

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-11-0004-SWP REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 249-2011
TREATMENT OF THE LICENSE OF)	
MAUREEN MCINNIS, a Licensed Clinical)	
Professional Counselor, License No. 523.)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

I. INTRODUCTION

The Business Standards Division (BSD) seeks to impose sanctions against the license of Maureen McInnis, Licensed Clinical Professional Counselor, on the basis that she provided opinion testimony regarding a proposed change in the custody of two minor children by their divorced parents, without having sufficient information to express the opinions.

On February 15, 2011, Hearing Officer Terry Spear held a contested case hearing in this matter. Tyler G. Moss, Special Assistant Attorney General, Office of Legal Services, Department of Labor and Industry, represented BSD and James A. Donahue Davis, Hatley, Haffeman & Tighe, P.C., represented the Licensee.

Dustin Johnson, BSD Compliance Specialist, Tammera V. Nauts, L.A.C., L.C.S.W., Licensee Maureen McInnis, M.S., L.C.P.C., and Donna Zook, Ph.D., testified under oath or affirmation.

Exhibits 1-7, 10, 101-02, 104 and 111 were admitted into evidence, with Exhibit 1 (the complaint against Licensee) admitted for the limited purpose of proving what was alleged and not as proof of the truth of the allegations, and Exhibits 4 and 5 admitted as the approved minutes of the Screening Panel of the Board of Social Work Examiners and Professional Counselors for the indicated dates.

After hearing, the parties filed their proposed decisions and supporting briefs and the matter was deemed submitted for decision.

After due consideration of the filings of record, the applicable authorities and the evidence adduced at hearing, the Hearing Officer issues these findings of fact and

conclusions of law, and recommended order, for the consideration and possible adoption of the Board of Social Work Examiners and Professional Counselors.

II. ISSUE

The issue in this case is whether the licensee committed unprofessional conduct by providing opinion testimony regarding custody of two minor children without sufficient information to support the opinions given.

III. FINDINGS OF FACT¹

1. Maureen A. McInnis, the licensee in this case, is a licensed clinical professional counselor holding license number 523, and is subject to the jurisdiction of the Board of Social Work Examiners and Professional Counselors.

2. Judy Klein and her former husband, Timothy Guderjahn, have two minor children. Beginning October 15, 2003, these parents had a custody order providing Guderjahn with substantially more parenting time with the children than Klein. Exhibit 101.

3. On November 13, 2008, a hearing was held in the Montana Judicial District Court, Great Falls, Montana, in CN ADR-02-094, *Marriage of Guderjahn* (Exhibit 3) on Klein's request to modify the custody order to 50/50 parenting with the children, through alternating weeks of custody so that both children would spend one week with Guderjahn and then one week with Klein, and so forth. Exhibit 3.

4. McInnis had been a treating clinician for the Guderjahn children. She was hired by Timothy Guderjahn, who had taken a parenting class she taught, to help with his single-parent issues, working with both of his children to identify their concerns in their relationships with him, during three sessions, in October 2005. Exhibit 2, McInnis Signed Statement (January 15, 2010), Bates Nos. 4-5.² In February and March 2006, McInnis saw the male minor child five times while an appointment with a psychiatrist was pending, and then did monthly monitoring follow-ups with the male minor child through November 2006 (seven follow-up visits). *Id. at* p. 5. During those visits, McInnis had telephone conversations with the mother an indefinite number of times. *Id.* After not seeing the children at all in 2007, McInnis had one visit with them in February 2008, related again to the father and his parenting of the children. *Id.* In April 2008, the children began to participate in the in-school AWARE program as their primary source of counseling;

¹ Any statements of fact in Sections IV and V hereafter are incorporated by reference to supplement the findings of fact. *Coffman v. Niece*, 110 Mont. 541, 105 P.2d 661 (1940).

² Zeroes on the Bates numbers are omitted, so that "4" is "000004" on the exhibit page.

