibits that may have been subject of motions before me, et cetera, et cetera. If you want to elicit - if you're eliciting testimony on a particular subject matter, certainly - and there are exhibits that are uncontested that relate to that, certainly directing the court's attention to them and eliciting testimony of what's happening when these text messages were - went back and forth is relevant and, I think, good practice. I do not want exhibits

read to me. That is of no use whatsoever. They're in. They're in testimony. Don't put an uncontested exhibit in front of your client and say so what did you say and then what did they say, and then that's it. Like, I said, that's just wasting your time with - before the court. And I'm just going to have you move on. So - but I also think that they should be referenced in findings later.

>>: It's always tough for us as practitioners to walk that fine line of not reading from an exhibit but also making sure that it gets in. So that's my question. Thank you. Lastly, is not for proof. And really, this is a - sometimes an underused - underutilized tool, which is it's really - it's so - it's if you're the proponent of certain evidence that's being objected to, it's our way to respond to that opposing attorney's objection to the admissibility of evidence at trial. And so if you try to propound some evidence and let's say Julie objects to it and Judge Allen of Judge Connelly or any other judge is inclined to sustain the objection, you can ask the judge to make an offer of proof as to what you believe that the evidence will inform the judge of and how you go about getting it and how you - if you have a way to get it in and if the objection should not have been sustained, should have been overruled. It really serves two purposes. One is the (unintelligible) to persuade the judge not to exclude the evidence. And, two, it's also a way to preserve any potential error on the record for appellate review. So the goal is that you want to describe what the evidence would be, explain that the purpose of introducing the evidence. You need to state for the judge that the grounds for the admissibility of the evidence that you're propounding. And then if necessary, is part of an appeal, be able to sufficiently inform the appeals court of the consequences of having that evidence that you were propounding excluded. Hopefully it doesn't come up in your cases, but I would strongly suggest this. If there's something that you need and you believe that would be admissible evidence that an objection is being sustained on it, that you let the court know it. And I think the judges are often very receptive to hearing why you believe it's relevant, why you believe it would be admissible. And maybe it's something that you just haven't gotten to yet as part of your examination. And I could see Judge Allen of Judge Connelly saying, OK, then if that's where you're going with it, you're going to have to lay some more foundation or maybe not say anything at all. But they could to say at this point in time, you know,

I'm going to sustain the objection. That doesn't necessarily mean that you're precluded from trying to introduce that evidence in a different fashion. I think a lot of people sometimes hear that their objection is sustained and that's it. You're precluded from going - from trying to continue to propound it into evidence. It may just be the objection is the way that you've sought to present it. Judges aren't there necessarily to give you a roadmap and tell you lay more foundation. A lot of times they do, but there is another way to get it in. And you may or may not know, the lawyers you often hear at trial will say, well, Judge why was it objected to? That's not their job - is to tell you why it was objected to. You should know. So if the objection is sustained, unless the judge says move on, that's not coming in, that's a pretty good high sign that what you're trying to get is inadmissible for a real purpose. Even an offer of proof will get you past it. But understand, you can provide and offer proof as to why you think it would be in, and keep trying it until you're told. No, that's out. And maybe you didn't know a specific reason why it's out, but it will be out no matter what the offer of proof is.

>>: I mean, again, I think the offer proof is good practice. You know, I feel if you've reached that point where you're not going to go any further than the discussion about whether it's admissible or not, then there's no reason not to preserve that particular matter for appeal if it's going to go in that direction. My only caution would be you're - throwing multiple opportunities in every trial to make an offer of proof. And that can get a little - I think you try and find the ones that are really important and that you - you know, being familiar as everyone is when they're preparing a case with the substance of the case, that there are certain points of evidence that you want in. And if it's not in, it's sufficiently important to your case to make that offer of proof. And I've had attorneys who have requested the opportunity make an offer proof in a writing, which, one, you've got to move the process along and, two, combative sit down and read a brief offer. I always limit it to two or three pages at the most. But I do think it's a reasonable way of preserving your client's rights.

>>: That's a great point, Judge. Particularly, if you anticipate that you're going to have difficulty with a certain piece of evidence, getting it in - and I've had this before. I've never seen a judge reject a bench memo on the

issue. But specifically, one of the things I was talking about earlier, marital disqualification, the issue that I had was the admissibility of these - what were perceived to be disqualified communications around the negotiation of what was a contract. That separation (unintelligible) said right in it. This is a contract that should be construed in the Massachusetts law. The objection was raised that disqualified communications - and I immediately present to the bench. And the judge took it and considered it. I think we took a brief recess. And that was a lot. So I'm sure both - Judges, would you allow us, as you suggested, Judge Connelly, a brief memo on that issue if that were to arise?

>>: I agree with that, and I also agree with sort of picking your battles and making - you know, if it's generally - you know, if it's a document you're trying to get in that isn't that is crucial or expert testimony, obviously those things are important. But, you know, you don't want to take it to the mat on every, you know, single text message or something. But it's a - but certainly, a bench memo is, I find, it always, always acceptable route to go.

>>: Thank you, both, again.

>>: Thank you.

>>: That thought was approved for judicial motive.