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Hearsay Evidence In Custody Cases

Part One of a Three-Part Series

By Bari Brandes Corbin and Evan B. Brandes

The rule against hearsay often presents roadblocks for counsel in contested custody and visitation cases, especially where the custodial parent frequently remarries or lives with a new partner. Understanding the rule and its implications is critical to the effective representation of a client in a custody matter.

Hearsay has been defined as "evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated. This " ... means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated." *People v. Caviness*, 38 NY2d 227 (1975); *See also* Farrell, Prince — Richardson on Evidence, 11th Ed., § 8-101.

The rule against hearsay prohibits evidence of an out-of-court statement that is offered for its truth where there is an objection, unless there is an exception to the rule. If there is no exception the evidence must be excluded. *Sadowsky v. Chat Noir*, 64 AD2d 697; Prince, Richardson on Evidence, 11th Edition, 8-103. A forensic report made by a court-appointed evaluator is hearsay. *Kessler v. Kessler*, 10 NY2d 445 (1962). *See also Matter of*

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Psychological Fundamentals of Aggressive Custody Litigation

By Ira Daniel Turkat

When child custody is contested, there are times when aggressive litigation is unavoidable. In such circumstances, how one approaches the litigation can vary substantially from case to case and from attorney to attorney.

Of course, there are no magic formulas to guarantee success in all cases, but there are a number of key variables to keep in mind when litigating aggressively. This is especially so when the battle is tough, ugly, highly competitive or just not proceeding satisfactorily.

Aggressively fought custody battles are typically complex and taxing. To succeed, one should approach these cases in the most comprehensive and clever manner possible.

The Decision-Making Team

Aggressive custody litigation begins with the decision to engage in it. This decision may come about for a variety of reasons, but the best reason is when the client has rightfully concluded that it is the most appropriate way to secure the best possible future for his or her offspring. In coming to such a conclusion, the client should have a realistic expectation of what can be achieved and the attorney should offer a practical game plan for how to achieve it.

In most cases, there is a long and winding road between the initial decision to litigate aggressively and a court order specifying the sought-after custody arrangement. An ever-increasing density of information will develop, and an active stream of decisions will have to be made by client and attorney. For the litigator, decision-making under pressure comes with the territory and the process itself is quite familiar. For the client, however, the custody litigation process is typically unfamiliar, distinctly stressful, and at times, painfully preoccupying (*see* Ira Daniel Turkat, *Custody Battle Burnout*, 28 AM. J. FAM. THER. 201 (2000)). Clients making critical decisions under these conditions benefit from the best input possible.

To facilitate management of the multitude of decisions to be made in a complex case, a solid litigation team is essential. Obviously, the client is a pivotal member of

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that team. No matter how small or large the team may be — from solo practitioner to large law firm — its members must function well together, especially when things get hectic. Where appropriate, forensic accountants, private investigators, and related support personnel may need to be called upon to contribute significantly to the litigation effort. At times, particularly in tough battles, the team may choose to improve its capabilities by engaging a matrimonial litigation strategist to shrewdly guide how to trap the other side, slice up adversarial witnesses, develop case strategy and prepare other high-level litigation maneuvers. While experts with such talent are rare in family law, in certain cases they may prove to be invaluable.

Ultimately, the decision to litigate aggressively over custody means a commitment of the highest order. As such, in most contests of this kind, a comprehensive approach to the litigation should be undertaken to improve the likelihood of a favorable outcome.

No Stone Unturned

In hotly contested custody battles, the obstacles facing the client may multiply significantly, ranging from a stream of minor irritants, to intensely problematic roadblocks, to devastating events. If managed correctly, the litigation effort is enhanced.

To this end, the value of taking a "no-stone-unturned" approach should not be underestimated. Here, even minor leads should be considered as possible bases for gaining an advantage. To illustrate, take the following example of a "minor irritant" that was turned into an effective courtroom influence in a custody battle.

