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## **Termination of Parental Rights (TPR)**

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In **In Re Relationship of E.T.**, 808 N.E.2d 639 (Ind. 2004), the Court affirmed in part and vacated in part 787 N.E.2d 483 (Ind. Ct. App. 2003), and affirmed the judgment of the Superior Court involuntarily terminating the parents' parental rights to their two children. The Allen County Office of Family and Children (OFC) removed the children from their home after the children were found wandering from their home for the second time in a month. Approximately two years later, OFC filed a petition for involuntary termination of parental rights. The trial court's original dispositional decree required parents to enroll in a Parents and Partners program offered by SCAN, Inc. Among other things, the program included home visits and supervised visitation. The reports from these supervised visits were admitted into evidence over the parents' objection.

On review, a divided panel of the Court of Appeals affirmed determining (1) the reports of SCAN, Inc. were admissible under the business records exception to the hearsay rule; (2) admission of the reports did not violate the parents' rights under the Confrontation Clause of the United States constitution; and (3) any error in admitting the reports was harmless. In re E.T., 787 N.E.2d at 486-87. The parents did not challenge the Court of Appeals' harmless error determination.

**Reports compiled by a social services agency describing home visits and supervised visitations do not qualify as business records and thus are not admissible as an exception to the hearsay rule.** The Court held that the reports at issue in this case did not qualify as business records within the meaning of the business records exception to the hearsay rule in that: (1) not all the information contained in the reports was the result of first-hand observations; (2) the reports contained conclusory lay opinions; and (3) SCAN, Inc. did not depend on the reports to operate its business.

Indiana's business records hearsay rule exception, Ind. Evidence Rule 803(6), follows:

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data

compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The Court observed that not all the information contained in the reports was the result of first-hand observations. The Court held that the reports were not automatically transformed into business records just because staff members compiling the reports had a duty to include third-party statements concerning events they did not observe. E.T., 808 N.E.2d at 643. “To construe these statements as admissible simply because the caseworker is under a business duty to record would be to open the floodgates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy --- cross-examination and impeachment of the declarant.” Matter of Leon R.R., 397 N.E.2d 374 (N.Y. 1979).

As to the inclusion in the reports of conclusory lay opinions, the Court observed that, although Rule 803(6) accommodates the inclusion of “opinions” in business records, the courts have long recognized, at least in the context of medical or hospital records, that the expertise of the opinion giver must be established. See Fendley v. Ford, 458 N.E.2d 1167, 1171 n. 3 (Ind. Ct. App. 1984). The Court held that no less is required when the decision of the trial court to terminate parental rights could very well rest on the opinion of a person who has never been placed under oath and whose expertise and opinion have never been subjected to the crucible of cross-examination. E.T., 808 N.E.2d at 644.

The Court’s third reason for finding the reports inadmissible under the hearsay rule’s business record exception was that SCAN, Inc. did not depend on the reports to operate its business. Instead, the reports, forwarded to OFC on a monthly basis, appeared to be compiled for the sole benefit of OFC. Nothing in the record supported the view that these reports were prepared for the systematic conduct of SCAN, Inc. as a non-profit corporation. Id. at 644-45.

The Court traced the origins of the business records hearsay rule exception back to the English common law “shop book” rule. Like the common law “shop book” rule, the business records exception is “based on the fact that the circumstances of preparation assure the accuracy and reliability of the entries.” Wells v. State, 261 N.E.2d 865, 870 (Ind. 1970). The reliability of business records stems in part from the fact that “the organization depends on them to operate, from the sense that they are subject to review, audit, or internal checks, [and] from the precision engendered by the repetition....” Stahl v. State, 686 N.E.2d 89, 92 (Ind. 1997); see also Advisory Committee’s Note to Fed R. of Evid. 803(6) (observing that business records are made reliable by “systematic checking, by regularity and continuity which produce habits of precision, by actual experience of

business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation”). E.T., 808 N.E.2d at 641-43.

The Court opined that, where a company does not rely upon certain records for the performance of its functions, those records are not business records within the meaning of the exception to the hearsay rule. In essence, the basis for the business records exception is that reliability is assured because the maker of the record relied on the record in the ordinary course of business activities. Id. at 643. The “regular course” of business “must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as business.” Palmer v. Hoffman, 318 U.S. 109, 115 (1943). It is not enough to qualify under the business records exception to show that the records are made regularly; rather the court must also look to “the character of the records and their earmarks of reliability acquired from their source and origin and the nature of their compilation.” Id. at 114.

The Court stated that a survey of Indiana cases revealed that nothing similar to the reports of SCAN, Inc. had ever been included by the courts within the business records exception. Id. at 645. The Decision, at footnote 4, lists Indiana cases holding evidence admissible under the business records exception to the hearsay rule. The Court held that, unlike financial statements, inventory records, or other administrative or operational documents traditionally allowed under the business records exception, the SCAN, Inc. reports appeared to be substantive end products of a service offered by SCAN, Inc. solely for an external government agency, to become the permanent property of the agency.