Section 1115. Evidentiary Issues in Care and Protection, Child Custody, and Termination of Parental Rights Cases

(a) General Rule. Evidence in child custody and child protective cases, both parental unfitness and termination of parental rights (TPR) proceedings, is admissible according to the rules of the common law and the Massachusetts General Laws.

(b) Official/Public Records and Reports.

(1) Probation Records, Including Criminal Activity Record Information (CARI). Adult probation records, including CARI, are official records that are admissible as evidence of a parent's character. Juvenile delinquency probation records are inadmissible in care and protection cases by operation of statute.

(2) Department of Children and Families (DCF) Records and Reports.

(A) G. L. c. 119, § 51A, Reports. Section 51A reports are admissible for the limited purpose of setting the stage.

(B) G. L. c. 119, § 51B, Investigation Reports. Primary facts contained in Section 51B investigations are admissible. Statements of opinion, conclusions, and judgment contained in these reports are not admissible.

(C) DCF Action Plans, Affidavits, Foster Care Review Reports, Case Review Reports, Family Assessments, and Dictation Notes. Primary facts contained in these DCF records are admissible as official records. Assessments prepared by private entities under contract with the DCF also are admissible as official records. Statements of opinion, conclusions, and judgment contained in these reports are not admissible.

(3) Drug and Alcohol Treatment Records. Drug and alcohol treatment records are confidential under State and Federal law. Such records may, however, be released to the parties by judicial order after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm, which specifically includes incidents of suspected child abuse and neglect.

(4) School Records. School records generally are admissible as official records, with the exception of records of clinical history and evaluations of students with special needs.

(5) Police Reports. Police reports regarding police responses are admissible as business records insofar as the report is a record of the police officers' firsthand observations. Opinions and evaluations are not admissible. Hearsay statements within the report generally are not admissible unless the statement satisfies another hearsay exception.

(c) Written Court Reports.

(1) Court Investigation Reports. Written reports of court-appointed investigators are admissible.

(2) Guardian Ad Litem (GAL) Reports. Written guardian ad litem reports may properly be admitted into evidence and are entitled to such weight as the court sees fit to give them.

(3) Court-Appointed Special Advocate (CASA) Reports. Written CASA reports may properly be admitted into evidence and are entitled to such weight as the court sees fit to give them.

(4) Court-Ordered Psychiatric, Psychological, and Court Clinic Evaluation Reports. Written psychiatric, psychological, and Court Clinic evaluation reports generally are not admissible in evidence.

(d) Children's Out-of-Court Statements.

(1) Statements Not Related to Sexual Abuse. Out-of-court statements made by children that are not related to sexual abuse are admissible if they fall within an established exception to the hearsay rule or are offered for a nonhearsay purpose.

(2) Statements Related to Sexual Abuse.

(A) Cases Involving TPR. An out-of-court statement of a child under the age of ten describing any act of sexual contact performed on or with the child, the circumstances under which it occurred, or the identity of the perpetrator offered in a TPR trial is admissible, provided that the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, that the person to whom the statement was made or who heard the child make the statement testifies, that the court finds that the child is "unavailable" as a witness, and that the court finds the statement to be reliable.

(B) Custody Proceedings Not Involving TPR. In care and protection cases and other child custody proceedings that do not involve termination of parental rights, a child's hearsay statement that describes any act of sexual contact performed on or with the child or the circumstances under which it occurred, or that identifies the perpetrator, is admissible, provided that the person to whom the statement was made or who heard the statement testifies, that the judge finds that the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable effort, and that the judge finds the statement to be reliable.

(e) Testimony.

(1) Children. Children may testify in care and protection and TPR proceedings if the court determines, after consultation with the child's attorney, that the child is competent and willing to do so. Children may testify in child custody proceedings in probate court at the discretion of the judge.

(2) Foster/Preadoptive Parents. Foster parents and preadoptive parents have the right to attend care and protection trials and to be heard, subject to the usual evidentiary rules, but are not parties to care and protection or TPR proceedings.

(3) Parents Called by Adverse Party. A parent may be called as a witness by an opposing party. An adverse party who calls the parent as a witness may question the parent witness according to the rules of cross-examination.

