Documentary Evidence in Child Support Litigation

by
John E.B. Myers*

Documentary evidence plays a key role in child support litigation. In many hearings, documents are admitted without objection. Occasionally, however, a party invokes the full panoply of evidence rules governing documents. This article discusses the evidentiary requirements to admit documents. Because most states follow the Federal Rules of Evidence, the article cites the Federal Rules.

Before a document is admissible to prove the contents of the document, five matters must be resolved: (1) relevance (Rule 402), (2) authentication (Rules 901-902), (3) best evidence rule (Rule 1002), (4) hearsay (Rule 802) and (5) probative value versus the danger of unfair prejudice (Rule 403). The following discussion assumes the document is relevant, and that probative value is not substantially outweighed by the danger of unfair prejudice. Analysis focuses on authentication, best evidence, and hearsay. Section four of the article addresses judicial notice.

I. Authentication

Rules 901 and 902 govern authentication. Rule 902 provides that certain documents are self-authenticating. Documents that are not self-authenticating fall under Rule 901, and require the proponent of the document to "produce evidence sufficient to support a finding that the item is what the proponent claims it is."[1] In other words, is this document the real McCoy? The Maryland Court of Appeals wrote, "Authentication has been defined as 'the act of proving that something (as a document) is true or genuine, especially so that it may be admitted as evidence.' Authentication of a matter prior to its admission 'is not an artificial

* Professor of Law, University of the Pacific, McGeorge School of Law.

1 FED. R. EVID. 901.

principal of evidence, but an inherent necessity,' and is integral to establishing relevancy."[2]

A. *Preliminary Questions of Fact*

The law regarding authentication is intertwined with the law governing determination of preliminary facts, that is, facts that must be determined as a condition precedent to the admission of evidence.[3] Rule 104 allocates the determination of preliminary facts between the judge and the jury. Some preliminary facts are decided by the judge alone (Rule 104(a)). Other preliminary facts are for the jury to decide, after the judge finds that sufficient evidence of the preliminary fact has been introduced "to support a finding that the fact does exist."[4]

Rule 104(a) provides that the following preliminary facts are for the judge alone: competence of a person to testify, whether a witness qualifies as an expert; application of privileges, whether an out-of-court statement is hearsay, and if it is, whether it meets the requirements of a hearsay exception. Among the preliminary facts that are for the jury to decide—Rule 104(b)—the most pertinent for present purposes is authorship of documents, that is, did a particular person create a document? Proof of authorship begins with the judge listening to evidence pro and con, and deciding whether a reasonable juror could find the document was created by a particular person, that is, whether the document is authentic. If the answer is yes, then the document is admissible, provided other rules of evidence are fulfilled (*e.g.*, hearsay). The jury decides how much, if any, weight to give the document.

In most states, there is no jury in child support litigation. In bench trials, questions about whether particular preliminary issues are for judge or jury do not arise. If you litigate child support in jury trials, you will polish your knowledge of Rule 104. Since the odds are you litigate child support to the court, Rule 104 is not further discussed.

---

2 Sublet v. State, 113 A.3d 695 (Md. Ct. App. 2015)(citations omitted).

3 FED. R. EVID. 104.

4 FED. R. EVID. 104(b). *See also Sublet*, 113 A.2d at 709 (2015)("The role of judge as 'gatekeeper' is essential to authentication, because of jurors' tendency, when a corporal object is produced as proving something to assume, on sight of the object, all else that is implied in the case about it.").

B. *Discovery and Stipulations Regarding Authentication*

In an ideal world, authentication issues would not arise at trial because such matters would be resolved in advance via discovery or stipulation. Some courts have rules requiring parties to resolve authentication before trial. Sometimes, such issues are addressed at a settlement conference. When authentication is not resolved in advance, family law attorneys need to be prepared to authenticate documents at trial.

Documents produced in response to discovery requests generally are considered implicitly authenticated.[5] In *Stumpff v. Harris*,[6] the Ohio Court of Appeals wrote, "Numerous courts, both state and federal, have held that items produced in discovery are implicitly authenticated by the act of production by the opposing party." The Ohio court noted that implicit authentication is appropriate when the person responding to discovery has the capacity to authenticate the document. Implicit authentication is generally inappropriate when the person lacks such capacity.

C. *Rule 902—Self-Authentication*

A document that is self-authenticating requires no extrinsic evidence to establish its bona fides. The court examines the document, and, if all is in order, authentication springs from the document itself.

