

TRIAL COURT CANNOT PREVENT RECORDING OF INDEPENDENT NEUROPSYCHOLOGICAL EXAM

September 17, 2020 | Law Alerts



Clayton v. Kenworthy

(Arizona Court of Appeals, September 15, 2020)

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The Arizona Court of Appeals held yesterday on special action that a trial court abused its discretion by completely prohibiting the recording of an Ariz.R.Civ.P. 35(c)(2)(A) independent neuropsychological examination.

In a medical malpractice action, Defendants requested a Rule 35 neuropsychological examination of a minor plaintiff to determine his current and future cognitive abilities. His mother agreed to the examination on the condition that she be present to observe the examination through one way glass or have the examination video-recorded through a small recording device. Defendants objected and presented the trial court with a declaration from the examining neuropsychologist and position papers from the National Academy of Neuropsychology and the American Academy of Clinical Neuropsychology stating that any form of observation or recording would “alter and impact the scientific reliability of the assessment process.” After briefing, the trial court denied Mother’s request to either observe or record the examination.

Mother sought relief in the court of appeals. The court held that the trial court was within its discretion in refusing Mother’s request to observe the examination, even through one-way glass. But the court held that the plain language of Rule 35(c)(2)(A) gives an examinee the right to have the examination recorded. Nothing in the rule, including the language allowing the court to “limit the recording,” authorized the court to entirely prohibit the recording. The court therefore ordered the trial court to allow the recording, but to decide in its discretion how to accomplish that with the least restrictive means that would limit the adverse effects of recording the minor’s neuropsychological examination.

It is unclear how the court’s ruling will affect the usefulness of the examination in the future if a party were to challenge the exam results based on the argument that the recording “altered and impacted the scientific reliability of the assessment process.”

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Eileen GilBride leads the firm's [Appellate Department](#), and focuses her practice on representing clients in federal and state appellate matters and dispositive motions. She also counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage. Eileen has handled more than 400 appeals at every level of the state and federal courts, in Arizona and other states, which have resulted in more than 80 published decisions.

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