McInnis was then no longer their primary counselor and she stopped seeing them. *Id.* At the father's attorney's request, McInnis saw the children once in September and once in October 2008, prior to the November 18, 2008, custody hearing. *Id.*

5. Guderjahn called McInnis as a witness at the November 13, 2008, hearing. She was subpoenaed to testify and was neither retained nor paid as an expert witness. Nonetheless, she testified in her capacity as a licensed clinical professional counselor who was a treating clinician for the Guderjahn children, expressing opinions in that capacity.

6. At the time of hearing, McInnis had no current treating relationship with Klein. McInnis had not assessed either Klein's parenting or Guderjahn's parenting.

7. It is a generally accepted standard of practice for a licensed clinical professional counselor that the clinician should not offer a professional opinion about the appropriateness of a parenting plan (custody arrangement) without sufficient information and knowledge about the parents and the children involved in the plan.

8. During the course of her testimony, McInnis expressed the opinion, as a licensed clinical professional counselor and a treating clinician for the children, that there was not enough cooperation between the two parents for the proposed 50/50 custody arrangement to work. Although she testified that she had never been in either home, she also testified that she believed that "probably" the two parenting styles were different. McInnis lacked sufficient information to form and express this opinion as a licensed clinical professional counselor and a treating clinician for the children.

9. McInnis was asked whether the existing custody provisions, with Klein having the children every other weekend, provided Klein and the children with "significant ongoing contact." McInnis responded, as a licensed clinical professional counselor and a treating clinician for the children, that she thought "every other weekend, [averaging] one day during the week is significant contact." She also testified, as a licensed clinical professional counselor and a treating clinician for the children, that the children's time with Klein was enough to maintain a bond between the children and Klein. McInnis lacked sufficient information to form and express this opinion as a licensed clinical professional counselor and a treating clinician for the children.

10. McInnis was asked whether it was important for Guderjahn and Klein's daughter, during her adolescent years, to have significant contact with her mother. McInnis responded, as a licensed clinical professional counselor and a treating clinician for the children, that she didn't know what "significant contact" was, but that every other weekend and regular phone calls constituted "ongoing contact."

McInnis lacked sufficient information to form and express this opinion as a licensed clinical professional counselor and a treating clinician for the children.

11. For the protection of the public, the sanctions upon the professional license of McInnis (stated hereafter in this proposed order) are appropriate and necessary in response to her unprofessional conduct.

IV. DISCUSSION

Tamara V. Nauts, L.A.C., L.C.S.W. testified credibly that it is a generally accepted standard of practice that a treating clinician not make recommendations (express professional opinions) as to a parenting plan (custody arrangements), without sufficient information and knowledge upon which to base those recommendations. The pivotal dispute in this case is whether McInnis had sufficient information and knowledge upon which to base the opinions she expressed under oath, during a judicial hearing, about the custody arrangements at issue in the pertinent dispute between the two parents of the two small children she had previously treated.

McInnis' previous professional contacts with the four persons involved in the custody case were not sufficient to support her presentation of opinions about which custody proposal (the father's versus the mother's) she considered appropriate for the children. The father of two children had met McInnis when he took a parenting class from her. He had hired her to assist him in parenting issues in his parenting of the kids. She had later evaluated one of the two children before that child saw a psychiatrist. She had seen the children twice before the hearing at issue here, at the father's request. She had talked to the mother a handful of times on the telephone.

McInnis did not have sufficient information and knowledge about the two parents (care providers) and the two children involved in this custody dispute to express professional opinions about which custody arrangement was more appropriate for the children. She had the greatest familiarity with the two children. She had considerable familiarity with the father, very little direct information about the mother, and had not evaluated either parent's parenting style or ability.

A professional opinion, under oath, must be based upon sufficient information and knowledge regarding the parenting styles of the two parents to support it. Despite the absence of such information and knowledge McInnis told the court that, in her opinion, these two parents had such conflicting parenting styles and such an inability or unwillingness to cooperate with each other, that a fifty-fifty parenting plan would not be in the best interests of the children. She went on to tell the court that the current custody arrangements provided sufficient contact between mother and daughter to maintain the appropriate parent-child relationship.

