IN THE SUPREME COURT OF GUAM

IN THE INTEREST OF N.A., D.A., B.A., R.A., R.A., AND J. A., Minors
Real Parties in Interest

M. A.
Respondent-Appellant

CHILD PROTECTIVE SERVICES
Petitioner-Appellee

OPINION

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Supreme Court Case No. CVA99-042
Superior Court Case No. JSP0306-97

Appeal from the Superior Court of Guam
Submitted on the briefs on November 20, 2000
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR. Chief Justice (Acting)[1], JOHN A. MANGLONA, Designated Justice, JOHN MAHER, Justice *Pro Tempore*.

SIGUENZA, J.:

[1] The Respondent-Appellant, M.A. (hereinafter "Appellant"), appeals the lower court's decision to proceed with a fact-finding hearing upon petition by the Government to determine whether two of his children were persons in need of services in Superior Court Case No. JSP0306-97. The Appellant also assigns error to various evidentiary rulings made by the lower court and further argues that its findings of facts were contrary to the evidence. We conclude that the Appellant's arguments lack merit and therefore affirm the trial court's decision.

I.

[2] The Appellant is the father of eight children, J.A., A.A., N.A., D.A., B.A., R.A., R.A., and J.A.. On March 7, 1997, the Family Division of the Superior Court of Guam issued an *ex parte* order which temporarily placed four of the children (R.A., R.A., B.A., and J.A.) into the custody of the Child Protective Services Division of the Department of Public Health and Social Services (hereinafter "CPS"). At that time, two of the children, D.A. and N.A., already lived outside the home under their own arrangements. The court upheld its *ex parte* order during a temporary foster care hearing on March 11, 1997.

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[1] The Chief Justice recused himself from deciding this matter. Justice Siguenza as senior member of the panel was designated as the acting Chief Justice.

[3] On March 31, 1997, CPS filed a Petition for Persons in Need of Services (hereinafter "first PINS petition"), seeking a declaration that six of the children, N.A., D.A., R.A., B.A., R.A., and J.A., were persons in need of services and to make provisions for the care and protection of the minors. *In Re N.A.*, Juv. Spec. Proceeding JSP0306-97 (Super. Ct. Guam Mar. 31, 1997) (PINS Petition). In response to this petition, on May 5, 1997, the Appellant and CPS agreed upon a Pre-Fact-Finding Settlement Order. Based on this agreement, the court granted the PINS petition and issued a Stipulation and Order to that effect on July 15, 1997. In that Order, the court gave CPS temporary legal custody of the children. Further, the court invoked the provisions of 19 GCA § 13311(a), and ordered inadmissible in any other action the testimony, evidence, or admissions of the Appellant that were elicited during the first PINS proceedings.[2] Finally, the court ordered CPS and the Appellant to formulate a Service Plan Agreement.

[4] On February 4, 1998, in light of new allegations of abuse, CPS filed a subsequent PINS petition (hereinafter "second PINS petition") in Juvenile Special Proceeding JSP0306-97, asserting that D.A. and J.A., both of whom were the subject of the first PINS petition, were persons in need of services. On February 27, 1998, the Appellant filed a motion to strike the second PINS petition, on the ground that it would be procedurally improper and violative of the his rights if the second PINS petition were carried on simultaneously with the first PINS petition. The court denied the Appellant's motion to strike during a hearing on March 27, 1998. At that hearing, the Appellant also argued that the court must release him from the first Stipulation and Order before agreeing to commence the second PINS petition. The court denied

[2] Title 19, section 13311(a) of the Guam Code Annotated (1994) provides:

> Any testimony or other evidence produced by a party in a child protective proceeding under this Chapter which would otherwise be unavailable may be ordered by the court to be inadmissible in any other territorial civil or criminal action or proceeding, if the court deems such an order to be in the best interests of the child.

this request on the ground that the first and second PINS petitions were separate proceedings and that the second PINS petition was based on new and separate facts and would stand on its own.

[5] The Appellant denied the allegations of the second PINS petition and the court ordered a fact-finding hearing. Prior to and during the fact-finding proceeding, the court made various evidentiary rulings to which the Appellant takes exception.

[6] The court excluded four of the Appellant's expert witnesses, including Doctors Pamina Hofer, Marcus Tye, Phillip Esplin and Betty-Ann Burns. The facts surrounding the court's exclusion of these experts are more fully discussed later in this opinion.

[7] Further, during the fact-finding hearing, at the request of the Guardian Ad Litem for D.A., R.A., B.A., R.A. and J.A. (hereinafter "GAL"), the court issued a protective order with respect to the Appellant's cross-examination of D.A., specifically disallowing a line of questioning wherein the Appellant's attorney inquired into inconsistent statements made by D.A.

[8] On January 29, 1999, the Appellant filed a motion to admit the transcript and tape recording of Dr. Burns' interview with J.A. and a motion to permit limited expert testimony by Dr. Tye. The court denied both motions at a hearing on March 9, 1999. Further, on that date, the court took judicial notice of the entire file of the first PINS petition, over the Appellant's objection.

[9] Finally, on March 12, 1999, based upon the testimony and evidence presented during the fact-finding proceedings, the court entered oral findings that the Appellant physically and sexually abused D.A. and J.A. The court later amended its findings, deleting the finding of sexual abuse. The Amended Findings of Facts, Conclusions of Law, and Order were filed on September 24, 1999. The Appellant subsequently filed a timely Notice of Appeal.

II.

[10] This Court has jurisdiction over final orders of the Superior Court pursuant to 7 GCA §§ 3107(a) and 3108(a) (1994).

III.

[11] Each of Appellant's various arguments on appeal are discussed below.