During hostile matrimonial proceedings, a custody litigant (petitioner) unexpectedly began receiving issues of a magazine that the litigant had not ordered and historically detested openly. The opposing litigant (respondent) was well aware of the petitioner's disdain for this particular magazine. As such, the respondent was viewed as the most likely culprit. Taking a "no-stone-unturned" approach, behind the scenes the petitioner engaged in a quiet investigation to track down the original subscription order. This effort led to the magazine's national warehouse, where the original order form was retrieved. The petitioner then retained a forensic document examiner. A copy of the order form was provided to the document examiner, along with numerous samples of the respondent's handwriting for laboratory analysis. The document examiner confirmed that the respondent's handwriting matched the handwriting on the magazine subscription order form. The respondent did not anticipate the petitioner's dedication to leaving no stone unturned in the litigation. When asked under oath about ordering the magazine the respondent denied having had anything to do with it. The document examiner was then called to the stand and testified that, in his professional opinion, the respondent was indeed the author of the completed order form. In the final divorce decree, the spiteful magazine ordering — and denial of it — were cited in the overall justification for changing custody of a young boy away from the respondent and placing him with the petitioner.

As illustrated above, a no-stone-unturned approach can prove invaluable; here, a minor irritant was successfully transformed into an important factor in the judicial reasoning on the ultimate question of custodial placement. If a no-stone-unturned approach had not been adopted, an effective point of influence would have been lost.

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Ira Daniel Turkat, PhD, specializes in the psychology of litigation specific to family law disputes, including case strategy for child custody, high-conflict divorce, relocation, visitation interference and related matters. He has served on the faculty at the Vanderbilt University School of Medicine and the University of Florida College of Medicine. Dr. Turkat is a licensed psychologist in Venice, FL, and may be reached at 941-488-8093.

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The Marital Residence

In Divorce, Financial Issues Abound

Part Two of a Two-Part Article

By Mark I. Plaine

Crucial to any division of the marital residence (or other assets) is an understanding of the tax consequences attendant thereto. Unfortunately, relevant tax issues are at times not addressed by the parties or the court, resulting in further litigation over the allocation of tax debt.

Tax Issues

In *Loeb v. Loeb*, 186 AD2d 174 (2nd Dept. 1992), the trial court directed that the parties share in the proceeds of the sale of certain real property, without making any allocation of the capital gains tax relating to the sale. On appeal, the Appellate Division modified the judgment of divorce so as to provide that any tax obligation resulting from the sale would be paid in proportion to the profits each party derived from the sale.

In *Ruvolo v. Ruvolo*, 133 AD2d 364 (2nd Dept. 1987), the trial court ordered that each party pay one-half the taxes resulting from the sale of the marital home, notwithstanding the fact that the wife realized all the profits from the sale of the home. The judgment was modified by the Appellate Division, which found that equity required that the wife bear all of the tax consequences of sale, because she was realizing all of the profits.

In *Teitler v. Teitler*, 156 AD2d 314 (1st Dept. 1989), the parties acquired a brownstone townhouse during the marriage, with title ultimately being placed in a subchapter S corporation of which the wife was the sole shareholder. The home was originally acquired for the sum of $145,000, and was worth $1,000,000 at the time it was to be sold. Each party was entitled to a 50% distribution of the value of the townhouse upon the sale of same. On appeal, the First Department noted that the capital gain tax liability upon sale would be substantial and, in light of the fact that the wife's corporation held title to the property, would fall upon the wife alone for tax purposes. In order to achieve a more equitable result, the court held that any tax liability arising out of a sale to a third party should be satisfied by the parties in the same ratio that their respective shares of the profits bore to the total profits of sale. It was the appellate court's determination that to saddle the wife with all of the capital gains taxes would be inequitable to her, and would afford a financial windfall to the husband.

In negotiation matters concerning a buyout of one party's interest in the equity of the marital residence, a question may arise as to whether capital gain tax consequences should be addressed and figured into the value attributed to the property, under the assumption that the eventual title holder may sell the property at a later date. In a series of cases involving commercial properties and business assets, this state's appellate courts have consistently adhered to the proposition that, absent proof that a sale of the asset is planned, there is no need for the court to consider tax consequences at all. *See, e.g., Hamroff v. Hamroff*, 35 AD3d 365 (2nd Dept. 2006); *Kudela v. Kudela*, 277 AD2d 1015 (4th Dept. 2000); *Waldman v. Waldman*, 196 AD2d 650 (2nd Dept. 1993); *Kohl v. Kohl*, 6 Misc.3d 1009 (A), (Sup. Ct., New York Cty. 2004). The reasoning of these cases would seem to preclude a court from reducing the amount of any distributive award provided to the party who will not retain an interest in the property, despite the other party's need to satisfy capital gain taxes upon sale at a later date.