1. *Rule 902(1) and (2): Public Document Signed by Public Employee and Under Seal*

Government documents generated by federal, state, and local agencies are self-authenticating when the document bears an official seal *and* the signature of a public employee "purporting to be an execution or attestation." (Rule 902(1)(B)).[7] If a public employee has no official seal, Rule 902(2) makes the employee's

---

5 Stumpff v. Harris, 31 N.E.3d 164 (Ohio Ct. App. 2015).

6 *Id.* at.

7 *See* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 9:30, 531 (4th ed. 2013)("The language of Rule 902(1) leaves no doubt that it covers a broad range of public documents. It reaches federal records of all sorts, whether from the executive, legislative, or judicial branch, and from any office department, agency, commission, or tribunal thereof. It reaches the nonfederal records of states, territories, and possession, and any

signature self-authenticating if the signature is accompanied by the signature of another public employee, who certifies under seal "that the signer has the official capacity and that the signature is genuine."

2. *Rule 902(4): Certified Copies of Public Records*

An official record is self-authenticating when it is certified as correct by the custodian of the record or another qualified person. Many government documents in child support cases are self-authenticating under Rule 902(4).

Rule 902(5): Official Publications

Rule 902(5) authenticates publications of public authorities. This rule embraces government manuals, and should include officially published child support guidelines. The official nature of the document is garnered from the appearance of the document.[8]

4. *Rule 902(8): Notarized Documents*

A notarized signature is self-authenticating.

5. *Rule 902(10): Federal Statute Declares Signature or Document Authentic*

Rule 902(10) provides that a signature or document is self-authenticating when a federal statute so provides. For example, 26 U.S.C. § 6064 provides, "The fact that an individual's name is signed to a [tax] return . . . shall be prima facie evidence for all purposes that the return . . . was actually signed by him."

6. *Rule 902(11): Certification of Business Records*

The business records exception to the hearsay rule contemplates testimony from the custodian of records to lay the foundation for the exception, and to authenticate the documents. (Rule 803(6)(D)). Rule 902(11) eliminates the need for actual testimony from the custodian. Instead, the custodian certifies that the

---

'political subdivision' or 'department, agency, or officer' thereof, which clearly means that county and municipal records are included.").

8 *Id.* at § 9:34, at 565.

records comply with Rule 803(6). States have similar rules, eliminating the need for *viva voce* testimony from the custodian.[9]

D. *Rule 901—Documents That Are Not Self-Authenticating*

For non-self-authenticating documents, the law does not presume the document is genuine. As I tell my evidence students, "You can't just march into court and say, 'I offer this letter, or text, or email, written by the defendant.' Before a document is admissible, you have to prove authorship; you have to authenticate the document; or, as lawyers like to say, you have to lay a foundation." Rule 901 articulates this requirement: "The proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[10] The burden of proof is not high: Authentication is a speed bump on the road to admissibility, not a barricade.[11]

Because authentication is a preliminary matter, the court can consider evidence that would not be independently admissible in evidence.[12] Evidence sufficient to authenticate can be direct or circumstantial.[13] The proponent does not have to rule out possibilities that are inconsistent with authentication.[14]

Rule 901(b) contains a list of techniques that are commonly used to authenticate documents, identify voices, and lay the foundation for real evidence—things. The subsections that follow describe the techniques used most frequently in family court.

1. *Witness With Personal Knowledge*

Rule 901(b)(1) describes the most straightforward way to lay the foundation for many items of evidence: Offer testimony from

---

9 *See, e.g.,* CAL. EVID. CODE §§ 1560 et seq.

10 In jury trials, authentication is a Rule 104(b) issue, that is, the jury has the final word on authentication.

11 United States v. Hassan, 742 F.3d 104 (4th Cir. 2014); United States v. Vidacak, 553 F.3d 344, 349 (4th Cir. 2009)("the burden to authenticate under Rule 901 is not high—only a prima facie showing is required").

12 State v. Young, 369 P.3d 205 (Wash. Ct. App. 2016). *See* 5 MUELLER & KIRKPATRICK, *supra* note 7, at § 9:2, 330.

13 Smith v. Smith, 196 So.3d 1191 (Ala. Civ. App. 2015); *Sublet*, 13 A.3d at 711; Donati v. State, 84 A.3d 156 (Md. Ct. Spec. App. 2014).

14 United States v. Gagliardi, 506 F.3d 140 (2d Cir. 2007).

a witness with personal knowledge.[15] Thus, to authenticate a signature, offer testimony from a witness who knows the signature. To authenticate an email, offer testimony from the person who wrote the email. To identify a voice, offer testimony from someone who knows the voice and the speaker. To authenticate that a document is a "copy" printed from a computer, put the person on the stand who printed the document. A pay stub can be authenticated by the bookkeeper who generated the pay stub or the employee who received it.

