Nicholas Cipriani Matrimonial Inn of Court
Zoom
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Substance Abuse and Custody

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§ 5328. Factors to consider when awarding custody.

(a) Factors.--In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.

(2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).

(3) The parental duties performed by each party on behalf of the child.

(4) The need for stability and continuity in the child's education, family life and community life.

(5) The availability of extended family.

(6) The child's sibling relationships.

(7) The well-reasoned preference of the child, based on the child's maturity and judgment.

(8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.

(9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.

(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.

(11) The proximity of the residences of the parties.

(12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.

(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

(14) The history of drug or alcohol abuse of a party or member of a party's household.

(15) The mental and physical condition of a party or member of a party's household.

(16) Any other relevant factor.

(b) Gender neutral.--In making a determination under subsection (a), no party shall receive preference based upon gender in any award granted under this chapter.

(c) Grandparents and great-grandparents.--

(1) In ordering partial physical custody or supervised physical custody to a party who has standing under section 5325(1) or (2) (relating to standing for partial physical custody and supervised physical custody), the court shall consider the following:

(i) the amount of personal contact between the child and the party prior to the filing of the action;

(ii) whether the award interferes with any parent-

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child relationship; and

(iii) whether the award is in the best interest of the child.

(2) In ordering partial physical custody or supervised physical custody to a parent's parent or grandparent who has standing under section 5325(3), the court shall consider whether the award:

(i) interferes with any parent-child relationship; and

(ii) is in the best interest of the child.

(Dec. 18, 2013, P.L.1167, No.107, eff. Jan. 1, 2014)

2013 Amendment. Act 107 added subsec. (a)(2.1). See section 6 of Act 107 in the appendix to this title for special provisions relating to applicability.

Cross References. Section 5328 is referred to in sections 5323, 6340 of this title; section 6307 of Title 42 (Judiciary and Judicial Procedure).

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231 Pa. Code § 1915.8

Rule 1915.8 - Physical and Mental Examination of Persons

(a) The court may order the child(ren) and/or any party to submit to and fully participate in an evaluation by an appropriate expert or experts. The order, which shall be substantially in the form set forth in Rule 1915.18, may be made upon the court's own motion, upon the motion of a party with reasonable notice to the person to be examined, or by agreement of the parties. The order shall specify the place, manner, conditions and scope of the examination and the person or persons by whom it shall be made and to whom distributed. In entering an order directing an evaluation pursuant to this rule, the court shall consider all appropriate factors including the following, if applicable:

(1) the allocation of the costs, including insurance coverage, if any, attendant to the undertaking of the evaluation and preparation of the resultant report and court testimony of any appointed expert;

(2) the execution of appropriate authorizations and/or consents to facilitate the examination;

(3) any deadlines imposed regarding the completion of the examination and payment of costs;

(4) the production of any report and of underlying data to counsel and/or any unrepresented party upon the completion of the examination; and

(5) any additional safeguards that are deemed appropriate as a result of the alleged presence of domestic violence and/or child abuse.

(b) Unless otherwise directed by the court, the expert shall deliver to the court, to the attorneys of record for the parties, to any unrepresented party, and to the guardian ad litem and/or counsel for the child, if any, copies of any reports arising from the evaluation setting out the findings, results of all tests made, diagnosis and conclusions. No reports shall be filed of record or considered evidence unless and until admitted by the court. Any report which is prepared at the request of a party, with or without a court order, and which a party intends to introduce at trial, must be delivered to the court and the other party at least thirty days before trial. If the report or any information from the evaluator is provided to the court, the evaluator shall be subject to cross-examination by all counsel and any unrepresented party without regard to who obtains or pays for the evaluation.

(c) If a party refuses to obey an order of court made under subdivision (a) of this rule, the court may make an order refusing to allow the disobedient party to support or oppose designated claims or defenses, prohibiting the party from introducing in evidence designated documents, things or testimony, prohibiting the party from introducing evidence of physical or mental condition, or making such other order as is just. The willful failure or refusal of a party to comply with an order entered pursuant to this rule may also give rise to a finding of contempt and the imposition of such sanctions as may be deemed appropriate

by the court, including, but not limited to, an adverse inference against the non-complying party.

(d) A petition for contempt alleging failure to comply with an order entered pursuant to subdivision (a) of this rule shall be treated in an expedited manner.

231 Pa. Code § 1915.8

The provisions of this Rule 1915.8 amended May 16, 1994, effective July 1, 1994, 24 Pa.B. 2882; amended May 23, 2007, effective August 1, 2007, 37 Pa.B. 2602; amended August 2, 2010, effective immediately, 40 Pa.B. 4634.

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No. 1091 EDA 2002
Superior Court of Pennsylvania

Luminella v. Marcocci

814 A.2d 711 (Pa. Super. Ct. 2002) · 2002 Pa. Super. 410
Decided Dec 23, 2002

No. 1091 EDA 2002.

Filed: December 23, 2002.

Appeal from the ORDER Dated March 28, 2002, in the Court of Common Pleas of CHESTER County, DOMESTIC RELATIONS at No. 89-10661. *712

William J. Gallagher, West Chester, for appellant.

Thomas J. Wagner, West Chester, for appellee.

BEFORE: HUDOCK, FORD ELLIOTT, and OLSZEWSKI, JJ.

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OPINION BY OLSZEWSKI, J.

¶ 1 Appellant, Debra Marcocci ("mother"), appeals from the custody order of March 28, 2002, and the contempt order of March 20, 2002, entered by the court below. Mother argues four issues on appeal.

¶ 2 Two of mother's arguments attack the sufficiency of the factual analysis of the court below. Mother argues that the trial court erred by:

> inadequately addressing appellee John Luminella's ("father") treatment of the children, and by concluding that it is in the children's best interest to have unsupervised visits with their father. Contrary to mother's contentions, we find the trial court's findings to be both supported by the record and, as analyzed in the trial court opinion, within its discretion.

¶ 3 Mother's third argument is that the trial court erred by finding her in contempt of its April 8, 1998, order. We find that the trial court did not err in finding mother in contempt, or in the substance of the remedy it imposed for the contempt.

¶ 4 Finally, mother argues that the trial court's order that she undergo drug testing violates the fourth amendment of the United States Constitution. We find that, if the fourth amendment applies to the order, it passes constitutional muster.

¶ 5 Father argues that mother's appeal is frivolous, and urges this Court to award him attorney's fees pursuant to Pa.R.A.P 2744. In light of our discussion of mother's fourth amendment claim, we do not find mother's appeal frivolous or taken solely for delay. Father's request for attorney's fees is denied.

¶ 6 The trial court opinion's Statement of Procedural History provides the foundation upon which we analyze mother's arguments on appeal:

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The parties are the parents of three girls: Angela Luminella, D.O.B. 8/22/85; Alexis Luminella, D.O.B. 12/3/87; and Monica Luminella, D.O.B. 12/13/88. The parties did not marry and the children became the subjects of this custody action on December 20, 1989 when Father filed the custody complaint. Since that time the parties have been embroiled in a bitter custody battle with each party, at times, accusing the other of abusing the children. On April 8, 1998, pursuant to an agreement of the parties, the Honorable Michael J. Melody entered a Custody Order which was in effect at the time of [the trial court's] hearing. The terms of a previous order dated March 10, 1997 were to remain in effect; Father and Angela were to begin counseling and visitation, Angela was to begin counseling, and the parties were to be evaluated by Linda Shope, Ph.D. Accordingly at the time of our hearing, in the relevant Custody Order, Mother and Father shared legal custody of Angela, Alexis, and Monica. Mother and Father shared physical custody of Alexis and Monica, with the girls living one week at Mother's home, then one week at Father's home. Father had one two-hour visitation with Angela each Saturday, with further visitations subject to Angela's discretion.

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On January 10, 2002 Father filed a Petition for Civil Contempt asserting that Mother had failed to comply with the Custody Order. Father averred that as of August 2001, Mother had denied Father his custodial time with Alexis and Monica, that she had denied him all telephone contact with the children, that she had not permitted the children to attend therapy, that she had changed the children's address at school, and that she was discouraging the children from having a relationship with Father.

On January 18, 2002 Mother filed a Petition to Modify Custody in which she sought sole custody of Alexis and Monica. She averred that Alexis (now 14) and Monica (now 13) refused to see their Father because on occasion, he had broken their possessions, had used obscenities in their presence, had failed to feed them properly, and he engaged in the practice of "witchcraft".

On February 22, 2002 the parties appeared before a Custody Conciliator who issued a Custody Order on March 6, 2002. The Order recommended that legal custody be shared and that Mother should have primary custody. Father was awarded custody every other weekend to commence after counseling and a recommendation from the counselor. If the children's current counselor could not provide reunification counseling, Father was to find a counselor who could perform the same. Father filed an objection to the Custody Conciliator's recommendation and the case was certified to proceed to a hearing.

Trial Court Opinion, 5/30/02, at 1-3 (footnotes omitted).

¶ 7 Following father's filing of the petition for civil contempt, and a hearing on the matter, the trial court filed a March 20, 2002, order finding

mother in contempt of the trial court's order of April 8, 1998. Also, after a March 2002 custody hearing, the trial court entered a temporary custody order on March 28.

¶ 8 Mother's petitions to stay and petitions to reconsider both the March 20, 2002, order and the temporary custody order of March 28 were denied by the trial court. Mother now appeals.

¶ 9 Much of mother's argument in this appeal consists of a re-presentation of facts that mother presented below. Mother addresses this Court's attention to "voluminous testimony about Father's abusive conduct toward his children, use of drugs in front of his children and practice of witchcraft." Brief of Appellant at 23. These salient facts are, according to mother, "barely discussed by the Trial Court in its Opinion." *Id.* Such a failure of comprehensive analysis, continues mother's argument, constitutes reversible error.

¶ 10 It is entirely correct for mother to make much of the responsibility of the trial court to develop the record and write a complete opinion. As mother argues:

> "In a custody matter, the trial court must file a comprehensive opinion containing its findings and conclusions regarding all pertinent facts." Alfred v. Braxton, 659 A.2d 1040, 1042 (1995). The trial court's opinion should also contain an exhaustive analysis of the record and its specific reasons for its ultimate decision. *Id.*

Brief of Appellant at 27 (quotation marks added and form of citation modified).

¶ 11 Our disagreement with mother's argument arises not with her assertion that a trial court bears a heavy burden to develop the record in a child custody hearing, but in how she would have us apply that maxim to the case at hand. We are not 716 persuaded *716 that "the Trial Court's Opinion, although 25 pages in length, does not provide this Court with an exhaustive analysis of the record and the specific reasons for its ultimate decision that Father should be entitled to unsupervised visitation of his children." Brief of Appellant at 27. On the contrary, we find the trial court's opinion sufficient in both its analysis of the record and explanations of its conclusions.

¶ 12 Mother argues that the trial court inadequately addressed father's treatment of the children. Specifically, mother argues that the trial court's opinion evidences inadequate consideration of the evidence she presented below concerning her allegations of: father's verbal and physical abuse of the children, father's use of marijuana in front of the children, father's practice of witchcraft, and the children's dislike of father. Certainly, mother is correct that a legally sufficient child custody opinion must articulate thorough consideration of such evidence. We find that the trial court opinion does articulate consideration of this evidence, though not with the out-come that mother intended. Simply put: The trial court, balancing mother's evidence against father's, was not persuaded to mother's position. Because the trial court conducted its evidence-balancing test from a vantage point of being able to gauge the credibility of witnesses and assign weight to evidence as it was presented, its opinion is entitled to a measure of deference. S.H. v. B.L.H., 572 A.2d 730 (Pa.Super. 1990).