A. The lower court's failure to release the Appellant from the first PINS petition.

[12] The Appellant frames the first issue in this appeal as whether the court committed reversible error when it denied the Appellant relief from the Stipulation and Order issued in the first PINS petition. The Appellant argues that the family court was required to grant relief from the first PINS petition in accordance with Rule 60(b) of the Guam Rules of Civil Procedure.

[13] This Court reviews the grant or denial of a Rule 60(b) motion for abuse of discretion. *See Midsea Industrial Inc. v. HK Engineering, Ltd.*, 1998 Guam 14, ¶ 4. Under this standard, a trial court decision will not be reversed unless we have a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors. *Id.* (citing *Santos v. Carney*, 1997 Guam 4, ¶4 (citation omitted)). "When using this standard, a reviewing court does not substitute its judgment for that of the trial court." *People v. Tuncap*, 1998 Guam 13, ¶ 12 (citation omitted). There is an abuse of discretion if the trial court did not apply the correct law, erroneously interpreted the law, relied upon a clearly erroneous interpretation of the facts, or rendered a decision of which the record contains no evidence in support thereof. *Id.* at ¶ 13 (citations omitted).

[14] However, the Appellant never requested Rule 60(b) relief in the court below. In his brief, the Appellant asserts that he filed a 60(b) motion on February 27, 1998. This motion, however, was captioned "MOTION TO STRIKE PINS PETITION FILED FEBRUARY 4, 1998". GAL's Excerpts of Record, p. 1. This motion is a motion to strike the *second* PINS petition filed in JS P0306-97, and not the Stipulation and Order of the first PINS petition filed on July 15, 1997. The relief requested in Appellant's February 27 motion was not for 60(b) relief from the first PINS, and the court did not address it as such, thus, there is no denial of Rule 60(b) relief to be reviewed by this court.

[15] We note that during the March 27, 1998 hearing on the motion to strike the second PINS petition, the Appellant did briefly argue that before the second PINS petition can be adjudicated, he must first be relieved from the prior Order. The basis of the argument was that the facts and allegations made in the second PINS petition were from the same time frame as the first PINS petition, and that it would be impossible for the court to base the decision in the second PINS petition on any new facts. Thus, the Appellant appeared to be arguing for release from the first PINS Order, and a new full-blown consolidated hearing to determine the facts as to both PINS petitions. The court rejected this argument and denied the request, ruling:

> [T]he latest PINS petition that has been filed is a PINS Petition that is based upon new facts. The Court does not agree with the [respondent's] side that these are identical, similar, or same issues that were presented in the first Petition. And, therefore, the Court believes that the second Petition will stand on its own.

GAL's Excerpts of Record at p. 11.

[16] Even assuming we accept the arguments presented at the hearing as a request for Rule 60(b) relief from the first PINS and the court's ruling as a denial of relief, which is a stretch, we cannot say that the court abused its discretion. *See Midsea Indus., Inc.*, 1998 Guam 14 at ¶ 4 (setting forth the abuse of

discretion standard). Under Guam Rule of Civil Procedure 60(b), on motion, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or if it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from operation of the judgment.

Guam R. Civ. P. 60(b). Because the second PINS petition was based on new allegations of abuse not asserted in the first PINS petition, and was therefore a completely separate proceeding, there were no grounds, under Rule 60(b), for relief from the Stipulation and Order of the first PINS petition.

[17] The Appellant also argues that he agreed to the Stipulation and Order of the first PINS petition because he believed there would be no new allegations of abuse to surface. He contends that because new allegations were made, he should have been entitled to a release from the Stipulation and Order and be entitled to a fact-finding hearing with regard to the allegations made in the first PINS petition. We do not agree. The reasons the Appellant agreed to the Stipulation and Order in the first PINS are irrelevant to the issue of whether he should be released from the Stipulation and Order. There is no evidence or allegation that the government led the Appellant to believe that the first PINS petition contained all possible allegations of abuse, nor is there evidence that the government made misrepresentations which induced the Appellant to agree to the Stipulation and Order.

B. The exclusion of the Appellant's expert witnesses.

[18] The Appellant argues that the lower court erred in excluding four expert witnesses on six different occasions. Specifically, he contends that the court erred in excluding Dr. Hofer on July 8, 1998, Dr. Tye on November 20, 1998, December 3, 1998, and March 9, 1999, Dr. Esplin on December 3, 1998, and

Dr. Burns on December 7, 1998.

[19] As a general rule, we review evidentiary rulings for an abuse of discretion. See *J.J. Moving Services v. Sanko Bussan (Guam) Co.*, 1998 Guam 19, ¶ 31 (citation omitted) (reviewing the trial court's decision regarding the admissibility of hearsay statements). Specifically, a trial court's decision on the admissibility of expert testimony is reviewed for an abuse of discretion or manifest error. *See Duenas v. Yama's Co.*, Civ. No. 90-00062A, 1991 WL 255834, *3 (D. Guam App. Div. Nov. 18, 1991). "A trial judge abuses his [or] her discretion . . . when the decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Midsea Indus., Inc.*, 1998 Guam 14 at ¶ 4 (citation omitted). Even if the lower court abused its discretion in excluding evidence, we will not reverse if the error was harmless. *See Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 529 (9th Cir. 1986). "[E]rror is harmless if the decision is more probably than not untainted by the error." *Id.* at 529; *see also Caspino v. Caspino*, Civ. No. 87-00065A, 1988 WL 242619, *2 (D. Guam App. Div. Jun. 7, 1988) (citation omitted).

[20] Each point of contention with respect to the proffered experts is discussed below.

1. Doctor Pamina Hofer

[21] On July 8, 1998, the lower court heard testimony by Dr. Hofer elicited at *voir dire* and excluded the doctor from testifying. The court stated:

> [T]he Court finds that Dr. HOFER is professionally qualified to testify as an expert in the field of clinical psychology. However, in this particular case, which is, actually, a case of first impression in my courtroom, with regard to the competency to testify, the Court has some question in light of the fact of the testimony given to this court. ¶ Specifically, the court recalls the testimony of Dr. Hofer, indicating that she is capable of giving an expert opinion, but she will not be able to completely give an unbiased opinion in light of her evaluation of [J.].