2. *Opinion on Handwriting*

In the digital age, handwritten documents and signatures are less common than they were in ancient times, before 2000. Yet, it is sometimes necessary to prove who penned a handwritten document or signed a word processed document, a check, or a credit card receipt. Needless to say, the author can authenticate her own handwriting. When a party disputes authorship, Rule 901(b)(2) allows a person who is familiar with the handwriting to opine on authorship. In cases where no one is familiar with the writing, a handwriting expert can compare the disputed document/signature with authenticated exemplars, and offer an opinion on authorship (Rule 901(b)(3)). As an alternative to a handwriting expert, Rule 901(b)(3) allows the party seeking to prove authorship to ask the jury to compare the disputed document to the exemplars and decide. As a trial lawyer, I would never trust a jury to do the comparison. I know what my handwriting expert will say. I have no way to control what a jury decides.

3. *Content and Distinctive Characteristics*

It is frequently possible to establish authorship of a document by pointing to content that could only be known to one person, or to peculiarities of spelling, word choice, word order, or phrasing. Rule 901(b)(4) speaks to this approach by providing that authentication can be established by "the appearance, con-

---

[15] *Sublet*, 113 A.3d at 710 ("The most straightforward approach to authenticating a writing is to ask an individual with personal knowledge about the document whether the matter was what it purported to be."); Manuel v. State, 357 S.W.3d 66, 74-75 (Tex. Ct. App. 2011); *Young*, 369 P.3d 205 (text messages authenticated; by an individual who had personal knowledge of the contacts).

tents, substance, internal patterns, or other distinctive characteristics of the items, taken together with all the circumstances." This method of authentication is often used to authenticate emails, text messages, Facebook postings,[16] and other electronic communications.

4. *Reply Letter Doctrine*

A disputed communication—letter, text, email, etc.—can be authenticated with evidence that it was written in response to another, authenticated, missive.[17] This is the reply letter doctrine.[18]

E. *Authentication of Electronic Communications*

Electronic communications—texts, emails, Facebook, etc.—often provide powerful evidence in family court. Jay Zitter wrote a thorough *American Law Reports* annotation on authenticating electronic evidence.[19] People say things in electronic communications to ex-spouses that make attorneys wince, and authors blush.[20] If you are a family law attorney, you have examples from your practice. Two illustrations make the point. In a child custody case, a father wrote an email to a mother in which he typed "F__k You Bitch" more than one hundred times in the same email! When the judge asked him why, his reply was, "Well, you just copy and paste. It was easy." In another custody matter, a mother texted her young son, "Ask your dad why he makes you miss your baseball games, after you practiced so hard. Ask him what lesson is he trying to teach you by doing this to you." Parents in high conflict custody cases should probably lose their telephone privileges. On the other hand, such loose cannon statements can be powerful evidence.

---

16 For discussion of authentication of Facebook postings, see United States v. Browne, 834 F.3d 403 (3d Cir. 2016); *Sublet*, 113 A.3d at 711; Commonwealth v. Purdy, 945 N.E.2d 372 (Mass. 2011); Commonwealth v. Gilman, 54 N.E.3d 1120 (Mass. App. Ct. 2016); State v. Inkton, 60 N.E.3d 616 (Ohio Ct. App. 2016)(defendant's Facebook page properly authenticated).

17 *Sublet*, 113 A.3d at 711.

18 *Manuel*, 357 S.W.3d 66.

19 Jay M. Zitter, *Authentication of Electronically Stored Evidence, Including Text Messages and E-Mail*, 34 A.L.R. 6TH 253 (2008, with annual updates).

20 *See Sublet*, 113 A.3d 695.

1. *Authentication Is a Two Step Process*[21]

First, the party seeking to prove the contents of an email, text message, Facebook post, or other electronic communication typically takes a photograph of the electronic medium displaying the message, and prints out a hard copy, or prints a screenshot. The person who took the photo, and printed out the hard copy, or the screen shot, can authenticate these documents as having come from a particular phone or computer. The person has personal knowledge for purposes of Rule 901(b)(1), and can testify that the phone or computer was working properly to satisfy Rule 901(b)(9).

Not infrequently, a party shows up in family court with cellphone, tablet, or computer in hand, and asks the judge to look at the offending message, or to listen to a voice message. Many family court judges will oblige.

Once the document is authenticated as having come from a particular phone or computer, the proponent moves on to step two: Prove authorship of the document.