¶ 13 "The scope of review of an appellate court reviewing a child custody order is of the broadest type; the appellate court is not bound by the deductions or inferences made by the trial court from its findings of fact, nor must the reviewing court accept a finding that has no competent evidence to support it." Waters v. Waters, 757 A.2d 966, 967 (Pa.Super. 2000). "However, this broad scope of review does not vest in the reviewing court the duty or the privilege of making its own independent determination." *Id.* "Thus, an appellate court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions

unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion." *Id.*

¶ 14 Reviewing the record and the opinion of the trial court, we find that the court did sufficiently address father's treatment of the children. The trial court opinion is replete with analysis of allegations that father abused the children.

¶ 15 During examination of the children, the trial court uncovered only one incident "in which Father had grabbed Monica by the arm." Trial Court Opinion, 5/30/02, at 19. Continuing, the court found that "when the children were pressed for further examples of Father's outbursts, neither child could recall any other incidents with specificity." *Id.* Moreover, "Angela denied that father had ever hit her," *Id.*, and "Monica reported that Father was `nice most of the time.'" *Id.* "Alexis and Monica both stated that Father was prone to outbursts, yet both children also testified about Father's positive attributes." Trial Court Opinion, 5/30/02, at 22.

¶ 16 The court also had testimony from witnesses other than the children to form its understanding of father's treatment of the children. The court found father to be a credible witness. "[Father] testified that he had occasionally lost his temper, but he denied ever abusing the children." Trial Court Opinion, 5/30/02, at 21. The court *717 considered the testimony of Gigi Cohen, who lives with father, and that of her son, Martin: "Neither testified to observing anything that would indicate that the girls were unhappy when they stayed with Father." Trial Court Opinion, 5/30/02, at 22.

¶ 17 With respect to mother's claims of father's abusive treatment of the children, the court ultimately concluded: "Father is motivated to see his children and [we believe] that his behavior will be appropriate." Trial Court Opinion, 5/30/02, at 22. We find this conclusion to be well founded in the record and within the trial court's discretion in its role as finder of fact.

¶ 18 Similarly, we cannot find that the trial court erred by finding that father did not use marijuana in front of the children. Despite the testimony of the children that father used marijuana in front of them, the court was simply "not convinced that Father had used marijuana in the girls' presence." Trial Court Opinion, 5/30/02, at 19.

¶ 19 Challenging the trial court's determination of witness credibility — and citing Barron v. Barron, 594 A.2d 682 (1991) — mother argues that " [w]hen a trial court makes a credibility determination relative to a party's use of an intoxicating substance that is not supported in the record, a remand will be ordered by the appellate court." Brief of Appellant at 31-32. In Barron, this Court remanded a custody order which had granted custody to a heavy-drinking father. The order was remanded because the trial court had explicitly misstated the very portions of the record that it claimed as support for its legal conclusions. In our case, the trial court did not render its legal conclusions unfounded by misconstruing testimony. Rather, the trial court weighed the credibility of contrasting testimony.

¶ 20 Also persuasive in Barron was the father's uncontroverted habit of drinking to excess. The father in Barron did not deny that he had a drinking problem, he only argued that his problem did not rise to the level of alcoholism. This Court, supporting is decision to remand the Barron case, noted that the trial court failed to weigh the father's uncontroverted drinking habit in its determination of the children's best interests. In our case, the question is not the seriousness of father's drug use, but whether father used drugs at all. Because the trial court did not find that father used drugs, it would be nonsensical to require it to consider drug use in its custody decision.

¶ 21 The trial court was within its discretion to find that father had not used drugs in front of the children. Father did not concede that he had; witnesses testified that he had. "[T]he credibility of witnesses and the weight to be given to their

testimony by reason of their character, intelligence, and knowledge of the subject can best be determined by the judge before whom they appear." S.H. v. B.L.H., 572 A.2d 730, 731 (1990).

¶ 22 Mother argues that "[t]he trial court failed to adequately consider the harmful effects of Father's religion upon his children." Brief of Appellant at 33. Religion merits consideration in child custody cases, Boylan v. Boylan, 577 A.2d 218 (Pa. Super 1990), but we are not persuaded that the trial court failed to properly analyze the effect father's unusual religion had on the children.

¶ 23 The trial court noted that father initially included the children in his religious practice of 718 "Neo-paganism," but *718 did not force them to participate. Trial Court Opinion, 5/30/02, at 20. The Court found that father's religious beliefs were not harming the children. *Id.* As noted by the trial court:

> "Unless it can be shown that a parent's conduct has had harmful effects on a child, it should have little weight in making a custody decision." Trial Court Opinion, 5/30/02, at 20 (quoting Commonwealth ex rel. Pierce v. Pierce, 426 A.2d 555, 558 (1981)). Mother's exhortations that the children did not like their father's practice of Neo-paganism do not lead inevitably to the conclusion that father's religious practices were harming the children.

¶ 24 We do not agree with mother that "the Trial Court failed to explain how it weighed the children's preferences." Brief of Appellant at 34. From the trial court opinion, we know that "During [the Trial Court's] interviews with Alexis and Monica they expressed a desire to live with their Mother." Trial Court Opinion, 5/30/02, at 18. Noting that the child's wishes are "an important factor that must be carefully considered in determining the child's best interest," Trial Court Opinion, 5/30/02, at 18 (quoting McMillen v. McMillen, 602 A.2d 845, 847 (1992), the court crafted a custody schedule to "serve the girls throughout the school year while also ensuring that they have a relationship with their Father." Trial Court Opinion, 5/30/02, at 19. "Pursuant to the Custody Order entered, the girls reside primarily with their Mother. They spend one night per week with Father and every other weekend. During the summer the girls will rotate one week with Father and one week with Mother." *Id.*

¶ 25 Mother's second main argument condemning the sufficiency of the trial court's findings and analysis is that "the Trial Court committed an error of law or gross abuse of discretion when it concluded that it was in the children's best interests to have unsupervised visits with Father." Brief of Appellant at 35. On this point, mother raises, once again, issues of father's treatment of the children. She argues that because of father's alleged "physical abuse, emotional abuse, drug use and practice of witchcraft," the children were afraid of father. Brief of Appellant at 36. Citing Stoyko v. Stoyko, 405 A.2d 1284 (Pa. Super 1979), she suggests that, because the children expressed fear of father, the trial court was required to conduct an exploration of father's relationship with the children to evaluate the origin of the children's fears of father, and whether they continue to fear father.

¶ 26 Stoyko stands for the proposition that a child's bald claim of resentment and fear of a parent is insufficient, absent a judicial inquiry into the past and present relationship between parent and child, to deny visitation rights. In our case, the trial court conducted a sufficient inquiry, as already discussed herein, into the relationship between father and the children. Contrary to mother's assertions, Stoyko did not require that the trial court conduct a special evaluation of the origin and development of the children's fear of father.

¶ 27 Mother's third main argument is that the trial court erred by finding mother in contempt. The trial court explains that it found mother in contempt because "Mother admitted that she

stopped participating in the partial custody provision of the April 8, 1998 Order." Trial Court Opinion, 5/30/02, at 23. Also, "[t]he April 8, 1998 Order provides that Father's home address shall be considered the children's 'home address' for purposes of school *719 attendance. We believe that in violation of the April 8, 1998 Order, Mother changed the children's school information so that Mother's address was the address listed." Trial Court Opinion, 5/30/02, at 23-24 (citation to April 8, 1998, order omitted).

¶ 28 The trial court order of March 20, 2002, found mother in contempt, placed mother on probation for a period of six months, compelled mother to undergo psychological testing, and compelled mother to pay to father a fine of $500.00 plus attorney's fees of $1,000.00.

¶ 29 Mother argues that the trial court erred because "Mother did not exhibit willful contempt of the Trial Court's April 8, 1998 Order," Brief of Appellant at 24, and because the order "had the effect of punishing Mother," Brief of Appellant at 25. We find that the trial court did not err in its contempt order.

¶ 30 Mother argues that she was not in willful contempt because she was not able to force the children to see father as the order required. But, in contrast, she also concedes that, "[f]or a long time," she "kept making the girls go [to visit Father] in accordance with the Trial Court's April 8, 2002 Order." Brief of Appellant at 39. Apparently, mother feels that over time she grew unable to force her children to comply with the order because "[s]he had good reason to fear for her daughter's [sic] safety, especially given her own experiences over ten years with their Father." Brief of Appellant at 40. As her argument goes, "Mother took it on herself to try to solve the situation by enrolling her daughter's [sic] in counseling where they could work on their issues regarding Father." *Id.*

¶ 31 To accept Mother's argument is to accept anarchy. By relying on fears for the children's safety as a reason that she could not comply with the court order, mother relies on factors she should have argued during the development of the custody order of April 8. It is not for mother to take it upon herself to solve the issues addressed in the order by enrolling the children in counseling. The court, before which mother had a chance to present her case, issued an order. As the trial court notes: Mother "did not pursue modifying the [C]ustody [O]rder until Father filed a Contempt action." Trial Court Opinion, 5/30/02 at 24. Mother is not permitted to ignore the order and unilaterally institute measures she feels appropriate instead of the order.

¶ 32 Moreover, the trial court's contempt order did not have the effect of punishing mother. Mother bases her position on her allegations that the $500.00 fine did not compensate father for litigation expenses, that mother would be hard pressed to afford the fine, and that the trial court's award of $1,000.00 of attorney's fees was arbitrary. Even if the $500.00 fine did not compensate father for litigation expenses, it served to compensate him for mother's violation of his court-mandated rights to custody of his children and, thus, was proper. Goodman v. Goodman, 556 A.2d 1379, 1392 n. 8 (1989). Moreover, the award of attorney's fees is a proper exercise of the trial court's civil contempt power. "Because an award of counsel fees is 'intended to reimburse an innocent litigant for expenses made necessary by the conduct of an opponent,' it is 'coercive and compensatory, and not punitive.'" *Id.* (citation removed). We cannot find that the award was punitive in nature, as mother argues, based on the fact that at the contempt hearing "[t]he majority of the testimony . . . focused on Mother's petition to modify the custody order." Brief of Appellant at 41. Placing "great reliance on the sound discretion of the trial judge," we find the award of attorney's fees to be reasonable. *720 Flannery v. Iberti, 763

A.2d 927, 929 (Pa.Super. 2000). We cannot find that the award of attorney's fees constituted "a clear abuse of discretion." *Id.*

¶ 33 Finally, we address mother's argument that the trial court's order that she undergo random drug testing violates her rights under the fourth amendment to the United States Constitution.

¶ 34 Mother and father were ordered to undergo monthly random drug testing pursuant to the custody order issued by the trial court on March 28, 2002. The fault that mother finds in this demand is that "there was absolutely no evidence presented that Mother ever used drugs." Brief of Appellant at 38. Mother argues that "in order for a court to require an individual to undergo compulsory drug tests, the court must be able to articulate some basis for a reasonable suspicion that the person is or has been in the past under the influence of drugs or intoxicants." *Id.*

¶ 35 The trial court does not specify the authority through which it ordered mother to undergo drug testing. Such authority does exist, however, in Pa.R.C.P. 1915.8, which provides for court-ordered physical and mental examinations of children or parties in actions for custody or visitation. Pa.R.C.P. 1915.8 does not explicitly require that a court articulate a basis of reasonable suspicion — based on evidence presented by the parties — to support an order issued pursuant to its rubric. Nor does mother direct us to any Pennsylvania law finding such a requirement.

¶ 36 We consider whether the fourth amendment to the United States Constitution requires such a basis:

The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

¶ 37 Finding no Pennsylvania cases addressing the application of the fourth amendment of the United States Constitution to Pa.R.C.P. 1915.8, we turn to federal law.

¶ 38 The fourth amendment applies to the states through the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25 (1949). It requires that government searches be reasonable. The reasonableness of a particular search is judged in a balance of its intrusion on the individual's fourth amendment interests against its promotion of legitimate government interests. Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989).