Carrying Charges for the Marital Residence

Another area rife with dispute concerns each party's obligation to satisfy carrying charges related to the marital residence.

In *Judge v. Judge*, 2008 WL 331477 (2nd Dept. 2008), the wife moved out of the marital residence approximately two years before the action for divorce was commenced. At trial, the husband sought a monetary credit toward the amount he expended in satisfying the home's carrying charges. The Appellate Division modified the trial court's judgment, awarding the husband one-half the sums he incurred in payment of taxes and the mortgage after the commencement of the action for divorce. The court's holding was based on the concept that it is the responsibility of each party to maintain the marital residence during the pendency of the divorce proceedings.

In an earlier decision of the Second Department, also involving a spouse's abandonment of the home, the court ordered reimbursement to the spouse who remained in the residence for half the carrying charges expended subsequent to the other spouse's departure. *Freigang v. Freigang*, 256 AD2d 539 (2nd Dept. 1998). This determination was made as part of a post- judgment proceeding for partition, and despite an extended period of exclusive use and occupancy of the premises by the party seeking reimbursement for the expenses incurred. In discussing the parties' respective rights as co-tenants, the court stressed that "the mere fact that a tenant enjoys exclusive use of a property held in common, without more, does not either preclude reimbursement from a cotenant of expenditures … or constitute an ouster of a cotenant … " *Freigang* at p. 540.

In *Soyer v. Perricone*, 222 AD2d 496 (2nd Dept. 1995), the parties were divorced by a judgment that awarded the wife exclusive use and occupancy of the marital residence pending a future sale. A provision was contained in the judgment providing the wife with reimbursement

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Mark L. Plaine is in private practice in Kew Gardens, NY. Mr. Plaine is a member of the Amicus and Pension and Retirement Fund committees of the New York State Bar Association Family Law Section, and a member of the Interdisciplinary Committees for Accountants and Appraisers and Mental Health Professionals with the American Academy of Matrimonial Lawyers

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for "amortization payments" made by her during her period of exclusive occupancy. The judgment was, however, silent with respect to other charges, such as escrow payments for taxes, water and sewer charges and repairs. Under such circumstances, the Appellate Division limited reimbursement to the wife, at the time of sale, to that which concerned mortgage principal and interest payments alone.

In an interesting twist of facts, *Borock v. Fray*, 220 AD2d 637 (2nd Dept. 1995) involved a judgment that incorporated a stipulation providing that the wife would remain in the marital residence until the parties' oldest child reached the age of 18. No provision was made for satisfaction of the carrying charges. Following the end of the wife's period of exclusive occupancy, she continued to reside in the home. In deciding how to allocate expenses related to the home, the court viewed the parties' obligations during two time periods. During the time period following the end of the wife's exclusive occupancy, she was solely responsible for all carrying charges assessed against the premises, in that her continued occupancy had "effectively ousted" the husband from possession of the home. Additionally, the wife was held responsible for payment of all carrying charges applicable to her period of exclusive occupancy, without further discussion in the court's decision, but based upon an earlier decision in *Martin v. Martin*, 82 AD2d 431 (2nd Dept. 1981). (The holding in *Borock*, appears to conflict with dicta contained in the *Freigang* decision, *supra*, decided at a later date).

Once again, proper framing of a stipulation is essential to avoid further litigation concerning the unresolved issues described above, *vis* à *vis* the parties' financial obligations during a period of extended occupancy of the marital residence. In the event that such issues proceed to trial, it is necessary that the court allocate the manner in which carrying charges will be paid to avoid confusion, and based upon each parties abilities to afford such expenses.

Valuation Date

In litigating and negotiating the distribution of the marital residence, the practitioner must be cognizant of various strategic factors, including the utility of maintaining the home and the tax consequences relevant to the sale of the residence. In addition, as has become evident in the current economic downturn, the state of the real estate market both at present and in the future must be taken into account.