2. *Email*

An email typically begins with "From" and "To." Because it is possible to fake emails, the fact that an email states that it is From "John Brown" is not sufficient, by itself, to authenticate John as the author.[22] The "From" portion of the email is relevant,

---

[21] *In re* L.P., 749 S.E.2d 389 (Ga. Ct. App. 2013); State v. Henry, 875 N.W.2d 374 (Neb. 2016); State v. Davis, 60 N.E.3d 650, 656 (Ohio Ct. App. 2016)("Courts have held that photographs of text messages sent from a defendant are not hearsay, instead they qualify as a party-opponent admission under Evid. R. 801(D)(2), as long as the statements are properly authenticated. . . . Generally, in cases involving electronic print media, i.e., texts, instant messaging, and e-mails, the photographs taken of the print media or the printouts of those conversations are authenticated, introduced, and received into evidence through the testimony of the recipient of the messages. . . . Therefore, statements from text messages are properly authenticated and are admissible as a party-opponent admission when the recipient of the messages identifies the messages as coming from the defendant.").

[22] State v. Eleck, 23 A.3d 818, 822 (Conn. App. Ct. 2011)("proving only that a message came from a particular account, without further authenticating evidence, has been held to be inadequate proof of authorship."); *Sublet*, 113 A.3d at 711; Tienda v. State, 358 S.W.3d 633, 641-642 (Tex. Ct. App. 2012)("That an email on its face purports to come from a certain person's email

but it must be fortified with other evidence.[23] The reply letter doctrine, in conjunction with the From line, is often sufficient.[24] In many cases, the necessary evidence is gleaned from the contents of the email—for example, "I dropped the kids off at soccer practice, as usual. Sally still has a band aid on her arm, but I put antibiotic on it, and it is better." In *State v. Manuel*,[25] the Texas Court of Appeals explained:

> Characteristics to consider in determining whether e-mail evidence has been properly authenticated include (1) consistency with the e-mail address in another e-mail sent by the alleged author; (2) the author's awareness, shown through the e-mail, of the details of the alleged author's conduct; (3) the e-mail's inclusion of similar requests that the alleged author had made by phone during the time period; and (4) the e-mail's reference to the author by the alleged author's nickname.[26]

A witness could describe a history of email communications sent and received to and from a particular email address.[27] An email sometimes contains a picture of the author, or a unique screen name.[28] A party's admission that he sent an email will suffice.[29]

In most cases, authentication is achieved without resort to expert testimony tracing the electronic communication to a particular device.

3. *Text Messages*

Text messages typically contain the name of the sender, and, often, the phone number. Like emails, texts can be faked, and judges typically want evidence in addition to a screen shot or

---

address, that the respondent in an internet chat from dialogue purports to identify himself, or that a text message emanates from a cell phone number assigned to the purported author—none of these circumstances, without more, has typically been regarded as sufficient to support a finding of authenticity.").

23 *Manuel*, 357 S.W.3d 66.

24 People v. Downin, 828 N.E.2d 341 (Ill. App. Ct. 2005).

25 357 S.W.3d 66 (Tex. Ct. App. 2011).

26 *Id.* at 75.

27 State v. Bohlman, No. A05-207, 2006 WL 915765 (Minn. Ct. App. Apr. 11, 2006).

28 Culp v. State, No. CR-13-1039, 2014 WL 6608543 (Ala. Crim. App. Nov. 21, 2014).

29 Kearley v. State, 843 So. 2d 66 (Miss. Ct. App. 2002).

photo of the text.[30] In countless cases, the necessary evidence is found in the string of back and forth text messages. Often, a text makes no sense unless it is from a particular person.[31] The authentication factors described above for emails work for texts.[32]

4. *Facebook*

Authorship of a message posted to Facebook can be authenticated with circumstantial evidence similar to that employed with emails and texts.[33] In *United States v. Barnes*,[34] the prosecution offered enough evidence to authenticate the defendant as the author of Facebook posts. A witness testified she had observed the defendant using Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating.

F. *Documents Commonly Offered in Child Support Cases*

This section describes authentication of documents commonly offered in child support cases.

---

30 *Eleck*, 23 A.3d at 822 ("proving only that a message came from a particular account, without further authenticating evidence, has been held to be inadequate proof of authorship.").

31 People v. Green, 107 A.D.3d 915, 967 N.Y.S.2d 753 (2013).

32 State v. Koch, 334 P.3d 280 (Idaho 2014); *Davis*, 61 N.E.3d at 656 ("Courts have held that photographs of text messages sent from a defendant are not hearsay, instead they qualify as a party-opponent admission under Evid. R. 801(D)(2), as long as the statements are properly authenticated . . . . Generally, in cases involving electronic print media, i.e., texts, instant messaging, and e-mails, the photographs taken of the print media or the printouts of those conversations are authenticated, introduced, and received into evidence through the testimony of the recipient of the messages . . . . Therefore, statements from text messages are properly authenticated and are admissible as a party-opponent admission when the recipient of the messages identifies the messages as coming from the defendant."); *Manuel*, 357 S.W.3d at 75 ("Text messages can be authenticated by applying the same factors.").