Transcript, vol. --, p. 92 (Hearing, July 8, 1998).

[22] The court then expressed great concern that the doctor's "multiple relationships" in the case would hinder the doctor's objectivity. These relationships included: (1) that the doctor employed the Appellant as an accountant for the preceding six months, and (2) that the doctor made an assessment of J.A. and released the report to the Appellant without authorization from either J.A. or the Department of Vocational Rehabilitation Center.

[23] The Appellant argues that the trial court abused its discretion in excluding Dr. Hofer on the ground that the doctor was biased. However, even if we assume that the exclusion on this basis was an abuse of discretion, the Appellant has not created a record adequate enough to allow this court to determine whether he was prejudiced by the exclusion. Guam Rule of Evidence 103(a) provides in part:

> **§103. Rulings on Evidence.** (a) Effect of erroneous ruling. Error may not be predicated upon a ruing which admits or excludes evidence unless a substantial right of the party is affected, and
> 1. Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
> 2. Offer of proof. *In case the ruling is one excluding evidence*, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Title 6 GCA § 103(a) (1993) (emphasis added).

[24] An offer of proof is a "method by which counsel places before the trial court (and ultimately the reviewing court) the evidence he or she wishes to present, to allow the court to determine the relevancy and admissibility of the proposed testimony." *Arhelger v. State*, 714 N.E.2d 659, 664 (Ind. Ct. App. 1999) (internal quotations omitted) (citation omitted). An offer of proof serves dual purposes. First, it reveals the substance of the evidence to the court so as to enable it to make a ruling as to admissibility.

Second, and most importantly for our purposes, an offer of proof provides the appellate court with a record by which to review whether the exclusion was erroneous and whether the appellant was prejudiced by such exclusion. *See Thomas v. Wyrick*, 687 F.2d 235, 239 (8th Cir. 1982); *see also Arhelger*, 714 N.E.2d at 664; *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1406-07 (10th Cir. 1991).

[25] At the very least, some record of the substance of the evidence must be made so as to enable an appellate court to make a determination of admissibility and whether its exclusion was prejudicial to the proponent. *See Thomas*, 687 F.2d at 239; *Wagner v. Peterson*, 430 N.W.2d 331, 332-33 (N.D. 1988) ("The language of 103(a)(2) may excuse the failure to make an offer of proof if the question was in proper form on its face and was framed as to clearly admit an answer favorable to the claim or defense of the party producing him.") (citation omitted).

[26] Appellate courts have refused to review a trial court's decision to exclude evidence where the appealing party has failed to preserve an adequate record on appeal via an offer of proof and the substance of the evidence is not clear from the record. *See Gannett v. Booher*, 465 N.E.2d 1326, 1333 (Ohio Ct. App. 1983) (denying appellant's claim that the trial court erred in excluding portions of a witness' direct examination testimony because the court could not glean the substance of the excluded testimony and an offer of proof was not submitted); *Wagner*, 430 N.W.2d at 332-33 (holding that because there was no offer of proof, and the substance of the witness' testimony was not clear from the questions asked, there was thus no record by which the appellant's claim of error could be evaluated) (citations omitted); *Arhelger*, 714 N.E.2d at 666 (holding that the because the proponent of the evidence did not make the substance of the testimony clear to the court, identify the grounds for admission, and identify the relevance of the testimony, the appellant failed to create the necessary record for review on appeal).

[27] The record reveals that on July 8, 1998, the Appellant made an offer of proof as to Dr. Hofer. The Appellant stated:

> [W]e do offer and tender medical testimony that it is not in the best interest of the children to not be in a position to reconcile, to resolve this problem - - reconcile is the wrong word - - to resolve their problems with their father. They are not going to ever do that if the children are taken out of this environment, and the doctors are ready to - - two doctors - -are ready to testify in that manner.

Transcript, vol. --, p. 13 (Hearing, July 8, 1998).

[28] The court subsequently asked the Appellant what his offer of proof was as to Dr. Hofer, in which the Appellant responded that he has a letter from Dr. Hofer which states that "from a medical viewpoint, a psychiatrists viewpoint, and from a clinical psychologist viewpoint, the only clinical psychologist involved in this case, [she] does not recommend [that the children be permanently placed in California], and we'd like to offer those to the Court at this time." Transcript, vol. --, at p. 14 (Hearing, July 8, 1998). The letters were never submitted to the court and the Appellant's recitation to the court regarding the doctor's proposed testimony is all that we have to review.

[29] Therefore, we find that the Appellant did not make a record sufficient for this court to conduct a meaningful review. While the record states what the doctor would testify to; we do not know enough of the substance of the testimony to enable this court to determine whether the testimony was relevant and how the exclusion specifically prejudiced the Appellant. Because the Appellant failed to make the substance of the testimony clear to the lower court, identify the grounds for admission, and specifically identify the relevance of the testimony, we decline to review the court's exclusion of Dr. Hofer. *See Arhelger*, 714 N.E.2d at 666.

2. Exclusion of Dr. Marcus Tye

[30] The court below excluded Dr. Tye's testimony on three different occasions, November 20, 1998, December 3, 1998, and March 9, 1999. The circumstances surrounding each exclusion are set forth below.

a. November 20, 1998

[31] CPS filed a motion *in limine* to strike Dr. Tye as an expert witness on two grounds: (1) that Dr. Tye's opinions, as set forth in the Offer of Proof, are irrelevant and immaterial to the fact-finding, and (2) that Dr. Tye's testimony would be duplicative of any testimony that Dr. Esplin could offer. The court heard arguments and granted the motion *in limine* during a hearing on November 20, 1998.

