

HOW DAUBERT IMPACTS TPR CASES



The Basics of Handling a Termination of Parental Rights Case from Start to Finish
October 11 – 13, 2017

Pre-Daubert vs. Post-Daubert

- **Pre** - If the *witness is qualified* to testify and the *testimony would help* the trier of fact understand the evidence or determine a fact at issue.
- **Post** - If scientific, technical, or other specialized *knowledge will assist* the trier of fact to understand the evidence or to determine a fact in issue, a *witness qualified* as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if the testimony is based* upon sufficient facts or data, *the testimony is the product* of reliable principles and methods, and the *witness has applied* the principles and methods reliably to the facts of the case.

Post-Daubert

- Distinction between expert witness and expert testimony.
- Focus now is whether the testimony will be provided is expert testimony

No need for the court to qualify a witness as an expert—just find that they are providing expert testimony.

- One witness may provide lay testimony and expert testimony

2 TYPES OF TESTIMONY

1. Lay Opinion Testimony (Wis. Stat. §907.01)

a. Witness testimony is limited to opinion or inference that are the following:

- The opinion is based on the perception of the witness—witness must have personal knowledge, not hearsay.
- The opinion testimony must be helpful to a clear understanding of the witness's testimony.

The opinion cannot be based on scientific, technical, or other specialized knowledge

b. Lay person testimony is the product of reasoning familiar in every day life; general ideas/experiences shared within the community; common generalizations and collective experiences.

EXAMPLES OF LAY OPINION

- ▶ COLLECTIVE EXPERIENCES AND COMMON GENERALIZATIONS
- ▶ APPEARANCE OF PERSON AND THINGS, IDENTITY, THE MANNER OF CONDUCT, COMPETENCY OF A PERSON, DEGREES OF LIGHT OR DARKNESS, SOUND, SIZE, WEIGHT, DISTANCE...
- ▶ OFFICER TESTIFIED ABOUT THE QUALIFICATION FOR HANDGUN PERMITS
- ▶ OFFICER TESTIFIED THAT HE WAS SPEEDING
- ▶ WITNESSED TESTIFIED THAT PERSON THAT HIT HIM WAS DRUNK
- ▶ PERSON ESTIMATES VALUE OF TV THAT WAS STOLEN
- ▶ POLICE TESTIFIED THAT PERSON WAS A LOOKOUT BECAUSE OF HIS BEHAVIOR
- ▶ OFFICER TESTIFIED AS TO WHICH BEDROOM D LIVED IN BASED ON WHAT HE OBSERVED IN THE HOUSE

EXAMPLES OF LAY TESTIMONY WITNESSES

- ▶ CASE MANAGER
 - ▶ ESPECIALLY TESTIMONY OF INITIAL ASSESSMENT SOCIAL WORKER
- ▶ NEIGHBOR
- ▶ VISITATION WORKERS
- ▶ PARENTING ASSISTANTS
- ▶ POLICE OFFICERS
- ▶ AODA GROUP FACILITATORS
- ▶ THERAPISTS??
- ▶ OTHER EXAMPLES?

2 TYPES OF TESTIMONY

EXPERT TESTIMONY (WIS. STAT. §907.02)

- a) IF SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WILL ASSIST THE TRIER OF FACT TO UNDERSTAND THE EVIDENCE OR TO DETERMINE A FACT IN ISSUE
- b) A WITNESS QUALIFIED AS AN EXPERT BY KNOWLEDGE, SKILL, EXPERIENCE, TRAINING, OR EDUCATION, MAY TESTIFY THERETO IN THE FORM OF AN OPINION OR OTHERWISE
- c) IF THE TESTIMONY IS BASED UPON SUFFICIENT FACTS OR DATA, THE TESTIMONY IS THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS
- d) AND THE WITNESS HAS APPLIED THE PRINCIPLES AND METHODS RELIABLY TO THE FACTS OF THE CASE
- e) TESTIMONY OF AN EXERT WITNESS MAY NOT BE ADMITTED IF WITNESS IS ENTITLED TO RECEIVE ANY COMPENSATION CONTINGENT ON THE OUTCOME OF ANY CLAIM OR CASE