For purposes of equitable distribution, the valuation date for marital assets can be any date from the date of commencement of the action to the date of trial. Domestic Relations Law 236 (B)(4)(b); *Lipsky v. Lipsky*, 276 AD2d 753 (2nd Dept. 2000). There exists no firm rule concerning the date to be chosen, and it has been noted that " … a trial court must have the discretion to select a date appropriate to the case before it in light of the particular circumstances presented." *Wegman v. Wegman*, 123 AD2d 220 (2nd Dept. 1986).

Where the asset in question is passive in nature (*i.e.*, those assets whose post-commencement worth are primarily controlled by market forces or inflation) courts have generally used a time-of-trial valuation, so as to avoid a windfall to one spouse based on fluctuations in the asset's value caused by external factors outside the parties' control. *See, e.g. Collins v. Donnelly-Collins*, 19 AD3d 356 (2nd Dept. 2005); *Patelunas v. Patelunas*, 139 AD2d 883 (3rd Dept. 1988); *Capasso v. Capasso*, 129 AD2d 267 (1st Dept. 1987). By example, in *Opperisano v. Opperisano*, 35 AD3d 686 (2nd Dept. 2006), the court determined that a proper disposition of the marital residence would involve either a sale of the property and sharing of the profits, or a buyout by the wife based on the exiting fair market value at the time of trial.

In *Brevilus v. Brevilus*, 41 AD3d 630 (2nd Dept. 2007), the parties' trial proceeded on various dates between October 2004 and June 2005. The trial court directed the wife to accept a buyout of her interest in the marital residence, and used a valuation of the property current as of June 2003 (more than one year prior to the commencement of trial). In remitting the matter for a new trial, the Appellate Division held that the appropriate date for valuation of the residence was the date of the commencement of trial.

In *Bartek v. Draper*, 309 AD 2d 825 (2nd Dept. 2003), the parties were similarly engaged in a lengthy trial, involving, *inter alia*, the issue of the appropriate valuation date for their cooperative apartment. Trial testimony was received from an appraiser on March 4, 1999. More than one year later, on June 26, 2000, the trial testimony ended. In remitting the matter to the trial court for a new hearing, the Appellate Division directed an appraisal as of June 26, 2000, while noting that *the last date of testimony* was the appropriate date for valuation.

Appellate courts have deviated from the date-of-trial guidepost in order to balance the equities, basing that decision on one party's misconduct.

In *Fuchs v. Fuchs*, 276 AD2d 868 (3rd Dept. 2000), the court accepted an appraisal of the marital residence that pre-dated the commencement of the divorce action. Title to the residence was granted to the husband. In reaching its determination to use a pre-commencement valuation date for purposes of distribution, the court found that the husband had allowed the residence to fall into disrepair, which had contributed to a significant decrease in its value.

In *Maio v. Maio*, 151 AD2d 463 (2nd Dept. 1989), the husband increased the mortgage against the marital residence which, in turn, decreased the property's equity as of trial. The husband was granted title to the residence. In order to offset the husband's diminution of the value of the asset, the court used a date-of-commencement balance on the mortgage to determine the property's equity in making a distributive award to the wife.

In a recent trial court decision, a date-of-commencement value was employed to prevent a spouse from

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sharing in the increased value of the marital residence in light of his persistent misconduct and obtrusive litigation tactics. Based on findings that the husband refused to support his family, violated orders of the court, failed to engage in disclosure and neglected to pay the mortgage, the trial court determined that it would be inequitable to use the higher date of trial value in making equitable distribution of the marital residence. Such increase in the asset's value occurred notwithstanding the husband's delinquent conduct. *See Aseel v. Aseel*, Nassau County Supreme Court, Index No. 202947/2002 (Zimmerman, J.).

CONCLUSION

The party retaining title to the home must possess the ability to maintain the asset based on his or her available cash flow. That party must also be aware of the capital gains taxes attendant to the sale of the home (including the ability to exclude gain), as well as expected increases and/or decreases in the value of the residence based on fluctuations in the real estate market. A party who will not be retaining an interest in the home will likewise need to concern herself with the potential loss of the investment in the property, and any continuation of liability under existing mortgages against the property. All of these issues must be addressed by appropriate legal strategy and the use of financial professionals and appraisers.