33 United States v. Hassan, 742 F.3d 104 (4th Cir. 2014); State v. Palermo, 129 A.3d 1020 (N.H. 2015)(State offered sufficient evidence that defendant authored Facebook posts); State v. Ford, 782 S.E.2d 98 (N.C. Ct. App. 2016)("The webpage contained content unique to defendant"); *Manuel*, 357 S.W.3d 66.

34 803 F.3d 209 (5th Cir. 2015).

1. *Pay Stubs*

A pay stub can be authenticated by testimony from a witness with knowledge (Rule 901(b)(1)). A pay stub qualifies as a business record under Rule 803(6). A certificate by the custodian of records will authenticate the stub pursuant to Rule 902(11).

2. *Tax Returns*

A tax return can be authenticated with testimony from a witness with knowledge (Rule 901(b)(1)). A business tax return qualifies as a business record.[35] A certificate by the custodian of records will authenticate the return (Rule 902(11)).

3. *Documents Prepared by Child Support Services*

Documents prepared by child support services can be authenticated by a witness with knowledge (Rule 901(b)(1)). Rule 901(b)(7) provides that public records can be authenticated with evidence that the record is from the office where such records are kept. Child support services documents are self-authenticating when they bear a seal and signature (Rule 902(1) and (2)), as well as when they are certified (Rule 902(4)), or notarized (Rule 902(8)).

4. *Loan Applications*[36]

This may surprise you, but some child support litigants underestimate their income. In *Marriage of Calcaterra*,[37] the husband estimated his net monthly income to be $1,715. Yet, he signed a loan application placing his monthly income at $28,000! The trial judge found that the husband committed perjury, and ruled that his income for purposes of support was the higher amount. The Court of Appeals approved.

A party's signature on a loan application can be authenticated by someone with knowledge that the party signed the document (Rule 901(b)(1)), and this includes an admission from the

---

35 *In re* Industrial Commercial Elec., Inc., 319 B.R. 35 (D. Mass. 2005).

36 Thanks to Child Support Commissioner Scott P. Harmon, of the Sacramento Superior Court, who reminded me of the utility of loan applications in setting income.

37 132 Cal. App. 4th 28, 33 Cal. Rptr. 3d 246 (2005).

party herself. A person who is familiar with the party's signature can authenticate the signature (Rule 901(b)(2)).

II. Best Evidence Rule

When a party seeks to prove the contents of a document, the party must produce the original. This is the Best Evidence Rule (Rule 1002). A duplicate of an original is typically a photocopy, and, pursuant to Rule 1003, a duplicate is usually admissible to the same extent as an original. Any trial lawyer will tell you, however, if you have the original, use it.

When a hard copy of a document is offered, best evidence issues seldom arise because the hard copy is either the original or a duplicate. Best evidence issues arise when a witness attempts to describe what a document says. At that point, opposing counsel may say, "Objection, this violates the best evidence rule. The witness is describing the contents of the document. The best evidence rule requires the production of the original."

Suppose the original is lost or destroyed. If the original was destroyed in the ordinary course of business, secondary evidence of the content of the original is admissible. If the original is lost, and the proponent of the document convinces the judge that a diligent but futile search was made for the original, secondary evidence is admissible. Of course, if the proponent destroyed or lost the original in order to gain an advantage in court, the judge will not excuse production of the original (Rule 1004(a)).

III. Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted (Rule 801(c)). In child support litigation, the hearsay exceptions most likely to apply are party admissions (Rule 801(d)(2)), business records (Rule 803(6)), and public records (Rule 803(8)).

A. *Party Admissions*

A party's own words—written or oral—are admissible against the party. Rule 801(d)(2) contains five types of party admissions: (A) Personal admissions; (B) Adoptive admissions; (C) Admissions by an authorized agent; (D) Statements by an employee of a party, within the scope of the employee's duties; and

(E) Statements by co-conspirators during the course of, and in furtherance, of the conspiracy.

1. *Personal Admissions*

Personal admissions abound in family law litigation. The statement, "I forgot to make last month's child support payment," is admissible against the speaker for the truth of the matter asserted, as is, "I won't get a job if it means paying child support," as is, "I get paid under the table," as is, "My monthly income is $10,000." A person's postings to their Facebook page are party admissions.[38] A party's tax return is admissible against the party as an admission.[39] The old saying, "Anything you say can be used against you" is true.