EXPERT TESTIMONY [WIS. STAT. § 907.02]

- ▶ WHEN A **PROPER OBJECTION** IS MADE, THE TRIAL COURT **MUST** MAKE A FINDING REGARDING EXPERT TESTIMONY BY:
 - ▶ A PRETRIAL EVIDENTIARY HEARING FEATURING THE EXPERT'S TESTIMONY
 - ▶ A PRETRIAL HEARING BASED ON PAPER RECORD
 - ▶ TESTIMONY AT TRIAL, SUBJECT TO A MOTION TO STRIKE

IS IT ADMISSIBLE??

[WIS. STAT. § 901.04(1)]

➤ BEFORE YOU EVEN GET TO *DAUBERT*...

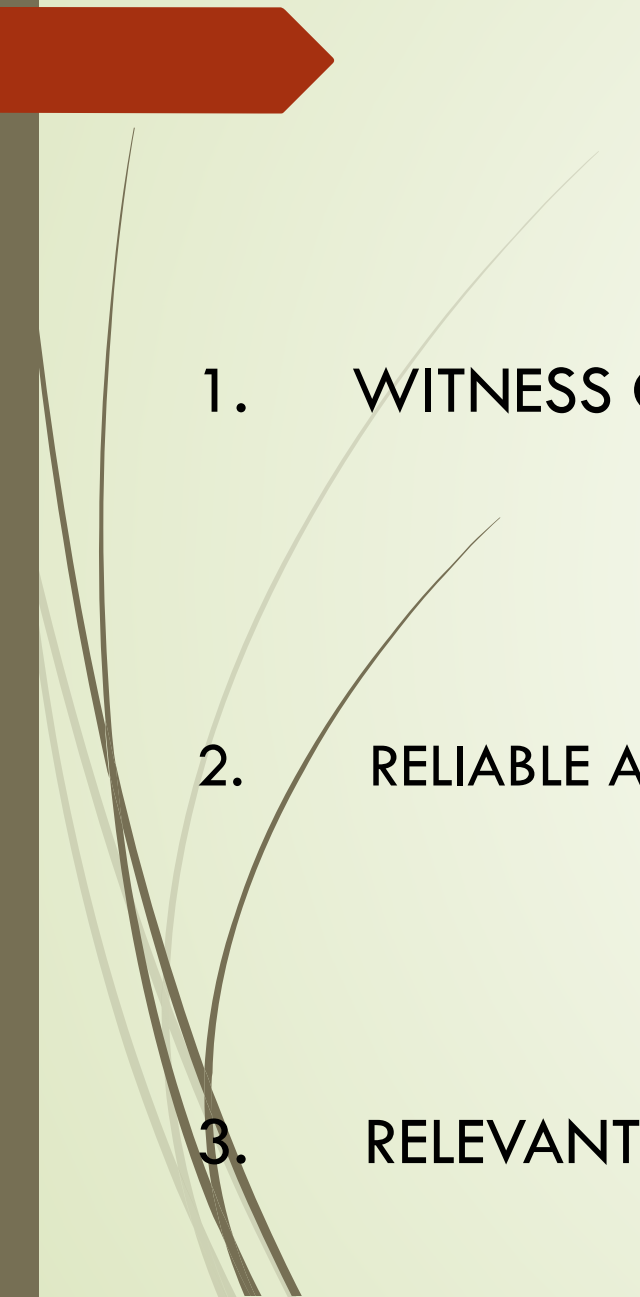
➤ QUESTIONS OF ADMISSIBILITY

➤ *GENERALLY*. PRELIMINARY QUESTIONS CONCERNING THE QUALIFICATION OF A PERSON TO BE A WITNESS, THE EXISTENCE OF A PRIVILEGE, OR THE ADMISSIBILITY OF EVIDENCE SHALL BE DETERMINED BY THE JUDGE, SUBJECT TO SUB. (2) AND SS. 971.31 (11) AND 972.11 (2). IN MAKING THE DETERMINATION THE JUDGE IS BOUND BY THE RULES OF EVIDENCE ONLY WITH RESPECT TO PRIVILEGES AND AS PROVIDED IN S. 901.05.

