Applying Exceptions To the Rules Against Hearsay Evidence In Custody Cases

Part Two of a Three-Part Article

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In Part One of this article, we discussed the fact that the rule against hearsay often presents roadblocks for counsel in contested custody and visitation cases. Now we look at the specific exceptions to the rules against hearsay as they relate to child custody litigations.

State of Mind

Evidence of state of mind is admissible not for its truth, but to show the speaker's mental state (*See People v. Ricco*, 56 NY2d 320 (1982)), to explain the speakers acts (*Loetsch v. New York City Omnibus Corp.*, 291 NY 308 (1943)), and to show why the person who heard the speaker acted the way he did (*People v. Felder*, 37 NY2d 779 (1975); *Hine v. N.Y. Elevated R.R. Co.,* 149 NY 154 (1896)). Statements of reason, motive or feeling are admissible when relevant. Certain statements about a present physical condition are also admissible for their truth. Involuntary expressions of pain, such as screams, groans or moans that are introduced to show the speaker was in pain, are admissible, but a statement that the speaker is currently suffering pain is not admissible unless made to a doctor for purposes of treatment. *Roche v. Brooklyn City & Newtown R.R. Co.*, 105 NY 294 (1887).

In *People v. Reynoso*, 73 NY2d 816 (1988), the defendant argued that he should be allowed to introduce a statement, made to his sister two hours after the shooting, that he believed the victim had been armed. The court held the statement irrelevant unless it was offered to prove its truth, and in that respect it would be inadmissible hearsay: "While such declarations may be received to show the declarant's state of mind at the time the statement was made, they are not admissible to establish the truth of past facts contained in them." Where the making of the statement indicates circumstantially the state of mind of the speaker or person who heard the statement it is not hearsay. Where a witness' state of mind is relevant, the witness may testify to an out-of-court statement made by others which would indicate circumstantially what he believed at the time." *Bergstein v. Bd of Ed*, 34 NY2d 318, 324 (1974). For example, in *People v. Harris*, 209 NY 70 (1913), at trial, for the purpose of showing that he had acted in the heat of passion and without intent to kill, the defendant was properly permitted to testify that, just before he killed his wife, she had told him that she was pregnant by another man. It did not matter whether the wife's statement was true or false. What she said to the husband may have produced an effect upon his state of mind.

In *Loetsch v. NYC Omnibus*, 291 NY 308 (1943), the state-of-mind exception was applied to the speaker. At trial, and on the issue of damages suffered by the surviving husband, the defendant offered in evidence a statement in the wife's will, executed a few months before the fatal accident, to the effect that since her husband had been cruel to her and had failed to support her, she was leaving him only one dollar. The Appellate Division held that the trial court erred in excluding this evidence: "No testimonial effect need be given to the declaration, but the fact that such a declaration was made by the decedent, whether true or false, is compelling evidence of her feelings toward, and relations to, her husband."

In *Matter of Noemi D.*, 43 AD3d 1302 (4th Dept. 2007), where the mother appealed from an order terminating her parental rights based on a finding of permanent neglect, the Appellate Division held that the court properly allowed the child's psychologist to testify concerning certain out-of-court statements made by the child because those statements were offered to show the child's state of mind rather than to establish the truth of the matter asserted.

Statements of the parents or witnesses, which are offered in custody and visitation cases to explain their actions, are not hearsay. In *Mateo v. Tuttle*, 26 AD3d 731 (4th Dept. 2007), the Appellate Division stated, "[T]he statements of the child to petitioner and his wife as well as statements made by a nurse to petitioner's wife were not offered for the truth of the matters asserted therein but, rather, were offered to explain actions taken by petitioner and his wife, and thus those statements and that testimony fall within an exception to the hearsay rule."

Present Sense Impression and Excited Utterance/Spontaneous Declaration

The present sense impression and excited utterance exceptions to the hearsay rule allow the statement as evidence of the truth contained in it.

An out-of-court statement is not hearsay where the mere utterance of a statement may indicate circumstantially the state of mind of the person who heard it, the state of mind of the speaker, or the speaker's knowledge, reason, belief, intent, or emotion at the time of the occurrence of the event. The statements are admissible for their truth to prove that the event happened. *Waterman v. Whitney*, 11 NY 157 (1854). Farrell, Prince - Richardson on Evidence, 11th Ed., § 8-106.

The present-sense-impression exception permits a court to admit hearsay testimony of a statement describing or explaining an event or condition

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made while the declarant was perceiving the event or condition, or immediately thereafter. Spontaneous descriptions of events made substantially contemporaneously with the observations are admissible if the descriptions are sufficiently corroborated by other evidence. Such statements may be admitted even though the declarant is not a participant in the events and is an unidentified bystander. *People v. Brown*, 80 NY2d 729 (1993).

