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THE EVIDENCE RULES ALL FAMILY LAW ATTORNEYS SHOULD MASTER

Part Three of a Three-Part Article

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CPLR s 4511 provides that the Supreme Court and Appellate Courts must take judicial notice, without request, of the common law, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States, and of the official compilation of codes, rules and regulations of the state (except those that relate solely to the organization or internal management of an agency of the state), and of all local laws and county acts.

Every court may take judicial notice, without request, of private acts and resolutions of the Congress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and the laws of foreign countries or their political subdivisions.

Judicial notice must be taken for matters specified in CPLR s 4511 if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice must be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice. CPLR s 4511(b).

The court may take judicial notice of prior orders of New York Courts. CPLR 4511. The Appellate Division may, sua sponte, search the record and take judicial notice of prior orders. Lobotsky v. Lobotsky, 103 A.D.2d 799 (2 Dept. 1984). The court may also take judicial notice of its own records (Casson v. Casson, 107 A.D.2d 342 (1 Dept.1985)) or of those of other New York courts (People v. Continental Cas. Co., 301 NY 79, 82. (1950)). The Appellate Division may take judicial

notice of the history of litigation between the parties arising from the same transaction. Leather Development Corp. v. Dun & Bradstreet Inc., 15 AD2d 761 (1st Dept. 1962).

However, it is improper for the court to consider any affidavit in the Supreme Court's file that had not been marked or introduced into evidence before the summations. The taking of judicial notice of the court's own files is restricted to undisputed portions of such files. Ptasznik v. Schultz, 247 AD2d 197 (2d Dept.
1998) (judicial notice doctrine does not authorize the introduction, during summation, of any affidavit that happened to be in the court's file, where no evidentiary foundation had been laid for the affidavit and it attested to disputed facts). In Ptasknik, the court observed that '[c]ourt files are often replete with letters, affidavits, legal briefs, privileged or confidential data, in camera materials, fingerprint records, probation reports, as well as depositions that may contain unredacted gossip and all manner of hearsay and opinion." Thus, the mere presence of such items in the file does not authorize their admissibility pursuant to judicial notice.

PRIOR TESTIMONY OF WITNESS OR PARTY

Frequently, a party seeks to introduce into evidence testimony of a party given at a prior hearing involving those same parties. CPLR s 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 be admitted pursuant to CPLR s 3117(a) where the witness is unavailable.

CPLR s 4517 (a)(iii) sets forth three conditions for the admissibility of the transcript of former testimony taken or introduced in evidence at a former trial, where the witness who testified at the former trial is unavailable. They are: 1) the unavailability of the witness; 2) identity of subject matter; and 3) identity of the parties. The witness must be unavailable because of "privilege, death, physical or mental illness, absence beyond the jurisdiction of the court to compel appearance by its process or absence because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts, or because he is incompetent to testify." Once these

conditions are met, the prior testimony as well as "all exhibits and documents introduced in connection with it may be introduced in evidence by any party ... subject to any objection to admissibility other than hearsay." If the witness is available, the former testimony may not be introduced into evidence. Prince, Richardson on Evidence, 11th Edition, 8-502. In addition, there must have been an opportunity to cross examine that witness at the former trial. Young v. Valentine, 5 Bedell 347, 69 N.E. 643 (1904); Prince, Richardson on Evidence, 11th Edition, 8-506. If the former testimony is introduced into evidence, it is subject to any objection other than hearsay. CPLR s 4517. Prince, Richardson on Evidence, 11th Edition, 8-508.

Dean v. Halliburton, 241 NY 354 (1925).

Custody Modification Proceeding

To illustrate these rules, look at the custody modification proceeding in Palma S. v. Carmine S., 134 Misc.2d 34 (Fam Ct, 1986). In that case, the petitioner moved to have admitted into evidence reports prepared by Dr. Abbott, who examined the parties for the court, and Dr. Milani, who examined the parties in the earlier divorce proceeding between the two parties. Both doctors were physically available to testify, but they requested fees as expert witnesses, which the petitioner could not afford to pay. The respondent objected to the admission of these reports, absent the testimony at trial of the doctors, as inadmissible hearsay.

The court granted the motion to admit the reports of Dr. Milani and denied the motion to admit the reports of Dr. Abbot. The court found that the conditions in Civil Practice Laws and Rules s 4517 had been met. The parties were the same, the subject matter (custody) was the same and respondent's counsel in this action had cross-examined Dr. Milani at the prior divorce and custody proceeding in the Supreme Court. The court held that due to the court's inability to compel Dr.

Milani to testify as to his opinions and recommendations concerning the parties, he was effectually absent beyond the jurisdiction of the court to compel his appearance by its process as a matter of law. The petitioner's motion with respect to the testimony and reports of Dr. Abbott was denied because he never testified in any action between the parties and, of course, was never cross-examined. The court further held that, though Dr. Milani's testimony at the prior proceeding was admissible in the case at bar, his report could not be used to cross examine the respondent's expert, who testified that

he read, but did not rely upon, the report of Dr. Milani.

