

ESSENTIALS IN TRIAL EVIDENCE

ATTORNEY FOR CHILD PROGRAM

Presented By: Barbara J. King

1. **Discovery:** The basics, the techniques and Special Proceedings

- a. Remember Family Court proceedings are Special Proceedings.
- b. Discovery is by permission of court or consent of parties
- c. Know what you need to prove your case
- d. Tip: address as early in proceedings as possible on the record.
- e. Common tools CPLR 3102:
 - i. Witness Demands CPLR 3101(d)(1)
 - ii. Expert Witness Demands
 - iii. Records: school; medical; therapeutic
 - iv. Need for HIPAA's
 - v. Documents including social media CPLR 3120
 - vi. Interrogatories CPLR 3130
 - vii. Notice to Admit CPLR 3123
 - viii. Physical/Mental exam CPLR 3121
- f. Objections to discovery CPLR 3122
- g. Protective Orders CPLR 3103
- h. Certified Business Records CPLR 3122-a
- i. CPLR Section 4540-a New Authentication rule
- j. Effect of refusal to comply: compel; preclude; determination; dismissal.
- k. Discovery produced is presumed admissible at trial.

2. **Subpoenas:** When are they needed and how are they used. CPLR 2301
Authority. With and without Court Order.

- a. Trial/Witness Subpoenas
- b. Duces Tecum/Document Subpoenas
- c. Judicial Subpoenas
 - i. Needed for Hospitals; municipal corps; state CPLR Sec. 2307 and Uniform Court Rule 202.7. Motion practice.
 - ii. Note Directed Service requirements CPLR Sec. 2306
- d. Service, costs and fees CPLR 2303 and 2303-a.
- e. Return at Court vs. Return at office and counsel obligations CPLR 2305.
- f. **Sample Subpoena and motion attached**

3. **Preparing Witnesses:** Tips and Techniques.

- a. Do close and aggressive questioning
- b. Find all the skeletons
- c. Do sample Direct and Cross
- d. Explain procedure of objections
- e. Explain Re-direct
- f. Warn them that other counsel may call them also.
- g. Simplify language; moderate tone; warn them not to "fence"
- h. Get bad stuff up front and address – "own it".
- i. Have some positives to say; acknowledgments
- j. Watch Body Language
- k. Watch the Judge
- l. Judge will watch you

4. **Introducing Records:** Getting documents into evidence and keeping them out.

- a. Go back to what you need to prove your case – Discovery
- b. Stipulate to enter exhibits subject to cross whenever possible
- c. Pre-mark exhibits if you can.
- d. Know what items you may have trouble getting in and plan for them.
- e. Your Notice to Admit would have helped overcome objections here
- f. Subpoenaed documents, if certified, can be easily stipulated to.
- g. Know what battles to fight; hopefully all parties consider this.
- h. **See attached sample questions** for getting in common exhibits: photos; texts; Social Media; recordings; videos.

5. **Voire Dire of Expert:** When to do it, why do it and how to do it.

- a. Whose expert is it and do you agree/disagree with their position.
- b. If agree: no need to voire dire unless court is not familiar with them or there is a need to highlight an area of expertise/qualifications.
- c. If you disagree: voire dire, at the very least to focus on a particular lack of expertise/qualifications.
- d. **Sample voire dire attached.**

6. Trial Objections: Most common and useful and how to use them:

- a. To Testimony:
 - i. Hearsay – But see: *Heather B. v. Daniel B*, 125 A.D.3d 1157 (2015) and Family Court Act Sec. 1046[a][iii][vi].
 - ii. Compound question
 - iii. Argumentative
 - iv. Leading
 - v. Assume facts not in evidence
 - vi. Asked and answered
 - vii. Speculation
 - viii. Relevance
 - ix. Privileged
- b. To Evidence:
 - i. Failure to lay proper foundation
 - ii. Lack of Authentication
 - iii. Relevance
 - iv. Inflammatory
 - v. Privileged
- c. Why object; why not, and how:
 - i. If evidence will harm your case
 - ii. To preserve issue on Appeal
 - iii. Objection could draw more attention to issue than you want.
 - iv. State basis for objection.
 - v. Throw off unprepared witness

7. Preservation of Issues for Appeal: Knowing your objectives in advance.

- a. Be prepared for what issues may end up on Appeal from history of case
- b. Note that Appellate Courts may not know the experts. *Voire dire* may be helpful for Appellate record.
- c. Objections should have bases stated on record.
- d. Offers of Proof are helpful

**PRESENT: HON.
FAMILY COURT JUDGE**

**STATE OF NEW YORK
FAMILY COURT COUNTY OF**

In the Matter of a Proceeding Pursuant
to Article 6 of the Family Court Act,

**ORDER TO
SHOW CAUSE**

_____,
Petitioner,
-against-

Respondent.

**File No.:
Docket #:**

Upon the annexed affirmation of _____, Esq., sworn to the ____ day of _____, let the Petitioner show cause before the Hon. _____, Judge of the Family Court, at the _____ County Family Court, Albany, New York on the _____ day of _____, at o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an Order should not be made pursuant to CPLR §2107 for the issuance of a Judicial Subpoena on _____ City Police Department.

Sufficient cause appearing therefore, let service of a copy of this Order to Show Cause, together with the papers upon which it is granted, by regular mail to _____, Esq., Attorney for the Petitioner, at _____, _____, Esq., Attorney for the Child, at _____, on or before _____, and _____, Esq., Corporation Counsel, at City Hall, _____, New York 12207 be deemed good and sufficient service herein.