McInnis' expert, Donna Zook, is very qualified (Master of Science in psychology, Ph.D. in clinical psychology, post-doctoral Master of Science in clinical psychopharmacology) and very experienced. Nonetheless, giving due deference and respect to Dr. Zook's qualifications, her testimony that McInnis could justifiably rely upon second-hand reports of conflicts between the parents (apparently largely related to their custody disputes) to give professional opinions about appropriate custody arrangements, without evaluating the parenting styles of both parents (and apparently without any first-hand evaluation of the mother at all), was simply not credible. The opinion testimony of an expert (no matter how well qualified) can still be rejected when the trier of fact finds it unpersuasive. *Magart v. Schank*, ¶10, 2000 MT 279, 302 Mont. 151, 13 P.3d 390 *Jacques v. Mt. N.G.*, 199 Mont. 493, 649 P.2d 1319, 1323-25 (1982); *Tompkins v. NW Union Trust Co. of Helena*, 198 Mont. 170, 645 P.2d 402, 408 (1982).

What would be the point of all of the hard work, professional accomplishment, learning, and experience that McInnis, Nauts, and Dr. Zook all three can justifiably claim, if a licensed clinical professional counselor can endorse one of two conflicting custody arrangements without evaluating either parent's actual parenting? If the information McInnis had was, as a matter of professional ethics, sufficient to form her professional opinions, no parent could ever establish the propriety of a 50-50 custody arrangement over the objection of the other parent, because the mere fact of their dispute over custody would be a basis for a professional opinion that the two parents could not sufficiently cooperate for a 50-50 plan.

The Hearing Officer is deeply concerned about the impropriety of assuring the presiding judge at the custody hearing, as McInnis did, that as a licensed clinical professional counselor, she had enough information to provide the court with reliable expert opinion evidence about which custody arrangement was appropriate. Under Mont. R. Ev. 702, expert opinion evidence is only admissible from a witness with the proper knowledge, skill, experience, training, or education and only when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Maureen McInnis clearly had the training, experience, and education pertinent to the issues in that custody hearing. But, contrary to what she represented under oath, she had insufficient information and knowledge to form and express any such expert opinions about the custody issues in the case in question.

Ultimately, the adjudicative panel of the Board of Social Workers and Professional Counselors can itself decide whether, as Nauts opined, McInnis departed from the generally accepted standards of practice in giving her testimony in the Guderjahn hearing, or whether, as Dr. Zook opined, McInnis followed generally

accepted standards of practice in giving that testimony. The adjudicative panel can utilize its experience, technical competence, and specialized knowledge in evaluating the evidence. Mont. Code Ann. § 2-4-612(7).

Licensee's counsel argued ably that McInnis was not on sufficient notice of any such generally accepted standard of practice regarding opinion testimony about parenting (custody) arrangements. However, the Hearing Officer, finding Dr. Zook's testimony on this point simply not credible, found that McInnis had sufficient notice so that she knew, or should have known, better than to express such opinions with too little information about the parents and their parenting styles. The adjudicative panel can now decide if the Hearing Officer's recommended decision is correct.

V. CONCLUSIONS OF LAW

A. *McInnis Violated the Applicable Professional Standards.*

1. The Board of Social Work Examiners and Professional Counselors has the authority to license clinical social workers and to discipline licensees who engage in unprofessional conduct, and therefore has jurisdiction to decide whether to discipline Maureen McInnis, Licensed Clinical Professional Counselor, and if so, what discipline to impose. Mont. Code. Ann. §§ 37-1-307 and 37-22-201.

2. The Department, in prosecuting this disciplinary proceeding, gave adequate notice of the nature of the unprofessional conduct alleged, so that McInnis was able adequately to prepare for and to meet the accusations made against her.