2. *Adoptive Admissions*

A party can adopt the truth of a statement uttered or written by a non-party. For example, a husband asks his employer to write a letter describing the husband's job responsibilities and salary. The husband uses the letter to secure an auto loan. In family court litigation, the wife could offer the letter as evidence of the husband's income, arguing that the husband adopted the contents of the letter. A person's tax return can be an adoptive admission or a personal admission.[40]

3. *Authorized Admissions*

When a party authorizes another to make statements on the party's behalf, the statements are admissible against the party. *Melamed v. Melamed*[41] was an action to increase child support. The husband acknowledged that bank records and tax documents were prepared for the husband's company. The Illinois Appellate Court ruled that "the documents can be viewed as statements by a person authorized by the party to make a statement concerning the subject."[42]

---

38 State v. Inkton, 60 N.E.3d 616 (Ohio Ct. App. 2016).

39 *In re* Sillins, 264 B.R. 894, 898 (N.D. Ill. 2001); *Greenspan*, 191 Cal. App. 4th 486 (tax return was either an adoptive admission or a personal admission).

40 *Greenspan*, 191 Cal. App. 4th 486.

41 50 N.E.3d 669 (Ill. App. Ct. 2016).

42 *Id.* at 676.

B. *Business Records Exception*

The business records exception is contained in Rule 803(6), which provides:

> A record of an act, event, condition, opinion, or diagnosis if: (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;[43] (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Routine records of a business of any size, including sole proprietorships, close corporations, and professional practices, are admissible as business records.[44] Documents regarding compensation, including pay stubs, are business records.[45] Documents describing deferred compensation for employees are business records. A business's books, tax documents, and tax returns are business records. An employee's business calendar containing appointments and business travel is a business record. Bank documents are business records.[46] On the other hand, purely personal documents are not business records, even when the document is written at work.[47]

The foundation to qualify a document as a business record includes testimony from the custodian of records, or a certification from the custodian that satisfies the requirements of Rule 902(11). If the foundation is laid in court, with the custodian of records, the elements of the foundation are: (1) The document was written by an employee of the company or agency; (2) The source of the information in the document works for the company and has personal knowledge of what is discussed in the doc-

---

43 The "knowledge" required is personal knowledge as that is defined in Rule 602.

44 4 MUELLER & KIRKPATRICK, *supra* note 7, at § 8:77, 712 and § 8:78, 716.

45 *Id.* at § 8:77, 712.

46 *Greenspan*, 191 Cal. App. 4th at 524 ("Bank records are admissible as business records.").

47 4 MUELLER & KIRKPATRICK, *supra* note 7, at § 8:78, 717.

ument. The author of the report does not have to have personal knowledge of the events; (3) The document was made at or near the time of the events discussed in the document. The time limit is flexible, and can be considerably longer than what would satisfy the excited utterance exception. The point of the time limit is to ensure that the document was prepared while events were fresh in memory; (4) It is a routine practice of the business or agency to prepare documents of the sort; and (5) The document was prepared in the regular course of business.

The witness who lays the foundation does not have to be the author of the document. Nor does the witness have to have personal knowledge of the events described in the document. Instead, the witness must be familiar with how the company or agency prepares and maintains documents.[48] The witness who lays the foundation for the business records exception also authenticates the document and satisfies the best evidence rule.

C. *Public Records*

The public records exception—Rule 803(8)—covers documents prepared by government agencies. The exception provides:

> A record or statement of a public office if: (A) it sets out; (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

The public records exception is broad, and embraces public records prepared by federal, state, and local government employees. The exception includes records of child support services, tax authorities, and public pension plans. Public records can be made self-authenticating by obtaining the seals, signatures, and certifications specified by Rule 902.

Attorneys sometimes offer public records under the business records exception *and* the public records exception. In civil litigation, there usually is little harm in this practice.

---

48 *Id.* at § 8:78, 728.

IV. Judicial Notice

When a court takes judicial notice of a fact, there is no need for evidence of the fact. As Christopher Mueller and Laird Kirkpatrick put it, "[J]udicial notice is a substitute for evidence."[49] Rule 201 concerns judicial notice, and provides in part:

> (a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.[50]
>
> (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Rule 201 regulates judicial notice of adjudicative facts, which are the who, what, where, and when of a case. Mueller and Kirkpatrick write, "[A]djudicative facts include everything that parties must prove in order to prevail because they amount to elements in claims, charges, or defenses."[51]

In child support litigation, the adjudicative facts include parentage, income, allowable deductions from income, number and ages of children, agreements regarding support, earning capacity, conduct justifying imputation of income, availability and cost of health insurance, and tax filing status and deductions.

