2015 Joint NYSCALA-OCA CLE Program

EVIDENCE FOR FAMILY AND MATRIMONIAL JUDGES HYPOTHETICALS

Prepared by Hon. Karen Lupuloff

Judge of the Family Court, Bronx County

HYPOTHETICAL 1

- 1. During a medical neglect fact finding trial in a child protective court, the ACS attorney prosecuting the case elicits testimony from the ACS caseworker that the respondent parent abused drugs while caring for the child. Such allegations were not pleaded in the charging petition. The prosecuting attorney asks the Court to conform pleadings to the proof and proof to the pleadings. The respondent parent's attorney objects and moves to strike the testimony on drug use, arguing that such testimony is beyond the scope of the charges. SUSTAINED OR OVERRULED?

ANSWER 1

- ANSWER 1: OBJECTION OVERRULED:
- CPLR section 3025 (c) permits the court to allow pleadings to be amended before or after judgment to conform them to the evidence. FCA section 1051 (b) states that if the proof does not conform to the specific allegations of the petition, the court may amend the allegations to conform to the proof. The respondent must be given reasonable time to prepare to defend against these additional allegations. Matter of Oksoon K. v Young K., 115 A.D.3d 486, 981 N.Y.S.2d (1st Dept. 2014), lv denied 24 N.Y.3d 902 (2014).

HYPOTHETICAL 2

- 2. At a sex abuse fact finding in a child protective court, ACS states that it will be calling the seven-year-old child victim to testify. The attorney for the child files papers seeking to permit the child to testify out of the presence of the respondent and asserts that the child would be harmed if required to directly confront him in open court. The respondent seeks an order requiring the child to testify in his presence, asserting that his due process rights and right to confrontation would otherwise be violated. The court, relying solely on the sexual abuse allegations in the petition, grants the attorney for the child's application and permits the child to testify via closed circuit live video. Respondent objects. SUSTAINED OR OVERRULED?

ANSWER 2

- ANSWER 2: OBJECTION SUSTAINED:
- While the Court may permit a child to testify outside of the presence of a respondent in a child protective proceeding, such ruling can only be made after a hearing, which may include live witnesses and/or sworn affidavits. The Court must balance the due process rights of the respondent with the mental and emotional well-being of the child. Matter of Arlenys B. v. Aneudes B., 70 A.D.3d 598, 896 N.Y.S. 2d 321 (1st Dept. 2010) (child permitted to testify via closed-circuit television); In re Q-L.H., 27 A.D. 3d 738, 815 N.Y.S.2d 601 (2nd Dept. 2006) (respondent excluded from courtroom due to emotional trauma to child).

HYPOTHETICAL 3

- 3. At a family offense fact finding in which a father alleges that his wife assaulted him and their child, the respondent was properly served but failed to appear. The Court conducted an inquest. At the trial, the petitioner's attorney calls the petitioner to the stand and asks numerous questions eliciting hearsay. The only other attorney participating at the fact finding is the child's attorney, and that attorney makes no objections. NO OBJECTION RAISED - - WHAT DO YOU DO

ANSWER 3

- ANSWER 3: RAISE THE OBJECTION SUA SPONTE: No hearsay is permitted at a fact finding hearing. Only competent, material and relevant evidence may be admitted. FCA § 834.

HYPOTHETICAL 4

- 4. During a modification of custody trial, the petitioning parent seeks to enter into evidence a 2001 prior custody order issued by a family court judge in Westchester County. The proponent of the evidence has a signed but unsealed copy of the order and asks you to take judicial notice of such order. The proponent has already testified that she received this prior order after a lengthy trial in Westchester and that she was handed the order by the clerk of the court at the completion of the trial. You do not know the Westchester judge and have never seen an order from that court. The respondent's attorney objects and opposes the request for judicial notice. SUSTAINED OR OVERRULED?