[32] At that hearing, the Appellant responded that while two witnesses, Dr. Esplin and Dr. Tye, would be testifying to the reliability of the government's evidence, the testimony would not be duplicative because Dr. Esplin's testimony would be based upon discovery material, while Dr. Tye's opinion will be based upon his observation of testimony elicited during the fact-finding hearing.

[33] The court then inquired as to how Dr. Tye would determine whether the evidence was reliable. The Appellant revealed, for the first time, that the doctor would rely on a technique called Statement Validity Assessment (hereinafter "SVA"). The court focused on Dr. Tye's use of SVA, and whether it was one method that has been scientifically accepted in the counseling community. The court made reference to a separate case a year earlier wherein Dr. Tye testified that SVA was commonly accepted in Germany but not the United States.

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[34] After the above discussion, the court granted the motion *in limine* to exclude the doctor's testimony. The bases for the exclusion were that: (1) Dr. Tye's testimony would be a waste of time and cause undue delay under 6 GCA §403; and (2) the SVA technique that the doctor proposed to employ in assessing whether the child's statements were reliable would invade the province of the fact-finder. Under Rule 702 of the Guam Rules of Evidence, an expert witness may testify if he or she is qualified and the proposed testimony would assist the trier of fact to understand the evidence or determine a fact in issue. *See* Title 6 GCA § 702 (1994). Expert testimony should not be permitted under Rule 702 if it concerns a subject improper for expert testimony, for example, one that invades the province of the jury. *See United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985).

[35] It is improper for an expert to testify as to the credibility of a witness. *See id.* (holding that the trial court abused its discretion where it admitted the testimony of three expert witnesses who testified that the three child victims were able to distinguish truth from fantasy which had the effect of improperly "bolstering the children's story and to usurp the fact-finding function"). "An expert is not permitted to offer an opinion as to the believability or truthfulness of a victim's story." *See Bachman v. Leapley*, 953 F.2d 440, 441 (8th Cir. 1992) (citation omitted). It is the fact-finder who has the duty of judging credibility after assessing a victim's statements and the circumstances surrounding the making of those statements. Accordingly, an expert's opinions regarding the reliability of a witness' statements usurp the province of the fact-finder. *See id.*

[36] In the instant case, Dr. Tye was proposing to testify that a scientific technique, SVA, could explain that Ms. Stinette's interviewing technique with J.A., in light of J.A.'s age and mental state, produced unreliable responses, and that therefore, J.A.'s allegations of abuse at the hands of the Appellant were

inaccurate. Such evidence would have been an expert opinion regarding the reliability and credibility of the victim, J.A. Such expert testimony usurps the function of the fact-finder and was therefore properly excluded.

[37] The court's other basis for exclusion was under Guam Rule of Evidence 403. We review the court's application of Rule 403 to the evidence for an abuse of discretion. *See People v. Evaristo*, 1999 Guam 22, ¶ 6. Under Rule 403, otherwise relevant evidence may be excluded if the court determines that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Title 6 GCA § 403 (1995).

[38] Here, we cannot say that the trial court abused its discretion in excluding the testimony. The probative value of the testimony is diminished when, as discussed above, such opinion invades the role of the fact-finder and that it was not necessary to help the fact-finder appreciate whether the Ms. Stinette's questions were suggestive or leading nor whether J.A.'s answers were affected by the form of the questions. These are conclusions that a fact-finder can make without an expert. In our estimate, such testimony would have taken an inordinate amount of time when compared with its probative value. Therefore, Doctor Tye's testimony could rationally be seen as unduly delaying the fact-finding hearing and the trial court did not abuse its discretion in excluding the evidence under Rule 403.

b. <u>December 3, 1998</u>

[39] During the December 3, 1998 fact-finding hearing, and after the court excluded Dr. Esplin, the Appellant requested that Dr. Tye be allowed to testify as an expert in order to present the evidence that Dr. Esplin would have proffered. In response, CPS argued that they were ready to proceed with the fact-

finding and emphasized that the Appellant had months to prepare.

[40] After hearing the above arguments, without commenting on the specific reason for excluding the testimony, the court denied the Appellant's request to have Dr. Tye testify. Presumably, the court accepted CPS's argument that the testimony should be excluded because of the Appellant's lack of preparation. Where a party fails to disclose an expert prior to trial, the court may exclude that expert's testimony. *See Habtu v. Woldemichael*, 694 A.2d 846 (D.C. App. 1997). In *Habtu*, the trial court refused to grant a motion to designate a new expert as a replacement for an expert who asked to be removed from the case. *Id.* at 847. The appellate court determined that the trial court abused its discretion in refusing to allow the party the opportunity to designate the new expert. *Id.* The appellate court made its analysis under the local rule that allowed the court the discretion to modify pre-trial orders regarding expert witnesses if "necessary to prevent manifest injustice". *Id*. at 849. The appellate court employed a three-part test in determining whether the lower court should have modified the order, with one factor being whether the motion to supplement the pre-trial order was made on the eve of trial. *Id.* at 849. Expert witnesses offered on the eve of trial are disfavored due to the hardship on the opposing party in obtaining discovery in time for trial. *See id.* The *Habtu* court found that the lower court should have allowed the party the opportunity to name a new expert when, in addition to other factors, the request for the designation of a new expert was made three months prior to the trial. *Id.*

[41] By contrast, in the instant case the Appellant made the request for a substitute expert on the first day of the fact-finding hearing. The court could reasonably conclude that allowing the expert to testify would work a hardship on the opposing party and it was within the court's discretion to exclude the expert on this ground. Accordingly, the court's exclusion of the expert was not an abuse of discretion.

c. March 9, 1999

[42] Finally, during the March 9, 1999 hearing, the Appellant requested, for the final time, to have Dr. Tye testify as an expert witness. The argument was made as follows:

> [I]n addition to what is different now is the Court has heard testimony which it had not heard before, testimony from both Mr. and Mrs. Stinette, and Dr. Burns, and [D.A.], and we submit that in light of their testimony, this expert witness' opinions would be helpful to the Court in interpreting the reliability of the testimony, and the assertions or observations evidenced to the Court in terms of dreams, separation anxiety, suggestive questioning, repeated questions, infant memory, and adolescent memory, and on that basis we would offer Dr. Tye's testimony, consistent with the exhibits that are attached, and the reasoning spelled out in our memorandum of points and authorities.