Evidence of adjudicative facts often takes the form of documents, including prior court orders and judgments, findings from child support enforcement and other government agencies (*e.g.*, IRS, DMV), pay stubs, tax returns, and other documents. Absent a stipulation regarding admissibility, receipt in evidence of such documents requires compliance with rules governing authentication, best evidence, and hearsay.

Courts routinely take judicial notice of the court's own records. Thus a child support court could take judicial notice of a divorce judgment from the same court, entered by the same or a

---

49 1 MUELLER & KIRKPATRICK, *supra* note 7, at § 2:2, 319-20.

50 Rule 201 regulates judicial notice of adjudicative facts. The Rule does not apply to judicial notice of basic facts, communicative facts, evaluative facts, or legislative facts.

51 1 MUELLER & KIRKPATRICK, *supra* note 7, at § 2:2, 321.

different judge, involving the same parties.[52] Also, a court generally will take judicial notice of court orders and judgments pertaining to the same parties, from courts in other counties and states.[53]

Judges occasionally balk at taking judicial notice of court documents involving different parties. Suppose, for example, that Juan and Maria divorce in 2015. In 2016, Juan declares bankruptcy, and receives a discharge from the federal bankruptcy court. In 2017, Maria takes Juan back to family court to increase child support, and Juan asks the family court to take judicial notice of the discharge in bankruptcy. The family court judge should oblige, despite the fact that Maria was not a party to the bankruptcy. Mueller and Kirkpatrick write, "Rule 201(b)(2) does not limit judicial notice of court proceedings [to cases involving the same parties], and there is no reason in policy or doctrine to impose such a limit. Records of any court can properly be noticed."[54] The Texas Court of Appeals commented in *Perez v. Williams*,[55] "'[A] court will take judicial notice of another court's records if a party provides proof of the records."[56]

As mentioned earlier, the fact that a court judicially notices a document does not eliminate the requirement that the document be authenticated.[57] The *Perez v. Williams* court wrote, "The contents of an unauthenticated or uncertified record from another court are not the type of evidence of which the court can take judicial notice."[58] With the right seals and signatures, court and other government documents are typically self-authenticating (FRE 902).

A court that takes judicial notice of court documents may accept as true statements of fact that are contained in the docu-

---

52 *See id.* at § 2:5, 342. *See also* Sullivan v. Doe, 100 A.3d 171 (Me. 2014)(court took judicial notice of pending criminal charges).

53 Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort, 91 Cal. App. 4th 875, 882, 110 Cal. Rptr. 2d 877, 882 (2001)("The court may in its discretion take judicial notice of any court record in the United States.").

54 1 MUELLER & KIRKPATRICK, *supra* note 7, at § 2:5, 345. *See also* Kowalski v. Gagne, 914 F.2d 229, 305 (1st Cir. 1990).

55 474 S.W.3d 408 (Tex. Ct. App. 2015).

56 *Id.* at 419.

57 1 MUELLER & KIRKPATRICK, *supra* note 7, at § 2:5, 346.

58 474 S.W.3d at 419.

ment if those facts are not subject to dispute.[59] Thus, a court taking judicial notice of a divorce decree may take notice that the divorce was final on the date specified in the decree. A court will not, however, take judicial notice of facts that are subject to dispute.[60] *Marriage of Carter-Scanlon*[61] illustrates the point. Joe and Lona divorced. They had two kids. The divorce court ordered Joe to pay monthly child support. Later, Joe had a child with Joann. Joann opened a case with the child support agency (CSED), which pegged Joe's yearly income at $74,000. Joe disputed the amount, and an administrative law judge (ALJ) lowered Joe's annual income to $25,000. Joe then returned to family court, and asked the court to lower the child support owing to Lona each month. Joe asked the family court to take judicial notice of the ALJ's finding that his income was $25,000. Lona objected to judicial notice because she received no notice of the proceedings before the ALJ, and had no opportunity to participate. Moreover, Lona argued that Joe was deliberately underemployed. It was unclear from the record whether the family court took judicial notice of the ALJ's findings, although it was clear that the court felt it was not bound by the ALJ's decision.