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There is a potential limitation to this approach. Without careful thought, one could end up inadvertently dissipating some valuable resources and time. As such, high-quality thinking needs to guide which stones to turn over, how to turn them, how to analyze the results, and if applicable, how to transform the discovery to maximize its utility.

CASE FORMULATION

At the heart of successful custody litigation when facing a difficult opponent is the strategy that unfolds from the case formulation. Over the years, the present author has published on a variety of case formulation issues, but space limitations herein require brevity. A few fundamentals are summarized below.

To begin, there is no monopoly as to what constitutes a case formulation. Precise definitions are not plentiful and generally lack professional consensus. This is true not only in regard to aggressive custody litigation and related family law matters, but in other disciplines as well, such as psychology and psychiatry. At its simplest, case formulation refers to your understanding of the case at hand. The author's view is that each custody case has its own particular idiosyncrasies and thus a unique case formulation should emerge that tailors a litigation plan specific to that formulation.

Certain custody cases generate impediments to developing a good case formulation. For example, if the information base is inadequate in a particular case, the litigator may be hampered. Likewise, some cases are so fast-moving and complex that it may interfere significantly with an attorney's ability to rapidly grasp all the implications and consequences, as one may be barraged on multiple fronts requiring immediate responses to a diverse range of issues. Here again, a solid litigation team with the right personnel may prove invaluable.

When it comes to litigating over custody, a good case formulation should generate a set of accurate predictions of the behavior of others integral to the litigation outcome. Such predictions provide a firm foundation for anticipatory and counter-maneuvering. As in a game of chess, being able to stay a step or more ahead of one's opponent offers an invaluable advantage. A good case formulation can help identify:

- when to file and not to file;
- what to plead and not to plead;
- what to reveal and what to withhold;
- what to ask and when to do it;
- what to present and how to do it; and
- what to expect and how to react.

In line with this predictive model, a good case formulation filters every aspect of the case in terms of how it may or may not affect rulings from the bench. The more accurate the predictions made from such filtering, the more utility the case formulation is likely to offer.

Finally, it should be noted that having a good case formulation does not always translate easily into a favorable litigation course. At times, even the most highly skilled litigator may come to understand a case correctly, yet feel "stuck" regarding how to maneuver more advantageously. In situations like these, one may consider seeking additional creative input for possibly turning the case around.

CREATIVITY

With a good case formulation in hand and a no-stone-unturned approach adopted, the litigation effort against a tough opponent is enhanced by innovative maneuvering on the battlefield. There is no substitute for creative thinking that leads to practical advantages when litigating aggressively over custody against fierce competition. Whether figuring out how to trap the other side into a significant litigation mistake or unleashing a surprise attack for a potent courtroom punch — all things being equal — creativity is king. Creative solutions may come from any of the team's key players, but when a family law litigation strategist is engaged to participate, this individual bears a special responsibility for generating innovative approaches when the problems of the case demand it.

A simple example of such creativity is in order.

Take the case of the custodial parent who was skilled at manipulating

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the children and the non-custodial parent when others were not around but behaved responsibly and respectfully when aware of the presence of witnesses. The custodial parent called the non-custodial parent to spew venom on the phone. The phone call was placed while one of the children was standing next to the custodial parent, with no one else around — an obvious alienating effort by the custodial parent. Prepared for the encounter through proper strategizing, the non-custodial parent brought two secretaries into the office, took the call on speakerphone, did not announce that the secretaries were present, listened to the poisonous verbiage flowing from the custodial parent, and engaged the child in conversation to provide reassurance — *which concomitantly established the child's presence* during the custodial parent's alienating barrage. Shortly thereafter, a motion for emergency hearing was filed. The custodial parent denied ever making the toxic statements; the secretaries testified regarding what they heard on the phone. Armed with the content of the secretaries' testimony, the judge took immediate action against the custodial parent.

In a tough custody battle, aggressive litigation benefits from innovative thinking that "hits the nail on the head." As such, it is to the client's benefit to enable his or her attorney(s) to structure the team's effort to facilitate on-target creative approaches to burdensome case issues. Creative approaches can make a crucial difference in certain litigation outcomes.