(4) Social Workers. A licensed social worker or social worker employed by a government agency may be called as a witness by any party. An adverse party who calls the social worker may question the social worker according to the rules of cross-examination. Regarding communications between a social worker and a client that are privileged under state law, the social worker may testify to any such communication that bears significantly on the client's ability to provide suitable care or custody if the court first determines (1) that the social worker has such evidence, (2) that it is more important to the welfare of the child that the communication be disclosed than that the social worker–client relationship be preserved, and, if a TPR case, (3) that the patient has been informed that any such disclosure would not be privileged.

(5) Psychotherapists. Psychotherapists may be called as witnesses in care and protection and TPR proceedings regarding disclosures by a patient that bear significantly on the patient's ability to provide suitable care and custody if the patient attempts to exercise the privilege at trial and the court then determines (1) that the psychotherapist has such evidence, (2) that it is more important to the welfare of the child that the information be disclosed than that the psychotherapist-patient relationship be preserved, and, if a TPR case, (3) that the patient has been informed that any such disclosure would not be privileged.

(6) Court-Appointed Investigators and G. L. c. 119, § 51B, Investigators. Court-appointed investigators appointed pursuant to G. L. c. 119, § 24, and investigators assigned to investigate G. L. c. 119, § 51A reports pursuant to G. L. c. 119, § 51B, may be called as witnesses by any party for examination regarding the information contained in any such investigation report.

(7) Experts. Opinion testimony by persons qualified by the court as experts is admissible if it is based on scientific, technical, or specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact at issue.

(f) Other Evidence.

(1) Adoption Plans. Adoption plans prepared by the DCF are admissible.

(2) Bonding and Attachment Studies. Written reports of bonding and attachment studies are inadmissible. Evidence relevant to any such bonding and attachment study may be the subject of testimony from the evaluator.

(3) Judicial Findings from Prior Proceedings. Judicial findings from prior proceedings may be admissible if the findings are relevant, timely and material.

(g) Adverse Inference from a Party's Failure to Appear. The court may draw an adverse inference against a party who has received notice and fails to appear, without good cause, at trial, as long as a case adverse to the nontestifying party has been presented.

NOTE

Subsection (a). This subsection is derived from G. L. c. 119, § 21A. Cross-Reference: Section 103, Rulings on Evidence, Objections, and Offers of Proof.

Subsection (b). This subsection is derived from Commonwealth v. Slavski, 245 Mass. 405, 415 (1923).

Subsection (b)(1). This subsection is derived from Adoption of Irwin, 28 Mass. App. Ct. 41, 43 (1989), and G. L. c. 276, § 100. Probation records, including CARI, are records of the court system and are by statute available for use by the courts of the Commonwealth. Adoption of Irwin, 28 Mass. App. Ct. at 43. It is unnecessary to qualify probation records as business records because they are admissible as official records. Id. While not necessarily conclusive, a parent's criminal record, as well as observations of his or her criminal conduct, are relevant as to the issue of parental fitness. Care & Protection of Frank, 409 Mass. 492, 495 (1991). "An adjudication of any child as a delinquent child . . . or any disposition thereunder . . . shall not be received in evidence or used against such child for any purpose in any proceedings in any court except in subsequent delinquency or criminal proceedings against the same person." G. L. c. 119, § 60.

Cross-Reference: Note to Section 405(b), Methods of Proving Character: By Specific Instances of Conduct.

Subsection (b)(2)(A). A "Section 51A report" is a report filed with the DCF that "details suspected child abuse or neglect." G. L. c. 119, § 21. Such reports are admissible to "set the stage," i.e., to explain the reasons for the filing of the petition. Care & Protection of Inga, 36 Mass. App. Ct. 660, 663–664 (1994), quoting Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990). But see Adoption of Lorna, 46 Mass. App. Ct. 134, 141-142 (1999) (Lorna's injuries, which were the subject of an unsupported 1992 51A report, taken in context with documented neglect in 1994 and abuse in 1995, establish a pattern of neglect and abuse probative of mother's current unfitness). Competent evidence regarding an incident that was the subject of an unsubstantiated Section 51A report may be admitted at trial against a parent as long as the evidence is "sufficient to convey to a high degree of probability that the proposition is true." Adoption of Rhona I, 57 Mass. App. Ct. 479, 484 (2003), quoting Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997).

