

Scope of Caseworker Testimony in DYFS Trials

By: Allison C. Williams, Esq.

Unlike the traditional civil trial, DYFS cases are often "streamlined" because of the Division's ability to enter documents generated by agency personnel into evidence without the formality required by the New Jersey Rules of Evidence. The authority for this guiding principle can be found in the Rules of Court, specifically R. 5:12-4(d), which provides:

Reports. The Division of Youth and Family Services shall be permitted to submit into evidence, pursuant to N.J.R.E. 803(c)(6) and 801(d), reports by staff personnel or professional consultants. Conclusions drawn from the facts stated therein shall be treated as prima facie evidence, subject to rebuttal.

Historically, reliance has been placed upon R. 5:12-4(d) to authorize the Division to simply provide the Court with a few reams of agency-generated Contact Sheets, reports, evaluations and summaries to be used at trial against a parent accused of abusing and/or neglecting his child. These Contact Sheets are typically inundated with multiple layers of hearsay, which would otherwise be inadmissible in any other proceeding. For instance, the Contact Sheet may contain the substance of a conversation between a police detective and medical personnel, which was relayed to a Division caseworker. Or perhaps, the Contact

Sheet may contain the substance of a child's allegation of abuse as relayed to a teacher, gleaned from the notations in a school's file, which was reviewed by a Division investigator.

These hearsay statements are not automatically admissible simply because they are contained in a document prepared by the agency. The threshold requirement of personal knowledge of the testifying witness, which is the hallmark of our adversarial system, must still be met. The Appellate Division first analyzed the quality of proofs necessary in DYFS proceedings in 1969 in the seminal case of In re Guardianship of Cope, 106 N.J.Super. 336 (App.Div.1969). In In re Guardianship of Cope, "several of [DYFS]'s witnesses testified from written reports prepared by other [DYFS] personnel.... The testimony of the witnesses was 'double' (sometimes 'triple') hearsay, making verification of its accuracy virtually impossible." Id. at 344.

The Court acknowledged that where fundamental rights are at stake (i.e., the irrevocable severance of the parent-child relationship), "evidence upon which judgment is based [must] be as reliable as the circumstances permit and the answering parent [must] be given the fullest possible opportunity to test the reliability of the

[State's] essential evidence by cross-examination". Id. By contrast, the Court also noted that were all Division employees having contact with a given case required to testify at trial, the workings of the agency would essentially grind to a halt. Id. To reconcile these two significant interests, the Court established the following criteria as a condition precedent to admissibility of the Division's hearsay reports in these matters:

1. Reports are prepared by Division employees or affiliated medical/mental health consultants
2. Reports are prepared from first-hand knowledge of the case
3. Reports are prepared at a time reasonably contemporaneous with the facts they relate
4. Reports are prepared in the ordinary course of business of the Division

In establishing these criteria, the Court reasoned that reports prepared by the "qualified personnel of a state agency charged with the responsibility for overseeing the welfare of children in the State, supply a *reasonably high degree of reliability as to the accuracy of the facts contained therein*". Id. Of course, any practitioner who regularly handles DYFS matters certainly will disagree with any suggestion that the Division's records reliably contain "accurate" facts. However questionable it may be, this rationale formed the basis of the Cope decision, as well as

the many cases addressing the admissibility of hearsay reports by Division caseworkers for years to come.

Then, in 2008, the tide turned. In a resounding victory for the champions of the Rules of Evidence, the Appellate Division decided the case of Division of Youth and Family Services v. M.C. III, 405 N.J.Super. 24 (App.Div.2008). The M.C.III decision principally changed the manner in which hearsay is addressed in DYFS proceedings and fine-tuned the holding in Cope to preclude the common practice of Division records coming into evidence without proper testimony.

In M.C.III, the trial Court found two teenagers to be abused children as a result of a physical altercation with their father. The trial judge placed primary reliance upon the Screening Summary report that was prepared by the Division Special Response Unit (SPRU) worker who investigated the allegation, as well as the DYFS-generated medical forms completed by the physician who examined the children following the incident. Applying the standards established in Cope, the Appellate Division found the admission into evidence and the trial Court's reliance upon both sets of documents to be impermissible.

In reversing and remanding, the Court found that the Screening Summary form prepared by the SPRU workers had not

been prepared from their "actual knowledge" as required by N.J.R.E. 803(c)(6). Id. at 356. Instead, the information that formed the basis of the abuse substantiation came from the physician who examined the children at the hospital. Id. Similarly, the "medical records" upon which the Division relied were not properly admitted into evidence as a business record, as the records were not documents kept in the ordinary course of business of the hospital; rather, they were hearsay documents - forms generated by the Division and given to the doctor to complete. Id. The Appellate Court reiterated the "high degree of reliability as to accuracy of facts" standard established in the Cope decision:

Where DYFS makes the initial referral to a DYFS-retained professional, resulting in an examination report proffered in evidence at a subsequent abuse or neglect proceeding, that professional is considered an "affiliated ... consultant[.]" Thus, such a referral by DYFS may satisfy the concern that there be a **"reasonably high degree of reliability as to the facts contained therein."** In re Guardianship of Cope, supra, 106 N.J.Super. at 344, 255 A.2d 798. The reliability of such evidence remains an issue to be assessed on a case by case basis within the trial judge's discretion. Where, however, DYFS's initial involvement in a matter arises from a referral by a non-affiliated professional ..., the facts and opinions contained in that individual's statements to a DYFS screening worker or on a DYFS-provided medical examination form do not rise to the "reasonably high degree of reliability[.]" ibid., required of DYFS's

proofs in this type of proceeding.

Id. at 356 (emphasis added).

The Appellate Court, by its decision in M.C.III held the Division to its burden to prove its allegations by use of only competent evidence, as is required by statute. See, N.J.S.A. 9:6-8.46. However, while the decision certainly goes a long way to level the playing field for parents accused by the State of abusing and/or neglecting their children, the viability of some of the assumptions underlying the opinion should be subjected to close scrutiny.

For instance, should one accept out of hand the notion that the findings of the Division's hired gun - i.e., a child abuse "expert" physician paid by the State to investigate and, more often than not, to find child abuse - is *more likely* to present "highly reliable facts" than is an independent physician, unaffiliated with either the State or the parent who is subsequently accused of child abuse, who examines a child and makes a report of his findings? Can the "facts" contained within Division Contact Sheets legitimately be considered to have a *reasonably high degree of reliability* when so many of these "facts", when subjected to aggressive cross examination, turn out to be inaccurate, incomplete, or simply outright

fabricated? And should the presumption of accuracy inure to the benefit of the most powerful player in this adversarial proceeding when the goal of the fact-finding hearing is not truly to protect children (protection of the children occurs in other stages of the litigation -during the removal process and during other hearings, which do not require competency of evidence)- but solely to obtain a finding of abuse or neglect against the parent, so they can be branded a child abuser on the State's Central Registry?

These questions cannot be answered at this time. But, undoubtedly, published decisions containing the principles established in the M.C.III decision move us that much closer to a fair system to adjudicate these sensitive matters.

Allison C. Williams, Esq., is an Associate in the law office of Pitman, Mindas, Grossman, Lee & Moore, P.C. in Springfield, New Jersey. She practices exclusively family law, specializing in the litigation of complex DYFS matters. Her expertise includes abuse/neglect trials, guardianship trials, administrative appeals of substantiations, and appeals.