

THE STATE OF TEXAS, )  
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 Plaintiff, )  
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 v. )  
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 YYY ZZZ, )  
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 Defendant . )  
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**TRIAL BRIEF IN SUPPORT OF INTRODUCTION OF EXPERT TESTIMONY RELATED TO INTERVIEWING PROTOCOLS OF ALLEGED CHILD SEXUAL ABUSE VICTIMS AND RELATED TO CHILD SUGGESTIBILITY AND FALSE MEMORIES**

When the defense to a charge of sexual abuse against a child is that the child's allegations were manipulated and the result of acrimony that resulted from a divorce, an attorney can be ineffective for not calling an expert witness to discuss this defensive theory. The recent case of *Wright v. State*, 223 S.W.3d 36 (Tex. App.–Houst.[1st] 2006) is exactly on point. In *Wright*, the defendant presented the testimony of a psychologist at a new trial hearing to support a claim that his trial counsel had been ineffective:

Dr. Jerome Brown, a licensed psychologist, testified that he was very familiar with literature regarding false allegations of sexual abuse. Brown explained that his research found that custody disputes generate a high proportion of false allegations of sexual abuse. In his review of the complainant's statements and Spears's interview notes, Brown noticed an "extreme variation from the standard protocol of working with a child victim; and the particular variances from that protocol suggested that there was a very high potential for significant adverse influences upon the child that might have created . . . a coercive environment in which she would be encouraged and pressured in various ways to make false allegations."

Brown noted that in the videotaped CPS interview of the complainant, the child

initially told the interviewer that her father, appellant, did not know that she was watching him masturbate; however, "the interviewer ignored the child's statement or otherwise did not pursue it at all." Brown also stated that [complainant's mother's's] participation in the therapy sessions, as reflected by [complainant's therapist's] notes, would not allow the complainant an opportunity to alter any dynamic occurring between the child and the mother that could encourage the child to make a false statement. Brown added that [complainant's therapist's] notes demonstrated "a significant violation of professional boundaries" by the State's participation in therapy sessions. In Brown's opinion, based on his review of the initial CPS interview of the child and Spears's notes, the investigation of the case and the treatment of the child was not impartial.

Brown opined that a properly qualified expert would have been able to assist appellant's trial attorney in preparing a cross-examination that would clarify whether or not [complainant's therapist's] "improper methodology," and any other adverse influences, would influence the complainant to make false statements. Brown also stated that an expert could have assisted in preparing for the cross-examination of the complainant and mother by providing an understanding of the dynamics of the custody battle between parents and explaining the dynamics between the father, daughter, and mother.

*Id.* at 40-41. The Court of Appeals fully agreed:

[D]espite the obvious strategy by [appellant's trial attorney] to discredit complainant's outcry and prove fabrication or improper influence, he was entirely unaware of the contents of [complainant's therapist's] notes, including exculpatory evidence that would have advanced appellant's defensive theory. [Appellant's trial attorney] never presented evidence showing [complainant's mother] presence at nearly all of the complainant's therapy sessions. Moreover, [appellant's trial attorney] never introduced into evidence the complainant's own statements, contained in [complainant's therapist's] notes, that "the court won't let [the complainant] see her dad because her mom is making them say that." Nor did he introduce into evidence the complainant's statement at the April 27, 2004 session that appellant "thought [the complainant] was asleep" and "never asked her to help him 'get the milk out'"--statements consistent with the complainant's initial comments during her CPS interview.

Moreover, we note that because [appellant's trial attorney] failed to fully investigate the complainant's therapy notes, he could never have recognized any possible diversions from standard protocol of interviewing child sexual assault victims. If [appellant's trial attorney] had uncovered such evidence, expert

testimony such as that given by Dr. Brown at the motion for new trial could have been used to further advance appellant's defensive theory. Brown's testimony regarding false allegations of sexual assault occurring after a divorce and the accepted protocols for interviewing suspected child sexual assault victims would have been admissible as long as he did not comment directly about the truthfulness of the complainant in this case.

The bottom line is that exculpatory evidence in Spears's notes, expert testimony about deviations from standard protocol reflected in the notes, and expert testimony regarding false allegations of sexual assault in connection with divorce proceedings constitute powerful evidence that would have supported appellant's defensive theory. At the very least, the assistance of such an expert to assist in the cross-examination of the adverse witnesses in this case could have made a significant difference in regard to the outcome of this case.

*Id.* at 44-45.

A different court of appeals recently reversed another case based upon a trial court's refusal to allow similar expert testimony. In *Delong v. State*, 2006 WL 3334061 (Tex. App.—Ft. Worth Nov. 16, 2006). There, the defense had proffered expert testimony at trial from Dr. Elizabeth Loftus. The gist of the testimony that Appellant sought to elicit from Dr. Loftus is that false memories can be induced in the mind of a witness under circumstances similar to those surrounding the outcry statements of the complainants in this case.

In this case, Dr. Loftus testified that a false memory is an untrue memory that the witness or complainant nonetheless believes to be true. She explained that a false memory can be very detailed, and a person who has a false memory can be very confident and even emotional about the false memory. Dr. Loftus testified that she could not say whether a particular person is lying or that a particular memory is a false memory--in other words, that she could not comment directly on the truthfulness of a complainant's allegations--but she could say whether the circumstances indicated suggestion of the sort that can lead to a false memory.

*Id.* at \*5.

The trial court disallowed the testimony. The Court of Appeals, relying in part upon *Wright*,

determined that the trial court erred, and it reversed the conviction. *Id.* at \*8.

Also of note is *Music v. State*, 2005 Tex.2005 WL 2323781 (Tex. App.–Austin Sept. 22, 2005). In that case, it was noted that the trial court allowed expert testimony in the following areas in an indecency with a child case: (1) children are easily manipulated, (2) children seek to please adults when questioned, and (3) multiple interviews can have the effect of influencing the answers of children. *Id.* at \*7.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, F. Clinton Broden, do hereby certify that, on this 19th day of March, 2007, I caused a copy of the foregoing document to be hand delivered to the Dallas County District Attorney's Office, 133 N. Industrial Blvd., Dallas, Texas 75207.

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F. Clinton Broden