Subsection (b)(2)(B). This subsection is derived from Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990), and Adoption of George, 27 Mass. App. Ct. 265, 272 (1994). Section 51B reports are required government documents and "may be considered for statements of fact, e.g., that there was screaming or beating or no food." Custody of Michel, 28 Mass. App. Ct. at 267. Hearsay statements contained in these reports may only be admitted for the truth asserted therein if they are statements of primary fact, or if they satisfy some other established exception to the hearsay rule. Adoption of George, 27 Mass. App. Ct. at 272. "'Primary fact' is not a self-defining phrase, but at least connotes facts which can be recorded without recourse to discretion and judgment, e.g., the fire alarm sounded at 10:30 p.m.; it was raining lightly at the time of the accident; the child was placed with Mr. and Mrs. Doe . . . ." Id. at 274. The exclusion of expressions of opinion, evaluation, or judgment from official records is a "practical working rule" that has exceptions. Id. at 272. "More leeway" relative to admissibility may be given to material that "smacks of opinion" if the source of the opinion is available for cross-examination. Id. at 274. Adoption of George does not address whether statements of identified non-mandated reporters contained in 51B Reports are admissible subject to redaction.

Subsection (b)(2)(C). This subsection is derived from Adoption of George, 27 Mass. App. Ct. 265 (1994); Care & Protection of Zita, 455 Mass. 272, 275 n.6, 279–280 (2009) (petitions in care and protection cases are not evidence, compared to DCF affidavits, which are official records; it is best practice to submit a sworn affidavit of a social worker in support of a request for emergency removal of a child, together with a petition); and Care & Protection of Bruce, 44 Mass. App. Ct. 758, 766 (1998) (DCF affidavits are reports of agents of DCF and are admissible as official records if the author is available for cross-examination). Statements of primary fact contained in these DCF documents, including affidavits supporting care and

protection petitions, are admissible under the official records exception to the hearsay rule, see Section 803(8), after redaction of expressions of opinion, evaluation, or judgment. Adoption of George, 27 Mass. App. Ct. at 271, 274–275. Service plans also are admissible under a statutory exception to the hearsay rule contained in G. L. c. 119, § 29. See the note for Subsection (b)(2)(B) above regarding the meaning of "primary fact," as well as regarding the extra "leeway" given to the admissibility of expressions of opinion, evaluation, or judgment included in these records. A private entity's assessment or case review performed under a contract with DCF is admissible in the same manner as an official record prepared by DCF because the private entity was required to conduct the assessment as an agent of DCF. Adoption of Vidal, 56 Mass. App. Ct. 916, 916 (2002). DCF documents formerly called Service Plans are now referred to as Action Plans. DCF social worker "dictation notes" required by regulation are official records and are admissible where they are limited to a statement of facts and the opposing party has a right to cross-examination of the author upon request or where another exception to the hearsay rule applies. Adoption of Luc, 94 Mass. App. Ct. 565, 566-570 (2018) (direct testimony of DCF employee who died before cross-examination properly struck from record, but primary facts in employee's notes were admissible as a declaration of a deceased person under G.L. c. 233, § 65) (Further Appellate Review Application Pending).

Because DCF social workers no longer perform G. L. c. 119, § 21A investigations, former Rule (b)(2)(D) and its Note have been removed from Section 1115 of the Guide.

Subsection (b)(3). This subsection is derived from G. L. c. 111B, § 11 (alcoholism treatment records); G. L. c. 111E, § 18 (drug rehabilitation treatment records); and 42 U.S.C. § 290dd-2 (substance abuse treatment records). Federal regulations require that, before issuing an order for release of these records to one or more parties, the court must determine that "disclosure [of the information] is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties [(among other things)]." 42 C.F.R. § 2.63(a)(1)–(3). Orders of appointment issued to court-appointed investigators do not satisfy the requirements of State and Federal law and therefore do not permit the court investigator to obtain drug and alcohol treatment records where the specific factual determination necessary for release of these records has not been made by the appointing judge.