¶ 39 The requirements of reasonableness in the context of criminal search and seizure are commonly known. "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, [the Supreme] Court has said that reasonableness generally requires the obtaining of a judicial warrant. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause." Vernonia School District 47J v. Acton, 515 U.S. 646, 653 (1995) (citation removed). The working of the fourth amendment in the civil context — while "[t]he Supreme Court has made clear that fourth amendment protection is not restricted to searches and seizures designed to uncover criminal wrongdoing" — is less clear. United States v. International *721 Business Machines Corp., 83 F.R.D. 97, 103 (S.D.N.Y. 1979).

¶ 40 With a dearth of legal analysis, mother cites Armington v. School District of Philadelphia, 767 F. Supp. 661 (E.D.Pa. 1991), for her assertion that the court must have "some sort of information that a party has used drugs or uses drugs," Brief of Appellant at 38, in order for the court-ordered drug testing to be reasonable as required by the fourth amendment. Because Armington addressed the application of the fourth amendment to drug testing of government employees, a context with vastly different expectations of privacy and government interests at issue than those at hand, it is inapplicable.

¶ 41 More relevant to our consideration is United States v. International Business Machines, in which the United States Court for the Southern District of New York addressed the application of the fourth amendment to quash a governmental discovery subpoena issued pursuant to the federal rules of civil procedure. 83 F.R.D. 97 (S.D.N.Y 1979). In its search for law addressing the issue of fourth amendment challenges to civil discovery, the court found only three cases:

> In General Petroleum Corp. v. District Court, 213 F.2d 689 (9th Cir. 1954), the court noted but did not deal with petitioner's argument that the trial court's order for production of documents called for an unreasonable search and seizure. The district court in Rekeweg v. Federal Mutual Insurance Co., 27 F.R.D. 431 (N.D.Ind. 1961), rejected defendant's constitutional claims made in response to a rule 34 motion for production of documents. "The documents here sought are not to be used in a criminal prosecution . . . nor do they constitute practically all of the records of the corporation. . . ." 27 F.R.D. at 438. Although the court's reasoning is inexplicit, it may be inferred that the court thought defendant's fourth amendment claims appropriately raised and rejected them on the merits. In United States v. Aluminum Co. of America, 1 F.R.D. 57 (S.D.N.Y. 1939), the district court stated that the subpoena duces tecum sought to be quashed by defendant "would constitute an invasion of the constitutional right of Alcoa to be free from an unreasonable search." 1 F.R.D. at 57-58. While Alcoa, and perhaps Rekeweg, may be said to stand for the proposition that discovery requests made in the course of a civil trial are subject to fourth amendment reasonableness protection, they contain little or no analysis to support that conclusion. The court finds them unconvincing.

83 F.R.D. at 101.

¶ 42 Ultimately, the International Business Machines court, finding itself "left in doubt" about the application of the fourth amendment to civil discovery, assumed the amendment's application for purposes of its decision. International Business Machines, 83 F.R.D. at 103. The court found that, if the amendment's requirement of reasonableness applies to civil discovery, the requirement is met

by the strictures of both the federal rules of civil procedure and caselaw encompassing those rules. The court specifically endorsed several factors as being germane to determination of the reasonableness of discovery: relevance, the need of the party for documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described, and the burden imposed.

¶ 43 Following the Southern District of New York's ruling in International Business Machines, the law of application of the fourth amendment in non-criminal contexts has developed. As noted recently by the Supreme Court in Vernonia School 722 *722 District 47J v. Acton: "A search unsupported by probable cause can be constitutional, . . ., when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." 515 U.S. 646, 653 (1995) (quotation marks removed).

¶ 44 In the case at hand, the fourth amendment's requirement of reasonableness, if the amendment in fact applies to civil discovery procedure, is met in Pa.R.C.P. 1915.8 as applied by the trial court. Pennsylvania's interest in the protection of children who are the subject of custody disputes justifies the trial court's order, pursuant to Pa.R.C.P. 1915.8, that mother undergo and pay for random drug testing.

¶ 45 In Vernonia, the Supreme Court applied a balancing test to determine the reasonableness of a government search that was conducted pursuant to special needs beyond the normal need for law enforcement. The Court vacated the judgment of the Ninth Circuit, which had held the Vernonia School District's practice of drug testing of student athletes to be violative of the fourth amendment. To reach its conclusion, the Vernonia Court analyzed the search under a three-prong test balancing: 1) "the nature of the privacy interest upon which the search . . . at issue intrudes" 515 U.S. at 654; 2) "the character of the intrusion that is complained of" 515 U.S. at 658; and 3) "the nature and immediacy of the governmental concern at issue . . ., and the efficacy of [the] means for meeting it." 515 U.S. at 660. The Court found the student athlete drug testing search reasonable considering: 1) the student athletes reduced expectation of privacy; 2) the not-significant invasion of privacy represented by the drug testing; and 3) the important — or perhaps compelling — purpose of deterring drug use among children, combined with the effectiveness of the drug testing of student athletes to combat the problem of the "role model" effect of athletes' drug use.

¶ 46 Our analysis, under the Vernonia reasonableness balancing test, of the trial court's exercise of Pa.R.C.P. 1915.8 authority leads us to conclude that, if the fourth amendment applies, the trial court's application of Rule 1915.8 passes constitutional muster.

¶ 47 First, we consider the nature of mother's fourth amendment privacy interest upon which the ordered drug testing intrudes. As pointed out by the Vernonia Court:

> The Fourth amendment does not protect all subjective expectations of privacy, but only those that society recognizes as legitimate. What expectations are legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-a-vis the State may depend upon the individual's legal relationship with the State.

Vernonia, 515 U.S. at 654 (quotation marks and citations omitted).

¶ 48 The civil litigant generally, and the custody dispute litigant in particular, has a drastically reduced expectation of privacy — and necessarily so. In order to minimize "substantially unfair or mistaken deprivations" of rights, civil procedure

provides for a fundamental and thorough examination of all issues — private and public — that are germane to the determination of life, liberty, or property at issue. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). The great intrusion into the privacy of the civil litigant, which is inherent to 723 the process *723 due a litigant, is necessary to ensure the greatest possibility of sound resolution of his or her rights.

¶ 49 Mother, as a child custody litigant, has an even lower reasonable expectation of privacy than the general civil litigant. In anticipation of her custody hearing, she could reasonably expect that the very core of her privacy interests — her home life and child rearing practices — would be the central focus of the hearing. The Supreme Court has emphasized, in other contexts, the significance of the rights at peril in a child custody determination:

> The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "rights far more precious . . . than property rights[.]" "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment[.]

Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations removed). Anticipation of a thorough disclosure of such significant matters might have made mother anxious, but it should also have engendered faith that the core of her fundamental rights would not suffer capricious determination.

¶ 50 Pennsylvania law, specifically the right to privacy protected by Pennsylvania's constitution, may have colored mother's reasonable expectation of privacy in this matter. In the context of disputes concerning child welfare, the Pennsylvania constitutional right to privacy has been held to bar compelled disclosure of psychological tests. In re "B", 482 Pa. 471 (1978); In re T.R., 557 Pa. 99 (1999). Here, drug testing is at issue, not mother's "innermost thoughts and feelings" drawn from a probing psychology professional. In re T.R., 557 Pa. at 109 n. 1. As we discuss immediately below, the United States Supreme Court has found drug testing in various forms to constitute a negligible, or not significant, intrusion of privacy. In sum, we find mother to have had a low reasonable expectation of privacy.

¶ 51 Our second consideration under the Vernonia balancing test is the character of the intrusion that is complained of. The record fails to specify the manner in which mother will be drug tested. Mother has not complained about the manner of the testing so much as the fact that she is to be tested at all.

¶ 52 Conceivably, mother could undergo drug testing of her urine, blood, or hair. "The privacy concerns ordinarily implicated by urinalysis drug testing are `negligible,' when the procedures used in collecting and analyzing the urine samples are set up `to reduce the intrusiveness' of the process." Chandler v. Miller, 520 U.S. 305, 326 (1997) (quoting Vernonia, 515 U.S. at 658). The Supreme Court has found that "the intrusion occasioned by a blood test is not significant." Skinner, 489 U.S. at 625 (1989). With respect to drug testing of the hair: It strains reason to imagine that an analysis of strands of hair for drug use is more intrusive than either urine or blood testing.

¶ 53 Considering our resolution of the other two prongs of the reasonableness test, we find identification of the particular method and specific 724 manner of drug *724 testing unessential to our resolution of the reasonableness of the search. Assuming conventional testing methods, we conceive of no drug test that would be so intrusive

as to trump mother's low expectation of privacy and, as we discuss next, the compelling nature of the government concern here at issue.

¶ 54 Our third, and final, consideration under the Vernonia balancing test is the nature and immediacy of the governmental concern at issue here, and the efficacy of the government's means for meeting it. The nature of the governmental concern underlying Pa.R.C.P. 1915.8 is found with reference to the 1981 Explanatory Comment to the rule and the Comment's comparison of the rule to its non-custody dispute, civil counterpart, Pa.R.C.P. 4010.

¶ 55 Rule 1915.8 allows the court hearing a child custody dispute to compel, sua sponte, physical or mental examinations of persons. In contrast, Rule 4010 requires that the compulsion of a person to undergo a physical or mental exam originate with a party request. The reason for this difference between general civil practice and child custody practice is evidenced in the 1981 Explanatory Comment to Rule 1915.8: "Custody cases are not akin to most other cases in the adversary process. The focus is not on parental rights but unrepresented children's rights." (quoting Pennsylvania Family Lawyer, p. 7) (emphasis added).

¶ 56 The Supreme Court has found the state interest in the welfare of children to be compelling. Recognition of such a strong state interest is what permits the state to overcome a parent's fundamental right to rear her child if a court terminates custody. Blair v. Supreme Court of Wyoming, 671 F.2d 389 (1982) (citing Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972)). The authority provided to courts by Pa.R.C.P. 1915.8 is a manifestation of Pennsylvania's compelling interest in the welfare of children.

¶ 57 We find that Rule 1915.8 effectively facilitates the State's exercise of its interest in the welfare of children. Mother's argument is that the compelled drug testing was unreasonable because no evidence was presented that she used drugs. Accepting mother's argument requires accepting that the only reasonable foundation, or origin, of a rule 1915.8 order for mental or physical examination is evidence presented by the parties. Mother would effectively nullify the right of the court, explicit in Rule 1915.8, to issue a 1915.8 order on its own initiative, absent any initiative taken by the parties to the dispute to present evidence on the matter.

¶ 58 Moreover, mother's argument is implicitly premised on an assumption not shared by the drafters of Rule 1915.8: that the parents embroiled in a custody dispute can be expected to thoroughly represent and present evidence in support of, not only their own interests, but also those of the children. Rule 1915.8 provides that a mental or physical examination can be compelled by the court, on its own initiative, because the children's rights are unrepresented.

¶ 59 Rather than finding the reasonableness of the trial court's exercise of Rule 1915.8 authority in evidence presented by the parties, we find it in the 1994 Explanatory Comment to Rule 1915.8: "In order to make a proper determination in a child custody case, the court often requires information which can only be supplied by an expert evaluation of the parties and the subject child." See Pa.R.C.P. 219(e) ("A note to a rule or an explanatory comment *725 is not a part of the rule but may be used in construing the rule."). A court's exercise of its Rule 1915.8 authority is reasonable, as was the trial court's here, when "[i]n order to make a proper determination in a child custody case" it requires information which can be supplied by "an expert evaluation" of the parties or child. Pa.R.C.P. 1915.8 Explanatory Comment 1994.

¶ 60 Such an expansive grant of court-compelled Rule 1915.8 power of discovery, though different in its working from Pa.R.C.P. 4010, is no more expansive than the court-compelled discovery

power available to parties in the context of general civil discovery. See Pa.R.C.P. 4011. Limited in its applicability as Rule 1915.8 is, to physical and mental examinations in the context of custody and visitation of minors disputes, this grant of authority is no greater than necessary to serve the state's compelling purpose of protection of minors.