The original stenographic notes of prior testimony may also be read into evidence, proved by anyone whose competence is established by the court. In addition, the former testimony may be proved by anyone who heard it. McRorie v. Monroe, 203 NY 426 (1911). When proven in this way, the witness is not required to give the exact words that were said in the prior proceeding; the substance of the prior testimony is sufficient. McIntyre v. NY Central RR, 10 Tiffany 287, 37 NY 287 (1867).

ADMISSIBILITY OF CHILD ABUSE REPORTS

A report or portion of a report made to the statewide central register of child abuse and maltreatment, which is otherwise admissible as a business record pursuant to CPLR s 4518, is not admissible in evidence in a custody or visitation proceeding, unless three conditions are met. These conditions are: 1) That the report, conducted pursuant the Social Service Law, determined that there is some credible evidence of the alleged abuse or maltreatment; 2) That the subject of the report was notified that the need for the report was indicated; and 3) That the report, or relevant portion of the report, was not amended or expunged by the State Commissioner of Social Services (or a designated agent). Social Services Law s 412; Family Court Act s 651 a.

If the report has been reviewed by the State Commissioner of Social Services or the Commissioner's designee and has been expunged, it is not admissible in evidence even if both parents consent to discovery of the files. In addition, when a child abuse allegation is determined to be unfounded by child protective services, identifying information about the subject of the report must be erased, according to law. It follows that, since the report is required to be expunged of identifying information, the parties are not allowed to circumvent the law by deposing or otherwise calling as a witness any social services investigator. K. v. K., 126 Misc. 2d 624, (Sup. Ct. 1984). Similarly, if the report has been reviewed and amended to delete any finding, each deleted finding is inadmissible. Id. If the report has been amended to add any new finding, each new finding, together with any portion of

the original report not deleted, is admissible if it meets the other requirements of the section and is otherwise admissible as a business record. Id. If the report, or portion of the report, is admissible in evidence but is uncorroborated, it is not sufficient to make a fact finding of abuse or maltreatment in such proceeding. However, any other evidence tending to support the reliability of the report will be sufficient corroboration. Domestic Relations Law '240(3); Family Court Act '656.

ADMISSION OF DRUG ABUSE, ALCOHOLISM RECORDS AND HIV-RELATED INFORMATION

42 USC s290 ee-3 provides that records of substance abuse treatment may be disclosed only upon the written consent of the patient, to medical or research personnel, or upon court order for good cause shown. The statute states that:
'[i]n assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." 42 USC s290 ee-3 (a)(2)(C).
Additionally, the court must limit the information released in the record to only that portion that is necessary. 42 U.S.C. s 290 ee-3(a)(2)(C), see also 42 CFR 2.1(b)(2)(C) and 2.13(a). An order may be made only if the court determines that the information requested is not available from another source and that the public interest outweighs the potential injury to the patient, the patient-physician relationship and the facility. 42 CFR '2.64 (d). The Family Court has held that confidentiality requirements of substance abuse treatment records contained in 42 USC s 290 ee 3 and the patient physician privilege contained in CPLR 4504 precludes disclosure of such records for the purpose of prosecuting a termination of parental rights case. Mtr. of Brandon A. v. Claritha P., NYLJ, 7/21/95, p.32 col.6, (Fam. Ct., Monroe Co., Kohout, J.)

21 USC s 1175 provides that records of the identity, diagnosis, prognosis, or treatment of any patient that are maintained in connection with the performance of any drug abuse prevention function are confidential. They may not be disclosed except by court order, following a showing of good cause. In assessing good cause, the court is required to weigh the public interest and the need for disclosure against the injury to the patient, to the physicianpatient relationship, and to the treatment services. Susan W. v. Ronald A., 147 Misc2d 669 (Sup. Ct. 1990).

In Commissioner of Social Services of City of New York v. David R. S., 55 NY2d 588 (1982), the putative father in a paternity proceeding sought the disclosure of such records pursuant to Section 1175 (subd. (b), par. (2), cl. (C)) for his own use in private litigation, so as to attack the credibility of the mother's testimony. The court held that "good cause" had not been sufficiently shown to direct disclosure by court order, since the substantial and legitimate interests of both the mother and her drug treatment center, as well as other drug treatment centers, weighed against disclosure. The court noted that there was a strong public interest in protecting patients against disclosures, the threat of which might well deter their participation in drug and alcohol treatment programs.

Public Health Law s 2785, provides, in pertinent part, that "no court shall issue an order for the disclosure of confidential HIV related information" ...
except that '[a] court may grant an order for disclosure of [such] information upon an application showing: (a) a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding." The Appellate Division has held that a plain reading of this Public Health Law provision, as well as logic and fairness, compel a conclusion that it supersedes the physician-patient privilege. Plaza v. Estate of Wisser, 211 AD2d 111, 626 NYS2d 446 (1 Dept., 1995).

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