Cross-Reference: Introductory Note (f)(5) to Article V, Privileges and Disqualifications.

Subsection (b)(4). This subsection is derived from Introductory Note (f)(2) and (f)(3) to Article V, Privileges and Disqualifications. There is no privilege preventing the introduction of relevant school records in evidence at trial, and most school records are admissible as official records. See Introductory Note (f)(2) to Article V, Privileges and Disqualifications (student records). Records of the clinical history and evaluations of students with special needs, created or maintained in accordance with G. L. c. 71B, are confidential but not privileged. G. L. c. 71B, § 3. See Introductory Note (f)(3) (special needs student records) and Introductory Note (d) (confidentiality versus privilege) to Article V, Privileges and Disqualifications.

Subsection (b)(5). This subsection is derived from G. L. c. 233, § 78. See Adoption of Paula, 420 Mass. 716, 727 (1995); Julian v. Randazzo, 380 Mass. 391 (1980). Besides the ordinary business records hearsay exception, there is an additional business records exception permitting second-level hearsay where the proponent of a hearsay statement shows "that all persons in the chain of communication, from the observer to the preparer, reported the information as a matter of business duty or business routine." Irwin v. Town of Ware, 392 Mass. 745, 749 (1984), quoting Wingate v. Emery Air Freight Corp., 385 Mass. 402, 406 (1982).

Cross-Reference: Section 803(6)(A), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Entry, Writing, or Record Made in Regular Course of Business.

Subsection (c). This subsection is derived from G. L. c. 119, §§ 21A and 24.

Subsection (c)(1). By the express terms of G. L. c. 119, § 24, investigators' reports are admissible and become part of the record in care and protection cases. Care & Protection of Zita, 455 Mass. 272, 281 (2009), citing Custody of Michel, 28 Mass. App. Ct. 260, 265 (1990). As set forth in G. L. c. 119, § 21A,

"[t]he person reporting may be called as a witness by any party for examination as to the statements made in the report." Hearsay statements, including multilevel hearsay, contained within the reports, including opinions, clinical observations, and recommendations, are admissible probatively as long as the declarant is identifiable and the parties have a fair opportunity to rebut the statements of both the investigator and his or her sources through cross-examination or other means. Id.; Gilmore v. Gilmore, 369 Mass. 598, 604–605 (1976); Adoption of Astrid, 45 Mass. App. Ct. 538, 546 (1998). This principle applies to hearsay statements of children against their parents that are contained in investigators' reports. Care & Protection of Inga, 36 Mass. App. Ct. 660, 664 (1994). "When a judge appoints an investigator under G. L. c. 119, § 24, it signifies the judge's expectation that the [investigator] has the training and specialized knowledge which will enable the [investigator] to make and report acute observations about the interactions of family members, and their respective mental conditions." Custody of Michel, 28 Mass. App. Ct. at 266. Opinions of the court investigator as to the credibility of another witness (including the credibility of any source) are not admissible. Commonwealth v. Triplett, 398 Mass. 561, 567 (1986) ("[I]t is a fundamental principle that 'a witness cannot be asked to assess the credibility of his testimony or that of other witnesses'" [citation omitted].).

Subsection (c)(2). Guardian ad litem (GAL) reports are analogous to court investigator reports in that hearsay, including multilevel hearsay, generally is admissible. See the Note to Subsection (c)(1) above and Adoption of Sean, 36 Mass. App. Ct. 261, 263 (1994). Guardian ad litem reports containing hearsay information are admissible, including multilevel hearsay and clinical evaluations, if the guardian ad litem is available to testify at trial and the source of the material is sufficiently identified so that the affected party has an opportunity to rebut any adverse or erroneous material contained therein. Adoption of Sean, 36 Mass. App. Ct. at 264. Adoption of Sean leaves open the question whether expert opinions contained in GAL reports are admissible. Id. It is "sound practice" for the judge to give notice to the parties if the judge intends to use the report. See Duro v. Duro, 392 Mass. 574, 575 (1984) (like guardian ad litem reports, reports of probation officers in the Probate and Family Court made pursuant to G. L. c. 276, § 85B must be in writing and subject to cross-examination).