ANSWER 4

- ANSWER 4: OBJECTION OVERRULED: Judicial notice of an order from another court may be taken as long as, such as in this case, the party furnishes the court with sufficient information to enable it to review and approve the request, and as long as the request is made with sufficient prior notice to adverse parties. In considering whether to take judicial notice of the order, the Court may consider any information on the subject, whether offered by a party or discovered through its own research. FCA § 164 and CPLR § 4511.

HYPOTHETICAL 5

- 5. In a mental illness child protective proceeding, the respondent's attorney employs a social worker on staff. During the respondent's direct testimony at a FCA §1028 hearing seeking the return of his child, he blurts out that the social worker told him not to attend an ordered mental health evaluation with the provider chosen by ACS, and that she would refer him elsewhere. Respondent adds that no matter how many calls the social worker made, she could not find a mental health provider, so he never went. Respondent suggests that, if no one believes him, that the judge should review the social worker's notes that she prepared at his meetings with her. The ACS attorney now seeks to call the social worker to the stand and demands the production of the notes. Respondent's attorney objects, claiming that questioning the social worker would violate attorney-client privileged information and that the disclosure of the notes would violate the attorney work product protection. SUSTAINED OR OVERRULED?

ANSWER 5

- ANSWER 5: OBJECTION OVERRULED: While the communication between the attorney's social worker, an employee of the attorney, and the respondent would be privileged, the respondent has waived the privilege by his unsolicited testimony. The respondent's attorney should now review the social worker's notes and disclose only those portions in which the privilege has been waived. The social worker's testimony will also be limited to only that specific communication that has now been waived. CPLR § 3101 (c); CPLR § 4503; Prince, Richardson on Evidence, Eleventh Edition, section 5-101, section 5-213.

HYPOTHETICAL 6

- 6. The Administration for Children's Services has filed a petition against respondent father, charging derivative abuse of his two surviving children, where a third child was brought to the hospital by him, unconscious and with severe head injuries and died soon thereafter. Respondent has been indicted for murder in the second degree. The fact finding in Family Court in the derivative abuse case is taking place some months before the homicide case is scheduled in Criminal Court. At the Family Court fact finding, respondent refuses to take the stand and testify, asserting the Fifth Amendment privilege against self-incrimination. The presentment agency asks the judge to draw a negative inference from respondent's failure to testify. Respondent objects. SUSTAINED OR OVERRULED?

ANSWER 6

- ANSWER 6: OBJECTION OVERRULED
- Reasoning: “[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). The court can properly draw a negative inference against a Respondent based on his failure to testify, which does not violate his Fifth Amendment rights because Family Court proceedings are civil in nature Matter of Rachel S.D., 113 A.D.3d 450; 979 N.Y.S.2d 22 (1st Dept. 2014
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ANSWER 6 CONTINUED

- While CPLR§ 4501 does not excuse a witness from answering a relevant question where the answer "might tend to establish that he owes a debt or is otherwise subject to a civil suit," a witness is not required to give an answer that would tend to "accuse him of a crime, or expose him to penalty or forfeiture." Although the Fifth Amendment privilege against self-incrimination applies to civil proceedings, including Family Court proceedings (see, Matter of Figueroa v Figueroa, 160 A.D.2d 390, 553 N.Y.S.2d 753; Matter of DeBonis v Corbisiero, 155 A.D.2d 299, 547 N.Y.S.2d 274 (1st Dept. 1989), lv denied 75 N.Y.2d 709 (1990), cert denied 496 US 938 (1990)), "[i]t is well settled that a blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances." Chase Manhattan Bank v Federal Chandros, 148 A.D.2d 567, 539 N.Y.S.2d 36 (2nd Dept. 1989).
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ANSWER 6 CONTINUED FURTHER

- The privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer. Moreover, in order to effectively invoke the protections of the Fifth Amendment, a party must make a particularized objection to each discovery request (i.e. inquiry).
- N.B.: In her discretion, a judge may rule that the prejudicial effect of the party's invocation of the Fifth outweighs the probative value of the evidence to which the party is failing to respond, and choose not to draw a negative inference in such circumstances.