Transcript, vol. --, p. 78 (Fact-Finding, Mar. 9, 1999).

[43] The court denied the motion, citing Guam Rule of Evidence 702, and emphasized that admitting evidence under Rule 702 is discretionary. Specifically, the court reasoned that: (1) testimony regarding dream interpretations, child and adolescence memory, post-traumatic stress disorder, and separation anxiety was irrelevant as it relates to dream interpretation; (2) the court did not need an expert to assist the trier of fact to understand any evidence of the existence of post-traumatic stress disorder, assuming there was an indication of the disorder; and (3) as to separation anxiety, child and adolescent memory, suggestive questions and repeated questions, the court did not need an expert to interpret the evidence that has been presented.

[44] Thus, we must decide whether the court abused its discretion in excluding Dr. Tye's testimony on the ground that the evidence would not be helpful to interpret the evidence. *See United States v. Recio*, 226 F.3d 1087, 1098 (9th Cir. 2000); *United States v. Thomas*, 74 F.3d 676, 682 (6th Cir. 1996). Analysis of a Rule 702 issue encompasses a two-part test: (1) whether the witness is qualified via knowledge, skill, experience, training, or education; and (2) whether the witness' testimony will assist the

trier of fact. *See Coleman v. Parkline Corp.*, 844 F.2d 863, 865 (D.C. Cir. 1988) (citations omitted). The court's determination that the evidence would not aid the fact-finder in interpreting the evidence implicates the second prong of the above test. If a court determines that the evidence should be excluded under the second prong of the test, the court is not required to undertake an inquiry into the first prong. *See United States v. Hall*, 165 F.3d 1095, 1103, n. 4 (7th Cir. 1999). We thus proceed to determine whether the court properly excluded the evidence under the second prong.

[45] We do not decide whether we would have excluded the testimony if we had sat as the trier of fact. *See Tuncap*, 1998 Guam 13 at ¶ 12 (citation omitted). Trial courts have considerable discretion to admit or exclude evidence under Rule 702 and we will only reverse if the trial court abused its discretion. *See United States v. Barta*, 888 F.2d 1220, 1223 (8th Cir. 1989); *see also Thomas*, 74 F.3d at 682. We find that the trial court did not abuse its discretion in excluding the testimony of Dr. Tye.

[46] Under the second prong of Rule 702, the evidence should be admitted if the testimony will assist the trier of fact to interpret the evidence. *See Coleman*, 844 at 865. In the present case, the trier of fact was the judge, as opposed to a jury. Sitting as the trier of fact, a trial judge is obviously more cognizant of what type of testimony would be helpful in interpreting the evidence, especially in light of the judge's understanding of the evidence already presented. A trial judge sitting as the trier of fact thus has more discretion in determining whether the particular testimony would be helpful than in a case where the trier of fact is an average jury. Accordingly, we defer to the court's determination that in light of the judge's experience dealing with psychologists for over 15 years, the particular testimony offered by Dr. Tye would not assist in interpreting the evidence. The exclusion was not an abuse of discretion.

3. Exclusion of Dr. Phillip Esplin

[47] In a pre-fact-finding hearing on November 12, 1998, CPS made a request that Dr. Esplin provide them with the documents the doctor planned to rely on to enable them to prepare for the doctor's testimony. The court ordered that the requested information be available within one week before the fact-finding, specifically, on or about November 19, 1998. On November 25, 1998, CPS notified the court that they had not yet received the requested materials. The court, on that date, ordered that the doctor send the materials by 3:00 p.m. on November 27th. CPS stated that they needed the materials for use during the telephonic testimony of the doctor. On December 3, 1998, CPS notified the court that the Appellant failed to submit the material by the date previously set by the court. In response to the failure to comply with the previous order, the court excluded the testimony.

[48] Courts may exclude expert testimony or evidence based upon their inherent powers, not governed by rule or statute, to manage their affairs and control their docket. *See Unigard Sec. Ins. Co v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (recognizing the district court's inherent powers). Within this inherent power lies the broad discretion to make evidentiary rulings that will facilitate the "orderly and expeditious disposition of cases." *Id.* Particularly, the court has discretion to exclude witnesses whose presence at trial would "unfairly prejudice an opposing party." *Id*. Planning effective cross-examination of adversary witnesses, especially expert witnesses, is one of a trial lawyer's most important responsibilities in preparation for trial. *See Rickett v. Hayes*, 473 S.W.2d 446, 448-49 (Ark. 1971). It is important that a party receive pre-trial discovery of a proposed expert's opinions in order to effectively prepare for cross-examination of that witness. *Id.* Thus, where a court directs a party to make information available regarding an expert witness, a party's failure to comply with the order is

sufficient grounds for exclusion of that expert, especially where the inclusion of the expert will delay the proceedings. Accordingly, the lower court did not abuse its discretion in excluding Dr. Esplin as a sanction for the Appellant's failure to comply with the discovery order.

[49] As a final note, the Appellant argues that under Guam Rule of Evidence 705, he was not required to disclose the underlying data that formed the basis of Dr. Esplin's testimony. The Appellant's argument cannot withstand scrutiny. The rule provides:

> **§705. Disclosure of Facts or Data Underlying Expert Opinion.** The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, *unless the court requires otherwise.* The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Title 6 GCA §705 (1994) (emphasis added). As pointed out above, the court did "otherwise require" that the Appellant disclose information regarding the Dr. Esplin's testimony.