Subsection (c)(3). A CASA is analogous to a guardian ad litem. Adoption of Georgia, 433 Mass. 62, 68 (2000). See the Note to Subsection (c)(2) above. For a CASA report to be admitted into evidence, including reports containing multilevel hearsay, the CASA must be available to testify at trial, and the sources of the information contained in the report must be sufficiently identified so that the affected party has an opportunity to rebut. Id. at 68–69. A CASA is not automatically qualified to file a report containing the CASA's expert opinions or to testify as an expert simply by being a CASA. Rather, when an objection is made regarding a CASA's qualifications to render an expert opinion, the court must determine whether the CASA is qualified to do so. Id. at 68 n.6. Expressions of opinion of mental health professionals (including the CASA if so qualified) in a CASA report are not admissible, but factual observations and information contained in clinical evaluations may be admissible and entitled to whatever weight the judge may give them. Adoption of Sean, 36 Mass. App. Ct. 261, 264 (1994).

Subsection (c)(4). Written court-ordered psychiatric evaluation reports are inadmissible. Adoption of Seth, 29 Mass. App. Ct. 343, 351–352 (1990). Although those who conduct psychological evaluations, including psychological evaluations that are court ordered, may testify in child custody, care and protection, and TPR proceedings (see Subsections [e][4], [5], and [6] below), there is no exception to the hearsay rule pertaining to written reports of such evaluations.

Cross-Reference: Section 503(d)(2), Psychotherapist-Patient Privilege: Exceptions: Court-Ordered Psychiatric Exam; Section 503(d)(5), Psychotherapist-Patient Privilege: Exceptions: Child Custody and Adoption Cases.

Subsection (d)(1). This subsection is derived from Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990) and Custody of Jennifer, 25 Mass. App. Ct. 241, 243 (1988). Children's out-of-court statements are not admissible for the truth of the matter asserted, but expressed preferences regarding where they want to live, are admissible insofar as the statements reflect the mental state of the children at the time. A child's

state of mind is often a material issue in child custody cases. Id. A child's out-of-court hearsay statement made to an expert witness may also be admissible, not for the truth of the matter asserted, but rather to indicate the basis of an expert opinion given by the witness. Id. Similarly, a child's statement may be admissible when used for diagnostic or treatment purposes. Id. at 268. See Mass. G. Evid. § 705.

A child's extrajudicial statement concerning a parent is not admissible as an admission by a party-opponent against that parent. Care & Protection of Sophie, 449 Mass. 100, 110 (2007); Mass. G. Evid. § 801(d)(2).

With respect to a child's privileged communications to a social worker or psychotherapist, exceptions exist that permit such statements to be admitted in certain circumstances. See Mass. G. Evid. §§ 503(d), 507(c). Children's out-of-court statements to court-appointed investigators are admissible where there is "an opportunity to refute the investigator and the investigator's sources through cross-examination and other means." Custody of Michel, 28 Mass. App. Ct. at 266. The child's parent must be allowed the opportunity to effectively rebut such hearsay when the child does not testify and the trial judge has no other means by which to assess the credibility and accuracy of the child's statements. Id.

Subsection (d)(2). This subsection is derived from G. L. c. 233, §§ 82 and 83. Cross-Reference: Section 503(d)(5), Psychotherapist-Patient Privilege: Exceptions: Child Custody and Adoption Cases; Section 803(24), Hearsay Exceptions; Availability of Declarant Immaterial: Out-of-Court Statement of Child Describing Sexual Contact in Proceeding to Place Child in Foster Care.

Subsection (d)(2)(A). This subsection is derived from G. L. c. 233, § 82. "Child under the age of ten" refers to the age of the child at the time the out-of-court statements were made, not the age of the child at the time of trial. Adoption of Daisy, 460 Mass. 72, 78–79 (2011). The following procedures must be utilized in Section 82 proceedings: (1) the DCF must give prior notice to the parent of their intention to introduce a child's out-of-court statements regarding alleged sexual abuse; (2) the DCF must show by more than a mere preponderance of the evidence that a compelling need exists for use of such a procedure; (3) any separate hearing regarding the reliability of the child's out-of-court statements must be on the record; (4) specific findings must be issued that present the basis upon which the reliability of the statements was determined; and (5) independently admitted evidence must be presented that corroborates the out-of-court statements. See Mass. G. Evid. § 804(b)(9); Adoption of Quentin, 424 Mass. 882, 892 (1997); Adoption of Olivette, 79 Mass. App. Ct. 141, 147 (2011), quoting Adoption of Arnold, 50 Mass. App. Ct. 743, 752 (2001).

