Thinking about the evidence

Attorney for Children Seminar
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I. Thinking about the evidence
- a. Unique position of AFC
  - 1. Cross examine both parties
- b. First PTC is settlement
  - 1. Books - Roger Fisher and William Ury , Getting to Yes

C. Second PTC discussing proof at trial
- 1. First time thought about the proof
- 2. Types of evidence

d. Trial notebook

II. Your client - see Brown, Michele "Best practices of in camera interview" AFC seminar October 6, 2006

a. The seminal authority for a private interview in a custody proceeding is the Court of Appeals case, *Lincoln vs Lincoln* 27 NY2d 270, 299 NYS2d 842 (1969).
- 1. See FCA 163, 664, CPLR 4019
- 2. Not on family offense
  - A. The 2nd Department found, in a family offense proceeding, it was an abuse of discretion to allow a son to testify against his mother in camera outside the presence of his mother or her attorney. *Mtr of Deith vs Deith* 27 AD3d 649, 811 NY 2d 451 (2nd Dept. 2006)
- 3. Abuse case
  - A. The *Mtr of Leslie G.* 224 AD2d 947, 637 NYS2d 560 (4th Dept 1996), distinguishes an abuse proceeding from a custody proceeding, and why the rationale to allow a private interview, thereby denying the fundamental right to confront witnesses, is appropriate in the custody matter, but not in abuse.
- 4. But see
  - A. However, in a case involving a request to vacate a long standing order of filiation, the child's statements supported the court's determination to refuse the relief requested,

premised upon a best interests analysis. *Mtr of Kim F vs Glenn W.* 295 AD2d 995 (4th Dept 2002).

5. Attorney for child

A. Generally, when the Law Guardian opposed the in camera, it is not error for the Court to refuse to conduct one. See, *Hill v Paglia*, 306 AD2d 909, 761 NYS 2d 905 (4th Dept 2003), where the Court found that it was not an abuse of discretion to deny an in camera when it was requested by the mother, opposed by the Law Guardian, and carefully considered by the lower court. Also, see *Gallogly v Gallogly,* 291 AD2d 892, 738 NYS 2d 619 (4th Dept 2002) where again it was not an abuse of discretion to refuse in camera where requested by mother and opposed by Law Guardian.

B. The court should also consider the potential emotional damage to the child when deciding to conduct an in camera interview. In *L.D. v D.J.D.* 186 Misc 2d 775, 720 NYS 2d 739 (Supreme Court 2000) the child was a victim of sexual abuse and suicidal. There the court chose not to conduct an in camera finding the in camera would be overly traumatic and damaging.

6. In camera done at the close of proof

A. Will parties case be dismissed at the close of proof before the in camera?

A. Motion for Judgement CPLR 4401

7. Child testifying in court ?

A. it was error to not permit a fourteen year old to testify. *Kapuscinski v Kapuscinski,* 75 AD2d 576, 426 NYS 2d 582 (2nd Dept. 1980).

8. Failure to hold incamera must be preserved for appeal

A. See *Rudy v Mazzotti,* 5 AD 3d 7877, 774 NYS 2d 171 (2nd Dept 2004) where it was held not to be an improvident exercise of discretion to fail to conduct an in camera of a four and seven year old given the children's ages and the failure of the parties and the Law Guardian to request one.

II. Statements of your clients

A. FCA 1046 (a) (vi) - previous statements of made by the child relating to any allegations of abuse and neglect shall be admissible ...

1. Statute pertaining to evidence in child protective proceedings is applicable to custody proceedings that are based in part upon allegations of abuse or neglect, and subject child's prior out-of-court statements are excepted from rule against hearsay if they are sufficiently corroborated. Wentland v Rossueau, 59 Ad2d 821, 875 NYS2d 280 (3rd Dept 2009)

2. Allegations of sexual abuse of a child by a parent, forming basis for a petition to change an existing custody arrangement, are subject to statutory corroboration requirements. Bennett v Davis, 277 Ad2d 517, 715 NYS2d 96 (3rd Dept 2000).