¶ 61 In light of mother's minimal reasonable expectation of privacy, the unobtrusiveness of conventional drug testing, and the compelling nature of the state's interest in the protection of children, we find that compelling mother to undergo drug testing is reasonable under the fourth amendment, if it applies.

¶ 62 Order AFFIRMED. Father's request for attorney's fees is DENIED.

¶ 63 FORD ELLIOTT, J., Concurs in the Result.

casetext

224 A.3d 729
Superior Court of Pennsylvania.

H.R. and C.A.R.
v.
C.P. and J.M.
Appeal of: C.P.

No. 807 MDA 2019
|
Submitted September 30, 2019
|
Filed December 18, 2019

Synopsis
Background: Unwed father filed petition for modification of child custody. The custody officer recommended that the trial court terminate drug-testing conditions on father's ability to exercise unsupervised custody and significantly increase duration and nature of father's three-hour period of supervised partial physical custody to nine hours of unsupervised custody on alternating Saturdays. Maternal grandparents filed exceptions to the custody officer's report and recommendation. The Court of Common Pleas, Schuylkill County, Civil Division, No. S-1868-2011, Charles M. Miller, J., found that it was not in best interest of the child to expand father's partial custody, and father appealed pro se.

Holdings: The Superior Court, No. 807 MDA 2019, Bowes, J., held that:

[1] rather than requiring court to ignore father's marijuana use, Medical Marijuana Act obligated trial court to contemplate father's physical condition, and

[2] court did not deny father's motion to modify child custody simply because father sought to utilize medical marijuana card, and instead, court concluded that it was not in child's best interests to expand father's custody.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Modify Custody.

West Headnotes (14)

[1] **Child Custody** Welfare and best interest of child
It is within trial court's purview as the finder of fact to determine which enumerated best-interest of child factors are most salient and critical in each particular child custody case. 23 Pa. Cons. Stat. Ann. § 5328.

[2] **Child Custody** Review
Child Custody Discretion
In reviewing child custody order, appellate court's scope of review is of the broadest type, and appellate court's standard of review is abuse of discretion.

[3] **Child Custody** Questions of Fact and Findings of Court
When reviewing child custody decision, appellate court must accept findings of the trial court that are supported by competent evidence of record, as appellate court's role does not include making independent factual determinations.

1 Cases that cite this headnote

[4] **Child Custody** Credibility of witnesses
With regard to issues of credibility and weight of the evidence in child custody action, appellate courts must defer to the presiding trial judge who viewed and assessed the witnesses first-hand.

1 Cases that cite this headnote

[5] **Child Custody** Questions of Fact and Findings of Court
Appellate courts are not bound by trial court's deductions or inferences from its factual findings in child custody action.

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[6] **Child Custody** Questions of Fact and Findings of Court

Ultimately, the test, when reviewing trial court's child custody decision, is whether trial court's conclusions are unreasonable as shown by the evidence of record.

[7] **Child Custody** Questions considered

Child Custody Questions of Fact and Findings of Court

In child custody action, appellate court may reject the conclusions of trial court only if they involve error of law or are unreasonable in light of the sustainable findings of trial court.

1 Cases that cite this headnote

[8] **Appeal and Error** Briefs and argument in general

Appeal and Error Citation to facts and legal authority in general

Where appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived for appeal.

[9] **Child Custody** Assignment of errors and briefs

Although unwed father's legal argument in child custody modification case was undeveloped and without citation to any legal authority, appellate court would address merits of father's claim because the deficiency did not interfere with appellate court's review of father's central claim that trial court ignored Medical Marijuana Act when determining if it was in best interests of child to expand custody with respect to father, who allegedly used medical marijuana. 35 Pa. Stat. Ann. § 10231.2103(c).

[10] **Child Custody** Decision and findings by court

Medical Marijuana Act does not preclude trial court, in child custody action, from making relevant findings concerning the effect of marijuana use, whether medical or recreational, on parent's ability to care for his child. 35 Pa. Stat. Ann. § 10231.2103(c).

[11] **Child Custody** Physical condition of parties

Rather than requiring the court to ignore unwed father's medical marijuana use, Medical Marijuana Act obligated trial court, in child custody modification case, to contemplate father's physical condition, i.e. the nerve pain he complained of in his wrist, and his reliance upon medication to subdue that pain. 23 Pa. Cons. Stat. Ann. § 5328(a); 35 Pa. Stat. Ann. § 10231.2103(c).

[12] **Child Custody** Grounds and Factors

Prior to making child custody determination, statute governing best interest factors mandates that trial court consider how parent's legal use of any pain medication impacts his child's best interest. 23 Pa. Cons. Stat. Ann. § 5328(a)(14) and (15).

[13] **Child Custody** Grounds and Factors

Medical Marijuana Act prohibits fact-finder from penalizing parent, in child custody action, simply for utilizing medical marijuana. 35 Pa. Stat. Ann. § 10231.2103(c).

[14] **Child Custody** Grounds and Factors

While Medical Marijuana Act prohibited trial court from penalizing parent for utilizing medical marijuana, trial court did not deny unwed father's motion to modify child custody simply because father sought to utilize medical marijuana card, and instead, trial court concluded that it was not in child's best interests to expand father's three-hour period of supervised partial

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custody to unsupervised overnight custody without requiring father to continue to submit to drug screening regimen; record established that father previously abused marijuana and was unsafe around his child. 23 Pa. Cons. Stat. Ann. § 5328(a); 35 Pa. Stat. Ann. § 10231.2103(c).

*731 Appeal from the Order Entered April 5, 2019, In the Court of Common Pleas of Schuylkill County, Civil Division at No(s): S-1868-2011, Charles M. Miller, J.

Attorneys and Law Firms

C.P., appellant, pro se.

J.M., appellee, pro se.

Lori A. S. Guzick, Pottsville, for H.R. & C.A.R., appellees.

BEFORE: BOWES, J., LAZARUS, J., and DUBOW, J.

Opinion

OPINION BY BOWES, J.:

**1 C.P. ("Father") appeals from the April 5, 2019 custody order that granted the exceptions filed by the maternal grandparents, H.R. and C.A.R. (collectively "Grandparents"), to the custody officer's report and recommendation, denied Father's counter-exceptions, and awarded Father periods of supervised physical custody of his ten-year-old son, L.P. We affirm.

L.P. was born in May 2009, of Father's relationship with J.M. ("Mother"), whom Father met while they were students at Penn State University. Mother and Father both struggle with substance abuse, and Father's recreational use of marijuana has been a recurring issue throughout the custody litigation.[1] The relationship remained intact for the first few years of L.P.'s life. During this period, the family was transient, *732 and it faced financial hardships. Following L.P.'s birth, Mother and Father moved from Pennsylvania to Michigan, in order for Father to obtain a medical marijuana license in that state. Thereafter, they relocated to Georgia, briefly, before settling in Maryland immediately before the relationship dissolved during 2012, when L.P. was approximately three years old.

Since July 2012, Grandparents have maintained primary physical custody of L.P. pursuant to a stipulated order that was entered after Mother alleged that Father fed L.P. a "fire cracker," which Mother described as a Graham cracker topped with marijuana-laced peanut butter. All four individuals shared legal custody. Mother, who resided with Grandparents in Tamaqua, Pennsylvania, for most of the ensuing period, now lives independently, in Ambler, Pennsylvania and exercises periods of physical custody for up to four hours on alternating weekends. Similarly, Father exercises three hours of supervised visitation on alternating Saturdays. His relationship with Grandparents is strained, and Father contends that Grandparents intentionally relocated with L.P. from Tamaqua to Denver, Pennsylvania, after Father moved to Tamaqua to be closer to his son. He complains that it takes approximately two hours to travel from Tamaqua to Denver, which is about a fifty-five mile car trip. Grandparents counter that the duration is closer to one and one-quarter hour.

[1] During 2014, Father filed a motion to modify the 2012 custody stipulation. Following a procedural misstep, the modification request culminated in a complete custody trial and a determination of L.P.'s best interests pursuant to the relevant factors outlined in § 23 Pa.C.S. § 5328(a).[2] As *733 it relates to the issue presented on appeal, the trial court awarded Grandparents physical custody pursuant to the terms of the initial 2012 stipulation except that it added a provision that conditionally extinguished the supervision requirement "upon Father's willingness to demonstrate sobriety and continued abstinence." Trial Court Order, 7/2/15, at 1. In pertinent part, the addendum provided,

> **2 1. The Order Of Court dated July 16, 2012 per Baldwin, P.J., shall remain in full force and effect except that the Order is hereby amended to include the following with regard to Father's supervised partial physical custody as follows:
>
> 3(d). Father shall be provided the opportunity for unsupervised contact within his home setting on alternating Saturdays for three (3) hours provided and contingent upon Father's willingness to demonstrate sobriety and continued abstinence through submission to hair follicle tests to be conducted by Compliance Drug and Testing Services, LLC., "NE Compliance" at intervals of six (6) months for two (2) years from the date of this Order. In the event the first test

> administered within thirty (30) days - of the date of this Order is negative, then Father may have the aforementioned unsupervised visitation provided that he continues to submit to the other hair follicle tests. It is agreed by [Grandparents] that they shall pay and be responsible for the hair follicle test fees submitted by NE Compliance to them. Furthermore, Father shall sign a release authorizing NE Compliance to release the test result reports to [Grandparents'] counsel who shall be authorized to provide copies of the same to Mother and the [Grandparents].
>
> 3(e). In the event that any of the four (4) the hair follicle tests are positive then supervised visitation shall continue until Father tests negative.

Id. at 1-2.

****3** The 2015 custody schedule continued unchanged until Father filed his most recent petition for modification on June 12, 2018. In addition to a general assertion that the prevailing custody arrangement was contrary to L.P.'s best interest, Father contended that, in light of his newly-acquired license to use medical marijuana as a mechanism to manage wrist pain, the trial court should not weigh the fact of his marijuana use against him. In this vein, Father argued, "Marijuana is now a state recognized medicine and shouldn't be used to keep children from parents." Petition for Modification of Custody, 6/12/18, at 2. Following two non-consecutive days of evidentiary hearings pursuant to Pa.R.C.P. 1915.4-2(b) (regarding record hearings for determinations of partial custody), the custody officer filed a report noting its consideration of the best-interest factors and a recommendation that the trial court (1) terminate the drug-testing conditions on Father's ability to exercise unsupervised custody, and (2) significantly increase the duration and nature of Father's three-hour period of supervised partial physical custody to nine hours of unsupervised custody ***734** on alternating Saturdays. It further recommended that Father's custodial periods increase to overnights in May 2019.

Grandparents filed exceptions to the custody officer's report and recommendation. In relevant part, Grandparents challenged the hearing officer's findings regarding Father's alleged medical condition and purported certification for medical marijuana, and its reliance upon the certification to discount Father's history of recreational drug use, and to remove the requirement that he submit negative drug-screens before exercising unsupervised physical custody. Subsumed within these arguments is Grandparents' contention that the custody officer erred in admitting into evidence Father's documentation concerning both his medical condition and his certification to use medical marijuana. They also complained that the hearing officer neglected to consider the presence of Father's housemates before awarding unsupervised overnight custody, and that the record did not sustain Father's supposition that Grandparents moved from Tamaqua out of spite or that Father was the primary caretaker when the family lived in Maryland.

While Father filed "counter exceptions," he did not assert any challenges relating to the hearing, report, or recommendation. Father simply responded to Grandparents' exceptions by presenting countervailing statements in opposition to Grandparents' contentions. Upon review of the record, the trial court entered the above-referenced order that granted all eight of Grandparents' exceptions and denied Father's counter exceptions.

Specifically, the trial court concluded that, upon review of the § 5328(a) factors and the safety concerns raised by Mother and Grandparents, it served L.P.'s best interests to continue with the prior custody arrangement and to reinstate the hair-follicle-testing condition to unsupervised physical custody. Trial Court Opinion, 4/5/19, at 12. The court continued,

> it is unknown from the record what effect Father's alleged medical condition and use of marijuana, whether medically prescribed or used recreationally, may have on his ability to care for and parent the child. [Additional] ... admissible evidence is necessary before an increase in Father's custodial time would be warranted to insure the child's safety and well-being.