Litigation Errors

In the heat of intense battle, particularly when it is protracted, conditions are ripe for errors in judgment. In the course of litigating aggressively over custody, as the months roll by countless decisions need to be made — decisions of all shapes, sizes and consequences. Sometimes, events on the ground may move so quickly, with every available option riddled with problems, that failure to come to a rapid decision may create a litigation error in and of itself. Information overload is a common characteristic of complex, aggressive custody litigation and it certainly invites errors in judgment as well.

One should appreciate that just from a statistical point of view, the more decisions one makes in this context, the greater the likelihood of making an error increases. Likewise, factors common to this type of litigation, such as heightened emotional tension and punishing time pressure, have their way of contributing to decision-making errors as well. All participants in hotly contested custody litigation appear prone to such errors.

Obviously, one tries to prevent making litigation errors while capitalizing on the opposition's missteps, including those mistakes elicited by pushing the other side's buttons in a fair and square manner. Having top-notch thinkers on your team improves the likelihood of achieving these goals. When errors are made — regardless of who makes them — each mistake should be considered in terms of potential impact on the litigation effort, aiming to advance one's position. Obviously, turning one's own litigation errors into a benefit is not always possible but in those instances amenable to such transformation, it is likely to require at least one clever mind. There is no substitute for high quality thinking when aggressively litigating over child custody against a challenging opponent.

Conclusion

Aggressive custody litigation is typically a lengthy process requiring a substantial commitment. Developing innovative strategies, and executing a comprehensive game plan that adapts successfully to the complexity and fluidity of the dispute can rarely be achieved without the psychological backbone of perseverance and patience. A top-notch litigation team is essential. The client who takes a no-stone-unturned approach in line with the talents of a highly skilled litigation team, empowers the effort to achieve the desired outcome for his or her children.

The observations noted above are particularly apropos when the opposing litigant is interfering with the children's relationship with the other parent (*see* Ira Daniel Turkat, *Parental Alienation Syndrome: A Review of Critical Issues*, 18 J. AM. ACAD. MATR. LAW. 131 (2002)); engaging in sophisticated manipulations (*see* Ira Daniel Turkat, *Sophisticated Manipulators*, 24 MATR. STRAT. 3 (May, 2006)) and/or acting maliciously (*see* Ira Daniel Turkat, *Divorce Related Malicious Parent Syndrome*, 14 J. FAM. VIOL. 95 (1999)). When an opposing litigant of this kind is equipped with a substantial budget, these recommendations are likely to take on even greater importance.

Fortunately, only a fraction of matrimonial cases require aggressive custody litigation. However, in this subset of cases, where the future of children and the family's financial resources are in play, the stakes are enormous. In such instances, a client on the side of right should enable his or her attorney to take the highest quality comprehensive approach possible; failure to do so may lead to a less-than-optimal outcome for the client and, more critically, for the client's offspring.

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D'Esposito v. Kepler, 14 AD39 (2d Dept. 2005); *Kahn v. Dolly*, 6 AD3d 437 (2d Dept. 2004); *Chambers v. Bruce*, 292 AD2d 525 (2d Dept. 2002); *Wilson v. Wilson*, 226 AD2d 711 (2d Dept. 1996). Most documents in the court file are hearsay too.

Taking judicial notice of the court's own files is restricted to undisputed portions of such files. The judicial notice doctrine does not authorize the introduction of an affidavit that happens to be in the court's file, where no evidentiary foundation has been laid for the affidavit and it attests to disputed facts. Court files are often replete with letters, affidavits, legal briefs, priv-

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New Jersey

Child Abuse and Neglect Definitions May Soon Be Changed

New Jersey's Law Revision Commission decided April 17 to consider changes to the laws defining child abuse and neglect. There are currently three definitions covering the subject in the civil law and another in the criminal code. The Commission's goal is to change the system so that there is just one set of definitions for civil matters and another for criminal, simplifying matters for courts, state child welfare workers and parents. Under the current state of the law, explains the Commission's Executive Director, John Cannel, "[i]t's insufficiently clear in the statutes what is and what is not child abuse and neglect. If someone is a bad housekeeper, is that neglect?"