3. Out of Court Statements must be of abuse or neglect

A. On mother's petition for modification of joint custody order, child's out-of-court statements, which mother sought to introduce via witness testimony, were inadmissible hearsay; gravamen of petition was not any abuse or neglect of child, and thus hearsay rule's statutory exception implicated by such allegations was inapplicable.

Jacqueline B. V Peter K. 8 Misc3d 807, 796 NYS2d 96 (2005)

III. Records

A. Article 23 of the CPLR is the subpoena section

1. CPLR 2301 sets out two sections

A. Subpoena as tetifcacandum - used for request of testimony of a non-witness either pre-trial or at fact finding

B. Subpoena duces tecum - used to require production of books, papers and other things

2. CPLR 3120 permits subpoena as part of pre-trial discovery to attorney's office

A. Permitted if only if copy served on all parties and notice of receipt of items provided when received.

3. CPLR 3103 2304 allows party to apply for protective order

4. CPLR 2307 request for books, papers and other things from library department or bureau of municipal corporation or state

A. On motion and one day's notice

1. Practice pointer call attorney representing governmental unit

IV. Dss Records

I. Article 10 proceedings

a. review file

II. No Article 10 proceeding DSS not a party

1. Social services Law 422 , 422-a

A. Social Serv Law 412.2 (ii) 3, 4 and 5 definitions

1. Unfounded defined SSL 412 (11)

A. No credible evidence

1., Not use caseworker to testify on the investigation

B. 422.5 not re disclosed

1. See K.v K 126 Misc 2d 624 (Sup Ct. 1984)

2. People v LV 182 Misc 2d 912 (Sup. Ct. 1999)

3. Exceptions under 422.5

4. Redaction

C. Founded reports

1. More than just Judicial Subpoena Duces Tecum

A. See attached forms

2. CPLR 2307 one day notice

A. Indicated 422.4

1. 25 exceptions

2. Requires finding by the court record is necessary for a determination of an issue before the court.

D. FCA 651-a

V. Records - Mental Health

A. Mental Health 33.13; 33.16 pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality

1. Perry v Fiumano, 61 Ad2d 512, 403 NYS 2d 382 (4th Dept 1978) "In custody proceeding brought by divorced mother, her purely conclusory and largely inadmissible opinions as to husband's condition and her assertions relating to his alleged threats were insufficient to support disclosure of records of counseling center; whether such

material was essential to doctor's diagnosis and prognosis could best be determined by him"

VI. Records - Alcohol and substance abuse

A. MH 33.13

B. 42 USC 290dd - 42 CFR 2.64 d

C. Privilege - CPLR 4504, 4507 4508

D. HIPAA (45 CFR 164.508 (a) (1) - Court website Form

VII. Business Records Exception

A. CPLR 4518 - if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter

B. Multi-Tier Hearsay

1. Johnson v Lutz 253 NY 124, 170 NE 517 (1930)

a. Writing or records, to be admissible, must be made under duty or on information imparted by persons under duty to impart information.

B. Murray v Dolan 77 Ad2d 337, 433 NYS 2d 184 (2nd Dept. 1980)

2.. NYLJ article May 5, 2006 Tippins, "Matrimonial Practice"

3. Introduction in Mass

A. Mtr. Leon RR 48 NY2d 117, 421 NYS 2d 863 (1979)

1. In proceeding to terminate parental rights, it was error to admit into evidence entire case file including hearsay even though court indicated that it would disregard all matters which would not survive a hearsay challenge.