On appeal, Joe argued the family court was required to take judicial notice of the ALJ's income determination. The Montana Supreme Court rejected Joe's contention. The court noted that "Joe has presented no evidence that Lona knew about, or partici-

---

59 *See* 1 MUELLER & KIRKPATRICK, *supra* note 7, at § 2:5, 348 ("Judicial notice should not be taken when the source material does not qualify as unimpeachable, or where the point in question is clearly subject to dispute."). *See also,* Hennessy v. Penril Datacomm Networks, 69 F.3d 1344, 1354 (7th Cir. 1995)("In order for a fact to be judicially noticed, indisputability is a prerequisite."); *In re* Vicks, 56 Cal. 4th 274, 314, 295 P.3d 863, 892, 153 Cal. Rptr. 3d 471, 506-07 (2013); Hawkins v. Suntrust Bank, 246 Cal. App. 4th 1387, 206 Cal. Rptr. 3d 681, 685 (2016).

60 Lockley, 91 Cal. App. 4th 875, 882, 110 Cal. Rptr. 2d 877, 882 (2001)("The court may in its discretion take judicial notice of any court record in the United States. . . . However, while courts are free to take judicial notice of the *existence* of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files. Courts may not take judicial notice of allegations in affidavits, declarations and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof.")

61 322 P.3d 1033 (Mont. 2014).

pated in" the ALJ proceedings.[62] More to the point, "[A] court may not take judicial notice of a fact from a prior proceeding when the fact is reasonably disputed . . . . [T]he matter to be judicially noticed here, that of Joe's yearly income, was subject to reasonable, and vigorous, dispute by the parties."[63]

Although a court may take judicial notice that a document exists,[64] a court generally does not take judicial notice of the truth of facts or findings recited in such documents, unless the documents are admissible under the hearsay rule.[65] Court documents typically meet the requirements of the business records exception (FRE 803(6)) and/or the public records exception (FRE 803(8)).[66] Mueller and Kirkpatrick write:

> [T]here is a difference between taking notice of the existence, content, and operative effect of any item and using the item as proof of whatever acts, events, or conditions, in the world that the words in the item describe—in short, making hearsay use of the item. The fact that a judgment exists, and that its effect is to create an obligation on the part of the defendant toward the plaintiff in a certain sum, is clearly appropriate for judicial notice, but underlying findings or conclusions (even those that are essential to a judgment), such as a finding that the defendant signed a promissory note in the sum awarded by the court, are not appropriate for judicial notice. Whether a judgment can be taken as proof of such points raises either issues to be resolved by applying the hearsay doctrine and deciding whether one of the hearsay exceptions can apply or by applying the doctrines of res judicata and collateral estoppel.
>
> In short, a court can appropriately take judicial notice that a pleading was filed on a certain day containing specific allegations, or that a deposition was given, or testimony received, that contains cer-

62 322 P.3d at 1037.

63 *Id.* at 1038.

64 *Id.*

65 *See* Wyatt v. Terhune, 315 F.3d 1108, 1114 (9th Cir. 2001)("taking judicial notice of findings of fact from another case exceeds the limits of Rule 201."); Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001)("when a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity."); International Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998).

66 *See* Lambert v. Lambert, 475 S.W.3d 646, 653 (Ky. Ct. App. 2015)("The records of a court are not subject to reasonable dispute. They are also admissible under the 'public records' exception to the hearsay rule. KRE (803(8). Thus, this argument has no merit.").

> tain statements or concessions, but generally such material cannot be taken as proof that the matters alleged in the pleadings are true or that the matters stated in the testimony are true.[67]

When a court takes judicial notice, failure to object by the party who disagrees, waives the objection, absent a finding of plain error (FRE 103(e)).[68] *Marriage of Harpenau,*[69] dealt with child support. The children's father asked the judge to take judicial notice of an unsigned and unverified child support worksheet attached to the divorce decree. The judge obliged. The mother's failure to object to judicial notice of the worksheet waived the right to raise the issue on appeal.[70]

Before leaving judicial notice, it is important to note that a judicially noticed document must satisfy the best evidence rule.

V. Conclusion

In child support proceedings in family court, strict compliance with the rules of evidence is the exception rather than the rule when there is no jury. Most of the time, it is quicker and more efficient for the court to consider all documents offered by the parties, especially when the parties are unrepresented. In the run of cases, winking at the technicalities of authentication, best evidence, and hearsay serves the truth. The experienced judge separates the wheat from the chaff. Yet, occasions arise, especially when cases go to trial, when counsel must come to grips with the full panoply of rules governing documentary evidence, and it is my hope this short article will be of some help in these instances.

---

67 1 MUELLER & KIRKPATRICK, *supra* note 7, at § 2:5, 346-47.

68 *See* Marriage of Harpenau, 17 N.E.3d 342 (Ind. Ct. App. 2014).

69 *Id.*

70 *Id.* at 349.