Dated:

Hon.
Judge of the Family Court

ENTER:

STATE OF NEW YORK

FAMILY COURT

COUNTY OF _____

In the Matter of a Proceeding

Under Article 6 of the Family Court Act,

_____,

Petitioner,

-against-

_____,

Respondent.

**ATTORNEY AFFIRMATION
IN SUPPORT OF ORDER TO
SHOW CAUSE FOR A JUDICIAL
SUBPOENA**

File No.:

Docket #:

_____, ESQ., an attorney duly admitted to the practice of law before the
Courts of the State of New York, does hereby affirm as follows:

1. I am an attorney duly admitted to the practice of law in the State of New York and am attorney for the Respondent, _____, and as such am fully familiar with the facts and circumstances set forth herein. To the extent I am not personally familiar with the facts set forth herein, I rely on a review of my file, conversations with my client and representations of the Petitioner.

2. I make this affirmation in support of the Respondent Order to Show Cause for a judicial subpoena pursuant to CPLR § 2307 upon Albany County Police Department.

3. A fact-finding hearing on Petitioner's relocation petition and Respondent's cross-relocation petition is set for _____. Upon information and belief, one of the issues that

will be raised in the hearing is the assault on the Respondent by the Petitioner's boyfriend, _____, that occurred in the presence of the subject child, as alleged in paragraph 6(b) of Respondent's cross-petition. Upon information and belief, _____ was arrested and charged with harassment as a result of the incident. Certified police records regarding the incident would certainly be probative and enable the Court to adequately make a determination as to the child's best interests.

4. Production of certified copies of the police records requested would cause minimal inconvenience to the police department. A copy of said proposed Subpoena is attached hereto.

5. It is respectfully submitted that the requested police records are material and relevant, and in fact necessary, to the Court's determination of the best interests of the child. The Court's need to for this information substantially outweighs any minor burden production of the requested records may place on the _____ City Police Department.

WHEREFORE, your deponent respectfully requests that this Court grant and execute Respondent's subpoena pursuant to Civil Practice Laws and Rules § 2307 for a judicial subpoena _____ City Police Department, together with such other and further relief as to the Court deems just and proper.

Dated:

_____, ESQ.

Attorney for Respondent

JUDICIAL SUBPOENA DUCES TECUM

STATE OF NEW YORK

FAMILY COURT

COUNTY OF

**In the Matter of a Proceeding for
Custody Under Article 6 of the
Family Court Act**

,

Petitioner,

-against-

Docket No.:

,

Respondent.

THE PEOPLE OF THE STATE OF NEW YORK

TO: _____ CITY POLICE DEPARTMENT
Attention: Police Chief _____
_____ New York

GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you appear and attend before the Hon. _____, Judge of the Family Court at the _____ County Family Court, (address) _____ on _____ at _____ o'clock, in the forenoon, and at any recessed or adjourned date to give testimony in this action on the part of the Petitioner and that you bring with you, and produce at the time and place aforesaid, the following:

A certified copy of any and all police reports, incident reports, log book entries and blotter book entries, and any and all notes and memoranda pertaining to _____ D.O.B. _____ S.S.# _____, of _____ from _____ to date.

Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed \$50 Dollars and all damages sustained by reason of your failure to comply.

WITNESS, Honorable _____, Judge of the Family Court at _____, New York the day of _____

, JFC

Sample Exhibit Introduction

Basic elements needed for photos, recordings, texts, social media:

- That the item is relevant
- That the Witness is familiar with the item at issue (scene in photo, content of text)
- That the Witness is familiar with the item as of the relevant date or dates at issue
- That the Exhibit fairly and accurately shows or demonstrates the item as of the relevant date
- That the probative value of the Exhibit exceeds any prejudicial effect (not really an element of introducing the Exhibit but can cut off any such objection).

Specific Sample inquiry - Sound/Video recording:

- Recording being offered is relevant
- Recording device was tested before use and was in normal working order
- Recording device used accurately records and produces image/sound
- Operator of device was familiar with operating the device used
- Operator of device saw/heard what was recorded
- After recording made, operator replayed sound/visual recording and confirmed that same was accurately recorded.
- Recording was then labeled/sealed and somehow secured to guard against tampering and later retrieved in untampered condition for use at trial.
- System being used to replay recording/image in court is itself in normal operating condition and can accurately reproduce the image/sound.
- Witness recognizes and can identify the voices/faces/location etc...on tape/recording.

Sample Voir Dire of Expert

General areas of Inquiry –

- schools attended and specialized training/discipline
- Length of time in their field
- Familiarity with literature in field
- Teaching/lecturing experience
- Authored articles/books
- Testimony experience
- Membership in related professional organizations
- Employment history
- Familiarity with similar cases/facts in this case

Specific Inquiry-

- Name, address, personal background
- Business/occupation: what, how long, description of field, company or organization, capacity, location, prior positions and descriptions of same.
- Education: undergraduate, graduate, degrees, when graduated, post graduate work and studies focus, when graduated.
- Training: formal courses, in what, where, when, under whom trained (recognized expert?), how long trained, last received training.
- Licenses: what, when received, specialty, certifications, licensing requirements.
- Professional associations: what, when, positions held
- Other background: teaching, lecturing, consulting work etc...
- Expert witness at trials: how many, where, when, which side testified for.
- Experience in specialty: types of specialty work/examinations done, for whom, when, why, get into where this dovetails in your case.
- Offer witness as expert qualified to give testimony and opinion testimony in the field of X

Other notable questions-

- How are you paid for today?
- Here pursuant to subpoena?