HYPOTHETICAL 7

- 7. In a child-neglect case that included allegations that the Respondent drove his car with his small children as passengers while his Connecticut license was suspended for DUI, Presentment agency sought to enter uncertified copies of official documents from the Connecticut DMV, under the business records exception to the hearsay rule as evidence that respondent's out-of-state license was suspended. Respondent objects, asserting that the copies of DMV records are hearsay and inadmissible. SUSTAINED OR OVERRULED?

ANSWER 7

- ANSWER 7: OBJECTION SUSTAINED:
- Copies of official records are admissible, however they are not self-authenticating: “a copy attested as correct by an officer or a deputy of an officer having legal custody of an official record of the United States or of any state, territory or jurisdiction of the United States, or of any of its courts, legislature, offices, public bodies or boards is prima facie evidence of such records.” CPLR R. 4540 (a). “Where the copy is attested by an officer of another jurisdiction, it shall be accompanied by a certificate that such officer has legal custody of the record and that his signature is believed to be genuine, which certificate shall be made by a judge . . . or by any public officer having a seal of office and having official duties in that district or political subdivision with respect to the subject matter of the record, with the seal of his office affixed. CPLR R. 4540 (c). To be admissible the copy of the out-of-state record must “comply with the statute’s requirement that the out-of-state document be authenticated by the certificate of a second, separate authority.” People v. Ricks, 90 A.D.3d 1562, 935 N.Y.S.2d 421 (4th Dept. 2011).

HYPOTHETICAL 8

- 8. In a custody trial, mother seeks to offer into evidence prior statements that her son made to ACS caseworkers in which the son described having observed father choking and repeatedly punching mother. Such statements had been previously admitted into evidence through the testimony of caseworker at the neglect trial. Here, at the custody trial, mother seeks to offer into evidence a page of an ACS case record that contains the son's statements. Father objects, asserting that such statements would constitute inadmissible hearsay. Is father's objection SUSTAINED OR OVERRULED?

ANSWER 8

- ANSWER 8: OVERRULED:
- In a child protective matter, Family Court Act § 1046 permits the entry into evidence of prior statements made by children about abuse or neglect. Such statements are permitted as a specific statutory exception to the hearsay rule. While no such specific statutory exception appears in Article 6 custody cases, case law dictates that, as long as the statements attributed to the children are about abuse or neglect, such statements are admitted as an exception to the hearsay rule. Such hearsay exception ONLY applies to statements about abuse or neglect, and other statements made by children would remain inadmissible hearsay.
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ANSWER 8 CONTINUED

- So, father's objection is overruled as the hearsay exception regarding prior statements made by children relating to incidents of abuse and neglect encompassed in Family Court Act § 1046 applies in custody cases brought under Article 6. Matter of Mildred S.G. v. Mark G., 62 A.D.3d 460, 879 N.Y.S.2d 402 (1st Dept. 2009); Matter of Pratt v. Wood, 210 A.D.2d 741, 620 N.Y.S.2d 551 (3rd Dept. 1994).

HYPOTHETICAL 9

- 9. In a custody dispute over a seven-year-old child, father files a petition seeking sole custody. On the return date, father appears and claims to have served mother. Father provides the court with an affidavit of service, indicating that service was effectuated on the mother the previous Sunday. The sworn affidavit states that service was accomplished when the father's girlfriend went to the mother's home and handed the papers to the child. Father asks the court to find that service is complete and that issue has been joined. The mother appears but objects to a finding that issue was joined. Is mother's objection SUSTAINED OR OVERRULED?