Connecticut

Same-Sex Partner Wants Loss Of Consortium Compensation

Christine Santoro is suing her same-sex partner's employers and others for damages for loss of consortium following her partner's slip-and-fall accident in the employer's parking lot that left the victim wheelchair bound. However, the accident occurred in January 2005, nine months before Connecticut began to authorize same-sex civil unions. Thus, although Santoro and her partner had at the time of the accident been in a committed relationship akin to marriage for 25 years, she may have no legal standing to sue. Santoro's attorney is arguing that the law of consortium, not being based on statutory law, can evolve through case law to arrive at an equitable conclusion. The current leading case on the issue is *Hopson v. St. Mary's Hospital*, decided by the state's highest court in 1979, which for the first time recognized the remedy of loss of consortium for both husbands and wives and allowed recovery for the loss of services, affection, society and marital intimacy for both spouses. Santoro's attorney, Julie Wilensky, of David Rosen & Associates in New Haven,CT, noted in argument that although the law in Connecticut at the time of the accident did not permit same-sex couples to officially unite, the State has since renounced its policy of limiting spousal rights to heterosexual couples. Wilensky told the court that if it disallowed the claim, it would give the defendants "a free pass for the lifetime of injury they have inflicted on Christine Santoro." David N. Rosen, who worked on the plaintiffs' briefs, said in an interview after the oral arguments that whichever way the court decides, the issue will likely be appealed.

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ileged or confidential data, in-camera materials, fingerprint records, probation reports, as well as depositions that may contain unredacted gossip, and all manner of hearsay and opinion. The mere presence of such items in the file does not authorize their admissibility pursuant to judicial notice. *Ptasznik v. Schultz*, 247 AD2d 197 (2d Dept. 1998).

If a statement is hearsay there are several exceptions to the rule that may be applicable in custody and visitation cases. In this article we will discuss those exceptions. They are 1) a present sense impression or spontaneous declaration/excited utterance (*People v. Caviness*, 38 NY2d 227 (1975); 2) former testimony (Civil Practice Law & Rules (CPLR) 4517); 3) admissions; 4) evidence of abuse and neglect; and 5) past recollection recorded. (*People v Weinberger*, 239 NY 307 (1925)).

If a statement is hearsay there are several exceptions to the rule that may be applicable in custody and visitation cases.

Operative Acts

First, it must be determined if the statement is hearsay. Verbal or operative acts and evidence of state of mind are not hearsay because they are not offered for their truth. When the act of a party is admitted into evidence, the declarations he made at the same time which elucidate and explain the character and quality of the act, and are so connected with it as to constitute one transaction, are admissible in evidence as an operative act. *People v, Salko*, 47 NY2d 230 (1979). The words are not hearsay because they were part of the legal act. *See People v. Davis*, 58 NY2d 1102 (1983); *People v. Cook*, 115 AD2d 240, (4th Dept. 1985)

Thus, where there is a declaration of a gift with the delivery of property to a spouse, the words are not hearsay because they are part of the legal act of giving a gift. Farrell, Prince — Richardson on Evidence, 11th Ed., §§ 8-105; 8-602. Where a witness testifies to what he heard the husband and wife say while making an oral agreement the words are not considered for their truth but merely because they were said as part of the act. The words have a legally operative effect in the formation of a legal obligation. *See Kosinski v. Woodside Const. Corp.*, 77 AD2d 674 (3d Dept. 1980).

In the next two issues, we'll look at the specific exceptions to the rules against hearsay as they relate to child custody litigations.

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Bari Brandes Corbin, a member of this newsletter's Board of Editors, maintains her offices for the practice of law in Laurel Hollow, NY. **Evan B. Brandes**, also a member of this newsletter's Board of Editors, maintains his office for the practice of law in New York. Both are Vice-Presidents of Joel R. Brandes Consulting Services Inc., Jersey City, NJ, and Ft. Lauderdale, FL, and editors of its Web sites.

DECISIONS OF INTEREST

FATHER GETS SECOND CHANCE

The Appellate Division, Third Department, held the doctrine of collateral estoppel did not bar a father from litigating the issue of arrears of his child support obligation. *Russo v. Irwin*, — N.Y.S.2d ——, 2854 NYS2d 240 (3d Dept. 3/20/08) (Mercure, J.P., Spain, Carpinello, Rose and Kavanagh, JJ.).