➤ QUESTIONS OF RELEVANCY

➤ ALTHOUGH RELEVANT, EVIDENCE MAY BE EXCLUDED IF ITS PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE, CONFUSION OF THE ISSUES, OR MISLEADING THE JURY, OR BY CONSIDERATIONS OF UNDUE DELAY, WASTE OF TIME, OR NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE.

DAUBERT TEST

- 
1. WITNESS QUALIFICATION
 2. RELIABLE AND VALID INFORMATION
 3. RELEVANT

1. QUALIFIED WITNESS

- ▶ IS THE WITNESS QUALIFIED TO DISCUSS THE SUBJECT MATTER?
- ▶ DOES THE WITNESS HAVE SPECIALIZED KNOWLEDGE, SKILL, TRAINING, EXPERIENCE, OR EDUCATION IN THIS AREA?
- ▶ WAS AN EXPERT REPORT, CV, ETC. PROVIDED?

2. RELIABLE AND VALID

- ▶ JUDGE MUST BE PERSUADED BY A PREPONDERANCE OF THE EVIDENCE THAT THE WITNESS'S PRINCIPLES AND METHODS ARE RELIABLE
- ▶ THE METHODOLOGY THE WITNESS USED TO COME UP WITH THE RESULTS
- ▶ IS THIS A RECOGNIZED METHOD (*JUNK SCIENCE*)
- ▶ RELIABILITY OF THE WITNESS'S PRINCIPLES AND METHODS AS WELL AS THEIR APPLICATION TO THE FACTS
- ▶ DID THE WITNESS APPLY THE PRINCIPLES AND METHODS IN A RELIABLE MANNER

2. RELIABLE AND VALID CONT.

- ▶ IS THE OPINION SUFFICIENTLY SUPPORTED BY FACTS AND DATA
- ▶ WHETHER THE EXPERT'S TECHNIQUE OR THEORY CAN BE OR HAVE BEEN TESTED. (CAN THE EXPERT'S THEORY BE CHALLENGED IN SOME OBJECTIVE SENSE OR IS IT A SUBJECTIVE CONCLUSORY APPROACH THAT CANNOT REASONABLY BE ASSESS FOR RELIABILITY
- ▶ WHETHER THE TECHNIQUE OR THEORY HAS BEEN SUBJECT TO PEER REVIEW AND PUBLICATION
- ▶ THE KNOWN OR POTENTIAL RATE OF ERROR OF THE TECHNIQUE OR THEORY WHEN APPLIED (HOW OFTEN HAS THE EXPERT'S EXPERIENCE BASED METHODOLOGY PRODUCED ERRONEOUS RESULTS)
- ▶ THE EXISTENCE AND MAINTENANCE OF STANDARDS AND CONTROLS

2. RELIABLE AND VALID CONT.

- ▶ WHETHER THE TECHNIQUE OR THEORY HAS BEEN GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY
- ▶ WHETHER EXPERTS ARE PROPOSING TO TESTIFY ABOUT MATTERS GROWING NATURALLY AND DIRECTLY OUT OF RESEARCH THEY HAVE CONDUCTED INDEPENDENT OF THE LITIGATION, OR WHETHER THEY HAVE DEVELOPED THEIR OPINIONS EXPRESSLY FOR PURPOSES OF TESTIFYING.
- ▶ WHETHER THE EXPERT HAS UNJUSTIFIABLY EXTRAPOLATED FROM AN ACCEPTED PREMISE TO AN UNFOUNDED CONCLUSION (EXTRAPOLATED - TO INFER (AN UNKNOWN) FROM SOMETHING THAT IS KNOWN; CONJECTURE)
- ▶ WHETHER THE EXPERT HAS ADEQUATELY ACCOUNTED FOR OBVIOUS ALTERNATIVE EXPLANATIONS
- ▶ WHETHER THE EXPERT IS BEING AS CAREFUL AS HE WOULD BE IN HIS REGULARLY PROFESSIONAL WORK OUTSIDE HIS PAID LITIGATION CONSULTING

