

June 2009

**BUSINESS RECORDS HEARSAY EXCEPTION**  
**By Ted Babbitt**

The Courts regularly allow into evidence records kept in the ordinary course of business under an exception to the hearsay rule contained within Fla. Stat. 90.803. Judges and lawyers are sometimes under the misapprehension that just because business records fall under this exception, everything within them is admissible even though it would be rank hearsay. That is not true. In fact, the business records exception is quite narrow and requires a meticulous analysis of whether the record meets the test necessary in order to be admitted as a business record.

That issue arose in the recent case of M.S. v. Dept. of Children & Families, 34 Fla. L. Weekly D679 (Fla. 4<sup>th</sup> DCA, April 1, 2009). There a father appealed a judgment adjudicating his daughter a dependent where the DCF felt the father was ineffective in protecting the child against her mother's erratic behavior. The trial court, over an objection, admitted into evidence certain records of the Maryland Social Services Network. The trial court's order adjudicating the child as a dependent relied heavily on those records and the Fourth District reversed finding that most of those records were inadmissible hearsay.

The test for the admissibility *vel non* of a business record is set forth in Brooks v. State, 918 So. 2d 181 (Fla. 2005). There the Court reversed a trial judge's admission of a note taken by an internal revenue agent from a woman

who was subsequently murdered and, therefore, unavailable to testify. The trial court admitted the note through Fla. Stat. 90.803(8), the statutory hearsay exception for public records and reports. In that case, at 193, the Supreme Court held:

“To be admissible as a business record, it must be shown that the record was (1) made at or near the time of the event recorded; (2) by or from information transmitted by a person with knowledge; (3) kept in the course of a regularly conducted business activity; and (4) that it was the regular practice of that business to make such a record. *See Quinn v. State*, 662 So. 2d 947, 953 (Fla. 5<sup>th</sup> DCA 1995); sec. 90.803(6)(a), Fla. Stat. (2002). To the extent the individual making the record does not have personal knowledge of the information contained therein, the second prong of the predicate requires the information to have been supplied by an individual who does have personal knowledge of the information and who was acting in the course of a regularly conducted business activity. *See Quinn*, 662 So. 2d at 953; *Van Zant v. State*, 372 So. 2d 502, 503 (Fla. 1<sup>st</sup> DCA 1979). If this predicate is not satisfied, then the information contained in the record is inadmissible hearsay, unless it falls within another exception to the hearsay rule. *See Quinn*, 662 So. 2d at 953-54; *see also Hill v. State*, 549 So. 2d 179, 181 (Fla. 1989); *Johnson v. Dep’t of Health & Rehab. Servs.*, 546 So. 2d 741, 743 (Fla. 1<sup>st</sup> DCA 1989); *Harris v. Game & Fresh Water Fish Comm’n*, 495 So. 2d 806, 809 (Fla. 1<sup>st</sup> DCA 1986). (‘The general rule is that a hearsay statement which includes another hearsay statement is admissible only when both statements conform to the requirements of a hearsay exception.’); *Van Zant*, 372 So. 2d at 503.”

In Reichenberg v. Davis, 846 So. 2d 1233 (Fla. 5<sup>th</sup> DCA 2003), records very similar to the records in question in the M.S. v. Dept. of Children & Families case were held to be inadmissible because the notations in the records were not within the personal knowledge of the agency employee.

In reversing the trial court's admission of this child's Maryland Social Services records and the ultimate judgment finding her to be dependent, the appellate court held that the trial court could not rely upon what amounts to hearsay within hearsay. While Fla. Stat. 90.803 does permit the introduction of business records even though they would otherwise be considered hearsay, that admissibility is predicated upon meeting the prerequisites contained within Brooks v. State, supra. The person making the business record must be identifiable and the actual person with the knowledge of the event portrayed within the record. Rank hearsay of unknown individuals not within the knowledge of the person making the business record remains rank hearsay and is inadmissible.

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