Hearsay Evidence in Custody Cases

Some More Considerations

Part Three of a Three-Part Article

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An admission — an act or declaration of a party or his agent that constitutes evidence against the party at trial — is an exception to the rule against hearsay. As a general rule, any declaration or conduct of a party or his agent, oral or written, that is inconsistent with that party's position at trial is admissible at trial as an admission. *Read v. Mc Cord*, 160 NY 330 (1899); Prince, Richardson on Evidence, 11th Edition, 8-201. An example of an admission is a party's statement of net worth. *Fassett v. Fassett*, 101 App Div 2d 604 (3d Dept. 1984) (valuation in statement of net worth of husband is an informal judicial admission).

In those custody cases in which former spouses have remarried, visitation issues are sometimes complicated by the new spouse's role in the household as part-time caretaker for the children — or even just as the person who answers the telephone as the self-proclaimed spokesperson for the former spouse. When the new spouse plays an active role in the visitation process, contact between the former spouse and new spouse is inevitable, and may bring up evidentary problems.

If a party wishes to introduce evidence of the new spouse's attempts to interfere with visitation, the out-of-court statements of the new spouse may be admissible under the spontaneous declaration, state of mind or evidence of abuse or neglect exceptions. If not, it may be admissible as an admission of an agent. In order to introduce the evidence, a proper foundation must be laid. First, the agency must first be established, and then it must be shown that the new spouse, as agent, had the authority to make the statement. An agency between husband and wife cannot to be implied from the mere fact of marriage. *Le Long v. Siebrecht*, 196 App.Div. 74, 76 (2d Dept. 1921). However, actual agency may be implied from the conduct of the parties or may be established by proof of subsequent ratification. *Hyatt v. Clark*, 118 NY 563 (1890); *Cutter v. Morris*, 116 N.Y. 310 (1889); Richardson on Evidence (Prince 10th ed.)254.

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As to third persons, agency may arise by estoppel. *Hannon v. Siegel Cooper Co.*, 167 N.Y. 244 (1901). The marital relation is a circumstance that may be considered, along with other facts and circumstances, in determining whether a spouse is the agent of the other spouse. *Wanamaker v. Weaver*, 176 NY 75 (1903). The agent must have the authority to make statements such as those the opposing party seeks to introduce. *Loschiavo v. Port Authority of New York* , 58 NY2d 1040 (1983). The authorization may be express, such as where the agent's job description includes the authority to speak for the principal or where the speaking authority may be drawn from circumstantial evidence. *Spett v. President Monroe Bldg. & Manufacturing Corp.*, 19 NY2d 203 (1967). Where an agent's responsibilities include making statements on his principal's behalf, the agent's statements within the scope of his authority are receivable against the principal. *See, e.g., Stecher Lithographic Co. v. Inman*, 175 NY 124 (1903; *see also* Richardson, Evidence (Prince, 9th ed.).

FORMER TESTIMONY

Frequently, a party seeks to introduce into evidence testimony given at a prior hearing involving the parties. CPLR 4517 (a)(I) and (ii) provide that at the trial of an action or hearing, the prior testimony of a party or his agent may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness or for any purpose (evidence in chief) by any party. Deposition testimony of a party or non party witness may also be used to impeach the witness or admitted pursuant to CPLR 3117(a) where the witness is unavailable. CPLR 4517 (a)(iii) sets forth three conditions for the admissibility of former testimony of any person, as evidence in chief, which is taken or introduced in evidence at a former trial: unavailability of the witness, identity of subject matter and identity of the parties. If the witness is available, it may not be introduced into evidence. Prince, 8-502. In addition, there must have been an opportunity to cross examine that witness at the former trial. *Young v. Valentine*, 177 NY 347 (1904); Prince, 8-506. If the former testimony is introduced into evidence, it is subject to any objection other than hearsay. CPLR 4517; Prince, 8-508; *Dean v. Halliburton*, 241 NY 354 (1925). The failure to permit cross-examination is one such objection.

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Hearsay Evidence

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The original stenographic notes may be read into evidence and proved by anyone whose competence is established by the court. The former testimony may also be proved by anyone who heard it. *McRorie v. Monroe*, 203 NY 426 (1911).