Cross-Reference: Section 804(b)(9), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Out-of-Court Statement of Child Describing Sexual Contact in Civil Proceeding, Including Termination of Parental Rights.

Subsection (d)(2)(B). This subsection is derived from G. L. c. 233, § 83. See Section 803(24), Hearsay Exceptions; Availability of Declarant Immaterial: Out-of-Court Statement of Child Describing Sexual Contact in Proceeding to Place Child in Foster Care. Where a care and protection case is joined with a TPR proceeding, the hearing should comply with the stricter requirements of G. L. c. 233, § 82. Adoption of Tina, 45 Mass. App. Ct. 727, 733 (1998).

Subsection (e)(1). This subsection is derived from G. L. c. 119, § 21A, and G. L. c. 233, § 20. Every person is competent to be a witness, unless excepted by statute or common law. This includes children of all ages who (1) have the ability to observe, remember, and give expression to that which they have seen, heard, or experienced and (2) have an understanding sufficient to comprehend the difference between truth and falsehood, their duty to tell the truth, that lying is wrong, and that failure to tell the truth will result in punishment. Mass. G. Evid. § 601(b). In care and protection and termination of parental rights proceedings, "[evidence] may include the testimony of the child if the court determines that the child is competent *and willing*, after consultation with counsel, if any, to testify." G. L. c. 119, § 21A (emphasis supplied). See Abbot v. Virusso, 68 Mass. App. Ct. 326, 337-338 (2007) (in a custody proceeding acknowledging discretion and discussing issues concerning in-camera interviews with children). Judges must be sensitive to a child's

limited stamina and have considerable latitude to devise procedures and modify the usual rules of trial to accommodate child and other witnesses with special needs. See Commonwealth v. Brusgulis, 398 Mass. 325, 332 (1986).

Cross Reference: Section 601, Competency.

Subsection (e)(2). This subsection is derived from G. L. c. 119, § 29D. Foster and preadoptive parents have a statutory right to testify at trial. Such testimony must be taken as any other witness's, under oath and subject to cross-examination. Adoption of Sherry, 435 Mass. 331, 337 (2001).

Subsection (e)(3). This subsection is derived from G. L. c. 233, § 22. Absent a valid assertion of a Fifth Amendment privilege, a parent may be required to testify in care and protection and TPR proceedings. Adoption of Salvatore, 57 Mass. App. Ct. 929, 930 (2003). The burden is on the party asserting the Fifth Amendment privilege to establish its existence. Commonwealth v. Brennan, 386 Mass. 772, 780 (1982). Negative inferences may be drawn against a party who asserts the privilege. See Care & Protection of Sharlene, 445 Mass. 756, 767 (2006). See also Mass. G. Evid. § 511. Whether to draw the adverse inference is a matter within the discretion of the judge, who should take into consideration all of the circumstances. See Adoption of Talik, 92 Mass. App. Ct. 367, 372 (2017).

Subsection (e)(4). This subsection is derived from G. L. c. 112, §§ 135, 135A, and 135B.

General Laws c. 112, § 135A, requires that from the initial phase of the professional relationship, a licensed social worker or social worker employed by a government agency shall inform the client about the confidential nature of their communications and not disclose any information acquired or revealed from the client except, inter alia, in the initiation of, or to give testimony in connection with, a proceeding under G. L. c. 119, § 24, to commit a child facing abuse or neglect to the custody of the department or agency, or to transfer custody by way of an emergency order, or to dispense with the need for consent to adoption of the child in the care or custody of the department or agency. G.L.c. 112, §135A(e).