The excited utterance exception was adopted by the Court of Appeals in *People v. Caviness*, 38 NY2d 22 (1975), where the court held that a spontaneous declaration or excited utterance made contemporaneously or immediately after a startling event, which asserts the circumstances of that occasion as observed by the declarant, is admissible. There, a witness to a shooting was allowed to testify that immediately after the victim was shot, she said "Burnis shot Earl," as she fell to the ground.

In *People v. Knapp*, 139 AD2d 931 (4th Dept. 1988), *appeal denied,* 72 NY2d 862, (1988), when the mother of a four-year-old victim of sexual molestation found her with the defendant, at which time the child said words to the effect that the defendant had sexually molested her. The court held these were admissible because the traumatic and emotional nature of the event indicated that the statement was made while the child was still in a state of excitement. *See* 5 N.Y.Prac., Evidence in New York State and Federal Courts 8:30.

EXPRESSIONS OF INTENT

Expressions of intent to perform a future act, when relevant, are an exception to the rule against hearsay. Such statements are allowed into evidence for their truth. In *People v. James*, 93 NY2d 620 (1999), the Court of Appeals held that the speaker's statement of intent was admissible to prove his own actions as well as those actions of other persons named in the statement. However, before a statement of intent to engage in joint or cooperative activity is admissible against the named nondeclarant, it must be shown that: 1) the declarant is unavailable; 2) the statement of the declarant's intent unambiguously contemplates some future action by the declarant, either jointly with the nondeclarant defendant or which requires the defendant's cooperation for its accomplishment; 3) to the extent that the declaration expressly or impliedly refers to a prior understanding or arrangement with the nondeclarant defendant, it must be inferable under the circumstances that the understanding or arrangement occurred in the recent past and that the declarant was a party to it or had competent knowledge of it; and 4) there is independent evidence of reliability, *i.e.*, a showing of circumstances which all but rule out a motive to falsify and evidence that the intended future acts were at least likely to have actually taken place.

This discussion concludes next month.

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Inadequate Discovery

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and no evidence to present to a judge at a trial. In such a case, if the titled spouse meets the initial, *prima facie* burden to establish that the contested property is separate and not marital, the non-titled spouse, having conducted no discovery, would be unprepared and unable to establish a marital property component, particularly as it relates to increases in the value of separate property or the transmutation of separate property by commingling it with marital property.

Transmuting Separate Property by Commingling: It is well-established law that separate property can be transmuted into marital property by commingling it with marital property. *Sherman v. Sherman*, 304 AD2d 744 (2d Dept., 2003). Once separate property is commingled with marital funds, it becomes marital property. *Walasek v. Walasek*, 243 AD2d 851 (3d Dept. 1997). This rule is so strict that the formerly separate property does not resume its status as separate even if all marital funds are later removed from the account. *Chiotti v. Chiotti*, 12 AD3d 995 (3d Dept., 2004); *see also Mahony v. Mahony*, N.Y.L.J. June 30, 1994, p.28 col. 1 (Sup. Ct. N.Y.) (where records not clear, funds deemed marital). However, the burden can be met by demonstrating that there is no other possible source for the funds. *Kenney v. Lureman*, 8 AD3d 1099 (4th Dept. 2004); *Zanger v. Zanger*, 1 AD3d 865, 867 (3d Dept. 2003); *Sarafian v. Sirafian*, 140 AD2d 801, 804 (3d Dept. 1988) (all holding that evidence must rebut even unsupported testimony that the asset was separate property). Obviously, the only way to discern the funds' nature is to follow the trail of financial records. This is especially true with regard to a marital residence, where funds may come from a variety of different sources, including gifts, inheritances, or even the sale of a former marital residence.

Increases in the Value of Separate Property As Marital Property Due to Direct or Indirect Contributions of the Non-titled Spouse: The case law has always given a broad interpretation to the statutory requirement that increases in a non-titled spouse's separate property are subject to equitable distribution as marital property "to the extent that such appreciation is due in part to the contributions or efforts of the other spouse," including indirect contributions that allow the titled spouse to devote time and effort to the separate property. D.R.L. § 236 (B)(1)(d)(3); *Price v. Price*, 69 NY2d 8 (1986); *Majauskas v. Majauskas*, 61 NY2d 481 (1984); *see also Hartog v. Hartog*, 85 NY2d 36 (1995) (emphasizing that appreciation must be due in its entirety to others' efforts or market forces before increase can be removed from marital estate; even a "small degree" renders the increase marital). Nevertheless, the non-titled spouse does possess a burden to establish the nature of any contribution. *Tzanopolous v. Tzanopolous*, 18 AD3d 464 (2d Dept., 2005); *Carnoil v. Carnoil*, 306 AD2d 366 (2d Dept., 2003). Results often depend on the

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