**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

| | | |
|---|---|---|
| Y.M., | : | |
| Plaintiff | : | |
| | : | |
| v. | : | No. 98-21,363 |
| | : | |
| M.S., | : | |
| Defendant | : | |

**ORDER**

This opinion addresses the question of whether, in a child support case, a Certified Nurse Practitioner may be qualified as an expert in internal medicine to offer a diagnosis and opinion on the defendant's ability to work. The nurse practitioner at issue is the defendant's primary medical care provider, assigned to him after the defendant's former physician left the office.

The case of Flanagan v. Labe, 690 A.2d 183 (Pa. 1997), provided by the defendant, is instructive. That case held that a registered nurse is prohibited from testifying as an expert when her testimony essentially would constitute a medical diagnosis of the patient's condition, as well as an opinion of why that condition existed and worsened. Citing the Professional Nursing Law, 63 P.S. §211 et seq., the Pennsylvania Supreme Court held that since the statute prohibits registered nurses from providing medical diagnoses, a registered nurse could not testify regarding a medical diagnosis. In a footnote, the court stated,

> In contrast, certified registered nurse practitioners are authorized to perform certain acts of medical diagnoses and prescription of medical, therapeutic, diagnostic, or corrective measures.

Id. at 185. While this is admittedly dicta, it nonetheless implies that certified registered nurse practitioners are permitted to give testimony on medial diagnoses and prescription of medical, therapeutic, diagnostic, or corrective measures.

The plaintiff has argued the nurse practitioner should not be permitted to provide expert testimony because she must practice "in collaboration with and under the direction of a physician licensed to practice medicine in Pennsylvania." 49 Pa. Code §21.251; 63 P.S. §218.2(b). The court does not find this restriction to be a reason for prohibiting such testimony, so long as the nurse practitioner is in fact working in collaboration with a physician.

Since the legislature has granted certified nurse practitioners the authority to make medical diagnoses (49 Pa. Code §21.251; 63 P.S. §218.2(b)), the courts should accept the testimony of these professionals. The fact that nurse practitioners are not as well trained as physicians relates to the weight of the testimony provided, rather than the admissibility.

Moreover, it would be unduly burdensome to require the defendant, whose primary medical provider is a nurse practitioner, to hire the services of a physician, whose cost may not be covered under his insurance. Certainly it would be questionable to rely on a nurse practitioner as an expert in a tort injury case, where large amounts of money are at stake. In such cases, it is well worth the investment for the patient to seek out, and pay for, the services of a physician. Support cases, however, are an entirely different matter. Individuals are often hard-pressed to pay for the frequent litigation that occurs in all too many instances. Moreover, since large amounts of money are rarely at stake in support cases, and since the needs of children are paramount, hiring special physicians is an investment many support litigants are unprepared and unable to make. In short, the courts must refrain from making support litigation overly burdensome financially. Permitting a nurse practitioner to testify is one reasonable way of obtaining this goal.

For these reasons, the court finds that the nurse practitioner may testify as an expert witness and the subject of her testimony may be medical diagnosis or

prescription of medical therapeutic or corrective measures, within her particular clinical specialty area.

The plaintiff has further argued that the nurse practitioner should not be able to testify regarding the defendant's ability to work, which she argues is akin to making a prognosis, rather than a diagnosis, because nurse practitioners are not specifically authorized to make prognoses in the statute or the code. The court does not find this argument persuasive. If a nurse practitioner can make a diagnosis and prescribe therapeutic and corrective measures to address that diagnosis, he or she can certainly opine about the ability to work during recovery. Once again, the fact that the witness is a nurse practitioner rather than a physician relates to the weight of the testimony, rather than the admissibility.

The next question is whether a nurse practitioner can relate opinions and diagnoses of a prior treating physician that are in the business records of the physician's office where she is employed. Under Pa.R.E. 803(6), business records can be introduced by a witness, but those records must be of "acts, events, or conditions." As the Comment to the rule makes clear, the rule does not include opinions or diagnoses. Therefore, the nurse practitioner will not be permitted to relate opinions or diagnoses of anyone other than herself under the Business Records exception to the hearsay rule, although she may introduce records containing acts, events or conditions.

Neither are the opinions or diagnoses of a prior physician admissible under Rule 803(4), Statements for Purposes of Medical Diagnosis. That rule exempts from the hearsay prohibition certain statements made by the patient for when seeking medical treatment. It does not exempt opinions of a physician.

Therefore, neither of the above hearsay exceptions permit the testifying nurse practitioner to introduce portions of documents from her office which contain the opinions of another physician. The question has arisen, however, as to whether the

documents themselves may be introduced under 23 Pa.C.S.A. §4342(f). That statute states:

> For proceedings pursuant to this section, a verified petition, affidavit or document and a document incorporated by reference in any of them which would not be excluded under the hearsay rule if given in person is admissible in evidence if given under oath by a party or witness.

Opinions are apparently included in this exception, so long as the person verifying the document could have testified to such an opinion at the hearing. This statute, which applies only in support proceedings, accommodates Domestic Relations litigants by giving them an easy, inexpensive way to introduce documents. Once again, the purpose is to make these frequent and routine hearings more user-friendly, and to reduce the cost for the litigants. The plaintiff argues that this places on her the financial burden of calling the witness to testify, and thus shifts the burden of proof of medical disability. Although the court is sympathetic to this argument, we cannot ignore the statute. Moreover, the individual claiming disability still has the burden of proving that disability. Permitting him or her to introduce a doctor's report without calling the doctor to testify simply makes his or her job a little easier. Thus 23 Pa.C.S.A. §4342(f) permits the defendant or another witness to introduce a verified document from one of the defendant's prior physicians. The nurse practitioner may not, however, testify about those records. Section 4342(f) simply allows the records to be introduced, without testimony. The document must stand on its own, without testimony unless it is testimony from the individual responsible for creating the document.

The final question is whether the defendant should be prohibited from introducing evidence of pulmonary and hematology health problems, when the information was due but not produced on October 1, 2004. On August 23, 2004, at a contempt hearing, this court ordered the defendant to provide a supplemental medical report by October 1, 2004, and rescheduled the contempt hearing to a date in October. Subsequently, by agreement of the parties, the contempt was consolidated with the family court proceedings for modification of support, as the testimony presented on both issues would be identical. Defendant's counsel apparently interpreted the order of September 30, 2004 as eliminating the requirement of providing a medical report by October 1, 2004. While this failure is understandable, the court notes that the defendant was also ordered to provide a medical report at contempt hearings held on June 9, 2004 and July 14, 2004, and failed to do so.

Clearly, the defendant has not produced the medical information as directed to; however, the court is not at this time prepared to take the drastic step of precluding him from introducing medical evidence of his disability. However, should another domestic relations contempt matter come before this court, the court will entertain a motion for the plaintiff's attorney fees that resulted from her attorney's multiple appearances due to the defendant's failure to produce the documents.

BY THE COURT,

_____

Richard A. Gray, J.

cc: Richard A. Gray, J.
Dana Jacques, Esq., Law Clerk
William Miele, Esq.
Randi Dincher, Esq.
Family Court
Gary Weber, Esq.