Evidence of Abuse or Neglect

In order to present a *prima facie* case, evidence of previous statements made by the child relating to any allegations of abuse or neglect may be admitted in court if they are corroborated by any other evidence tending to support the reliability of the statements. Thus, in *Eli v. Eli*, 159 Misc.2d 974 (Fam. Ct. 1993), the court suspended visitation premised upon the mother's allegation that the father sexually abused his child. In *Rosario WW. v. Ellen WW*, 309 AD2d 984 (3rd Dept.2003), the court admitted the mother's testimony "revealing statements of the children as to conduct by the father that would constitute acts of abuse and neglect" because it was corroborated by other evidence. In *Mateo v Tuttle*, 26 AD3d 731 (4th Dept. 2006), the court said it was well settled that there is "an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Ct. Act § 1046(a)(vi)," where the statements are corroborated.

In *Matter of Bartlett v. Jackson*, 849 NYS2d 704 (3d Dept 2008), the mother argued on appeal that Family Court incorrectly admitted hearsay evidence and then relied upon such evidence in its custody decision. The Appellate Division noted that Family Court is accorded considerable discretion in determining whether there is sufficient corroboration for admitting such hearsay evidence. Here, one of the primary grounds asserted as a significant change in circumstances meriting the modification of custody was the alleged pattern of severe corporal punishment that resulted in the child having considerable bruises on his legs and arms as well as an occasional bloody nose. Witnesses at the hearing testified about the child's statements to them regarding such actions by the mother and her boyfriend. While this testimony was hearsay, it involved alleged abuse and was corroborated. Corroboration came from various forms of evidence, including photographs of the child's many bruises. As for the assertion that the mother caused a bloody nose on several occasions by striking the child, corroboration included the eyewitness account of her former boyfriend. The hearsay evidence as to unduly severe punishment was sufficiently corroborated and, as for the other hearsay evidence, the error in admitting such proof was harmless in light of the extensive admissible evidence at the hearing that supported the Family Court's decision.

Past Recollection Recorded

If even after reading a memorandum, the witness remains unable or unwilling to testify as to its contents, the memorandum itself is admissible as evidence of the truth of its contents, provided that otherwise competent testimony establishes that: 1) the witness once had knowledge of the contents of the memorandum; 2) the memorandum was prepared by the witness, or at his direction; 3) the memorandum was prepared when the knowledge of the contents was fresh in the mind of the witness; and 4) the witness intended, when the memorandum was made, that it be accurate. *People v. Raja*, 77 AD2d 322 (2d Dept. 1980).

Not every past recollection will be admitted, of course. In the custody case of *Smith v. Miller*, 4 AD3d 697 (3d Dept. 2004), the court found Family Court properly excluded the mother's journal from evidence despite attempts to have it admitted as a past recollection recorded. Her own attorney had at one part of the proceedings objected to the journal's disclosure as a document prepared for litigation, and the mother admitted that some entries were not made contemporaneously with the events in question. She was, however, allowed to refer to it during the hearing in order to refresh her memory.

One Last Exception: Hearsay Admitted in Error

The admission of hearsay evidence does not automatically constitute reversible error. CPLR § 2002, which codifies the "harmless error" rule in New York, provides that: "An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced." Under this rule the erroneous admission of improper evidence is harmless error, and not a basis for reversal, if the outcome probably would have been the same even if the evidence had been excluded. Where the trial court erroneously excludes competent and relevant evidence, reversal is appropriate only if the excluded evidence probably would have been a "substantial influence" in producing a different result. *See, e.g., Kahn v. Galvin*, 206 AD2d 776 (3d Dept. 1994); *Walker v. State*, 111 AD2d 164 (2d Dept. 1985). *See also Barbagallo v. Americana Corp.*, 25 NY2d 655 (1985).

Although individual errors might be deemed harmless when considered separately, a new trial may be ordered when such errors, considered collectively, cause substantial prejudice to a party. It has been held that an error is harmless where the admissible evidence amply supports the court's determination, and it does not appear from the record that the court relied upon that inadmissible evidence in making its determination. *See generally In re Christina A.M.*, 30 AD3d 1064, 1064 1065 (3d Dept. 2006); *Matter of Michael G.*, 300 AD2d 1144, 1145 (4th Dept. 2002); *In re Sherri M.K.*, 292 AD2d 868 (4th Dept. 2002).

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