Id. Significantly, the trial court determined that the custody officer erred in relying upon Father's contention that he was certified to use medical marijuana, as Father failed to present medical evidence to establish either a wrist affliction that necessitates its use or the effect that the use of medical marijuana will have on Father's parenting ability. *Id.* at 12-13. It concluded, "without benefit of testimony from the doctor who Father alleges authorized the use of medical marijuana, it

is not in the best interest of the child to expand Father's partial custody." *Id.* at 13.

This timely *pro se* appeal followed. Father initially failed to comply with Pa.R.A.P. 1925(a)(2)(i) by contemporaneously filing a concise statement of errors complained of on appeal. On June 5, 2019, this Court entered an order directing Father to file and serve the Rule 1925(b) statement with the trial court by June 12, 2019. He filed the required statement within the designated period, and the trial court entered an order directing our attention to its opinion entered on April 5, 2019.

****4** Father presents two issues for our review:

> 1. Whether the court may ignore a properly [*bona fide*] registered medical marijuana card & certificate as substantiated evidence.
>
> ***735** 2. [The trial court relied upon h]earsay or [un]substantiated evidence to show [Father's] abuse of [marijuana].

Father's brief at unnumbered 2.

[2] [3] [4] [5] [6] [7] Our standard of review is well-settled.

> In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

V.B. v. J.E.B., 55 A.3d 1193, 1197 (Pa.Super. 2012) (citations omitted). As it relates to our deference to the trial court's role in reviewing the factual findings of a custody officer, we previously explained that

> the trial court is required to make an independent review of the record to determine whether the hearing officer's findings and recommendations are appropriate. Although advisory, the hearing officer's report and recommendations are given the fullest consideration particularly on the issue of credibility of witnesses, which the trial court is not empowered to second-guess.

T.B. v. L.R.M., 753 A.2d 873, 881-82 (Pa.Super. 2000) (*en banc*) (cleaned up).

[8] [9] The argument section of Father's brief is deficient. [3] In its entirety, the section provides:

> Argument
>
> My personal good track record and trying to be the most fit – presenting father I can be and use a safe natural medicine now approved by the PA state law should assumedly [sic] be considered fit and allow... my natural rights as [F]ather [to be] restored - as well as ... [M]other in my argument as we both should be by default fit until proven unfit. There [are] no grounds to assume otherwise and request natural parents be given full rights back to raise our child as we see fit and by default assume that is one to fulfill the 16 factors of best interest of the child since naturally we have instinct to care for our own flesh and blood and successor to our genetics. [M]other and myself both love our child very much and should be given in light of this a chance to be free of control in the raising of our child. [4]
>
> Conclusion

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I am a [*bona fide*] medical marijuana participant with [a Pennsylvania] ID ***736** card[.] [Grandparents did not present] substantiated evidence to show abuse or suggest [that] I would be unsafe around my child (as protected by medical marijuana act). [M]other is an excellent parent and has shown to be responsible with finding work and being there for my son as much as [G]randparents allow. ...

****5** Father's brief at 4-5. No relief is due.

Father's claims invoke the Medical Marijuana Act, which provides, in pertinent part,

> (c) Custody determination.--The fact that an individual is certified to use medical marijuana and acting in accordance with this act shall not by itself be considered by a court in a custody proceeding. In determining the best interest of a child with respect to custody, the provisions of 23 Pa.C.S. Ch. 53 (relating to child custody) shall apply.

35 P.S. § 10231.2103(c).

From the foregoing excerpt, the statements of questions presented, and other declarative statements that Father asserts in his brief, we can discern two facets to Father's argument. Preliminarily, he contends that the trial court erred in discounting as inadmissible the evidence that he produced to establish his medical condition and his certification to use medical marijuana in Pennsylvania. Father argues that the medical marijuana identification card issued by the Commonwealth was admissible evidence under the business record exception to the prohibition against hearsay. As to the evidence of his underlying wrist injury and medical diagnosis, Father asserts that it would be impractical to require him to present the testimony of his physician.

Unfortunately for Father, these arguments are predicated upon the faulty legal position that, upon demonstrating his certification to use medicinal marijuana, the Medical Marijuana Act barred the court from considering any aspect of its use in reaching the best interest determination. As our review of this latter aspect of Father's claim is dispositive, we need only address the merits of that component.

We reject Father's contention that the trial court flouted the legislature's directive to forego consideration of marijuana use in the determination of L.P.'s best interests. Chiefly, this argument fails because the trial court did not weigh the fact of Father's purported certification against him. In reality, the court examined Father's well-documented history of recreational drug use, including the allegations that Father laced his toddler's food with marijuana, incorporated those considerations into its best-interest determination, and concluded that it served L.P.'s best interests to employ the proven custody arrangement that had been in effect since 2012 and to reinstate the hair-follicle-testing conditions of unsupervised custody. Trial Court Opinion, 4/5/19, at 12.

****6 [10] [11] [12]** Plainly, the Medical Marijuana Act does not preclude the trial court from making relevant findings concerning the effect of marijuana use, whether medical or recreational, on a parent's ability to care for his or her child. Indeed, contrary to Father's assertion, the Medical Marijuana Act expressly reaffirms § 5328(a) as the controlling mechanism for determining a child's best interest. ***See*** 35 P.S. § 10231.2103(c) ("In determining the best interest of a child with respect to custody, the provisions of 23 Pa.C.S. Ch. 53 (relating to child custody) shall apply."). That statutory framework explicitly requires the fact-finder to consider not only a parent's history of drug and alcohol use but also their mental health and physical conditions. Thus, rather than requiring the court to ignore Father's marijuana use, the ***737** Medical Marijuana Act obligated the trial court to contemplate Father's physical condition, *i.e.* the nerve pain he complains of in his right wrist, and his reliance upon medication to subdue that pain. By way of comparison, OxyContin®, Vicodin®, codeine, and morphine are legal substances when prescribed by a physician; however, it is beyond cavil that, prior to making a custody determination, § 5328(a)(14) and (15) mandates that a trial court consider how a parent's legal use of any of these substances impacts his or her child's best interest. That is precisely the analysis that the trial court performed in the case at bar.

Moreover, notwithstanding Father's protestations to the contrary, the certified record establishes that Father previously abused marijuana and was unsafe around his child. In this vein, during the October 2018 evidentiary hearing, Mother confirmed that she and Father engaged in

the illegal use of marijuana recreationally and recounted Father's feeding to L.P. a marijuana-laced snack. N.T., 10/17/18, at 47-48. While Father continues to challenge the veracity of Mother's testimony, the trial court made credibility determinations in Mother's favor on these precise points during the 2015 litigation, and since the certified record supports those findings, we will not disturb them. ***See*** Trial Court Opinion, 6/25/15, at 8-9.

[13] **[14]** Accordingly, for all of the foregoing reasons, Father's argument that the trial court violated the Medical Marijuana Act is baseless. While that act prohibits the fact-finder from penalizing a parent **simply** for utilizing medical marijuana, the trial court did not deny Father's motion to modify custody simply because Father sought to utilize a medical marijuana card. In actuality, following its consideration of the enumerated best-interest factors in light of the testimony presented during the two-day evidentiary hearing, the trial court concluded that it was not in L.P.'s best interests to expand Father's three-hour period of supervised partial custody to unsupervised overnight custody without requiring Father to continue to submit to the drug screening regimen. Thus, no relief is due. [5]

Order affirmed.

All Citations

224 A.3d 729, 2019 WL 6884957, 2019 PA Super 357

Footnotes

1 According to the custody report that the court-appointed custody evaluator prepared in 2012, Father acknowledged that he "us[ed] marijuana for recreational and social purposes" since he was eighteen. N.T., 6/25/15, Exhibit 1, Custody Evaluation, 5/30/12 at 10. Likewise, Mother reported that Father's fixation with marijuana use was "definitely an issue" for the couple. ***Id.*** at 9. She explained, "[Father] was more interested in growing marijuana than anything else, and he discussed this openly. After [Father's] mother found plants growing [in the home that Mother, Father, and L.P. were staying as guests], she asked [Father] to leave." ***Id.*** at 8.

2 Pursuant to 23 Pa.C.S. § 5328(a), the determination of a child's best interest requires the examination of the following factors:

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.

(2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).

(3) The parental duties performed by each party on behalf of the child.

(4) The need for stability and continuity in the child's education, family life and community life.

(5) The availability of extended family.

(6) The child's sibling relationships.

(7) The well-reasoned preference of the child, based on the child's maturity and judgment.

(8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.

(9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.

(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.

(11) The proximity of the residences of the parties.

(12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.

(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

(14) The history of drug or alcohol abuse of a party or member of a party's household.

(15) The mental and physical condition of a party or member of a party's household.

(16) Any other relevant factor.

23 Pa.C.S. § 5328. It is within the trial court's purview as the finder of fact to determine which enumerated best-interest factors are most salient and critical in each particular child custody case. ***M.J.M. v. M.L.G.***, 63 A.3d 331 (Pa.Super. 2013). The trial court weighed the applicable custody factors in awarding Grandparents primary physical custody. In this vein, it found that thirteen of the applicable factors militated to varying degrees in favor of Grandparents. Factors six, seven, and eight were either neutral or inapplicable. None of the factors favored Father.

3 Father's legal argument is undeveloped and without citation to any legal authority. It is beyond cavil that, "where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived." ***In re W.H.***, 25 A.3d 330, 339 n.3 (Pa.Super. 2011). Instantly, however, we address the merits of Father's claim because the deficiency does not interfere with our review of his central claim that the trial court ignored the Medical Marijuana Act.

4 Mother did not file a brief in this appeal. During the October 2018 custody hearing, she noted her support of Grandparents' continuing exercise of primary custody, at least until she "can provide a nice home and a good school and everything that comes along with that." N.T., 10/17/18, at 52.

5 In addition to sustaining Grandparents' exceptions for the above-referenced reasons, the trial court accurately determined that the custody officer neglected to address best interest factors two, fourteen, and fifteen in relation to the unidentified members of Father's household. ***See*** Trial Court Opinion, 4/5/19, at 14 ("It is unknown whether Father's home is safe and appropriate for the child at the present time. The Custody Conciliation Officer failed to establish the identity and the background of the residents of Father's home in accordance with the [best interest] factors[.]").

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FACT SCENARIO

Mother, Nancy Botwin, and Father, Judah Botwin, were married in 2009, separated in 2013, and divorced in 2020. Their marriage produced two children: Silas Botwin (8/21/10) and Shane Botwin (7/5/12). The children have resided primarily with Father since 2016. The children have always lived in Philadelphia. The children have not seen Mother in three years.

Mother has a long history of substance abuse. She began experimenting with drugs when she graduated from college with a degree in Philosophy and realized that she could not get a job and would need to go to law school. She never finished law school and believes that it destroyed her marriage. She relocated to Florida in August of 2019 to enroll in an intensive rehabilitation program, which lasted until December of 2020. She then returned to Philadelphia, where she continues to receive outpatient drug treatment. She is prescribed medication for paid and anxiety. She also has a medical marijuana card. When Mother initially returned to the Philadelphia area she lived with her mother and sister. She has since moved into her own home. Mother is employed as a secretary at a dermatologist's office.

Father has lived in Northeast Philadelphia his entire life. He lives with his new fiancé, who is half his age, and the parties' two children. When his marriage ended Father became depressed, and then very religious. Father's life is otherwise unremarkable. He has no history of substance abuse. He is employed full time as a truck driver. He does not drink. He enjoys reading, signing, and watching Discovery+.

Mother has a DUI conviction on her record from 2015. Father has no criminal record. DHS was involved with the parties in 2017, and a safety plan was issued at that time providing there is to be no unsupervised time between Mother and the children.