In any court proceeding or preliminary proceeding thereto, General Laws c. 112, § 135B, creates a privilege enabling a client to refuse to disclose, or prevent a witness from disclosing, any communication between the client and the social worker relative to the diagnosis or treatment of the client's mental or emotional condition. The exception to the privilege in this subsection is taken nearly verbatim from G. L. c. 112, § 135B(e), (f) and (g).

Cross-Reference: Section 104, Preliminary Questions; Section 507, Social Worker–Client Privilege.

Subsection (e)(5). This subsection is derived from G. L. c. 233, § 20B. See Section 503(a) for definitions of "psychotherapist," "patient," and "communications," and Section 503(b) and (d) for descriptions of, and exceptions to, the privilege. See also Commonwealth v. Lamb, 365 Mass. 265, 270 (1974). Because the privilege is not self-executing, the patient must attempt to assert it during the trial. Adoption of Carla, 416 Mass. 510, 515 (1993).

Cross-Reference: Introductory Note to Article V, Privileges and Disqualifications; Section 503, Psychotherapist-Patient Privilege.

Subsection (e)(6). This subsection is derived from G. L. c. 119, § 21A.

Subsection (e)(7). This subsection is modeled after Sections 702, 703, and 705. Massachusetts law, unlike Federal law, allows expert opinion on the ultimate issue. Mass. G. Evid. § 704. Expert testimony that simply "vouches" for the credibility of other witnesses, opines as to whether a child told the truth, makes legal conclusions, or renders an opinion within the common understanding of the trier of fact is inadmissible. See Mass. G. Evid. § 704. See also Care & Protection of Rebecca, 419 Mass. 67, 83 (1994); Adoption of Olivette, 79 Mass. App. Ct. 141, 152 (2011).

Cross-Reference: Section 702, Testimony by Expert Witnesses.

Subsection (f)(1). This subsection is derived from G. L. c. 210, § 3(c). Section 3(c) requires the court to consider the adoption plan by the DCF, which plan need not be in writing but may be presented to the court through testimony. Adoption of Stuart, 39 Mass. App. Ct. 380, 393–394 (1995). It is not necessary that the plan be fully developed or that the plan identify prospective adoptive parents, but it must have sufficient content and substance to permit the court to meaningfully evaluate and consider the suitability of the DCF adoption plan. Adoption of Lars, 46 Mass. App. Ct. 30, 31 (1998).

Subsection (f)(2). Bonding and attachment evaluators may testify in the same manner as any other witness. Expert opinions held by such evaluators are admissible subject to Sections 702, Testimony by Expert Witnesses, and 703, Bases of Opinion Testimony by Experts.

Cross-Reference: Section 201, Judicial Notice of Adjudicative Facts; Section 803(22), Hearsay Exceptions; Availability of Declarant Immaterial: Judgment of a Previous Conviction.

Subsection (f)(3). Findings of fact in a prior care and protection or termination of parental rights proceeding that are not "out of date, or the product of a proceeding where the parent may not have a compelling incentive to litigate," may be admitted in a subsequent proceeding to the extent that they are both relevant and material. Adoption of Paula, 420 Mass. 716, 721 (1995); Adoption of Darla, 56 Mass. App. Ct. 519, 520-521 (2002).The parties and the judge are not bound by the prior findings, which carry no special evidentiary weight, and evidence may be offered by any party as to any of the issues covered by the prior findings, either to support or contradict them. Id. at 722. Where a prior proceeding is on appeal, the better practice is for the judge to decline to admit the prior findings in the subsequent proceeding. Adoption of Simone, 427 Mass. 34, 43 (1998), citing Adoption of Paula, 420 Mass. at 722. See also Care and Protection of Zita, 455 Mass. 272, 283 (2009) (judge may not judicially notice facts or evidence brought out in a prior hearing or trial).

Subsection (g). This subsection is derived from Adoption of Talik, 92 Mass. App. Ct. 367, 370–373 (2017). Whether to draw the adverse inference is a matter within the discretion of the judge, who should take into consideration all of the circumstances. Id. at 372. No adverse inference may be drawn "unless a case against the interests of the affected party is presented, so that failure of the party to testify would be a fair subject of comment." Id., citing Custody of Two Minors, 396 Mass. 610, 616 (1986).