ANSWER 9

- ANSWER 9 : SUSTAINED:
- CPLR § 308, entitled “Personal Service Upon a Natural Person,” states that personal service can be accomplished in several ways. The most common form of personal service is direct delivery of the summons to the person to be served. Personal service can also be accomplished by delivering the summons to a person of suitable age and discretion at the actual place of business, dwelling or usual abode of the person to be served AND by either mailing the summons to the person being served at his last known residence or by mailing the summons to the person's business with the words “personal and confidential” on the envelope and nothing on the envelope indicating that a legal matter is involved.
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ANSWER 9 CONTINUED

- This second step, of mailing the papers, must be completed within 20 days of the first step of hand delivery to the person of suitable age and discretion. General Business Law §11, entitled “Serving Civil Process on Sunday,” prohibits all service of process on Sunday except where specifically permitted by statute (for example, service of a summons and an order of protection in a family offense case is permitted).
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ANSWER 9 CONTINUED FURTHER

- In this case, service was wholly improper, and the court cannot rule that issue was joined even though mother is present in the courtroom. To begin with, the affidavit of service states that the seven-year-old child was the "person of suitable age and discretion" handed the papers by the father's girlfriend. A seven-year-old child would not possess the sufficient level of maturity needed to understand that she was being asked to complete the significant task of providing important legal papers to her mother. Further, the affidavit of service fails to state that the papers were mailed to either the mother's home or business. Finally, service of a custody petition is not permitted on a Sunday.
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ANSWER 9 CONTINUED FURTHER

- N.B.: In cases where a proffered affidavit is sufficient on its face but the completion of service is disputed, the party disputing service may ask for a ‘Traverse’ hearing. At such hearing, the petitioner bears the burden of proof in establishing, by a preponderance of the evidence, that service on the respondent was properly effectuated. Continental Hosts, Ltd., v Levine, 170 A.D.2d 430, 565 N.Y.S.2d 222 (2nd Dept. 1991); Frankel v. Schilling, 149 A.D.2d 657, 540 N.Y.S.2d 469 (2nd Dept. 1989).

HYPOTHETICAL 10

- 10. In a custody case brought after a finding of neglect against the mother of a 4-year-old based on acts of domestic violence perpetrated against the child's father, the father seeks to admit into evidence a printed copy of a screen shot of a text message. Father asserts that the message was sent by the mother to the father's phone stating, "Bang, bang Daddy, you're dead." Father testifies to the fact that the mother's name and phone number came up when he received the text. Mother objects to admission of the printed copy of the screenshot, arguing lack of proper authentication and lack of foundation.

ANSWER 10

ANSWER 10: OVERRULED:

- Fathers testimony that mother’s number was stored on his phone and appeared as the source of the message, that they formerly regularly communicated via text message, and that the screen shot was taken using the phone that received the message as he received it, is sufficient to authenticate the printed photographic copy of the text message.
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ANSWER 10 CONTINUED

- This is similar to the testimony of a participant in a phone conversation testifying to the accuracy of a transcript of the conversation. Authentication does not necessarily require testimony from a phone-service provider about the source of the message. People v. Agudelo, 96 A.D.3d 611, 947 N.Y.S.2d 96 (1st Dept. 2012) discussing People v Clevenstine, 68 A.D. 3d 1448, 891 N.Y.S.2d 511 (3rd Dept. 2009), lv denied 14 N.Y.3d 799, 899 N.Y.S.2d 133 (2010). "[T]estimony that someone else could have sent the messages from [defendant's] phone presented a factual issue for the [trier of fact]." People v Hughes, 114 A.D.3d 1021, 981 N.Y.S.2d 158 (3rd Dept. 2014).
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ANSWER 10 CONTINUED FURTHER

- N.B. This is a rapidly evolving area of law. In a criminal case, the Third Department cited the additional corroboration of the phone-service provider's testimony that the messages had been sent between specific phone numbers. People v Hughes, 114 A.D.3d 1021, 981 N.Y.S.2d 158 (3rd Dept. 2014). Where the content of instant text messages "made no sense unless sent by defendant," the Second Department found that such text messages could be self-authenticating. People v Green, 107 A.D.3d 915, 967 N.Y.S.2d 753 (2nd Dept. 2013).

EVIDENCE HYPOTHETICALS QUESTIONS ONLY
EVIDENCE FOR FAMILY AND MATRIMONIAL JUDGES
PREPARED BY HON. KAREN LUPULOFF, BRONX FAMILY COURT

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PREPARED BY HON. KAREN LUPULOFF, BRONX FAMILY COURT

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