In 2019, an Order was entered directing Mother to participate in reunification therapy with the children. That never occurred.

Father was granted sole physical and legal custody of the children following a hearing on 10/14/20. Mother failed to appear at that hearing.

Mother filed a Petition to Modify Custody on 5/20/21. Mother is requesting partial physical custody of the children every week from Monday to Wednesday. Father opposes any contact between Mother and the children and wishes that she had remained in Florida for the remainder of her existence.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FAMILY COURT DIVISION

NANCY BOTWIN, PETITIONER	:	
VS.	:	
	:	
	:	
JUDAH BOTWIN,	:	
RESPONDENT	:	DOCKET NO. 0C191909

ORDER

AND NOW, THIS 26th DAY OF AUGUST 2021, UPON MOTION OF THE CUSTODY HEARING OFFICER, MICHAEL L. VIOLA, ESQUIRE, BASED UPON THE TESTIMONY PRESENTED AT THE HEARING THIS DATE BEFORE THE CUSTODY HEARING OFFICER IT IS HEREBY ORDERED THAT NANCY BOTWIN IS ORDERED TO APPEAR FOR DRUG/ALCOHOL TESTING AS FOLLOWS:

DATE: 8/26/21

Substance Analysis Unit

ROOM 9.69

1501 ARCH ST.

PHILA, PA 19102

FAILURE TO APPEAR AS ORDERED AND/OR TO REMAIN UNTIL EXCUSED BY THE LABORATORY TECHNICIAN WILL BE CONSIDERED A POSITIVE RESULT OF THE DRUG/ALCOHOL TESTING. DRUG/ALCOHOL PLEASE FORWARD ALL REPORTS TO CUSTODY HEARING OFFICER MICHAEL L. VIOLA, ESQUIRE, CUSTODY UNIT, 13TH FLOOR, PHILADELPHIA FAMILY COURT, 1501 ARCH STREET, PHILADELPHIA.

BY THE COURT:

____

HONORABLE MARGARET T. MURPHY

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FAMILY COURT DIVISION

NANCY BOTWIN,
PETITIONER :
VS. :
:
:
JUDAH BOTWIN, :
RESPONDENT : DOCKET NO. 0C191909

ORDER

AND NOW, THIS 26th DAY OF AUGUST 2021, UPON MOTION OF THE CUSTODY HEARING OFFICER, MICHAEL L. VIOLA, ESQUIRE, BASED UPON THE TESTIMONY PRESENTED AT THE HEARING THIS DATE BEFORE THE CUSTODY HEARING OFFICER IT IS HEREBY ORDERED THAT JUDAH BOTWIN IS ORDERED TO APPEAR FOR DRUG/ALCOHOL TESTING AS FOLLOWS:

DATE: 8/26/21

Substance Analysis Unit

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BY THE COURT:

____

HONORABLE MARGARET T. MURPHY

TRTST

First Judicial District Of Pennsylvania

Family Divison
1501 Arch Street
Philadelphia PA 19102

Substance Analysis Unit
Urine Drug Testing Report

Name/Sample date NANCY BETWIN   Date Tested: 8/27/2021
Sample ID: OC191909   Time Tested: 2:47:00PM
Date of Birth: 11/19/1991
Sex   Worker/NCD VIOLA

TEST	RESULT		CUTOFF
Alcohol	< 0	mg/dl	0 - 13 mg/dl
Amphetamines	negative 0	ng/ml	0 - 1000 ng/ml
Barbiturate	negative 0	ng/ml	0 - 200 ng/ml
Benzodiazepine	negative 0	ng/ml	0 - 200 ng/ml
Cocaine	negative 0	ng/ml	0 - 300 ng/ml
Creatinine	23	mg/dl	Diluted if less than 20 mg/dl
Marijuana	POSITIVE 112	ng/ml	0 - 50 ng/ml
Opiate	negative 9	ng/ml	0 - 300 ng/ml
PCP	negative 0	ng/ml	0 - 25 ng/ml
			0 -20 ng/ml

First Judicial District Of Pennsylvania

Family Divison
1501 Arch Street
Philadelphia PA 19102

Substance Analysis Unit
Urine Drug Testing Report

Name/Sample date JUDAH BOTWIN | Date Tested: 8/27/2021
Sample ID: 0C 19 19 09 | Time Tested: 2:45:00 PM
Date of Birth: 1/12/1991
Sex | Worker/NCD VIOLA

TEST	RESULT		CUTOFF
Alcohol	< 0	mg/dl	0 - 13 mg/dl
Amphetamines	negative 0	ng/ml	0 - 1000 ng/ml
Barbiturate	negative 4	ng/ml	0 - 200 ng/ml
Benzodiazepine	negative 0	ng/ml	0 - 200 ng/ml
Cocaine	negative 0	ng/ml	0 - 300 ng/ml
Creatinine	118	mg/dl	Diluted if less than 20 mg/dl
Marijuana	negative 0	ng/ml	0 - 50 ng/ml
Opiate	negative 0	ng/ml	0 - 300 ng/ml
PCP	negative 0	ng/ml	0 - 25 ng/ml
			0 -20 ng/ml

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FAMILY COURT DIVISION – DOMESTIC RELATIONS BRANCH

Nancy Botwin (Mother)	:
Petitioner	: **D.R. # 0C191909**
	:
v.	: Action in Custody
Judah Botwin (Father)	:
Respondent	:

PROPOSED ORDER AND FINDINGS OF CUSTODY HEARING OFFICER

Date of Hearing: 8/27/21

Parties and Counsel present: Petitioner appeared, pro se
Respondent appeared, pro se

Current Order: An Order was entered on 10/14/20, which provided in relevant part, that Father have sole physical and sole legal custody of the children due to Mother's failure to appear despite proper notice.

Petition(s) Filed: Petition to Modify by Mother on 5/20/21

Child or Children: Silas Botwin, born 8/21/10
Shane Botwin, born 7/5/12

Summary of Pertinent Testimony:
Mother is requesting partial physical custody of the children, Silas Botwin, born 8/21/10, and Shane Botwin, born 7/5/12. The children were born during the marriage of the parties, so paternity was not at issue. Because the parties could not reach an agreement as to whether Mother would be entitled to partial physical custody and, if permitted, what the physical custody schedule should be, testimony was taken for consideration of this Report and Recommendation.

In ordering any form of custody, under 23 Pa.C.S.A. § 5328(a), the court shall determine the best interest of the children by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the children. The testimony of the parties and additional relevant information, summarized below, was considered when evaluating the factors under 23 Pa.C.S.A. § 5328(a).

> (1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.
> (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
> (2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).
> (3) The parental duties performed by each party on behalf of the child.

(4) The need for stability and continuity in the child's education, family life and community life.
(5) The availability of extended family.
(6) The child's sibling relationships.
(7) The well-reasoned preference of the child, based on the child's maturity and judgment.
(8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.
(9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.
(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.
(11) The proximity of the residences of the parties.
(12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.
(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.
(14) The history of drug or alcohol abuse of a party or member of a party's household.
(15) The mental and physical condition of a party or member of a party's household.
(16) Any other relevant factor.

At the time of the hearing, Mother indicated that she lived in a 2-bedroom apartment with the children's maternal grandmother Mary Parker (DOB 1/30/56), the child's maternal aunt, Louise Parker (DOB 8/1/87) and the children's cousins, Anthony (DOB 4/29/14) and Jasmine (DOB 4/6/15). On the Domestic Relations Information Sheet submitted by Mother at the hearing in August, she listed a different address. It was not disclosed whether Mother lives alone or with anyone else at this other address. Mother initially reported no involvement by the Department of Human Services (DHS) with the children. Mother has a DUI conviction arising from an arrest in 2015. Neither the child's maternal grandmother nor the maternal aunt has any known criminal history in Pennsylvania. Mother reported no incidents of domestic violence in her household in June 2021. She reported no incidents of domestic violence with Father. According to Mother, no one else in her household in June 2021 has been determined to have any problems with drugs or alcohol. However, Mother reported that she is currently in an outpatient drug program. She reported she was in an intensive outpatient program from August 2019 until December 2020. Mother's current program meets Thursday mornings from 10-11:30 am. While this program is expected to end this fall, Mother testified that she may continue in another program afterwards. Mother represented that she currently takes suboxone and has had a medical marijuana card to help her deal with chronic pain, anxiety, and stress. She also testified that her sister suffers from post-traumatic stress disorder for which she may be on medication. She indicated that her sister's situation would not impact any award of custody to her.

Father and the children reside in a 4-bedroom house with Father's fiancée Brittany Aguilera (DOB 6/25/90). Father reported that DHS was involved with the children in July 2017 resulting in the implementation of a safety plan which was marked as Exhibit F-1. This safety plan specifically provided there was to be no unsupervised time between Mother and the children. Neither Father nor Ms. Aguilera has a known criminal history in Pennsylvania. Father indicated

that there were no incidents of domestic violence within his household. He testified that there were incidents of domestic violence with Mother. He reported there were criminal stay away orders against Mother in his favor. According to Father, no one in his household has been determined to have any problems with drugs or alcohol. Further, no one in his household has been determined to have any physical health or mental health problems that would impact any award of custody.

The parties did not agree when they lived together. Mother alleged that they lived together from 2008 until December 2013. Father alleged that they lived together from the late fall of 2009 until early 2013. While Mother thought the children have been living with Father since 2017 or 2018, Father indicated that it may have been from 2016. They agreed that the children have always lived in Philadelphia. Father has been the primary caretaker of the children.

According to Mother, it takes about 20 minutes to drive between the residences of the parties given where Mother lived in June 2021. Both parties have valid driver's licenses, and each has access to a car. Presently, Mother works weekdays from 9 am to 5 pm. Father works from 8 am to 4:30 pm weekdays. Father has no other children. Mother has two other children, Aidan (age 4), and Derrick (age 2 ½) who are living with their paternal grandmother.

Mother indicated that she does not know how the children are doing in school. However, Father reported that the children are thriving in school and that they is involved in several extra-curricular activities.

Although it has been at least three years since Mother has spent time with the children, Mother was requesting partial physical custody of the child every week from Monday after school until Wednesday evening. Mother indicated she would make sure the children got to school on time although she did not know where the children go to school. When asked who she would suggest serve as a supervisor if her time with the child were supervised, Mother offered the children's maternal grandmother or their maternal aunt.

It was Father's position that, at the present time, Mother should not be afforded any time with the children. He felt that she needed to go to therapy and additional drug counselling and drug testing. Father offered himself as the supervisor.

During the custody events, each party requested that the other party submit to drug and alcohol testing. Accordingly, an Administrative Order was prepared on August 26, 2021 directing the parties to submit to such testing. See PA. R.CP. 1915.8. The results of that testing were considered by this Custody Hearing Officer. Luminella v. Marcocci, 814 A.2d 711 (Pa. Super. 2002).

Father's test results were negative. He did show evidence of a small amount of barbiturates in his system; however, that amount was small enough to be considered a negative result. Mother tested positive for marijuana with a result of 112, which is more than twice the highest amount for the "cutoff" amount. Mother testified that she obtained a medical marijuana card in November 2020 and provided a copy of her card to this Custody Hearing Officer (Exhibit M-1). Mother also had a small amount of opiates in her system, but this amount was small enough to be considered a negative result. Mother testified that she takes suboxone; however, it is the understanding of this Custody Hearing Officer that suboxone does not routinely show up as

opiates on a routine drug test. In addition, Mother's creatinine level was 23 mg/dl. An amount of less than 20 mg/dl is a clear indication that a person was trying to flush his or her system of drugs. It should be noted that Mother's possession of a medical marijuana card does not give her any exemption of special consideration in the analysis of what is in the child's best interest. See HR v. CP, 224 A.3d 729 (Pa Super. 2019) and 35 P.S. § 10231.2103. Rather, the totality of the results of Mother's drug test leads this Custody Hearing Officer to question whether is sufficiently clean of drugs to merit an award of custody.