2. RELIABLE AND VALID CONT.

- ▶ WHETHER THE FIELD OF EXPERTISE CLAIMED BY THE EXPERT IS KNOWN TO REACH RELIABLE RESULTS FOR THE TYPE OF OPINION THE EXPERT WOULD GIVE
- ▶ THE EXPERT'S TESTIMONY MUST BE GROUNDED IN AN ACCEPTED BODY OF LEARNING OR EXPERIENCE IN THE EXPERT'S FIELD, AND THE EXPERT MUST EXPLAIN HOW THE CONCLUSION IS SO GROUNDED

3. HELPFUL AND RELEVANT

- ▶ THE WITNESS HAS APPLIED THE PRINCIPLES AND METHODS RELIABLY TO THE FACTS OF THE CASE
- ▶ IS THE TESTIMONY HELPFUL TO THE TRIER OF FACT IN DETERMINING A FACT IN ISSUE OR IN UNDERSTANDING THE EVIDENCE
- ▶ MUST ASSIST THE TRIER OF FACT, NOT TELL THEM HOW TO DECIDE OR NOT TELL THEM WHAT RESULT TO REACH

PREPARING FOR THE EXPERT

- ▶ STATE SHOULD SUBMIT NAME AND BACKGROUND INFORMATION – REPORT, CV...
- ▶ DEPOSE PERSON
- ▶ THROUGH DISCOVERY GET INFORMATION ON THEIR TESTS, EXAMS, ASSESSMENTS, DATA, MANUALS...
- ▶ DON'T STIP TO THEIR QUALIFICATIONS - PROVE IT!!
- ▶ HIRE YOUR EXPERT TO NEGATE THEIR EXPERT
- ▶ LIMIT THEIR TESTIMONY
- ▶ INTRODUCE LEARNED TREATISES
 - ▶ DSM – DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS
 - ▶ AMERICAN PSYCHOLOGICAL ASSOCIATION - GUIDELINES FOR PRACTITIONERS
 - ▶ APA HAS APPROVED A VARIETY OF PRACTICE GUIDELINES AND RELATED CRITERIA AS APA POLICY IN SUCH AREAS AS MULTICULTURAL PRACTICE, CHILD CUSTODY EVALUATIONS AND TREATMENT OF GAY, LESBIAN AND BISEXUAL CLIENTS. THESE GUIDELINES ARE INTENDED TO EDUCATE PRACTITIONERS AND PROVIDE RECOMMENDATIONS ABOUT PROFESSIONAL CONDUCT.
 - ▶ MEMBER V. NONMEMBER

Appellate Case Law

Not Much Help – 0 appellate cases holding expert testimony inadmissible under Daubert

- ▶ **Siefert v. Balink**, 372 Wis.2d 525 (1/6/17)
 - ▶ 1st case heard by WI Supreme Court
 - ▶ Focus was on the reliability prong
 - ▶ In some fields, experience is the predominant, if not sole basis, for a great deal of reliable expert testimony
 - ▶ Testimony did not align with Daubert factors, but court did not err when it relied on the medical expert's expertise and knowledge as a practicing physician
 - ▶ Doctor's testimony was reliable
 1. Methodology was reliable
 2. Doctor stated the standard of other family practice doctors, not his own preferences
 3. It is the standard of care customarily provided by other physicians
 4. Doctor's testimony was based on his knowledge thru education, decades of medical work, observations in clinical experience, and his teaching and supervisory experience
 - ▶ Instead exclusion, the appropriate means of attacking "shaky but admissible" experience based testimony is by "vigorous cross examination, presentation of contrary evidence and careful instruction on the burden of proof"