4. Exclusion of Dr. Betty-Ann Burns

[50] During the testimony of Dr. Burns on December 7, 1998, the court halted the Appellant's attempts to question the witness regarding basic psychological principles. The court reasoned that the doctor was not qualified as an expert. Because the Appellant was attempting to elicit expert testimony from a witness not so qualified, the trial court did not abuse its discretion in excluding the testimony. *See* 6 GCA § 702 (providing that a witness may testify as an expert if he or she is so qualified and the testimony will assist the trier of fact).

C. Exclusion of a tape-recorded interview of J.A.

[51] On March 9, 1999, the Appellant attempted to offer into evidence a tape-recorded interview of J.A., and corresponding transcript, made by Dr. Burns. *See* Respondent-Appellant's Excerpts of Record, p. 307. The court denied its admission after objection by CPS and GAL on the ground that the evidence

was not properly authenticated. CPS specifically stated that during the testimony of Dr. Burns on December 7, 1998, the making of the tape was discussed yet the Appellant did not attempt to introduce the tape into evidence at that time. The court agreed, ruling:

> The Court will sustain the objection. It's an improper way to bring in evidence. ¶ First of all you're trying to bring in a transcript that has not been verified by the persons who actually were speaking in the tape, then you haven't had Dr. Burns identify the tape. So based on the way you're presenting it, that you're going to offer it, it's improper, so the Court will not allow it at this time.

Transcript, vol. --, at p. 97 (Fact-Finding, Mar. 9, 1999).

[52] CPS is correct in relying on Guam Rule of Evidence 901(a) regarding the admissibility of evidence. That section provides:

> **§901. Requirement of Authentication or Identification. (a) General Provision**. The requirement of authentication or identification as a condition precedent of admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Title 6 GCA § 901(a) (1994).

[53] All evidence must be authenticated before the court can admit it into evidence. *See id.* Here, the court made it clear that the Appellant failed to provide any testimony regarding whether the tape or transcript was what the Appellant claimed at the time the Appellant attempted to admit the evidence. A review of the record reveals that there was no attempt to authenticate the evidence. Therefore, the court did not abuse its discretion in excluding the evidence.

D. The court's taking of judicial notice of the entire case file.

[54] During the March 9, 1999 hearing, the Appellant requested that the court to take judicial notice of paragraph number 6 of the first PINS Stipulation and Order filed on July 15, 1997, which stated that the Appellant and CPS would endeavor to enter into a service plan agreement. In response to this request,

the GAL made a further request that the court take judicial notice of everything in the file up until that point. The Appellant objected to GAL's request. Notwithstanding, the court granted both requests.

[55] The Appellant argues that the court improperly took judicial notice of the entire file, citing Guam Rule of Evidence 201, and specifically, Rule 201(e). The relevant portions of the rule are as follows:

> **§201. Judicial Notice of Adjudicative Facts.**
> **(a) Scope of Rule**. (a) This Rule governs only judicial notice of adjudicative facts.
> (b) **Kinds of facts**. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot readily be questioned.
> . . . (e) **Opportunity to be heard.** A party is entitled *upon timely request* to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

Title 6 GCA § 201 (1993) (emphasis added).

[56] The Appellant argues that the court erred because the court failed to give him the opportunity, as provided in Rule 201(e), to be heard on the issue of whether it was proper to take judicial notice of the entire file. We disagree. In accordance with §201(e), a party is entitled to be heard only if a "timely request is made". *Id*. A party who desires a hearing must affirmatively make a request or he will be foreclosed from challenging the court's decision on appeal. *See Chen v. Metro. Ins. & Annuity Co.*, 907 F.2d 566, 569 (5th Cir. 1990) (implying that whether a party properly preserved for appeal the propriety of taking judicial notice depends on if the party filed a motion requesting an opportunity to be heard.); *see also Matter of King Resources Co.*, 651 F.2d 1326, 1337, n. 12 (10th Cir. 1980) (recognizing that a party can request a hearing to determine the propriety of taking judicial notice at the time the court takes notice). Furthermore, making an objection at the time the court takes judicial notice is not enough to entitle the party to a hearing. *See* 21 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND

PROCEDURE, § 5109 (-- ed. 19--). "In order to obtain a hearing on the propriety of taking judicial notice, a party must request a hearing. Rule 201(e) establishes no formal requirements for the request; presumably an oral demand will suffice. In making the request, [however,] *counsel should make clear that he is not simply objecting to the court's taking of judicial notice but is insisting on his right to a hearing*." *Id.* (emphasis added).

[57] Because the Appellant merely objected to GAL's request that the court take judicial notice of the file, and did not request a hearing as required under Rule 201(e), the trial court committed no error in not granting a hearing on the propriety of taking judicial notice. Moreover, the failure to properly request a hearing under Rule 201(e) amounts to a failure to preserve the issue for appeal. *See Chen*, 907 F.2d at 569.