According to the Court's records and mentioned by the parties during the hearings, an Order was previously entered directing the parties to participate in reunification therapy. This Order was entered by Judge Thompson on 2/4/19. It was not disputed that such therapy was never completed. Mother indicated that she was precluded from participating in reunification therapy until she was "clean" of all drugs including prescription medication. Given the period of time since Mother last spent time with the child, in the opinion of this Custody Hearing Officer, efforts should be renewed for reunification therapy for Mother and the child before a definitive custody schedule is implemented.

Recommendation:
In consideration of the testimony and evidence offered at hearing by petitioner Mother, and respondent Father, including all of the factors listed under 23 Pa.C.S.A. § 5328(a), the undersigned Custody Hearing Officer finds the following recommendation to be in the children's best interest:

The Petition to Modify filed by Mother, Nancy Botwin, on 5/20/21 regarding custody of the children, Silas Botwin, born 8/21/10, and Shane Botwin, born 7/5/12, is granted in part and denied in part.

1. Mother and Father, Judah Botwin, are to enroll in reconciliation therapy for reconciliation between Mother and the children. Which sessions the parties are to attend shall be at the sole discretion of the therapist. The parties are to follow the recommendations of the therapist as to the appropriate arrangements for any contact between Mother and the children. The parties shall equally divide all co-pays regardless of any current support order. Both parties are to make sure that insurance coverage is maximized.

2. Mother shall obtain the names, contact information, and all cost information for three (3) reconciliation therapists. Father will then select one from the list who will serve as the therapist outlined above.

3. Father shall retain sole legal custody of the children.

4. Except as may be recommended by the therapist, Father shall continue to have sole physical custody of the children.

______________________________ ______________________________

Michael L. Viola, Esq. Date
Custody Hearing Officer

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FAMILY COURT DIVISION – DOMESTIC RELATIONS BRANCH

Nancy Botwin (Mother)	:	
Petitioner	:	**D.R. # 0C191909**
	:	
v.	:	Action in Custody
Judah Botwin (Father)	:	
Respondent	:	

FATHER'S EXCEPTIONS TO PROPOSED ORDER OF CUSTODY

Judah Botwin (hereinafter "Father"), hereby takes the following Exceptions to the Proposed Order of Custody issued by Master Michael L. Viola, Esquire, following a hearing on August 27, 2021:

1. The master erred by directing the children to engage in reconciliation with Nancy Botwin (hereinafter "Mother").

Mother's drug testing results indicate that she continues to have substance abuse issues. She abuses marijuana, and her drug test results show that she used a masking agent to cover up additional drug use. Mother continues to suffer from mental health issues and presents a danger to the children. It is in the best interests of the children that Mother's substance abuse and mental health issues be resolved before any contact between Mother and the children takes place.

2. The master erred by granting a reconciliation therapist the discretion to expand Mother's physical custody with the children absent further Court proceedings.

Mother has a long history of substance abuse and has been absent from this children's lives for many years. She is not involved in their lives in any way. This Court appropriately determined that it is in the best interests of the children for Father to

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maintain sole physical and legal custody. It is not legally appropriate for the Court to delegate legal authority for determining whether Mother's contact with the children should be expanded to a yet to be selected counselor. The legal determination of the parties' custody arrangement rests exclusively with the Court.

Respectfully submitted,

______________ ______________________________

DATE **JUDAH BOTWIN**

Substance Abuse Evaluation, Testing, and Monitoring in Custody Cases

V. Richard Roeder, Ph.D.

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Substance Abuse Evaluation, Testing, and Monitoring in Custody Cases

V. Richard Roeder, Ph.D.

I. INTRODUCTION

Judges and attorneys are confronted with allegations of abuse of alcohol, illegal drugs, or prescription drugs in criminal and civil cases on a weekly basis. In the past 15 years, the technology for making accurate determinations of substance abuse and the level of substance abuse in forensic cases has markedly improved. Simultaneously, as the complexity of the technology has increased, making decisions about how the technology is to be used to its best advantage has become more difficult. Various types of substance abuse testing methods are now available and it is important for judges, attorneys, and evaluators involved in child custody cases to understand how to use the technology appropriately and to its full advantage for not only assessment, but monitoring of these individuals while they are parenting their children.

II. ASSESSING SUBSTANCE ABUSE

A. A Traditional Substance Abuse Evaluation

1. Includes a psychosocial, medical, mental health, and substance abuse history, as well as possibly the results of checklists and other self-report rating scales.

2. May be useful in determining the necessity for treatment and what type of treatment is needed when dealing with clients who are seeking help for a substance abuse problem

3. Far less useful in identifying substance abuse in clients who are referred for a forensic evaluation, with or without a custody evaluation.

B. Clients who are abusing substances are often defensive about their substance abuse, and in a forensic evaluation are likely to be even more willing to exhibit superlative self-presentation in an effort to influence the decision of the court.

1. Even assessment instruments that are designed to detect subtle signs of substance abuse, such as the Substance Abuse Subtle Screening Inventory (SASSI) are unlikely to generate useful results due to high levels of defensiveness.

2. Traditionally the questions being asked of the evaluator are usually whether or not the person is abusing substances, the extent of that substance abuse, and what type of treatment would be recommended

3. In the case of child custody and other forensic cases, an additional question would be how to monitor the individual's abstinence from abused substances during their custodial time with the child.

C. Increasingly, the answer for many of these questions lies in the field of substance abuse testing and monitoring.

III. FORENSIC SUSTANCE ABUSE TESTING

A. Forensic substance abuse testing methods favor the donor in that they are designed to maximize specificity for illegal drug use (which drugs) at the expense of some sensitivity (amount ingested)

B. In forensic substance abuse testing the need to avoid false positive results is paramount

C. The federal government has set guidelines for cutoff levels for urine testing for only certain drugs through the Substance Abuse and Mental Health Services Association (SAMHSA) (See Appendix A)

1. These cut-off levels are usually applied to other types of testing, including hair, blood, and saliva.

2. These SAMHSA levels are often used as the standard in court cases, some states set their own cut-off levels, and some jurisdictions use cut-off levels are significantly higher than those used by the federal government.

D. A description of levels for alcohol testing follow the guidelines determined by the World Health Organization, and in the case of hair testing, also follow the guidelines set by the Society of Hair Testing.

E. Most laboratories report their results in terms of picograms or nanograms per milligram or per milliliter (1000 pg. equals 1 ng.)

IV. STRENGTHS AND WEAKNESSES OF VARIOUS TYPES OF FORENSIC TESTING

A. Forensic testing will not establish the amount of the drug ingested with medical certainty from testing levels

1. Individuals absorb specific drugs differently based upon biological and genetic differences (including race, gender, body size, and other factors)

2. Repeat testing of subjects can be used to indicate that an individual has ingested more or less of a specific drug than they had ingested on previous testing reports.

3. Forensic testing cannot determine with medical certainty whether an individual is abusing a drug that they are legally prescribed

    a. Sometimes very high levels of a tested drugs can lead to an assumption of excessive use

    b. Individuals who are abusing a prescribed drug are often ingesting or abusing other drugs that they are not prescribed

B. The Substance Abuse and Mental Health Services Association (SAMHSA) provides guidelines for what qualifies as a positive drug test

1. If the test does not yield results higher than the guidelines, it does not qualify as a "positive" test

2. If an initial immunoassay test for a specific drug gives positive results, than normally a second test using gas chromatography or mass spectrometry must also give positive results before a laboratory will announce a "positive" finding

3. Frequently, the confirmatory test not only determines that the drug is present with a much higher level of accuracy, but will also assess the presence of the metabolites of the drug within the sample, thus confirming beyond doubt the deliberate ingestion of the drug

C. Determination of the type of testing to be performed can be dictated by:

1. The need for quick results

2. The type of drug being tested

3. The comfort of the individual being tested

4. The need for historical testing

D. Blood testing for drugs usually requires a clinical setting

E. Urine testing in an office setting is often used as a screening for illegal drugs

1. A "screen" is not a "test"

2. The sample must to go to a laboratory for confirmation of the results by gas chromatography or mass spectrometry in order for the results to be considered valid

3. Without a confirmatory test, the results of a drug screen alone would be legally suspect

F. Saliva screening offers many of the same features as urine screening with little discomfort or embarrassment to the client

1. Also requires that the sample be sent to a laboratory for confirmatory testing in order for the results to be validated

2. Urine and saliva testing do have the advantage of immediacy

3. Urine and saliva testing have the potential ability to screen and test for alcohol and benzodiazepines (including drug such as Xanax, Ativan, and Klonopin).

G. Hair testing is accurate, useful for historical testing, and almost impossible for the subject to manipulate if performed by an FDA approved and accredited laboratory

1. A typical hair sample of approximately 1 ½ inches will reveal what substances the client may have used over the past 90 to 100 days

2. The sample can be segmented if necessary to detect the time of ingestion with some accuracy

3. Laboratories offer an ever widening number of tests for substances in hair

a. Metabolites of alcohol

b. The SAMHSA drug panel has been extended by many laboratories, who now include testing for prescription drugs that could potentially be abused, including benzodiazepines and stimulants

V. ALL TESTING IS NOT THE SAME

A. The standard panel for substance abuse testing includes:

1. Cocaine and its metabolites
2. Phencyclidine (PCP)
3. Marijuana
4. Amphetamine (possibly also including methamphetamine, MDMA known as Ecstasy, MDA, and MDEA)
5. Opiates (usually including morphine, codeine, and heroin, and often including oxycodone, hydrocodone, and hydromorphone)

B. The test must be appropriate for drug and the circumstances

	HAIR	URINE	SALIVA
Comfort of client	X		X
Immediate screening capability		X	X
Benzodiazepine detection	X	X	X
Alcohol detection	X	X	X
Historical testing	X		
Detection of time of ingestion	X		
Retest capability	X		
Ability to establish non-use with 3 tests per year	X		
Resistance to evasion	X		X

C. The laboratory must perform the appropriate test for the drug of

abuse

1. The test results stating that the sample was "negative" for "opiates" does not mean that the laboratory tested for the particular opiate that was potentially being abused

   a. The standard SAMHSA drug panel for opiates does not include testing for oxymorphone (marketed as Opana or Numorphan) and many other opiates

   b. Many laboratories do not include testing for this drug in their standard panel unless it is specifically requested.

2. A test for "amphetamine" would not usually test for other stimulants of abuse, including phentermine, Ritalin, and Adderall, unless requested

3. Laboratories that are testing hair or urine for benzodiazepines are usually only testing for selected compounds, and not all benzodiazepines

4. Testing for drugs outside of the standard panel can be sometimes be requested on samples of hair, urine, or saliva, but those tests done at special request may be performed at extra cost

D. The laboratory must certify that the chain of custody for the sample to be tested is intact

   1. This proves that no one could have tampered with the sample

   2. This should be stated clearly on the report of the test results

E. The laboratory must be FDA approved for the test that they are performing

   1. Many laboratories are currently performing tests for substances for which they do not have FDA approval

   2. This is particularly true in the area of hair testing, including testing for benzodiazepines

F. The laboratory should hold other accreditations that are highly valued within the industry that attest to the quality of their procedures

1. Accreditation by the College of Forensic Pathologist Forensic Drug Testing Accreditation Program

2. Accreditation by Forensic Quality Services

G. The laboratory should store positive and negative samples for retrieval after testing

1. Necessary if the sample needed to be re-examined at a later time

2. Negative samples should be stored for one year and positive samples for up to five years

H. The laboratory should offer assistance through in-house attorneys and forensic toxicologists who can answer questions on forensic testing and if necessary, provide expert witness testimony

I. A knowledge of how many times that laboratory's test results have been upheld in state and federal courts can be useful.