Court of Appeal Cases

- ▶ **State v. Giese**, 356 Wis.2d 796 (2014)
 - ▶ Expert's opinion admissible because it was the product of reliable principles and methods based upon sufficient facts and data
 - ▶ Daubert standard is flexible but has teeth
- ▶ **State v. Smith**, 366 Wis.2d 613 (2015)
 - ▶ Child sexual assault case, no expert report provided
 - ▶ S.W. had sufficient knowledge, skill, experience, training or education to testify
 - ▶ Did not neatly fit Daubert factors, but does not require exclusion of testimony. Okay for court to consider other factors...testimony generally accepted within her discipline
- ▶ **State v. Chitwood**, 369 Wis.2d 132 (2016)
 - ▶ Since the testimony was based on specialized knowledge, trial court erred when it did not apply Daubert factors
 - ▶ COA can affirm if it will reach the correct result but for the wrong reason – not saying the error was harmless
 - ▶ Court did not err in admitting testimony under 907.02(1) – the DRE had been tested and scrutinized. Test is reliable

Unpublished COA Cases

- ▶ **Dane County Dept. of H.S. v. J.B.**, 2016AP2422, (2-16-17)
 - ▶ Court erred when allowing S.W. to give expert opinion that there was a likelihood that JB could not meet conditions in 9 months following trial
 - ▶ Harmless error
 - ▶ Overwhelming evidence to support the jury's finding to the 4th element
 - ▶ S.W. could have offered similar testimony as lay opinion – common sense opinions (JB had not complied with drug treatment for 3 years...therefore unlikely to meet condition)
- ▶ **State v. Zamora**, 2016AP1923, (9-27-17)
 - ▶ State called expert and advised court that she was the preeminent authority in the country on this issue, never failed to meet Daubert standards before, submitted transcripts of two other courts that qualified her under Daubert.
 - ▶ Defense argued that since there were no peer review of her standard, her testimony should not be considered expert testimony
 - ▶ Court, refer to the **Smith Case** a lot, said that the test is flexible, that it can rely on other factors and that lack of peer review does not outweigh the impressive credentials and experience of the witness

FOR EACH EXAMPLE...

1. ADMISSIBLE AND RELEVANT UNDER 901.04

1. DETERMINE TESTIMONY WOULD FIT UNDER LAY TESTIMONY OR EXPERT TESTIMONY.

- ▶ IF LAY TESTIMONY, DETERMINE IF THE TESTIMONY WOULD BE IDEAS AND EXPERIENCES GENERALLY SHARED WITHIN THE COMMUNITY.

- ▶ IF EXPERT TESTIMONY, WHAT QUALIFICATIONS, SPECIALIZED KNOWLEDGE, EDUCATION, EXPERIENCES, TRAINING WOULD BE NEEDED TO KNOW THIS INFORMATION.

1. PRETRIAL MOTION—WHAT DO YOU THINK EACH WITNESS TALK ABOUT SO YOU CAN PROPERLY PREPARE

EXAMPLE 1

STATE INTENDS TO CALL THE INITIAL ASSESSMENT SOCIAL WORKER. THE WORKER WILL TESTIFY THAT WHEN SHE WENT TO THE PARENT'S HOME, SHE SAW A 3 LINEAR SHAPED, RED TO BLUE BRUISES UNDERNEATH THE CHILD'S EYE. THIS PATTERN IS CONSISTENT WITH THE CHILD BEING SLAPPED WITH AN OPEN HAND.

EXAMPLE 2

STATE INTENDS TO CALL CASE MANAGER TO TESTIFY THAT BASED ON HER KNOWLEDGE AND EXPERIENCE AS A CASE MANAGER FOR TWO YEARS, THAT TANYA HAS NOT COMPLETED THE CURRENT COURT CONDITIONS AND, IN THE CASE MANAGER'S OPINION, SHE WILL NOT BE ABLE TO MEET THE COURT CONDITIONS IN THE NEXT NINE MONTHS FOLLOWING THE CONCLUSION OF THE FACT-FINDING.