3. The Department bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126.

4. By expressing, as professional opinions regarding a custody arrangement, what could only have been lay conclusions based on second-hand information, contrary to the generally accepted standard of practice stated by Tamara V. Nauts, L.A.C., L.C.S.W., McInnis violated both Mont. Code Ann. § 37-1-316(18) (engaging in conduct that does not meet generally accepted standards of practice) and also Admin. R. Mont. 24.219.804(1) (noting that the Board's specific standards in the second section of that rule "supplement current applicable statutes").

B. *The Appropriate Sanction.*

5. A regulatory board may impose any of the sanctions enumerated within Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Mont. Code Ann. § 37-1-312(1)(a), (b) and (c)

provide that a regulatory board may revoke, suspend (indefinitely or for a set time), or restrict or limit practice under the license when the licensee has engaged in unprofessional conduct. This same extremely broad power is entrusted to the discretion of each of the various boards authorized under Title 37, Mont. Code Ann.

6. To determine appropriate sanctions, the Board of Social Work Examiners and Professional Counselors, like all Montana's professional and occupational licensing boards, must first consider the sanctions that are necessary to protect or compensate the public. Only after making this determination may the board consider and include in the sanctions any requirements designed to rehabilitate a licensee. Mont. Code Ann. § 37-1-312(2)

7. The protection of the public includes preventing licensees from giving expert testimony, relying upon their licenses to establish their expertise, about the propriety of various custody arrangements without having sufficient information to form said opinions in accord with generally accepted practice in the profession. Failure to police such testimony exposes children in such disputes to the risk of being placed in custody arrangements that are not in their best interests. Failure to police such testimony imperils the fundamental relationship between parents and children, which endangers the public welfare.

8. By giving inadequately supported opinion testimony, McInnis' engaged in unprofessional conduct that requires suspension of her license for 30 days, followed by a period of no less than two years of supervised probation with quarterly reports. Additionally, McInnis should be subject to a monetary fine of \$500.00 and, during her probationary period, should be required to participate in no less than 10 contact hours of continuing education approved in advance by the Board.

VI. RECOMMENDED ORDER

Based on the foregoing, the Hearing Examiner recommends the following order:

1. That the Board of Social Work Examiners and Professional Counselors suspend Maureen McInnis' Montana Licensed Clinical Professional Counselor License, No. 523, for 30 calendar days from the date of entry of the Board's order herein, for the unprofessional conduct it has found her to have committed, and shall pay a fine of \$500.00 before she is reinstated to the probationary status assigned to her after her 30-day suspension. Mont. Code Ann. § 37-1-312(1)(b) and (h).

2. That McInnis shall surrender her suspended license within 24 hours of receiving notification of the suspension. Mont. Code Ann. § 37-1-312(4).

3. That during the period of the suspension of her license, McInnis must complete and maintain all requirements to maintain licensure, or risk expiration and termination of her license. *See* Mont. Code Ann. § 37-1-141.

4. Upon completion of her suspension and payment of her fine, the Board shall reinstate McInnis on a probationary status for two years of supervised probation, under the supervision of an appropriate professional licensee situated in McInnis' community of practice appointed by this Board, with quarterly reports to the Board of McInnis' satisfactory probationary performance as a condition of the maintenance of her probationary license. Mont. Code Ann. § 37-1-312(1)(c) and (e).

5. During her probationary period, McInnis must complete at least 10 contact hours of continuing education, as approved by the Board and her supervising professional. Mont. Code Ann. § 37-1-312(1)(d).

6. Failure to comply in full with each requirement of this order is, in itself, sanctionable unprofessional conduct prohibited by Mont. Code Ann. § 37-1-316(8).

7. Upon successful completion of all of the terms and condition of her probation, McInnis can request reinstatement of her full license. At that time the Board may grant full reinstatement or offer continued licensure subject to such restrictions, limitations, or probation upon the license as it deems appropriate at that time for protection of the public. Mont. Code Ann. § 37-1-312(1).

DATED: December 27, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Examiner

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NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.