VI. MONITORING OF SUSTANCE ABUSERS SEEKING PARENTING AND PLACEMENT TIME

A. Abstinence monitored using weekly urine drug screens

1. Clients are often aware of when the test will be performed, and avoid using substances for 48 hours prior to the test

2. Urine testing can easily be altered or contaminated, particularly if the provision of the test sample is not closely observed (which can be uncomfortable for the subject and the sample taker)

B. Abstinence monitored using hair testing three times a year on a client with hair length on the head of 1½ inches, or a normal body hair sample will provide proof of abstinence for drugs and proof of non-abuse of alcohol for the entire year

1. Hair testing for alcohol (EtG testing) will identify individuals consuming as few as 2 to 26 alcoholic drinks on average per week, resulting in a level reported in the "Mild to Moderate Consumption" category, and individuals who fall into the

"Excessive Alcohol Consumption" category are consuming at least 4 to 6 alcoholic drinks per day

2. EtG hair testing for alcohol cannot be used to determine complete abstinence

C. Abstinence from alcohol can be monitored by using breath testing

1. Many easy to use and relatively accurate devices are available that attach to a smart phone and can detect and record alcohol levels at the beginning and end of the parent's custodial time

2. A more sophisticated alcohol breath test can be done randomly and automatically during the parent's custodial time by using a system such as "Soberlink"

    a. This type of monitor requires that the individual breathe into a handheld device which transmits their alcohol level and photograph (identified by facial recognition technology) wirelessly to a remote site for monitoring and storage as a record of their abstinence

    b. This type of monitor does not require the involvement of another party

D. Technologically more sophisticated means of alcohol monitoring are available

1. The home interlock requires that the individual breathe into the device connected by communication link while in the home

2. The transdermal monitor for alcohol use (often known as SCRAM) is usually in the form of an ankle monitor that regularly checks and transmits the individuals alcohol level to a remote site

3. Near Infrared Tissue Spectroscopy

    a. The device is capable of scanning an individual's finger using near-infrared light and initially will identify the individual by their body tissue (biometric identity)

    b. The device will then determine the alcohol levels within the body tissue in as quickly as 20 seconds

c. The device is currently being used to monitor workers at various facilities as they enter, and require a fairly heavy and bulky device

d. Technology may soon make it possible to apply near infrared tissue spectroscopy to a cell phone device

e. The device may eventually be able to within seconds give a precise reading of the individual's consumption of multiple substances, including alcohol and drugs, making it possible to determine within seconds whether an individual is "under the influence"

Appendix A

The Substance Abuse and Mental Health Services Association (SAMHSA) provides guidelines for what qualifies as a positive drug test. If a test does not give results higher than the guidelines, it does not qualify as a "positive" test. If an immunoassay test gives positive results, a second Gas Chromatography test must also give positive results before a result of "positive" is announced. The following chart shows the guidelines by substance.

Initial Test Cutoff Concentration		
SUBSTANCE	**Initial Test (IMMUNOASSAY)**	**Confirming Test (GC / MS)**
Cannabis	**50 ng/ml**	**15 ng/ml**
Cocaine	**300 ng/ml**	**150 ng/ml**
Opiates	**2000 ng/ml**	**2000 ng/ml (morphine)** **2000 (codeine)** **6-Acetylmorphine)**
Amphetamines	**1000 ng/ml**	**500 ng/ml**
PCP	**25 ng/ml**	**25 ng/ml**
Notes: Cannabis is detected through its metabolite Delta-9-tetrahydrocannabinol-9-carboxylic acid. Cocaine is detected by its metabolite Benzoylecgonine. Methamphetamine positive confirming test requires both 500ng/ml of methamphetamine and 200ng/ml of amphetamine.		
from SAMHSA Feb 2005, 69 FR 19644		

Alcohol and drug testing locations in Philadelphia and surrounding counties

Arcpoint Labs

233 S 6th St Suite C-2, Philadelphia, PA 19106

1012 West 9th Ave Ste 130, King of Prussia, PA 19406

275 S. Main Street Ste 4, Doylestown, PA 18901

https://www.arcpointlabs.com/king-of-prussia/patient-solutions/drug-alcohol-tests/

Services: Saliva, urine, hair follicle, nail, 5 panel drug, 10 panel drug, prescription drug, synthetic drug, oral fluid – visit location to learn more specifics about the testing and pricing

AnyLabTestNow!

131 S. State Road, Springfield, PA, 19064

https://www.anylabtestnow.com/springfield-19064/

Services and Pricing

- 10 Panel Instant Drug Screen (Saliva): The 10 Panel Instant Drug Screen (Saliva) will determine the presence or absence of 10 types of drugs or their metabolites in your saliva. This is an instant test that screens the saliva for the drug metabolites and can include a laboratory confirmation, if necessary. **$49.00**
- 10-Panel Instant*: The *Instant Urine Drug Test (10-Panel) will determine the presence or absence of 10 types of drugs or their metabolites in your urine. This test is an instant test that screens the urine for the drug metabolites and can include a laboratory confirmation, if necessary **$49.00**
- 5-Panel Instant*: The *Instant Urine Drug Test 5-Panel) will determine the presence or absence of 5 types of drugs or their metabolites in your urine. This test is an instant test that screens the urine for the drug metabolites and can include a laboratory confirmation, if necessary. **$49.00**
- 9-Panel Instant*: The *Instant Urine Drug Test (9-Panel) will determine the presence or absence of 9 types of drugs or their metabolites in your urine. This test is an instant test that screens the urine for the drug metabolites and can include a laboratory confirmation, if necessary **$49.00**
- Blood 5-Panel: This Blood Drug Test (5-Panel) will determine the presence or absence of 5 types of drugs or their metabolites in the bloodstream. Blood drug analysis are best when it is suspected that someone is actively under the influence of drugs or alcohol. Drugs are detectable in blood within minutes to hours, depending on many factors such as the drug and the amount ingested. This test is a laboratory-based test and includes a screen and a confirmation if necessary. **$209.00**

- Blood PEth Alcohol Drug Test: This is the most convenient way to test for phosphatidylethanol (PEth). PEth is born in our red blood cells where it lives as part of the cell membrane. Studies show a Blood PEth Alcohol Drug Test can tell the difference between intentional use and incidental exposure of ethanol. **$299.00**
- Cotinine (Nicotine Metabolite): This urine cotinine (nicotine) test will determine the presence of cotinine/nicotine in the system. Cotinine is the metabolite or what is left after nicotine consumption and is the test of choice to evaluate active tobacco use or exposure to tobacco in many forms. Cotinine is more stable and has a longer life in the body than nicotine. However, nicotine is highly addictive and found in tobacco, cigarettes, and many other manufactured products such as e-cigarettes used for vaping. This test is a laboratory-based test and includes a screen and confirmation if necessary. **$59.00**
- Designer Drug Panel: This Designer Stimulants Panel includes 21 compounds that are often synthesized for illicit use and can go undetected in a common drug test. Abuse of designer stimulants continues to be a problem in the US as they are easy to obtain and often produced with legal ingredients. This test includes seven newer generation compounds that have recently be found in bath salts. Also included are 14 potentially dangerous drugs such as Ecstasy and Khat. **$129.00**
- DXM Drug Test (OTC Cough Medicine): Dextromethorphan (DXM) is an antitussive (cough suppressant) medication that is generally found in many over-the-counter cold and cough medications. When taken as prescribed on the label side effects are mild and include fever, dizziness, nausea, vomiting, pupil dilation and excessive sweating. However, DXM can and is being abused by many young adults and teens. Serious side effects when taken in large quantities are concerning and include seizures, confusion, agitation, impaired coordination, disorientation and hallucinations. **$49.00**
- Hair 5-Panel Drug Test: This Hair Follicle Drug Test (5-Panel) will determine the presence or absence of 5 types of drugs in your hair. Most people requesting a Hair Follicle Drug Test request a detection window for up to 90 days, depending upon the length of hair collected. A small sample of hair will be collected from several inconspicuous spots on your head. As a substitute, body hair can be used; however, the detection window varies for body hair. **$189.00**
- Hair 5-Panel With Expanded Opiate Drug Test: This Hair Follicle Drug Test (5-Panel with Expanded Opiates) will determine the presence or absence of 5 types of drugs in your hair. Most people requesting a Hair Follicle Drug Test request a detection window for up to 90 days, depending upon the length of hair collected. A small sample of hair will be collected from several inconspicuous spots on your head. As a substitute, body hair can be used; however, the detection window varies for body hair. **$199.00**
- Hair Alcohol Test: The EtG Hair Alcohol Test can detect ingestion of Ethyl Alcohol within the past 7 to 90 days. EtG is a metabolite of Ethyl Alcohol, and can be detected for longer periods of time after ingestion than simply testing for Ethyl Alcohol. This test is not an under the influence test. **$229.00**
- Hair Child 5, 7, or 9-Panel Drug Exposure Test: The Child Hair Follicle Exposure Drug Test will determine the passive exposure to drugs in the hair of children. Most young children are not drug users but are in the environment of drugs so the child hair drug tests for both the native and drug metabolites providing a much better insight in the child's environment. Like the typical

hair drug test, the child hair test has a detection window for up to 90 days and can be done on a child of any age. **$179.00**

- Hair Date Rape Test: The Drug Facilitated Sexual Assault (DFSA) formerly Date Rape Panel can be performed using blood, urine, hair, nails and tests for drug(s) most commonly used in date rape situations. The recommended biological specimen to be tested should be determined by the incident date. **$669.00**
- And many more

Dr. V. Richard Roeder

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610-891-9923

AverHealth

27 S. Church Street, West Chester, PA 19382

https://averhealth.com/child-and-family-services/

Averhealth partners with Family Courts and Child and Family Services Programs to provide timely and reliable data that supplements comprehensive assessments, observations, and screening tools. With our reliable, next business day test results and software that provides insights beyond just an individual positive or negative result, Averhealth's programming supports key program goals including:

- Supporting the safety and well-being of children and families
- Helping to keep family members struggling with substance use issues employed and financially independent
- Supporting compliance with treatment and other programming aimed at improving long-term outcomes
- Increasing the stability of families by keeping substance using family members sober and accountable
- Increasing staff efficiency and responsiveness to the ever-changing needs of the families they support

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [17]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Rule 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment:

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Rule 1.15 Safekeeping Property

(a) The following definitions are applicable to Rule 1.15:

(1) *Eligible Institution*. An Eligible Institution is a Financial Institution which has been approved as a depository of Trust Accounts pursuant to Pa.R.D.E. 221(h).

(2) *Fiduciary*. A Fiduciary is a lawyer acting as a personal representative, guardian, conservator, receiver, trustee, agent under a durable power of attorney, or other similar position.

that would be undertaken when attempting to locate a person for service of process, such as examinations of local telephone directories, courthouse records, voter registration records, local tax records, motor vehicle records, or the use of consolidated online search services that access such records. Lawyers must maintain records of the disposition of unclaimed or unidentifiable funds and make such records available for production to the Pennsylvania Lawyers Fund for Client Security or the Office of Disciplinary Counsel in accordance with Pa. R.P.C. 1.15(c). The IOLTA Board shall make a standardized form with instructions available on the IOLTA Board's website or by request for use by lawyers submitting unclaimed or unidentifiable funds to the IOLTA Board. Conservators appointed pursuant to Pa.R.D.E. 321 should follow the procedure in Pa.R.D.E. 324(c)(1) for distributing unclaimed and unidentifiable funds.

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or,

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or,

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment:

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is

completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Rule 1.17 Sale of Law Practice

A lawyer or law firm may, for consideration, sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:

ADVOCATE

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment:

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment:

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary

proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment:

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the

persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16 to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case; but a lawyer may pay, cause to be paid, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness' loss of time in attending or testifying; and,

(3) a reasonable fee for the professional services of an expert witness;

(c) when appearing before a tribunal, assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or,

(d) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and,

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2.

Comment:

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (d) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rules 4.2 and 4.3(b).

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or,

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Comment:

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct and/or the Rules Governing Standards of Conduct for Magisterial District Judges, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order