EXAMPLE 3

AT TRIAL, THE CASE MANAGER IS ASKED TO READ A CASE NOTE FROM THE VISITATION WORKER THAT THE CLIENT CAME TO THE VISIT HIGH. THE VISITATION WORKER CALLED THE CASE MANAGER AND THE VISITS WERE SUSPENDED.

CAN THE VISITATION WORKER TESTIFY THAT THE CLIENT CAME TO THE VISIT HIGH?

EXAMPLE 4

STATE INTENDS TO CALL A REPRESENTATIVE FROM MAXWELL HOUSE, THE RESIDENTIAL AODA PROGRAM. THE STATE WANTS THE REPRESENTATIVE TO TESTIFY ABOUT TANYA'S PERFORMANCE IN THE PROGRAM BASED ON HER EXPERIENCE, WHAT NORMALLY HAPPENS, SPECIFICALLY REGARDING LIKELIHOOD OF RELAPSE, WHEN A PERSON DOES NOT COMPLETE AN AODA PROGRAM

EXAMPLE 5

- ▶ STATE INTENDS TO CALL A REPRESENTATIVE FROM THE LOCAL DOMESTIC VIOLENCE SHELTER. THE STATE WANTS THE WITNESS TO TALK ABOUT DOMESTIC VIOLENCE IN GENERAL, AFFECTS OF DOMESTIC VIOLENCE ON WOMEN WITH CHILDREN, THE FACT THAT DOMESTIC VIOLENCE VICTIMS ARE DRAWN TO THE SAME TYPE OF PARTNERS, ETC.

EXAMPLE 6

AT GROUNDS, THE STATE INTENDS TO CALL THE CHILD'S THERAPIST. THE THERAPIST WILL TESTIFY TO

- ▶ THE CHILD'S DIAGNOSIS, PROVIDED TO THE THERAPIST BY ANOTHER PSYCHOLOGIST
- ▶ THE CHILD'S IMPROVED BEHAVIOR SINCE BEING IN THE CURRENT FOSTER HOME
- ▶ THE DESIRES NOT TO HAVE ANY VISITS WITH THE MOTHER
- ▶ THE CHILD'S SPECIAL NEEDS

EXAMPLE 7

STATE INTENDS TO CALL THE PSYCHOLOGIST THAT COMPLETED THE PSYCHOLOGICAL EVALUATION ON TANYA. THE DOCTOR INTENDS TO TESTIFY THAT

- ▶ TANYA IS CURRENTLY NOT ABLE TO EFFECTIVELY CARE FOR HER CHILD IN AN UNSUPERVISED SETTING BASED ON HER MENTAL HEALTH ISSUES
- ▶ BASED ON HER ISSUES AND LIMITATIONS, SHE WILL NEVER BE ABLE TO EFFECTIVELY CARE FOR HER CHILD IN AN UNSUPERVISED SETTING.

EXAMPLE 7, REMIX

- ▶ WHILE THE DOCTOR IS TESTIFYING, HE IS READING/SHARING HIS REPORT COLLATERAL INFORMATION THAT HE RECEIVED FROM THE CASE MANAGER. THIS INFORMATION INCLUDES PRIOR CRIMINAL ARRESTS, A PRIOR MENTAL COMMITMENT, SEXUAL ABUSE, AND A MISCARRIAGE. IS THIS PORTION OF TESTIMONY ADMISSIBLE?

EXAMPLE 8

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- ▶ AT TRIAL THE PSYCHOLOGIST IS GIVEN A HYPOTHETICAL SITUATION TO ANSWER. IS THAT ADMISSIBLE?

EXAMPLE 9



AT TRIAL, THE CASE MANAGER IS GIVEN A HYPOTHETICAL SITUATION TO ANSWER, IS THAT ADMISSIBLE?



GOOD LUCK!!