4. Certification of Business Records - CPLR 3122 (a)

A. Business records produced pursuant to a subpoena duces tecum under shall be accompanied by a certification, sworn in the form of an affidavit

1. affiant is the duly authorized custodian or other qualified witness

2. the records or copies thereof are accurate versions of the Documents

3. affiant's knowledge, after reasonable inquiry, the records or copies produced represent all the documents described in the subpoena duces tecum

4. records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and that it was the regular course of business to make such records

5. A certification made in compliance with subdivision (a) is admissible as to the matters set forth therein and as to such matters shall be presumed true. When more than one person has knowledge of the facts, more than one certification may be made

6. party intending to offer at a trial or hearing business records authenticated by certification subscribed pursuant to this rule shall, at least thirty days before the trial or hearing, give notice of such intent and specify the place where such records may be inspected at reasonable times. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the offer of business records by certification stating the grounds for the objection

7. Watch submitting documents as business records without certification

VIII. School records

A. Accommodating witnesses time

IX. Introducing documents at Fact finding

A. Marking exhibits for Fact Findings

1. Mark in advance

A. Petitioner's A- Z

1. Co petitioner co p A-Z

B Respondent 1- ...

C. Mark page of report may wish to use separately

1. i e. mental health report stabled exhibit 5 page 4

D. Be chronological in marking

E. Large documents or multiple in folder mark each separately

E. Mark for identification

F. Move to introduce into evidence

G. Court Clerk keeps records when introduced into evidence

X Other types of documentary evidence Pictures

A. Two purposes for photograph

1. All illustration of other testimony or
2. Substantive evidence of facts shown in the photograph

B. Foundations - General

1. Is this photograph marked as "exhibit A'a fair and accurate representation of the condition kitchen in the Respondent's home as it existed on September 9, 2011?

A. The photo graph is a fair and accurate representation of the person, place, scene or subject portrayed. (see People v Pobliner, 32 NYS2d 356, 298 NE2d 637 (1973) The general rule is that photographs of are admissible if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered

C. Foundation elements

1. The witness is familiar with the object, or scene

a. The witness need not be the photographer so long as the witness can testify that the photograph accurately shows what it purports to show. It is rarely necessary that identity and accuracy of photograph be proved by photographer; any person having requisite knowledge of facts may verify.See People v Brynes , 33 NY 2d 343, 308 NE2d 435 (1973) Kowalski v Loblaws, Inc. 61 Ad2d 340, 402 NYS2d 681 (1st Dept. 1978) Photographs may be authenticated by any witness shown to be familiar with the subject portrayed

2. Witness explains basis for familiarity with the scene for object.

3. The witness recognizes the scene or citation of object

4. The photo is a fair accurate and depict of the scene or object at the relevant time

D. Digital photos -

XI. Computer evidence

A. Computer stored versus Computer Generated

1. Computer stored - input from humans equivalent of writing - **Michael J. Hutter "Admissibility of Electronic and Computer Generated Evidence in New York; Evidentiary Hurdles and Related Issues" ; Durin Rogers, Esq. Assistant County Attorney ' Admissibility of Electronically Stored information (ESI) in Family Court" ; Stephen Gassman. Esq. "Matrimonial Law and the Digital Age New York State Judicial Institute 2011 Matrimonial Seminar**

A. Hearsay rules apply

2. Computer generated - do not contain human statements so not subject to the hearsay rules

B. Both Computer stored and Computer generated must be **authenticated**

_____1. Record is what it proponent claims it to be

Proof that the users of the computer program rely on it in the ordinary course of business - See Federal Rules of Evidence 901(b)(a); see US v Moore 923 F2d 910 (1st Cir, 1991) ; See Hutter, Supra pages 14, 15 for series of questions on authentication

2. If computer generated - CPLR 4518 - true and accurate representation

A. Same as paper records

1. Routine procedure to assure accuracy

2. Possibility to be altered by key stroke not effect authentication

3. Best evidence the print out is the original

4. Hearsay

A. Admission by party opponent

B. Present sense impression

C. Business Record

1. Might include Email if in the regular course of business

D. State of Mind - relevant to show the recipient's state of mind

B. Text messages written communications sent from cell phone to cell phone

1. Instant messages transmitted by internet , real time through account by internet service provider

2. Take picture of the texts to introduce into evidence but not digitally enhanced or request for the original photo.

C. Foundation

1. Authentication`

A. Must show the message, text is transmitted from person the proponent claims transmitted it

1. Mere fact it may be altered fraudulent not effect admissibility - same as paper US v Savafian 435 F2d 36 (S.D.N.Y. 2006)