[58] It is proper to take judicial notice of court files. *See In Re S.S.*, 334 N.W.2d 59, 61 (S.D. 1983) (holding that in a termination of parental rights hearing, the trial court did not err in taking judicial notice of prior proceedings because of the rule that "'trial courts may take judicial notice of their own records or prior proceedings in the same case'") (citation omitted). However, in taking judicial notice, a court may only take judicial notice of *the truth of facts* in certain documents, including past court orders, findings of fact and conclusions of law, and judgments. *See In Re Snider Farms, Inc.*, 83 B.R. 977, 986-87 (Bankr. N. D. Ind. 1988) (citation omitted). As for all other submissions in the file, a court should only take judicial notice of the fact of their existence, and not the truth of the facts within. *Id.*

[59] In the instant case, the court took judicial notice of "all the pleadings", the July 15, 1997 Stipulation & Order of the first PINS petition, and the "entire file". It is unclear whether the court merely took judicial notice of the existence of the documents in the file, as opposed the truth of the facts contained within the

documents in the file. We do not have to make this determination, however, because even assuming the court did the latter, which would have been improper, the error was harmless. *See* Guam R. Civ. P. 61. "Error is harmless if it is more probable than not that the error did not affect the outcome of the trial." *Caspino*, Civ. No. 87-00065A, 1988 WL 242619, at *2 (citation omitted). Reviewing the oral and written Findings of Facts and Order issued in the second PINS petition, we find that while the court stated that it came to its conclusions based on numerous pieces of evidence including all facts judicially noticed, there was more than enough evidence presented at the fact-finding to support the court's conclusion even in the absence of the file. *Cf. Hennegan v. Holden*, Civ. No. 81-0072A, 1983 WL 30214, * 5 (D. Guam App. Div. Nov. 28, 1983) (holding that because the exhibit reflected and was cumulative of other admitted evidence, the admission of the exhibit was harmless error).

E. The court's limit on the cross-examination of D.A.

[60] During the fact-finding hearing on February 19, 1999, the Appellant conducted a cross-examination of D.A. in which he probed into inconsistent statements made by D.A. on several occasions. The Appellant specifically asked D.A. to explain why on one occasion he stated that he remembers specific incidents where the Appellant hit him in the groin, and a contradictory statement that D.A. made that he did not remember any specific incident. Respondent-Appellant's Excerpts of Record, p. 272. The GAL objected and requested a protective order on the ground that the Appellant was repeating questions with the purpose of harassing D.A. The court sustained the objection and issued the protective order. The court found that the D.A. was being harassed because the questions posed repeatedly took the minor's prior statements out of context.

[61] A court's decision to limit cross-examination of a witness is reviewed for an abuse of discretion. *See People v. Viloria*, Crim. No. 92-00023A, 1993 WL 470409, *4 (D. Guam App. Div. Oct 12, 1993) (citing *United States v. Dischner*, 960 F.2d 870, 881 n. 12 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1290 (1993)). In determining whether the court abused its discretion, reference to the Child Protective Act is necessary. In accordance with the Act, the court has discretion to control the manner in which a child testifies in a child protective proceeding.[3] The Act provides:

> **§13311.** (b) The court may direct that a child testify under such circumstances as the court deems to be in the best interests of the child and the furtherance of justice, which may include or be limited to an interview on the record in chambers with only those parties present as the court deems to be in the best interests of the child.

Title 19 GCA § 13311(b) (1994).

[62] We read this section to allow a court to limit the examination of the child if it is within the best interest of the child. *See* Title 19 GCA § 13100 (1994) ("This Chapter shall be liberally construed to serve the best interests of the children and the purposes set out in this Chapter.") Here, the trial court cited that the attorney's questioning amounted to harassment because the attorney took the child's past statements out of context. Based upon a reading of the record, the attorney did refer to isolated and specific statements made by the child during prior interviews. The judge presided over the hearing and heard the questions being presented, the manner by which they were being asked, as well as the points the Appellant was trying to make. The judge was clearly in the best position to assess the situation and we thus defer to the court's judgment that the circumstances surrounding the questioning constituted harassment. Because the court issued the protective order in an effort to protect the child from this harassment, the court was

[3] Title 19 GCA § 13101(f) (1994), defines "child protective proceeding" as "any action, hearing or other civil proceeding before the court under this Chapter." *Id.* A fact-finding hearing is a proceeding under the chapter. *See* Title 19 GCA §§ 13101(m), 13318 (1994).

clearly looking out for the best interests of the child. Such protection of the child was well within the discretion afforded the family court in fact-finding proceedings. The court did not abuse its discretion in limiting the cross-examination of D.A.

F. The court's findings of facts.

[63] The court entered an oral Decision and Order in the second PINS petition on March 12, 1999. The court defined the burden of proof, explaining that the government must prove by a preponderance of the evidence that a child or children has been harmed or subject to threatened harm. The court found that based upon the totality of the evidence, including the direct evidence, circumstantial evidence, stipulations, judicially noticed matters, and transcripts, J.A. and D.A. were persons in need of services.

[64] An amended Findings of Facts, Conclusions of Law, and Order was filed on September 24, 1999, which incorporated the oral pronouncement of March 12, 1999. In the findings of facts, the court made the following findings:

> 5. [J. A.] has been subject to harm and threat of harm while residing with his father, due to physical abuse of him by his father, in that on a number of occasions his father struck him on and about his groin using a stick or other implement, and on a number of occasions his father squeezed his penis, both types of behavior causing pain to J.A. ¶5
>
> 6. [D. A.] has been subject to harm and threat of harm while residing with his father, due to physical abuse of him by his father, in that on two occasions [D.] was kneed in the groin by his father, and on one of those occasions extreme pain was caused to [D. A.]. ¶6

In the Interest of N.A., Juv. Spec. Proceeding No. JSP0306-97 (Super. Ct. Guam Sept. 24, 1999).

[65] The Appellant argues that the fact-finding court relied upon "materially false or unreliable information" in rendering its findings of facts in the second PINS petition. He points out numerous occasions where the testimony the court accepted was contradicted by other witnesses or of which the evidence fails to support. The Appellant cites one finding of fact, that the Appellant struck J.A. in the groin,

where he asserts there is no evidence in the record of such finding. Reliance on this evidence in making its findings, the Appellant argues, was a violation of the Appellant's due process rights and was an abuse of discretion.

[66] Findings of facts made by a judge sitting as the trier of fact are reviewed for clear error. *See Estate of Benavente v. Maquera*, 2000 Guam 9, ¶ 7 (quoting *Yang v. Hong*, 1998 Guam 9, ¶4); *see also Craftworld Interiors, Inc. v. King Enterprises, Inc.* 2000 Guam 17.