The petitioning father and respondent mother were divorced in 1988 and, as part of a property settlement agreement, petitioner agreed to pay $65 per week in child support. Sometime in late 1991, the parties reconciled and began residing together as a family, commingling assets. Petitioner claimed that the respondent agreed at that time that, under the circumstances, the child support payments should be discontinued. However, the support order was not suspended until 1998, after respondent received a letter from the Warren County Support Collection Unit informing her that it had come to its attention that the child support order of $65 per week had a delinquency of $28,811. After learning of the parties' reconciliation, the coordinator of the child support unit filed a petition on behalf of respondent, which stated that "the parties have reconciled and that [respondent] does not wish to enforce the Order of Support." In March 1998, Family Court entered an order on consent of the parties suspending petitioner's support obligation, fixing arrears in the amount of $29,851.49 and vacating the "balance of Judgment due [respondent] with consent from both parties." The father was not represented by counsel at that time, and he asserted in the present action that he had understood the 1998 order as extinguishing the arrears. Once the parties separated again in 1999, however, the respondent sought the back child support. An order was entered in July 2005 whereby the petitioner was directed to pay $75 weekly to satisfy arrears still owing of $26,776. Petitioner, pro se, filed an objection to the entry of the judgment. Family Court found that petitioner had previously had the opportunity to object to the arrears, that his objections at this point were untimely and that Family Ct Act § 451 prohibited the reduction or cancellation of child support arrears.

On appeal, the Third Department conceded that the prerequisites to application of the doctrine of collateral estoppel — that the issue was identical to one previously and necessarily resolved and that petitioner had had a full and fair opportunity to contest it — had arguably been met. However, the court was not persuaded that the equitable and discretionary doctrine should be applied in this case because the 1998 order establishing arrears was confusing, the petitioner was not represented by counsel at that time, and no hearing was ever held on the issue. He also presented strong evidence that the couple had reunited and that the respondent had agreed to forego child support. Based on these facts, the Third Department reversed and remitted the matter to Family Court for further proceedings.

ARTIFICIAL INSEMINATION

A man who did not sign a consent form for his wife's artificial insemination can still be deemed the child's father, based on common law and public policy considerations that impose parental responsibility for conduct "evincing actual consent." *Laura WW v. Peter WW*, 502930 (3d Dept. 4/11/08) (Cardona, P.J., Spain, Carpinello, Kavanagh and Stein, JJ.)

The divorcing parties already had two children when the husband had a vasectomy. Thereafter, the wife conceived a child through artificial insemination. Before the wife gave birth, the parties separated pursuant to an agreement that provided, among other things, that the husband would not be financially responsible for the child. In her divorce complaint, the wife alleged that the child was born to the marriage, but she later entered into a settlement agreement reaffirming the terms of the separation agreement and calculating the husband's support obligation based on only the couple's first two children. Supreme Court, Delaware County, found that the provision in the separation agreement absolving the husband of his support obligation for the child was void as against public policy and ordered the father to pay child support. This appeal followed.

Concurring with the lower court, the Third Department found that "the agreement was unenforceable because it "left the child fatherless without any hearing or analysis of the child's rights and interests." It noted that Domestic Relations Law §73 creates an irrebuttable presumption of paternity when a married woman is inseminated through artificial means following written consent to the procedure by both husband and wife (among other things), but that lack of such signed consent did not necessarily mean the husband was off the hook for the child's support. Instead, consistent with New York's strong presumption of legitimacy, as well as the compelling public policy of protecting children conceived via artificial insemination, the court determined that it should "follow the lead of other jurisdictions that impose a rebuttable presumption of consent by the husband of a woman who conceives by [artificial insemination], shifting the burden to the husband to rebut the presumption by clear and convincing evidence." Although the father here had not attempted to rebut the presumption of legitimacy in the court below, the appellate court found adequate evidence in the record to conclude that he should pay child support in this instance. Specifically, he was aware that his wife was attempting to become pregnant through artificial insemination, and although he testified that he did not want a third child and had repeatedly told his wife that he did not think such procedure was "a good idea," he did not testify that he ever informed his wife that, should a child be born as a result of the procedure, he would not accept it as his own. Thus, the husband failed to rebut the presumption that he had consented to having the third child and he must contribute to that child's support.

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