B. Methods

1. Direct- Billing information screen name - see State v Bell 2005 WL 388174 (Ohio Ct. App.)

2. Screen name -types his or her name at the end of message

a. no typed name

B. Automatic signature

C. Distinct characteristics

D. Reply letter rule - on going exchange of emails

E. Compares to other authenticated emails

3. Course of discovery

2. Circumstantial -People v Pierre 41 Ad3d 289 , 838 NYS 2d 546 (1st Dept. 2007)

A. Close friend testified defendant's screen name

B. Victim's cousin sent instant message to the same account and reply only by defendant

XII. Other evidence - Video and audio tapes and CD

A. People v Ely 68 NY2d 520 503 NE 2d 88(1986)

1. Clear and convincing that the offered evidence is genuine and that has been no tampering

2. Chain of custody from People v Ely *supra* not required but showing

A. Making of the tape

B. Identification of the speakers

1.

C. Within reasonable limits, who handled the tape from time making to production in court

D. Custody and unaltered state

3. Authentication

A. Testimony participant that the conversation is complete and accurate reproduction of the conversation and has not been altered. Tepper v Tannenbaum 65 AD2d 359, 411 NYS2d 588 (1st Dept. 1978)

B. Does not have be an expert n the use of tape recording where testimony

1. Device operable
2. Capable of operating
3. Recording authentic
4. Unedited and audible
5. Identified speakers - Harry R v Esther R. 134 Misc 2d 404 , 510 NYS2d 792 (Fam Ct, Bx. Co. 1986).

C. Partially inaudible or unintelligible admission at discretion of the trial judge People v Graham 57 Ad2d 478, 394 NYS2d 982 (4th Dept,. 1977)

D. Surreptitious Recordings

1. CPLR 4506(3)

A. Aggrieved party may suppress communications, conversations or discussions unlawfully overheard r recorded

But see party not aggrieved if called answering machine since knew being recorded Fryer v Fryer 1995 WL 468437 (N.Y.Sup.

B. No exclusion conversations freely heard People v Kirsh 176 Ad2d 652, 575 NYS 2d 306 (1991)

C. Father could not consent to recording telephone conversations between other parent and the child and could not be used by experts and professionals since illegal eavesdropping I.K. v M.K. 194 Misc 2d 608, 753 NYS2d 828 (St Ct, NY Co. 2003)

XIII. Website Owner of website

1. Posting by the owner or by third party?

A. Court's wary of authenticity posted by the owner

1. See Lorraine v Markel Insurance Company 241 FRD 535 (D. Md. 2001) but see St. Clair v Johnny Oyster &Shrimp Inc. 76 F Supp 2d 773-775 (S.D. Tex. 2000)

B. Authentication

1. Person who viewed and printed the information (print screen) See Miriam Osborn Mem. Home Ass., v Town of Rye Assessors , 9 Misc 3d 1019, 800 N.Y.S.2d 909 (Sup. Ct. Westchester Co. 2005)

2. Suggested questions from Lorraine supra above

A. What was the actually on the website?

B. Does the exhibit or testimony accurately reflect it?

C. If so is it attributable to the owner of the site?

C. Best Evidence - The original is the readable display Lorraine supra

D. Public records -

1. Information published on government sites may be admissibile

A. See Johnson Woodbridge v Woodbridge 2001 WL 838986 Ohio App (2001) or business record Proscan Radiology of Buffalo v Progressive Cas.. Inc, 12 Misc 3d 1176.(Buff. Cty Court 2006)

This court will take judicial notice of the records kept and maintained by the State of New York and other states on their official government websites and will accept that information as

an exception to the hearsay rule under

CPLR Rule 4518(a), the business records exception and State Technology Law § 306 (*see*

Miriam Osborn Memorial Home Assc v. City of Rye, 9 Misc.3d 1019 [2005]; *Citibank NA v.*

Martin, 11 Misc.3d 219 [2005]; Cali v. East Coast Aviation, 178 FSupp2d 276, 287 [EDNY

2001]).