> A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below commit a mistake. The appellate court accords particular weight to the trial judge's assessment of conflicting or ambiguous evidence. The applicable standard of appellate review is narrow; the test is whether the lower court rationally could have found as it did, rather than whether the reviewing court would have ruled differently.

Craftworld Interior, Inc., 2000 Guam 17 at ¶ 6 (quoting *Yang*, 1998 Guam 9 at ¶ 4).

[67] The appellate court gives due regard to the trial court's opportunity to judge the credibility of witnesses. *See Donicker Corp. v. Pittsburgh Nat'l Bank*, Civ. No. 90-0072A, 1991 WL 255854 *4 (D. Guam App. Div. Nov 18, 1991) (quoting Guam R. Civ. P. 52). This court will not reverse if, viewing the record in its entirety, the trial court's findings were plausible. *Yang*, 1998 Guam 9 at ¶ 6 (citation omitted). Findings of facts are only reversible if it "tends to defy logic and common sense." *Id*. at ¶ 7 (citation and internal quotation omitted).

[68] In determining whether the lower court made clearly erroneous findings of facts, a few cases are instructive. In *Guam Hearse and Funeral Services, Inc. v. Mendiola*, Civ. No. 86-0009A, 1987 WL 109398 (D. Guam App. Div. Feb. 12, 1987), the plaintiff sued for money due under a promissory note. *Id*. at *1. The issue was whether the promissory note contained all material terms when the defendant signed it. *Id*. The plaintiff alleged that it did, and the defendant claimed otherwise. After a bench trial, the

trial court held in favor of the plaintiff, finding the plaintiff's story more credible. *Id.* On appeal, citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 1512 (1985), the appellate division affirmed, stating that where the trial court observed witnesses who gave conflicting stories, the court's findings should be given great deference. *Id.*

[69] Similarly, in *Coffey v. Government of Guam*, 1997 Guam 14, the court deferred to the trial court's determinations regarding credibility of witnesses. In *Coffey*, the appellant challenged the family court's order terminating her parental rights. *Id.* at ¶ 4. In the disposition hearing below, the government bore the burden to prove by clear and convincing evidence that the appellant was not able to provide a safe home for the child. *Id.* at ¶ 7. One issue on appeal was whether the family court's decision was supported by clear and convincing evidence. *Id.* at ¶ 5. The appellant argued that the testimony provided by Dr. Richardson, Dr. Kiffer, and Mrs. Cruz, whose testimony supported termination of parental rights, was not enough to meet the burden of proof. Further, the appellant alleged that the trial court failed to adequately consider her testimony that she was willing and able to care for the child, as well as testimony that Mr. Coffey would take care of the child and make sure the child was not subjected to abuse if reunification with the appellant occurred. On appeal, the court reviewed the evidence on the record, and held that the trial court was presented with enough evidence to support the termination order, notwithstanding the mother's assertions that she would be able to care for the child. The court stated:

> In light of the overwhelming evidence presented in favor of termination, it was reasonable for Judge Maraman, after considering its totality, to have found that Drs. Richardson and Kiffer, and Ms. Cruz, were more convincing and more credible witnesses than the Respondent-Appellant and Mr. Coffey. That, in turn, supported a finding, by clear and convincing evidence, that the Respondent-Appellant could not provide a safe home for [the child]. We see no reason to disrupt Judge Maraman's factual findings; rather, we give deference to the fact that she had the opportunity to judge the credibility of the witnesses.

Id. at ¶ 19 (citations omitted).

[70] In the instant case, the Appellant specifically argues that the evidence as presented revealed that he never struck the two children, J.A. and D.A., in the groin area. In its oral Decision and Order, the court explained the evidence that the findings of fact were based upon. Specifically, the court found that the Appellant hit D.A. in the groin on two occasions and J.A. on one occasion. In regard to D.A., the court relied on the following evidence: (1) Dr. Burns' testimony that D.A. told the doctor that the Appellant struck him in the groin area twice, (2) Dr. Burns' testimony that one of D.A.'s two sisters corroborated the allegations that the father struck D.A. in the groin; (3) D.A.'s testimony that on one occasion the Appellant kneed him or kicked him on the "side", as corroborated by a statement that D.A. made on this occasion, "You better not do this to me again or I'll tell somebody"; and (4) D.A.'s testimony that on another occasion, he stated that "My penis had been hit by [the Appellant's] knee". We find that this evidence is sufficient for the family court to determine that Appellant hit D.A. in the groin area on two occasions.

[71] One issue of contention is the court's reliance on Dr. Burns' testimony that J.A. told him that Appellant squished his bottom. The Appellant asserts that the doctor never gave this testimony. However, the record does reveal that one witness, Ms. Stinette, offered testimony that would support the conclusion that the Appellant touched J.A.'s bottom. The court, in its findings of facts, also relied upon the testimony by Ms. Stinette. Thus, the record does contain evidence by which the court could find that the Appellant hit J.A. in the groin area.

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[72] Based on all the testimony the court relied upon, which are part of the record and which the court was at liberty to accord due weight, the findings of fact were supported by the evidence. Thus, the trial court's findings of facts were not clearly erroneous.

IV.

[73] We find that the lower court did not commit error in proceeding with the second PINS petition. Further, the court did not abuse its discretion in its evidentiary rulings made prior to and during the fact-finding hearing. Finally, the court's findings of facts were supported by the evidence and were thus not clearly erroneous. Accordingly, we **AFFIRM** the lower court's decision.

JOHN A. MANGLONA
Designated Justice

JOHN B. MAHER
Justice *Pro Tempore*

PETER C. SIGUENZA, JR.
Chief Justice (Acting)