

Scope of Caseworker Testimony in DYFS Trials: An Update

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In October 2009, this author presented in the annual Hot Tips for Family Lawyers seminar presented by the Institute for Continuing Legal Education of New Jersey, discussing the scope of caseworker testimony in proceedings initiated by the Division of Youth and Family Services. The focus of that article was the interpretation and application of the Court Rule governing admissibility of certain hearsay reports in DYFS proceedings. Specifically, the Division of Youth and Family Services is authorized to offer certain reports into evidence in compliance with Evidence Rule 803(c)(6), which is the Business Records exception to the hearsay rule:

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.

The article explored the scope of this rule, as relating to the testimony of DYFS caseworkers, in particular, the need for testimony as to the allegations of abuse or neglect to afford parents the greatest opportunity to meet the Division's proofs at trial. This need was first expounded in the seminal case of In re Guardianship

of Cope, 106 N.J.Super. 336 (App.Div.1969), wherein the Appellate Division established the golden rule in DYFS proceedings that "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. at 344.

This fundamental principle has remained constant throughout DYFS matters since 1969, though the particulars of its application have - as with all areas of law - evolved over time to fit the mores of the times. In 2008, 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), in which the Cope standard of admissibility was expounded. M.C.III. involved the common practice by the Division of Youth and Family Services of offering into evidence the Screening Summary, a document detailing the initial referral received prompting a DYFS investigation, as well as offering a DYFS-generated form given to the treating physician to complete. In M.C.III., the Screening Summary at issue contained hearsay statements of a medical professional who treated the children at issue and alleged that abuse was suspected. The Appellate Division held that the statements made by the medical professional in that

instance did not qualify for admission into evidence pursuant to R. 5:12-4(d), as he was not a professional consultant as intended by the rule. Specifically, the Court held:

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).

For anyone who has read the works of this author, it certainly should come as no surprise that it is with much chagrin that the phrase "high degree of reliability" be ascribed to DYFS records. Nevertheless, Cope set the standard, upon which our society has come to rely - namely, that the agency charged with such a critical function as investigating child abuse and protecting children from the

same must be considered highly reliable in order for society to vest with such agency the inordinate power it is granted over the lives of its citizenry. This notion of reliability as to facts in DYFS reports has not been experienced by this practitioner, and anecdotal evidence suggests that I am not alone.

For that reason, in the October 2009 precursor to this article, I questioned the viability of the underlying assumptions in Cope that DYFS consultants would be more apt to provide "highly reliable facts" than an independent medical professional who treats a child at a hospital and makes a report of suspected child abuse. Specifically, this author queried:

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?

This query turned out to be quite prophetic in the sense that the Appellate Division decision in M.C.III. was overturned by the New Jersey Supreme Court on March 31, 2010 in a decision, which offered guidance on the issue of

defining an affiliated consultant as contemplated by R. 5:12-4(d). In addressing certain hearsay statements contained on the DYFS-generated medical form given to the treating physician in that matter, the Court posits that “[t]he Division’s use of a disinterested treating physician is not inconsistent with the purpose of the Rule” (referencing R. 5:12-4(d), which allows admission of forms from medical consultants of the Division). This broad language appears to open the door for the Division to offer hearsay provided by any medical provider, not merely that of its paid consultants, as is usually required.

One could debate ad nauseum which provider of medical facts and data is more likely to give “highly reliable facts” in reporting alleged child abuse to DYFS. Medical consultants paid by DYFS that derive a considerable source of their income from DYFS consultation certainly have a financial incentive to find child abuse, and thus, may be considered less likely to give the most candid assessment of a case. Conversely, medical professionals who fear reprisal in the event a medical error is detected and not reported as child abuse may have even greater incentives to report child abuse - incentives including:

(a) An increase in malpractice premiums in the event a malpractice suit is filed; certainly a finding that child

abuse caused an injury decreases the likelihood that a jury would later find medical malpractice caused the same injury;

(b) A decrease in funding for child abuse research in the event the volume of referrals decreases¹; and

(c) potential civil liability in the event child abuse is not reported and serious injury or fatality occurs.

Whichever side of the argument one takes, it is certain that the Supreme Court's definition of affiliated consultants in no way disturbed the Appellate Division's explication in M.C.III.(1) that "[t]he reliability of ... evidence remains an issue to be assessed on a case by case basis within the trial judge's discretion".

Reliability of evidence should always be tested through zealous cross examination by defense counsel to ensure that the fundamental protection of parents' interests as interspersed throughout our jurisprudence remains rooted in the Cope principle that "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-

¹ Pressure to bring in research dollars may be experienced at higher levels of hospital administration; however, pressure at the top often trickles downward.

examination". This proviso is the cornerstone of a fair judicial proceeding and can never be forgotten.

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