2. Government Website may be subject to Judicial Notice - Kingsbrooke Jewish Medical v Allstate, 61 Ad 3d 13 871 NYS2d 680 (2nd Dept 2009) CPLR 4511

C. Website postings - permit third party postings

1. I.e chat rooms, facebook - Authentication

A. Contents show by printout authenticated by person or observed? Or read the posting? Ford v State 274 Ga. App 695 617 SE 2d 265 (2005)

2. Identity

A. Screen name? User account? Saw person making the posting/

B. Circumstantial

1. Individual used the screen name?

2. Meeting the person with the screen name?

3. Person with screen name identified him or herself?

4. Evidence from the hard drive of the computer? Lorraine, supra

5. Distinctive characteristics?

6. People v Clevenstine 68 Ad 3d 1448, 891 NYS 2d 511 (3rd Dept. 2009)

"Here, both victims testified that they had engaged in instant messaging about sexual activities with defendant through the social networking site MySpace, an investigator from the computer crime unit of the State Police related that he had retrieved such conversations from the hard drive of the computer used by the victims, a legal compliance officer for MySpace explained that the messages on the computer disk had been exchanged by users of accounts created by defendant and the victims, and defendant's wife recalled the sexually explicit conversations she *1451 viewed in defendant's MySpace account while on their computer. Such testimony provided ample authentication for admission of this evidence (*see* **2 *People v Lynes*, 49 NY2d 286, 291-293 [1980]; *People v Pierre*, 41 AD3d 289, 291 [2007], *lv denied* 9 NY3d 880 [2007]; *see generally* Zitter, Annotation, *Authentication of Electronically Stored Evidence, Including Text Messages and E-mail*, 34 ALR6th 253). Although, as defendant suggested at trial, it was possible that someone else accessed his MySpace account and sent messages under his user name, County Court properly concluded that, under the facts of this case, the likelihood of such a scenario presented a factual issue for the jury (*see People v Lynes, 49 NY2d at 293).* "

7. Evidence to show See State v Eleck 130 Conn. App 632, 23 A3d 818 ((2011) - Facebook posting no self authenticating

8. Hearsay issues

1. If authenticate then admission by party opponent

2. Business record

3. Declaration against interests

4. Excited utterances

9. Ethical issues

A. See Reiss, Zeiderman and Jacobs, " Divorces, Cyberspaice and Discovery: Writing on a Wall may not be private after all" NYSBA Family law Review Spring 2011 Vol 43 No.1; Boehnig, Toal "Ethics on Evidence of Social Networking " NewYork law Journal August 2, 2011: Berman, The Ethics of Social Networking and Discovery New York Law Journal New York Law Journal November 2, 2010

B. New York State Bar Association Committee on Professional Ethics, opinion 843 (9/10/10); See Rules 4:1:4.2 4:3, 5.3(b)(1); 8.4 (c)

1. Allowing public information but not "friending"

2. New York City Bar opinion 2010-2 contacting social network unrepresented party

C. SPC 18 U.S.C. 27029(b) securing private information from user or by court ordered subpoena

D. N.Y,. County Lawyers Association Ethics opinion

E. Radder v CSX Tranp. Inc. 68 AD3d 1743, 893 NYS2d 725 (4th Dept. 2009) Unethical versus inadmissible

Even assuming that law firm representing injured employee and his coworker had improperly

or irregularly obtained evidence concerning employee's injury, railroad suffered no prejudice

to any substantial right in defending employee's Federal Employers' Liability Act (FELA)

action, as would require suppression of such evidence; evidence of the coworker's forgery of

document critical to employee's case was previously known to attorneys for railroad, it was not

privileged, and it could have been exposed in normal course of discovery.

F. Suggestions for advice for client in matrimonial form Reis, Supra

1.Refrain from online networking

2. Advise client on to be dishonest on social networking site
3. Tell client to careful on posting pictures
4. "Defriend" the other spouse
5. Have client print facebook page for your files
6. Remind client to use privacy controls
7. Log off of sites when finished
8. Don't post until litigation finished

XIV. Handwriting foundation

A. The witness recognizes the author's handwriting

1. Lay witness can d identify handwriting is familiar wither seeing party write writings acknowledged by the party See Gross v Sormani 9 Ad2d 594, 189 NYS2d 522 (3rd Dept 1959: People v Corey 48 NY 476 42 NE 1066
2. Trier of fact can make own determination Roman v Goord 272 AD 2d 685 708 NYS2d 904 (3rd Dept 2000)
3. CPLR 4356 - Comparison

XV. Prior Inconsistent Statement against a party

A. Writing subscribed by him or was made under oath

1. CPLR 4514 - no foundation since received as an admission . See Viera v NYC Transit Authority 221 Ad2d 625, 634 NYS2d 168 (2nd Dept. 1995)

XVI. Prior inconsistent statement against a non party

A. Receivable as evidence in chief Campbell v City of Elimira, 198 AD2d 736,604 NYS2d 609 Affd 84 NY2d 505, 620 NYS2d 302 (1993)

B. Proper Foundation give witness opportunity to explain his testimony and prior inconsistent statement. Questioned as to the time place and substance of prior statement People v Duncan 46 NY2d 74 412 NYS2d 833 (1978)

1. Foundational requirement

A. Mark for identification

B. Show the witness to acknowledge authorship pr

1. Authenticate otherwise if witness does not acknowledge

2. Before used as basis of cross examination Larkin v Nassau Electric RR Co 205 NY 267, 269 98 NE 465 (1912).

3. If oral asked if made the statement the time place where it was made See Larkin Supra.

4. If witness denies or does not recall then statement a be used to impeach since the witness must first given an opportunity to explain or explain. Sloan v NY Central RR 45

NY 125 (1871); People v Latef, 176 Ad2d 505 574 NYS2d 700 (1st Dept 1991)

A. Must show witness specifically asked and directed to fact in issue. See People v Wise, 176 Ad2d 595, 575 NYS2d 39 (1st Dept. 1991)

XVII. Use of Deposition Testimony

A. CPLR 3117

1. Reading part of the deposition procedure is the discretion of the Court Reape v City of New York 228 Ad2d 659, 645 NYS2d 499 (2nd Dept. 1996)

XVIII. Present recollection refreshed

A. Any writing or object to refresh recollection of witness while testifying

1. Irrespective of source accuracy authorship or time of making McCarthy v Meaney 183 NY 190 (1905)

1. Once refreshed the witness must testify from his own knowledge since the writing or object is not in evidence

2. If witness has forgotten the facts and cannot recall them after looking at the writing the writing which was made at the tie or soon after may evidence although the witness has no present recollection See Howard v McDononough 77 NY 592 (1897)

3. One the witness has used the writing or object to refresh their present recollection the opposing party has a right to inspect; to use on cross and to introduce in to evidence see People v Gezzo 307 NY 385 (1954)

A. Second Department case that the right to inspect applies if the notes were reviewed for the purpose of preparing for trial see Chabica v Schneider 213 Ad2d 579 624 NYS2d 271 (1995)

XIX. Past Recollection recorded

A. Witness is unable to testify as to facts by or thorough a memorandum the memorandum is admissible into evidence if

1. If witness observed the matter recorded

2. The memorandum made contemporaneous with the occurrence

3. Witness believes the memorandum was correct when made

4. People v Caprio 25 Ad2d 145 268 NYS2d 70 (1966) affirmed in People v Raja 77 Ad2d 322 , 433 NYS2d 200 (2nd dept. 1980)

5. Not independent of the witnesses testimony but supplement to the testimony People v Taylor, 80 NY2d 1 (1992)